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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

S2444 SAT-MSC-20020325-00054
Compass Systems, Inc.
Southpoint 2

April 2, 2003

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Received
APR 21 2003
Policy Branch
International Bureau

Re: **Application of Compass Systems, Inc. for Authority to Construct an
International Direct Broadcast Satellite System, File No. SAT-MSC-
200320325-00054 (DA 03-410)** SAT-MSC-20020325-00054

Dear Ms. Dortch:

Enclosed for filing are an original and four copies of *Compass Systems, Inc.'s Application for Review* in the above-captioned matter.

I have enclosed an additional copy for date-stamp and return. Please contact me if you have any questions. Thank you for your assistance in this matter.

Yours sincerely,



J.C. Rozendaal
Counsel for Compass Systems, Inc.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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OFFICE OF THE SECRETARY

In the Matter of)

Application of Compass Systems, Inc.)
for Authority to Construct an International)
Direct Broadcast Satellite System)

File No. SAT-MSC-200320325-00054;
DA 03-410

APPLICATION FOR REVIEW OF COMPASS SYSTEMS, INC.

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April 2, 2003

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File No. SAT-MSC-200320325-00054;
DA 03-410

APPLICATION FOR REVIEW OF COMPASS SYSTEMS, INC.

Executive Summary

Compass Systems, Inc. (“Compass”), through its attorneys, hereby seeks review of a March 3, 2003, decision of the Commission’s International Bureau (“IB”) and Wireless Telecommunications Bureau (“WTB”) in the above-captioned matter to dismiss Compass’s application for authority to construct an international Direct Broadcast Satellite (“DBS”) system.

Compass applied to provide international DBS service with a nationwide integrated terrestrial platform (“ITP”) that would make exceptionally efficient use of its allocated spectrum by providing content of national or international interest via satellite and content of local interest, including high-speed Internet access, terrestrially. Rather than accepting Compass’s application for filing and calling for comments thereon, the IB and WTB waited for a year and then dismissed the application as premature because they erroneously treated the application not as an integrated international DBS application but as, in effect, two applications – one for a purely domestic DBS service and one for a stand-alone Multichannel Video and Data Distribution Service (“MVDDS”) – both of

which would, in the view of the IB and WTB, be subject to auction. Compass was accordingly invited to participate in upcoming auctions 52 and 53. No other reason for the dismissal was given.

The dismissal of Compass's application on the ground that the authorization it seeks should be obtained via auction was error. Compass expressly sought authorization to provide an *international* satellite communications service. The ORBIT Act prohibits auctions of "orbital locations or spectrum used for the provision of international or global satellite communications services."¹ No explanation was provided in the *Dismissal Letter*² from the IB and WTB as to how the dismissal could possibly be consistent with the ORBIT Act.

To the extent that the *Dismissal Letter* rests on the notion that DBS is somehow inherently domestic, rather than international, it is mistaken. Nor is it relevant that the Region 2 DBS Band Plan of International Telecommunications Union ("ITU") anticipates that DBS satellites in orbital locations assigned to the U.S. will primarily serve the U.S. (The *Dismissal Letter* does not mention this factor, but the Commission relied on the Region 2 Band Plan as its justification for auctioning DBS licenses in Auction 52.) As the Commission has previously acknowledged, modification of the Band Plan is the rule rather than the exception when a new DBS satellite is launched. Just last year the Commission approved the launch and operation of an EchoStar satellite

¹ See Open-Market Reorganization for the Betterment of International Telecommunications Act, Pub. L. No. 106-180, 114 Stat. 48, § 647 (enacted Mar. 12, 2000), codified at 47 U.S.C. § 765f ("ORBIT Act").

² *Application of Compass Systems, Inc. for Authority to Construct and International Direct Broadcast Satellite System*, File No. SAT-MS-20020325-0054, Letter from Donald Abelson, Chief, International Bureau, and John B. Muleta, Chief, Wireless Telecommunications Bureau, to Antoinette Cook Bush, Vice President, Compass Systems, Inc. (Mar. 3, 2003) ("*Dismissal Letter*").

that will target Mexico City from a U.S. orbital location, even though this will require modification of the Region 2 Band Plan.

