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JUN 22 2005

Mr. Thomas S. Tycz
Chief, Satellite Division
International Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Federal Communication Commission
Bureau / Office

**Re: File No. SAT-MOD-20050621-00132 and Amendment to
SES-LFS-20040831-01253
Memorandum of Agreement among Telesat Canada,
EchoStar Satellite L.L.C. and SES Americom, Inc.**

Dear Mr. Tycz:

SES Americom, Inc. ("SES Americom") and EchoStar Satellite L.L.C. ("EchoStar"), by their attorneys, hereby request confidential treatment of the unredacted Memorandum of Agreement and associated exhibits ("Agreement") by and among Telesat Canada ("Telesat"), EchoStar and SES Americom (collectively, the "Parties") attached hereto in support of the above-referenced applications for temporary modification of the AMC-16 license and amendment of EchoStar's pending application for blanket receive-only earth station authority from the 118.7° W.L. orbital location. SES Americom and EchoStar have submitted a redacted copy of the Agreement for the public file as part of the AMC-16 modification application and EchoStar's amendment application, and a copy is also provided here for the Commission's convenience. SES Americom and EchoStar ask that the unredacted Agreement be withheld from public disclosure pursuant to Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459, and Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4). The Agreement is a highly proprietary business document, and SES Americom, EchoStar, and Telesat would suffer serious competitive harm if competitors were accorded access to the Agreement. Consistent with Commission precedent, the Agreement is exempt from public disclosure.

Mr. Thomas S. Tycz
June 22, 2005
Page 2

Exemption 4 of FOIA provides protection from disclosure for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). *See also* 47 C.F.R. § 0.457(d).¹ The Agreement falls squarely within this category and qualifies for protection pursuant to Section 0.457 of the Commission's Rules, 47 C.F.R. § 0.457.

The Agreement contains information regarding the Parties' service arrangements and future plans that would typically not be disclosed to the public. Companies closely guard from their competitors information regarding strategic business alliances and future service plans. The Parties marked the Agreement as confidential and proprietary and included terms to restrict disclosure of the Agreement to non-Parties. Thus, the Commission should treat the redacted information in the Agreement as confidential under Section 0.457(d).

The Parties have taken steps to prevent unauthorized dissemination of the Agreement because unrestricted disclosure of the information contained therein would harm SES Americom, EchoStar and Telesat competitively. The Commission has recognized that it is obligated to ensure that in the exercise of its duties it does not unnecessarily disclose information that might place a regulated entity at a competitive disadvantage.²

In this instance, the risk of competitive harm is clear. The Agreement reveals information concerning the Parties' business plans and proprietary documentation regarding SES Americom's satellite facilities. Unrestricted disclosure of this information to the Parties' competitors would allow them to tailor their own plans to counter or imitate the Parties' business strategy. Furthermore, it would permit rivals to obtain sensitive technical information developed by SES Americom.

¹ *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) ("*Critical Mass*") ("[W]e conclude that financial or commercial information provided to 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."

² *See, e.g., Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24822 (1998).

The Commission has recognized that these types of risks justify protecting technical and financial information from unrestricted disclosure.³ The Commission has found that competitive harm could result from unrestricted release of information relating to a satellite licensee's market plans and business strategies.⁴ For example, in denying a FOIA request for access to information regarding INTELSAT's technical and strategic business concerns, the Commission noted that "such information could prove very useful to a competitor."⁵ Specifically, the Commission noted that "if an entrepreneur knows the technical and commercial aspects of a competitor's proposed operations, it may then structure its own system in order to take advantage of its competitor's weaknesses, whether they be technical or marketing." *Id.*⁶ In addition, such information can give competitors a "heads up" for use in negotiating their own agreements.⁷

In addition, the redacted portions of the Agreement also contain highly sensitive information that if disclosed could place SES Americom, EchoStar and Telesat at a competitive disadvantage, including specific information about future operations and non-public information regarding the AMC-16 satellite that should be protected under § 0.459 of the Commission's rules, 47 C.F.R. § 0.459. There are a number of entities who would stand to benefit competitively from any knowledge of the redacted commercial terms included in the Agreement.

³ See, e.g., *Mercury PCS II, LLC*, FCC 00-241, FOIA Control No. 98-95 at ¶ 4 (rel. July 17, 2000) (discussing Bureau determination that documents that revealed submitter's overall business strategy should not be disclosed because disclosure could adversely affect company's competitive position and ability to implement its business plan).

⁴ See, e.g., *Orion Satellite Corp.*, 54 RR 2d 1315, 1317 (1983) (information regarding INTELSAT's future plans and business strategies withheld under Exemption 4).

⁵ *M/A-COM, Inc.*, 55 RR 2d 641, 644 (1984).

⁶ See also *Satellite Business Systems*, 54 RR 2d 336, 339 (1983) (denying disclosure of SBS's satellite transponder use forecasts because it would permit competitors "to better assess SBS's capabilities, thereby assisting them in preparing their own market strategies and in acquiring customers who might otherwise seek SBS's services").

⁷ *Letter to John L. McGrew, Esq.*, 10 FCC Rcd 10574, 10575 (Com. Car. Bur. 1995).

