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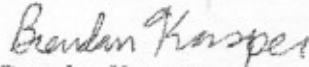
Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
455 12th Street, S.W.
Washington, DC 20554

Re: EchoStar Petition for Reconsideration (File Nos. SAT-STA-20050321-00068; SAT-MOD-20050513-00103; SES-MFS-20050527-00662)

Dear Ms. Dortch:

Enclosed is a Revised Attachment 1 to EchoStar's Petition for Reconsideration of the International Bureau's Memorandum Opinion and Order (DA 05-1581) in the above captioned matter. The only change to Attachment 1 is that the Peak EIRP is corrected to read 54.9 dBW. The original Attachment 1 incorrectly stated that the Peak EIRP was 56.8 dBW. If you have any questions regarding this filing, please feel free to contact me.

Sincerely,


Brendan Kasper

CC (via email): Donald Abelson
Thomas Tycz
Karl Kensinger
Jay Whaley
Cassandra Thomas
William Wiltshire

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED & INSPECTED

JUN 9 2005

FCC - MAILROOM

In the Matter of)

ECHOSTAR SATELLITE L.L.C.)

Application for Special Temporary Authority)
to Conduct Telemetry, Tracking, and Command)
Operations during the Relocation of EchoStar 4)
to the 77° W.L. Orbital Location;)

File No. SAT-STA-20050321-00068

Application for Modification of)
Direct Broadcast Satellite Authorization)
To Permit Long-Term Cessation of Operations)
On Three DBS Channels at the 157° W.L.)
Orbital Location; and)

File No. SAT-MOD-20050513-00103
Call Sign: S2621

Application for Modification of Earth Station)
Authorization to add the EchoStar 4 Satellite at)
77° W.L. as a Point of Communication.)

File No. SES-MFS-20050527-00662
Call Sign: E020306

To: The International Bureau

PETITION FOR RECONSIDERATION

EMERGENCY ACTION - EXPEDITED BRIEFING REQUESTED

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June 8, 2005

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

_____)	
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to Conduct Telemetry, Tracking, and Command)	
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Application for Modification of Earth Station)	File No. SES-MFS-20050527-00662
Authorization to add the EchoStar 4 Satellite at)	Call Sign: E020306
77° W.L. as a Point of Communication.)	
_____)	

To: The International Bureau

PETITION FOR RECONSIDERATION

EMERGENCY ACTION - EXPEDITED BRIEFING REQUESTED

Pursuant to the Commission's Rules, 47 C.F.R. § 1.106, EchoStar Satellite L.L.C.

("EchoStar") hereby petitions the International Bureau ("Bureau") to immediately reconsider the denial and dismissals of the above-captioned Applications.¹ *In light of the exigent*

¹ See *In the Matter of EchoStar Satellite L.L.C., Application for Special Temporary Authority to Conduct Telemetry, Tracking and Command Operations during the Relocation of EchoStar 4 to the 77° W.L. Orbital Location; Application for Modification of Direct Broadcast Satellite Authorization to Permit Long-Term Cessation of Operations on Three DBS Channels at the 157° W.L. Orbital Location; Application for Modification of Earth Station Authorization to add the EchoStar 4 Satellite at 77° W.L. as a Point of Communication*, File Nos. SAT-STA-

*circumstances presented in this proceeding, EchoStar requests an expedited briefing schedule of one day for the filing of any oppositions to this petition for reconsideration.*²

I. INTRODUCTION AND SUMMARY

In a decision released June 3, 2005, the Bureau denied EchoStar the limited authority it had requested to remove a DBS satellite from a U.S. orbital location and to move it to another orbital location allotted by the International Telecommunication Union ("ITU") to Mexico in order to meet its customer's requirements and its own business needs.

The Bureau should reconsider its denial because new facts have emerged, demonstrating that granting EchoStar's STA request is in the public interest, even under the Bureau's rationale in the *Denial Order*. These additional facts are: (1) EchoStar now understands that Mexico's *Secretaria de Comunicaciones y Transportes* ("SCT") will promptly grant the pending application of QuetzSat Directo, an affiliate of EchoStar's customer SES Americom S.A., to provide direct-to-home ("DTH") service to Mexican consumers from EchoStar 4 at 77° W.L. and provide a second source of DTH service for the Mexican public; and (2) EchoStar has determined that it can also provide DTH service to the portions of the U.S. from EchoStar 4 at 77° W.L. Consistent with the Bureau's rationale in the *Denial Order*, these new facts mean that the requested STA (and related applications) should now be granted. EchoStar's request is now indistinguishable from the Bureau's previous grant of an STA to DIRECTV for relocating DIRECTV 3 to 82° W.L. (even on the basis cited in the *Denial Order* for distinguishing the two cases).