Furthermore, the ORBIT Act prohibits auctions of even purely domestic DBS or MVDDS licenses because these services rely on spectrum that is “used for the provision of” Non-Geostationary Satellite Orbit Fixed Satellite Services (“NGSO FSS”), which are indisputably international or global satellite communications services. In sum, the ORBIT Act squarely prevents the granting via auction of the authorization that Compass seeks.

The dismissal of Compass’s application is also at odds with the Commission’s treatment of other, similar applications. While Compass was awaiting Commission action on its application, the Commission accepted for filing the application of SES AMERICOM to provide international DBS service. The Commission also granted Mobile Satellite Service (“MSS”) operators permission to add an ancillary terrestrial component to their systems in order to increase spectrum efficiency. In neither of these cases did the Commission suggest that auctions would be appropriate – but it now says Compass must undergo not one, but two auctions to reach the same result. This difference in treatment is arbitrary and capricious and cannot be justified. The failure even to consider Compass’s application on the merits flies in the face of recent Commission policy regarding the flexible use of spectrum and Congress’s encouragement of flexible use in 47 U.S.C. § 303(y). Compass not only promises to bring much-needed competition to the markets for Multichannel Video Program Distribution but also to provide long-awaited service to Alaska and Hawaii as well as rural areas in the contiguous United States (“CONUS”).

Hence, in addition to being directly contrary to the ORBIT Act, the dismissal of Compass's application presents at least two important questions of law and policy which have not been previously resolved by the Commission: First, whether the Commission can lawfully treat Compass differently from similarly situated applicants, including SES AMERICOM and the MSS operators, whose applications for similar authorizations the Commission has accepted for filing. Second, whether the Commission should encourage, rather than hinder, Compass's flexible use of spectrum for satellite and terrestrial use, in accordance with 47 U.S.C. § 303(y). Finally, to hold Compass's application for a year while accepting other, similar applications for filing and then to dismiss Compass's application as premature constitutes prejudicial procedural error. For all these reasons, the present application for review should be granted, *see* 47 C.F.R. § 1.115(b)(2) (describing factors warranting Commission consideration of questions presented), and Compass's application to provide international DBS service should be accepted for filing and granted.

Background

More than a year ago, on March 20, 2002, Compass submitted an application to provide DBS service nationwide, including to the underserved residents of Alaska and Hawaii and to rural subscribers, in competition with existing domestic multichannel video programming distributors ("MVPDs").³ In addition, Compass planned to provide service internationally to Mexico, Canada, and the Asia-Pacific region.⁴ Compass proposed to provide this service from the 157° and 166° W.L. western orbital locations – two locations from which no DBS operator has ever provided service. Compass's

³ *See* Compass Amended Application at 1-2.

⁴ *Id.* at 2.

proposed system also features an integrated terrestrial platform (“ITP”) that would operate in the assigned DBS spectrum to make maximally efficient use of that spectrum. By transmitting content of local interest terrestrially, the ITP would simultaneously increase the capacity available for such content at least 50 times while simultaneously freeing up precious satellite transponder space for broadcasting more content of national interest. This combined satellite-terrestrial system would enable Compass to compete effectively with the entrenched MVPD providers, including the two established DBS providers, EchoStar Satellite Corp. (“EchoStar”) and DIRECTV, Inc. (“DIRECTV”), who currently hold all of the DBS orbital slots capable of serving all of the CONUS.⁵ EchoStar and DIRECTV’s control over these so-called full-CONUS slots has heretofore proven an insurmountable barrier to entry by new DBS providers and is the primary reason that the spectrum assigned to the western orbital locations Compass requests currently lies fallow.