Mr. Thomas S. Tycz
June 22, 2005
Page 4

In further support of this request, SES Americom and EchoStar provide the following information in response to the requirements of 47 C.F.R. § 0.459(b):

1. SES Americom and EchoStar request confidential treatment of the unredacted Agreement, which contains sensitive business and technical information. As noted above, SES Americom and EchoStar have already filed a redacted version of the Agreement, and this request for confidential treatment pertains only to those provisions of the Agreement that are redacted from the public file version.
2. The Agreement is being submitted in support of SES Americom's and EchoStar's above-referenced applications.
3. The redacted portions of the Agreement contain sensitive commercial information. Specifically, the redacted information addresses strategic business matters and confidential technical data. This is commercial information that has not been made public and is not available to the Parties' competitors.
4. The redacted information pertains to the provision of FSS satellite capacity for multichannel video programming. Both the FSS satellite market and the multichannel video programming distribution market are competitive.
5. Disclosure of the redacted information could result in substantial competitive harm to SES Americom, EchoStar, and Telesat. The redacted information regarding future operations at the 118.7° W.L. orbital location would give the Parties' competitors advance notice of future plans that have not previously been made public. As noted above, this would allow these competitors to take steps to counter whatever advantage the Parties may gain in the market based on the future operations in the 118.7° W.L. orbital location.
6. SES Americom, EchoStar, and Telesat have taken significant measures to ensure that this information is not disclosed to the public, restricting access to the proprietary materials and agreeing to contract terms that ensure the confidential nature of the information is protected.

Mr. Thomas S. Tycz

June 22, 2005

Page 5

7. The redacted material for which non-disclosure is sought is not available to the public.
8. SES Americom and EchoStar request that the redacted materials be withheld from disclosure for an indefinite period. Disclosure of this information at any time could jeopardize the competitive positions of SES Americom, EchoStar and Telesat.
9. Finally, SES Americom and EchoStar note that a denial of its request that this information be kept confidential could impair the Commission's ability to obtain this type of voluntarily disclosed information in the future.⁸

SES Americom and EchoStar request that the Commission return the unredacted Agreement if this request for confidential treatment is denied. *See* 47 C.F.R. § 0.459(e). To the extent that the Commission concludes that the disclosure of some or all of the redacted terms should be made available to parties to this proceeding, such disclosure must occur pursuant to the terms of a protective order.⁹ Permitting a requesting party to inspect the Agreement under the terms of a protective order at least would reduce the risk that such access would cause competitive and other harm to SES Americom and EchoStar.¹⁰ In particular, access to the confidential documents must be

⁸ *See Critical Mass*, 975 F.2d at 878 (“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.”).

⁹ If access to the documents is sought for a purpose other than to facilitate the requester’s ability to participate in a relevant Commission proceeding, it should be denied outright. The Commission has recognized that absent an ongoing proceeding in which the requester is participating, the Commission cannot enforce restrictions on access that may be necessary to protect proprietary data. The Commission cited to the Supreme Court’s observation that there is “no mechanism under FOIA for a protective order.” *The Lakin Law Firm, P.C.*, FCC 04-257 (rel. July 8, 2004) at ¶ 7, quoting *National Archives and Records Admin. v. Favish*, 124 S. Ct. 1570, 1580 (2004).

¹⁰ *See, e.g., Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2212-13 (1997) (Use of a protective order serves the “dual purpose of permitting limited access to important information by interested persons while protecting proprietary information from public disclosure.” As a result, protective order “appropriately balances the competing interests at stake.”); *MCI*

Mr. Thomas S. Tycz
June 22, 2005
Page 6

available only to counsel who are not involved in competitive business decisions. In previous decisions, the Commission has recognized that this type of restriction is appropriate where the party seeking access to confidential information is a competitor of the company that submitted the information.¹¹

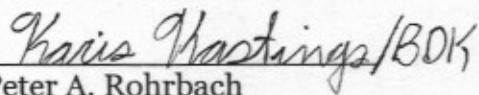
Telecommunications Corp., 58 RR 2d 187, 190 (1985) (allowing release of Shared Network Facilities Agreements found to be confidential under Exemption 4 of FOIA subject to a protective order).

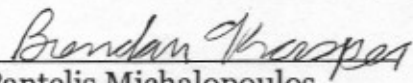
¹¹ See, e.g., *WorldCom, Inc. and MCI Communications Corporation*, 13 FCC Rcd 11166, 11168-69 (Com. Car. Bur. 1998) (access to sensitive information limited to counsel who are "actively engaged in the conduct of this proceeding, provided they are not involved in 'competitive decision-making'"). See also *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24833-34 (1998) ("when specific future business plans are involved" Commission will "consider limiting access to documents to outside counsel and experts so as to minimize the potential for inadvertent misuse of such information") (citations omitted); *Southwestern Bell Telephone Company*, 12 FCC Rcd 7770, 7774, 7777 (1997) (approving a protective order for disclosure of information regarding equipment costs that prohibits review by persons engaged in the purchase of the same or similar equipment).

Mr. Thomas S. Tycz
June 22, 2005
Page 7

For the foregoing reasons, SES Americom and EchoStar request that the Commission withhold the unredacted Agreement from public disclosure pursuant to FOIA Exemption 4 and Section 0.459 of the Commission's Rules.

Respectfully submitted,


Peter A. Rohrbach
Karis A. Hastings
Counsel for SES Americom, Inc.


Pantelis Michalopoulos
Philip L. Malet
Brendan Kasper
Counsel for EchoStar Satellite L.L.C.

Enclosures