20050321-00068, SAT-MOD-20050513-00103, and SES-MFS-20050527-00662; Call Signs: S2621 and E020306, DA 05-1581 (rel. June 3, 2005) ("*Denial Order*").

² EchoStar is today serving counsel for DIRECTV, the only entity that has submitted an informal letter in this proceeding, via email delivery in order to expedite service and facilitate expedited briefing on this petition.

Aside from these new facts, the Bureau's decision was also in error. The Bureau proceeded to evaluate what the satellite would be doing at a foreign orbital slot and prevented EchoStar from moving its property to that location, matters clearly beyond the jurisdiction of the Commission. In denying and dismissing the above-captioned Applications, the Bureau submitted two similarly situated, and indeed competing, entities – EchoStar and DIRECTV – to a different standard. Just last year, DIRECTV was authorized to move not one but two DBS satellites to two orbital locations allotted to Canada. The simpler of these two moves was indistinguishable from the instant request. DIRECTV sought and received authority to move its DIRECTV 3 satellite to the Canadian 82° W.L. orbital location, where it would become subject to the jurisdiction of Canada. The Bureau tries to distinguish the disparate treatment of the two DBS companies based on its view that the move of the DIRECTV satellite to the Canadian slot would “help to assure continuity of service” to Canadian customers.³ But the Commission does not have authority to evaluate the service needs of the Canadian public or the alleged lack of service to the Mexican public as it found in this case.

The *Denial Order* also discriminates unfairly between two foreign administrations – Canada and Mexico. By preventing EchoStar's customer from meeting a condition of its Mexican license to bring into use a satellite at 77° W.L. by July 10, 2005, the *Denial Order* not only hampers plans to use the Mexican slot for service to Mexico, but also to portions of the United States. This is particularly inappropriate considering that Canada does not have a reciprocity agreement with the U.S. regarding DTH service. Mexico, by contrast, has reached a bilateral DTH protocol with the U.S. under the auspices of the North America Free Trade Agreement (“NAFTA”). As EchoStar had explained in its Application, the instant STA request

³ *Id.* at ¶ 7. See also *DIRECTV, Inc.*, Order and Authorization, 19 FCC Rcd 11055, at ¶ 10 (2004) (“*DIRECTV 3 Order*”).

is directly related to Mexico's ability to enjoy its rights under the DTH protocol. Allowing Mexico to meet the July 10 ITU deadline for bringing this orbital location into use would preserve the slot for a second DTH provider to offer service to Mexico and the U.S., even aside from the immediate service to Mexico and the U.S. that will be possible from EchoStar 4.

In denying EchoStar's Application, the Bureau also misapplied the public interest standard. First, the Bureau is not well-equipped to gauge what it viewed as the lack of immediate service from EchoStar 4 to Mexico. This is Mexico's concern. The Bureau erred by proceeding to evaluate what the satellite would be doing when located at a Mexican orbital slot and under the licensing authority of another country. Second, EchoStar's STA request is only requesting authority to *remove* the satellite from U.S.-licensed services and move it to a foreign orbital location. This is akin to a common carrier applying for authority to discontinue service over certain facilities pursuant to Section 214 of the Act. In evaluating such applications, the Commission cannot properly claim that the public interest is disserved if the facilities will not be immediately redeployed to provide service, let alone service to citizens of another country. The only factors that the Commission properly considers in its public interest analysis of such applications is whether consumers will be disenfranchised, recognizing the right of carriers to be able to make sound business decisions. For that reason, the Commission has routinely granted service discontinuances in the common carrier context. EchoStar, of course, is not a common carrier, and its removal of a satellite from U.S. service should therefore be subject to even less scrutiny. Indeed, EchoStar could turn its license in tomorrow without any prior Commission approval, even if consumers were to lose service.

Likewise here, EchoStar is seeking to discontinue U.S.-licensed operations for one of its satellites in order to put that satellite to more productive use from a foreign orbital slot. The only

relevant issues for the Bureau to consider for such a move are: (1) whether U.S. consumers would lose service; and (2) whether there is a risk that the satellite could collide or interfere with any radio stations within the Commission's jurisdiction on its way to the foreign orbital location. Neither of these factors militates against approval here. EchoStar has explained that not one U.S. consumer would lose service as a result of the move. And EchoStar, one of the most experienced satellite operators, has moved satellites across the geostationary arc numerous times. Instead, the Bureau appears to have based its decision solely on its perception of what services could be provided from the satellite in Mexico. This is not a proper public interest consideration in this case.