Rather than being accepted for filing, however, no action was taken on Compass’s application for nearly a year and then it was dismissed as premature. According to the *Dismissal Letter* from the IB and WTB, DBS licenses are to be distributed by competitive bidding; therefore, applications for such licenses can be accepted only after the Commission has opened a filing window, which it had not done at the time Compass submitted its application.⁶ (In fact, no window for DBS applications had been opened for more than seven years.⁷) Similarly, the *Dismissal Letter* in effect treated Compass’s

⁵ 47 U.S.C. §765f.

⁶ *Dismissal Letter* at 1.

⁷ *FCC Announces Auction of Direct Broadcast Satellite Service*, Public Notice, Report No. AUC-95-08 (Auction No. 8) (FCC rel. Dec. 21, 1995).

application to deploy an integrated terrestrial component to its system as if Compass were applying for a license under the Commission's newly minted rules for MVDDS – rules that were not even in existence at the time Compass filed its application.⁸ According to the *Dismissal Letter*, “[b]ecause the filing window [for MVDDS licenses] has not yet been opened, [Compass’s] application for terrestrial authority using DBS frequencies is premature.”⁹ Prematurity was the *sole* reason given for dismissing the application. The *Dismissal Letter* invited Compass to file applications in the upcoming auctions for DBS and MVDDS licenses (auction nos. 52 and 53).¹⁰ In its application, Compass had specifically called the Commission’s attention to the fact that the ORBIT Act, 47 U.S.C. § 765f, prohibits the auctioning of orbital locations or spectrum used in the provision of international or global satellite communications services of the kind Compass wished to provide.¹¹ Yet the *Dismissal Letter* does not even attempt to explain how Compass could be made to participate in an auction without violating the ORBIT Act.

The dismissal of the Compass application is at odds with the manner in which the Commission processed another international DBS application filed only a few weeks later. On April 25, 2002, SES AMERICOM submitted an application to provide international DBS service to the U.S. and the Caribbean, and the Commission accepted it

⁸ See generally *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the KU-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614 (2002).

⁹ *Dismissal Letter* at 2.

¹⁰ *Id.*

¹¹ Compass Amended Application at 24-25.

for filing.¹² The Commission did not call for competing applications or suggest that it would be appropriate to auction off the right to provide the service SES AMERICOM had proposed. In addition, before taking action on Compass's application, the Commission authorized MSS operators to deploy an "ancillary terrestrial component" ("ATC") to their satellite systems.¹³ The Commission specifically rejected the arguments of some commenters that authorizing the ATC required the Commission to engage in competitive bidding and that failing to use competitive bidding would result in unjust enrichment of the incumbent MSS operators.¹⁴

Thus, while Compass was awaiting Commission acceptance of its application for filing, the Commission not only accepted a later-filed international DBS application but also authorized the terrestrial use of satellite spectrum without calling for an auction in either instance. Yet when they finally got around to taking action on *Compass's* application to provide international DBS service and to make ancillary terrestrial use of its satellite spectrum, the IB and WTB determined that it would be subject to not one but two separate auctions.

¹² FCC Public Notice, *Satellite Space Applications Accepted for Filing*, Report No. SAT-00110 (May 17, 2002) (noting that SES AMERICOM sought permission "to offer satellite capacity for third party direct-to-home services to consumers in the United States and certain British Overseas Territories in the Caribbean").

¹³ *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz band, the L-Band, and the 1.6/2.4 GHz Bands, et al.*, Report and Order and Notice of Proposed Rulemaking, ¶ 2, IB Docket Nos. 01-185 & 02-364, FCC 03-15 (FCC rel. Feb. 10, 2003) ("*MSS Flexibility Order*").

¹⁴ *Id.* ¶¶ 222-226.