While being unduly solicitous for the service needs of Mexican and Canadian consumers, the *Denial Order* also disregarded the public interest benefits for U.S. consumers set forth in EchoStar's Application, including the fact that it will help make one additional CONUS orbital location available for service to the U.S.

II. SUBSEQUENT EVENTS HAVE SHOWN THAT GRANTING ECHOSTAR'S APPLICATION IS IN THE PUBLIC INTEREST

After the *Denial Order*, new facts have emerged, demonstrating that granting EchoStar's Application is in the public interest, even under the Bureau's rationale in the *Denial Order*. These additional facts are: (1) EchoStar now understands that Mexico's SCT will promptly grant QuetzSat Directo's pending application to provide DTH service to Mexican consumers from EchoStar 4 at 77° W.L. and provide a second source of DTH service for the Mexican public; and (2) EchoStar has determined that it can also provide DTH service to portions of the U.S. from EchoStar 4 at 77° W.L. Consistent with the Bureau's rationale in the *Denial Order*, these new facts mean that the requested STA (and related applications) should now be granted. EchoStar's

request is now indistinguishable from the Bureau's approval of the move of DIRECTV 3 to 82° W.L.

The expectation that Mexico will soon grant QuetzSat Directo's pending application to provide DTH service to Mexican consumers is based on assurances that EchoStar has received after the release of the *Denial Order*. It thus relates to "events that occurred or circumstances which have changed since the last opportunity to present such matters ..."⁴ Likewise, the fact that EchoStar has subsequently determined that it can also provide DTH service to portions of the U.S. from EchoStar 4 at 77° W.L. should be considered because such consideration is in the public interest.⁵ The public interest benefits from providing service into the U.S. from EchoStar 4 at 77° W.L., discussed below, outweigh any alleged harm from failing to provide such information as part of EchoStar's Application.⁶

A. EchoStar 4 Would Immediately Benefit Mexican Consumers Upon Relocation to 77° W.L.

Even if the Bureau's rationale were correct, the Bureau should immediately reconsider its decision because that rationale is based on inaccurate facts. As discussed above, the Bureau tries to distinguish the *Denial Order* and the *DIRECTV 3 Order* on the ground that DIRECTV 3 would be immediately used to benefit Canadian customers, while EchoStar 4 would not immediately be used to serve Mexican customers, in part because an additional concession is

⁴ See 47 C.F.R. § 1.106(b)(2)(i).

⁵ See 47 C.F.R. § 1.106(c)(2). See *In the Matter of EchoStar Satellite Corp.; Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed Satellite Service*, 17 FCC Rcd 23489 (2002) at ¶ 5 ("*EchoStar 1.106(c)(2) Decision*") and *In the Matter of Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, 5 FCC Rcd 4842 (1990) at ¶ 33.

⁶ See *EchoStar 1.106(c)(2) Decision* at ¶ 5 ("The public interest in seeing EchoStar's Ka-band services brought to the public outweighs any harm caused by EchoStar's failure to provide this information as part of its initial milestone compliance demonstration.").

needed to provide DTH service in Mexico.⁷ This is inaccurate, however. It is EchoStar's understanding, based on assurances received since the Bureau released the *Denial Order*, that Mexico's SCT will promptly grant QuetzSat Directo's pending DTH concession application.

Thus, as in the *DIRECTV 3 Order*, EchoStar 4 will be used to immediately benefit Mexican consumers upon its arrival at the 77° W.L. by providing additional DTH services. Indeed, the move of EchoStar 4 to 77° W.L. will be a key step towards the introduction of a new and competitive DTH service in Mexico. In fact, the move will allow a second DTH competitor to enter the Mexican DTH market, which currently has only one DTH provider. This immediate benefit for Mexican consumers is at least as compelling as the DBS needs of Canadian consumers, which served as the basis for the public interest finding in the *DIRECTV 3 Order*.⁸

B. EchoStar Has Subsequently Determined That It Can Use EchoStar 4 to Provide Service to the U.S. from the 77° W.L. Orbital Location

In addition to immediately providing service to Mexican consumers, EchoStar has determined subsequent to the *Denial Order* that it can also provide DBS service to the U.S. from EchoStar 4 at 77° W.L.⁹ Thus, granting EchoStar's Application is also in the public interest because it would enable EchoStar to provide much needed additional spectrum at a full CONUS (versus a half-CONUS slot like 157° W.L.) orbital location, which could be used to offer local-into-local, HDTV, ethnic and other programming into the U.S. These benefits can be achieved

⁷ See *Denial Order* at ¶¶ 6-7 ("In particular, we note that QuetzSat's Concession clearly indicates that, in order to provide Direct-to-Home Service, i.e. an actual service consumers, that service must be provided either through an existing concessionaire for such a service, or through the issuance of a new concession This case, therefore, is unlike other cases in which the Commission has granted authority to move an FCC licensed satellite to a non-U.S. DBS location in order to address capacity needs and concerns with continuity of service.").

⁸ See *DIRECTV 3 Order* at ¶ 10.

⁹ EchoStar will file an application shortly for a blanket receive-only earth station authorization to provide service to U.S. consumers from EchoStar 4 at 77° W.L.

without affecting EchoStar's current subscribers because the programming provided by EchoStar 4 at its existing location is duplicative of the programming provided from another EchoStar satellite at 148° W.L.

The grant of EchoStar's Application would also be consistent with the Commission's recent grant of a similar STA request (and related applications) by DIRECTV Enterprises, LLC ("DIRECTV").¹⁰ In that proceeding, DIRECTV had entered into a similar arrangement with Telesat Canada ("Telesat") whereby DIRECTV relocated the DIRECTV 5 satellite to Telesat's Canadian-licensed BSS slot at 72.5° W.L., from which DIRECTV would provide DBS service on an interim basis to the United States. The Commission approved that arrangement, despite finding that Canada did not meet the "effective competitive opportunities" test for comparable DBS services, because of the public interest benefits associated with increasing the number of markets able to receive local-into-local programming from DIRECTV.¹¹

This proposal offers a more compelling case for authorization than the arrangement between DIRECTV and Telesat because it delivers similar public interest benefits without raising the countervailing concerns about the competitive opportunities for U.S. satellites in a foreign market. Unlike Canada, Mexico and the U.S. have a bilateral agreement to facilitate the provision of commercial satellite service, and in particular the two countries have adopted protocols related to the provision of DTH services.¹² Under the DISCO II framework, the

¹⁰ *In the Matter of DIRECTV Enterprises, LLC, Request for Special Temporary Authority for the DIRECTV 5 Satellite*, DA 04-2526, Order and Authorization, SAT-STA-20040107-00002, Call Sign S2417 (released Aug. 13, 2004).

¹¹ *Id.* at ¶ 23.

¹² Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception from

Commission presumes that the entry of a foreign satellite licensed by government with whom the U.S. has a bilateral agreement for the relevant service will promote competition and thus an analysis of the effective competitive opportunities is not required.¹³

While EchoStar is not required to show that using EchoStar 4 to provide DBS service to the U.S. from a Mexican orbital location offers public interest benefits substantial enough to overcome any competitive concerns, the move of EchoStar to 77° W.L., nevertheless, offers compelling public interest benefits.

While EchoStar 4 can only operate on a limited number of transponders at any given time, the additional full CONUS spectrum that will become available at 77° W.L. would allow EchoStar to compete more effectively with established cable operators in the MVPD market. As the Commission is aware, EchoStar operates with significantly less bandwidth and programming capacity than is available to most digital cable providers. All 32 DBS channels at the 77° W.L. orbital location are controlled by Mexico. By moving EchoStar 4 to 77° W.L., EchoStar will

Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States, April 28, 1996, Article I and Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and the United Mexican States, November 8, 1996.

¹³ See *In the Matter of 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; Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations*, 12 FCC Rcd 24094, at ¶ 143 (1997) ("DISCO II"). Indeed, the Commission highlighted the agreement with Mexico as the type of agreement that would benefit U.S. satellite operators. See *Id.* at ¶ 139. See also *In the Matter of Televisa International, LLC., Application For Blanket License For Receive-Only Earth Stations In The Fixed Satellite Service For Direct-To-Home Subscription Television Service*, 13 FCC Rcd 10074 (1997) (approving the application, under the bilateral agreement, to operate 1,000,000 receive only earth stations to receive DTH service from a Mexican satellite).

thus be able to bring a portion of this new full CONUS satellite capacity to use in providing DBS service to U.S. consumers.