Discussion

I. The ORBIT Act Prohibits Distributing Via Auction the Orbital Locations and Spectrum Compass Seeks

The core error at the heart of staff's *Dismissal Letter* is that Compass specifically sought authorization to provide *international* DBS service with an integrated terrestrial component. It did *not* seek a purely domestic DBS license, and it did not seek authorization to provide terrestrial service on a stand-alone basis. The ORBIT Act provides in relevant part that "the Commission shall not have the authority to assign by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services."¹⁵ On its face, Compass's application sought permission to provide *international* satellite communications services; therefore, by the plain terms of the ORBIT Act, the Commission cannot auction the orbital locations and spectrum that Compass seeks.

In a public notice issued the same day as the *Dismissal Letter* at issue here, the Commission announced that it would be opening a filing window for applications to use the very orbital locations and spectrum at 157° and 166° W.L that Compass had sought permission to use a year earlier.¹⁶ The Commission apparently takes the position that it may auction these licenses despite the ORBIT Act's prohibition because DBS is not an international or global satellite communications service.

¹⁵ 47 U.S.C. § 765f.

¹⁶ See *Auction of Direct Broadcast Satellite Service Licenses Scheduled for August 6, 2003*, Public Notice, FCC 03-40 (FCC rel. Mar. 3, 2003) ("Auction 52 Public Notice").

As explained in comments submitted by Northpoint Technology, Ltd., and Broadwave USA, Inc., in response to the Public Notice,¹⁷ the idea that DBS is a purely domestic service represents a dramatic and unexplained reversal of Commission policy and runs counter to a series of recent decisions in which the Commission not only permitted international DBS service but affirmatively praised the benefits of such service. The Commission's sole justification for its new position is that the ITU Region 2 DBS Band Plan anticipates that DBS satellites in orbital locations assigned to the U.S. will primarily serve the U.S. This supposed justification is completely inadequate because, as the Commission has previously acknowledged, modification of the Band Plan is the rule rather than the exception when a new DBS satellite is launched. In fact, just last year the Commission approved the launch and operation of an EchoStar satellite that will target Mexico City from a U.S. orbital location, even though this will require modification of the Region 2 Band Plan. In addition, as noted above, the Commission accepted for filing (without calling for competing applications) a petition by SES AMERICOM to provide international service to the U.S. and the Caribbean from an orbital location outside the ITU Region 2 DBS Band Plan. In light of these and other recent examples, Compass believes that the Commission is clearly mistaken in denying that DBS is an international or global satellite communications service – especially when, as in Compass's case, an applicant specifically seeks permission to provide *international* service.

Moreover, even *domestic* DBS and MVDDS licenses fall within the ORBIT Act's prohibition on auctions because these services rely upon spectrum that is “used for the

¹⁷ See generally *Auction of Direct Broadcast Satellite Service Licenses (Auction 52)*, Comments of Northpoint Technology, Ltd., and Broadwave USA, Inc., Regarding DBS Auction Procedures (FCC filed Mar. 17, 2003). For the Commission's convenience, the analysis provided in those comments is repeated in large part herein.

provision of’ Non-Geostationary Satellite Orbit Fixed Satellite Services (“NGSO FSS”), which are indisputably international or global satellite communications services.

A. DBS Is an International or Global Satellite Communications Service

Until it issued this Auction 52 Public Notice, the Commission had consistently and correctly regarded DBS as an international or global satellite communications service. The Commission has provided no adequate basis for reversing that conclusion now.

1. DBS Services Can Be Received Beyond the Borders of the United States

The Commission does not dispute that existing DBS services are “international” at least in the sense that they can be received in countries outside the U.S.¹⁸ Despite this admission, the Commission nevertheless argues that coverage of neighboring countries does not make DBS an “international” service within the meaning of the ORBIT Act because such coverage is “incidental to U.S. coverage and will be limited to areas close to the U.S. border.”¹⁹ This newfound distinction between international services and services that are “incidentally international” finds no support in the statute. The text of the ORBIT Act prohibits auctions of orbital locations or spectrum used in the provision of “international” services – not “predominantly international” or “substantially international,” just plain international. So the Commission’s argument falls at the first hurdle – the plain language of the statute.