In addition, EchoStar can provide service from EchoStar 4 at 77° W.L. without causing harmful interference. There is no BSS orbital location in the vicinity of 77° W.L. that is assigned to the United States (the closest U.S. location is 61.5° W.L.). EchoStar 4 will also be operated in accordance with the existing coordination agreements between the Administrations of Mexico and Canada with respect to the adjacent BSS assignments assigned to Canada (72.5° W.L. and 82° W.L. orbital locations).¹⁴

III. THE DENIAL ORDER FAILS TO TREAT SIMILAR APPLICATIONS IN A SIMILAR MANNER

It is well established that “administrative agencies must apply the same basic rules to all similarly situated applicants”¹⁵ and that “an agency must provide adequate explanation before it

¹⁴ EchoStar 4 will operate in full conformity with the 1996 Mexican ITU modification over all points in Canada and the United States. The attached map showing the proposed e.i.r.p. contours of EchoStar 4 at 77° W.L. demonstrates that the operation of EchoStar 4 at that location should be below or at the e.i.r.p. envelope of the 1996 Mexican ITU modification over virtually all of the United States and all of Canada. Outside the United States and the 72.5 W.L. service area, EchoStar 4 may operate above the ITU modification over a limited number of points, and in these areas EchoStar 4 will operate on a non-interference basis.

¹⁵ See *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996) (“[A]dministrative agencies must apply the same basic rules to all similarly situated applicants. An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.”); *Adams Telecom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994) (“We have recently reminded the FCC ‘of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment.’” (quoting *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993)); *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (“[An agency] ‘cannot act arbitrarily nor can it treat similar situations in dissimilar ways,’ [] and we [have] remanded litigation to the agency when it did not take pains to reconcile an apparent difference in the treatment accorded litigants circumstanced alike.” (quoting *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 780 (D.C. Cir. 1969))).

treats similarly situated parties differently.”¹⁶ In distinguishing between the disparate treatment of EchoStar and its competitor DIRECTV, the Bureau has resorted to an unavailing distinction -- *i.e.*, the welfare of consumers in Canada versus those in Mexico -- a factor that is both outside the purview of the public interest standard and outside the Commission’s jurisdiction.

Just last year, the Bureau authorized DIRECTV to move not one but two satellites to two DBS orbital locations allotted to Canada. In a case almost identical to the instant request, DIRECTV sought and received authority to move its DIRECTV 3 satellite to the Canadian 82° W.L. orbital location, where it would become subject to the jurisdiction of Canada.¹⁷ Like the requested move of EchoStar 4,¹⁸ the removal of DIRECTV 3 from U.S.-licensed service would not lead to any loss of service to U.S. consumers.¹⁹ Also, neither application appeared to raise any significant concern about harmful interference or collisions with other satellites during the move across the geostationary arc.

¹⁶ See *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (“We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently.”); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965) (“We think the Commission’s refusal at least to explain its differential treatment of appellant and NBC were in error. Both were connected with the deceptive practices and their renewal applications were considered by the Commission at virtually the same time. Yet one was held disqualified and the other was not. . . . [W]e think the differences are not so ‘obvious’ as to remove the need for explanation.”). See also *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) (“An agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently”). See also *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (same).

¹⁷ See *DIRECTV 3 Order*.

¹⁸ The programming provided by EchoStar 4 at the 157° W.L. orbital location is duplicative of the programming offered by EchoStar at the 148° W.L. orbital location.

¹⁹ See *DIRECTV 3 Order* at ¶ 2 (DIRECTV 3 was in a storage orbit and was not being used to provide service to U.S. consumers.).

The Bureau tries to distinguish the disparate treatment of the two companies based on its view that moving the DIRECTV 3 satellite to the Canadian slot would meet the service needs of the Canadian public. In the Bureau's words, "[T]he [move of the DIRECTV 3] satellite provided for immediate improvement in the quality and reliability of an existing service provided to direct-to-home subscribers in Canada. In granting that request, we noted that helping 'to assure continuity of service' served the public interest by comporting 'with cooperation between U.S. and Canadian satellite providers in times of emergency or capacity need.'"²⁰ In the Bureau's view, these needs distinguished DIRECTV's application from EchoStar's request. In this case, the Bureau reasoned, the EchoStar 4 satellite would not immediately serve the Mexican public because of the need to obtain an additional concession to provide DTH services.²¹ But the agency does not have authority to evaluate the service needs of the Canadian public *or* the perceived lack of service to the Mexican public. One of the primary purposes of the Communications Act is to ensure the availability of service to U.S. consumers.²² The provision of DBS service to Canadian or Mexican consumers is not a cognizable part of the Commission's

²⁰ See *Denial Order* at ¶ 7 (citations omitted).

²¹ See *Denial Order* at ¶ 6.

²² See 47 U.S.C. § 151 (Purposes of Act) ("For purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communications service ...). See also *General Motors Corporation, et al.*, 19 FCC Rcd 473, 492 ¶ 34 (2004) (rejecting the concern raised by EchoStar regarding effective competitive opportunities for U.S. satellite operators in Australia because: "The nature of our inquiry here focuses on whether the provision of Title III services by a U.S. licensee (with a controlling interest held by a foreign incorporated entity) would harm competition *in the U.S. market*. EchoStar's argument, at best, advances the position that U.S. licensees could be at a competitive disadvantage in the Australian market due to Australia's statutory and regulatory foreign ownership limitations on subscription television.") (emphasis added).

public interest standard. In any event, as indicated above, the *Denial Order* relied upon inaccurate information as to the pending DTH concession in Mexico.

IV. THE *DENIAL ORDER* FAILS TO TREAT FOREIGN ADMINISTRATIONS IN A NON-DISCRIMINATORY FASHION

The *Denial Order* also discriminates unfairly between two foreign administrations -- Canada and Mexico. By granting the DIRECTV applications and denying EchoStar's instant requests, the *Denial Order* put the service needs of the Canadian public above the needs of the Mexican public because in the Bureau's view the former were superior and more immediate.²³

This is especially inappropriate considering that Mexico, unlike Canada, has entered into a protocol with the U.S. with respect to the provision of DTH services. Canada does not provide U.S. DTH providers with the same opportunities to serve the Canadian market because of local content requirements. As the Commission has found, "a *de jure* barrier exists in Canada for any U.S. satellite seeking to offer [DTH service]."²⁴ In order to allow service to the U.S. from Canadian slots, therefore, the Commission has had to find "countervailing public interest factors" to overcome the lack of reciprocity required under the Commission's "ECO-Sat" test.²⁵

Mexico, by contrast, has reached a bilateral DTH protocol with the U.S. under the auspices of NAFTA that allows reciprocal service from the orbital locations of each country to

²³ See *DIRECTV 3 Order* at ¶ 10 ("The use of the DIRECTV 3 satellite to augment the service currently provided by Telesat's Nimiq 1 and Nimiq 2 satellites helps to assure continuity of service to Canadian customers."); *Denial Order* at ¶ 7 ("[In the *DIRECTV 3* case, the] satellite provided for immediate improvement in the quality and reliability of an existing service provided to direct-to-home subscribers in Canada. . . . In [the EchoStar 4] case, there are no considerations concerning capacity needs for continuity of existing service.").

²⁴ See *Digital Broadband Applications Corp.*, Order, 18 FCC Rcd 9455, 9462 ¶ 14 (2003) ("DBAC Order").

²⁵ *Id.* at 9462 ¶ 15.

consumers located in the other country.²⁶ As EchoStar explained in its Application, the instant STA request and subsequent movement of EchoStar 4 is critical to Mexico's ability to enjoy its rights under that DTH protocol.²⁷ Allowing EchoStar's customer to meet a condition of its Mexican license to bring a satellite into use by the July 10, 2005 ITU deadline for Mexico's 1996 modification to the ITU Broadcast Satellite Services ("BSS") plan for Region 2 would preserve the slot for use by Mexico and for service to the U.S. market. Consistent with the DTH protocol, the Bureau should be sensitive to Mexico's attempt to safeguard its international rights.

V. THE DENIAL ORDER MISAPPLIES THE PUBLIC INTEREST STANDARD

The *Denial Order* also misapplies the public interest standard. *First*, as mentioned above, it is not appropriate for the Bureau to weigh what it views as the lack of immediate service from EchoStar 4 to Mexico from a Mexican orbital location. This is solely a concern for Mexico.

The Bureau's evaluation of the use of the 77° W.L. slot was not only beyond the scope of the public interest standard, but also factually incorrect. The Bureau did not have before it all the facts about service to Mexican consumers from the satellite, because they should have been irrelevant to any evaluation of the removal of the satellite from a U.S. orbital location. In fact,

²⁶ Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception from Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States, April 28, 1996, Article I and Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and the United Mexican States, November 8, 1996.

²⁷ See SAT-STA-20050321-00068, at 4 ("[T]his request will usher in the potential to use the 77° W.L. orbital location for the eventual provision of service to the U.S. Specifically, in addition to allowing use of EchoStar 4 as a Mexican-licensed satellite at 77° W.L., the requested STA will allow QuetzSat to satisfy a condition of the Mexican license and thus ultimately would enable EchoStar to use the 77° W.L. for the purpose of offering local-into-local, HDTV, ethnic and other programming into the U.S.").

QuetzSat Directo, an affiliate of EchoStar's customer SES Americom S.A., already had pending an application to obtain authority to do precisely what the Bureau faulted EchoStar for not providing -- using EchoStar 4 to provide service to Mexico. As mentioned above, EchoStar understands that Mexico's SCT will promptly grant this application. So the Bureau's view that Mexican consumers do not stand to benefit from a DBS satellite at 77° W.L. was misguided.

But the more fundamental point is that the Bureau does not have the power to safeguard the welfare of Mexican consumers and to second-guess the Mexican regulator's view as to whether any particular use of the satellite at 77° W.L. serves the *Mexican* public interest.²⁸ The Bureau is charged with protecting and promoting the U.S. public interest.

Second, EchoStar is only seeking authority to *remove* the satellite from U.S. jurisdiction so that it can move the satellite to a Mexican orbital location. This request is akin to a common carrier requesting authority to discontinue service over certain facilities pursuant to Section 214 of the Act.²⁹ Like the instant request, discontinuances of service are subject to the public interest standard. But if the Commission applied that standard in the way it did here, it would almost certainly have to deny all Title II discontinuance applications. In every such case, the Commission could reason that the subject facilities would not be redeployed to serve consumers. EchoStar submits that this is not the proper public interest analysis of a proposed service discontinuance. The only legitimate factors that the Commission should consider in this context is whether consumers will be disenfranchised without appropriate notice, and whether any potential disenfranchisement outweighs the applicant's right to make sound economic and

²⁸ See 47 U.S.C. § 151. See also *General Motors Corporation*, *supra* note 22, at ¶ 34.

²⁹ See 47 U.S.C. § 214 ("No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall have first been obtained from the Commission a certificate that neither the present nor the future public convenience and necessity shall be adversely affected ...").

business decisions. Under that standard, the Commission routinely approves discontinuances of service even if consumers will lose service, recognizing the value of affording the carrier certain business flexibility.³⁰ In fact, the Commission has found that most service discontinuances can be deemed automatically granted, so long as adequate notice to consumers is provided.³¹

EchoStar, of course, is not a common carrier, and its removal of facilities from service is therefore subject to even less scrutiny. Indeed, as a DBS operator, EchoStar could turn in its license for EchoStar 4 tomorrow without requesting prior approval from the Commission. It could do so even if consumers were to lose service. In the context of moving a U.S.-licensed DBS satellite from a U.S. orbital location and relocating it to a slot allotted to another country, the public interest analysis should likewise be straightforward. There are only two factors of any conceivable relevance: (1) whether U.S. consumers will be disenfranchised; and (2) whether

³⁰ See *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, 85 F.C.C. 2d 1, at ¶¶ 146-47 (1980):

“We recognize that service discontinuance can be disruptive to customers. We believe, however, that we are offering customers a fair degree of protection by requiring carriers to notify all customers of discontinuance plans and by providing customers with an opportunity to inform the Commission of resultant hardships. . . . Nonetheless, in a competitive marketplace ease of exit is essential. If regulatory exit barriers are not lowered, carriers may be discouraged from entering high risk markets for fear that they may not be able to discontinue service in a reasonably short period of time if it proves unprofitable. Ease of exit is also a fundamental characteristic of a competitive market. We have already found that the overall public is best served in these areas by the development of this competition, even though some customer dislocations might be attendant thereto. We believe that Section 63.71 strikes a good balance between the need to reduce regulatory barriers to exit from competitive markets and our responsibility to ensure that the public served will be given a reasonable period of time to make other service arrangements.”

³¹ 47 C.F.R. § 63.71 (permitting carriers to automatically discontinue service within a certain time after an application to discontinue is filed, provided that adequate notice is given and unless it can be shown that customers would be unable to receive service or a reasonable substitute from another carrier).

there is any risk that the satellite would interfere or collide with any object subject to U.S. jurisdiction on its way to its new location.

Neither of these factors militates against a denial here. As EchoStar explained in its Application, no U.S. consumer would lose any programming as a result of the relocation, since the traffic on the satellite is duplicative of programming available from another satellite at 148° W.L.³² In addition, EchoStar has requested authority to perform TT&C operations during the relocation and has represented, in accordance with industry practice, that such operations will be coordinated with potentially affected satellite operators during the relocation of the satellite.³³ As a result, there will be no risk of harmful interference or collision with other satellites. The *Denial Order* makes no mention of any of these matters.

In fact, the detailed additional questions that the Bureau directed to EchoStar did not suggest the Bureau was going to decide this case on extraneous grounds.³⁴ The Bureau did not ask EchoStar to explain what the satellite would be doing at the Mexican orbital location. Nor did the Bureau ask EchoStar whether EchoStar 4 would provide service to Mexican consumers or when such service could commence. Rather, the Bureau merely asked EchoStar to show that “QuetzSat’s authorization from SCT, or any additional authorizations, are intended to be sufficient to make Mexico the licensing administration for EchoStar 4 pursuant to Article 18 of the ITU Radio Regulations.”³⁵ Such questions, of course, were proper, and EchoStar submitted

³² See SAT-STA-20050321-00068.

³³ See *Id.*

³⁴ See Letter from Thomas S. Tycz, Chief, Satellite Division, International Bureau, FCC to Pantelis Michalopoulos, Counsel for EchoStar Satellite L.L.C. (Apr. 13, 2005).

³⁵ *Id.*

detailed and satisfactory answers to them.³⁶ These questions, however, turned out to be largely irrelevant to the public interest analysis that the *Denial Order* applies.

VI. THE DENIAL ORDER DISREGARDS THE PUBLIC BENEFITS OF ECHOSTAR'S PROPOSAL FOR U.S. CONSUMERS

While being unduly solicitous for the service needs of Mexican and Canadian consumers, the *Denial Order* disregards the public benefits of EchoStar's Application for U.S. consumers, even setting aside the new facts presented herein. As EchoStar explained in its Application, in addition to allowing use of EchoStar 4 as a Mexican-licensed satellite at 77° W.L., the requested STA will allow QuetzSat to satisfy a condition of its Mexican license and thus ultimately would enable EchoStar to use the 77° W.L. for the purpose of offering a variety of services to portions of the United States, including local-into-local retransmissions of broadcast stations, HDTV, ethnic and other programming.³⁷ While the *Denial Order* dismisses this benefit as "purely speculative"³⁸ in this case, the Bureau recognized a similar possibility of future service to the U.S. as a benefit in the *DIRECTV 3 Order*.³⁹ The prospect of U.S. service, which properly appears to have contributed to the Bureau's grant of the DIRECTV move, should likewise be weighed favorably here.

³⁶ See Letter from Pantelis Michalopoulos, Counsel for EchoStar Satellite L.L.C. to Marlene H. Dortch, Secretary, FCC (Apr. 26, 2005); Letter from Pantelis Michalopoulos, Counsel for EchoStar Satellite L.L.C. to Marlene H. Dortch, Secretary, FCC (May 13, 2005) (with request for confidentiality); Letter from Pantelis Michalopoulos, Counsel for EchoStar Satellite L.L.C. to Marlene H. Dortch, Secretary, FCC (May 24, 2005).

³⁷ See SAT-STA-20050321-00068.

³⁸ See *Denial Order* at ¶ 8.

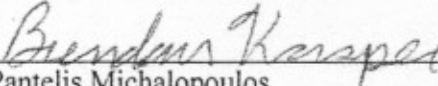
³⁹ See *DIRECTV 3 Order* at ¶ 13 ("In fact, relocation of the DIRECTV 3 satellite may have a beneficial effect on the likelihood of additional service to the United States, to the extent that it increases capacity at the 82° W.L. and 91° W.L. orbital locations.").

VII. CONCLUSION

For the foregoing reasons, EchoStar respectfully requests that the Bureau immediately reconsider its decision and grant EchoStar's Application to move EchoStar 4 to the 77° W.L. orbital location.⁴⁰

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June 8, 2005

⁴⁰ The Bureau should also reconsider its associated dismissals of the related EchoStar applications and grant them as well.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June 2005, a copy of the foregoing was served upon the following by electronic mail:

Donald Abelson
Chief, International Bureau
Federal Communications Commission
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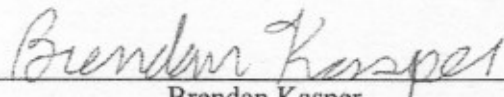
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DECLARATION OF DAVID BAIR

I, David Bair, declare under penalty of perjury under the laws of the United States of America that the assertions of fact contained in the foregoing "Emergency Petition for Reconsideration," filed in SAT-STA-20050321-00068, SAT-MOD-20050513-00103 and SES-MFS-20050527-00662, and are true and correct to the best of my knowledge, information and belief.

Executed on 7 JUNE 2005

A handwritten signature in black ink, appearing to read "D. Bair", written over a horizontal line.

David Bair
EchoStar Satellite L.L.C.
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Relative Downlink EIRP Contours

Peak EIRP = 54.9 dBW per transponder
Contours shown are -2, -4, -6, -8, -10, -15 and -20 dB relative to peak