¹⁸ Auction 52 Public Notice at 2 & n.8 (acknowledging that existing DBS footprints “spill into Canada, Mexico, and the Caribbean”).

¹⁹ *Id.* at 2 n.8.

2. DBS Provides More Than Incidental Coverage of Foreign Countries

Even if the Commission were correct that an “incidentally international” service is not an “international” service for purposes of the ORBIT Act, the Commission would still be wrong to argue that DBS is only “incidentally international.” There can be no dispute that DBS satellites are capable of serving multiple countries. The western orbital locations scheduled for inclusion in Auction 52 are capable of serving much of the Pacific rim, as is clear from the coverage maps attached hereto as Exhibit A, which were recently downloaded from the Commission’s Web site.²⁰ The international use of DBS satellites is not merely a theoretical proposition: Compass explicitly proposed to serve the continental U.S., Alaska, Hawaii, Canada, Mexico, Australia, New Zealand, and Papua New Guinea.²¹ Therefore, any constraint on providing more than “incidental” DBS service to other countries must be regulatory rather than technological in nature.

The Commission, however, has no such regulatory prohibition. The Commission lifted its restrictions on providing DBS services beyond the borders of the United States years ago in its *DISCO I* Report and Order.²² There, the Commission found that globalization of satellite markets had rendered prior distinctions between domestic and international system licensees unnecessary. The Commission decided to allow satellite systems licensed as “domestic” to provide service to any international point within the

²⁰ The maps attached as Exhibit A hereto are available at <http://wireless.fcc.gov/auctions/data/maps/dbs.pdf>.

²¹ Compass Amended Application at 23.

²² *Amendment to the Commission’s Regulatory Policies Governing Domestic Fixed Satellites and Separate international Satellite Systems*, Report and Order, 11 FCC Rcd 2429 (1996) (“*DISCO I*”); see also Public Notice at 3 (acknowledging that *DISCO I* “removed FCC regulatory prohibitions on the provision of DBS service . . . beyond the borders of the United States.”)

footprints of their satellites and to allow systems licensed as “international” to provide service between any points in the United States that lie within the footprints of their satellites.²³

The Commission concluded that allowing such expanded operations would benefit system operators by giving them additional sources of revenue and benefit users by giving them more options in meeting their communications needs. For example, “the possibility of providing international DBS services to Pacific Rim nations could make the western-most DBS orbital locations allocated to the United States – from which no permittee appears ready to operate in the near future – more attractive platforms, which could accelerate development of those locations and thereby accelerate the delivery of DBS service to Hawaii and Alaska.”²⁴ These “western-most” orbital slots are precisely the slots that Compass seeks to use – and it seeks to use them to provide precisely the kind of international service, as well as service to Alaska and Hawaii, that the Commission envisioned in *DISCO I*.

There was no suggestion in *DISCO I* that, despite the apparent relaxation of the rules against international service, the Commission actually regarded DBS as a domestic service due to the supposed constraints of the ITU Region 2 DBS Band Plan (as it now claims). To the contrary, the Commission expressly concluded that “U.S. geostationary DBS satellite systems should be permitted to provide *both domestic and international services* from their authorized channels without additional approval from the Commission.”²⁵ These statements leave no doubt that the Commission regarded DBS –

²³ *DISCO I*, 11 FCC Rcd at 2430, ¶ 7.

²⁴ *Id.* at 2439, ¶ 67.

²⁵ *Id.* at 2439, ¶ 70 (emphasis added).

particularly from the western orbital locations at issue here – as a truly (and not just incidentally) international satellite communications service.

Suddenly, without notice, the Commission has reversed its policy. In a public notice conveniently timed to coincide with the dismissal of the Compass application (although the *Dismissal Letter* does not itself mention the issue), the Commission has announced that in fact, DBS was really a purely domestic service all along. Why? Because of the supposed constraints imposed by the Region 2 Band Plan for Ku-band DBS satellites, which the ITU adopted two decades ago, and which the Commission never regarded as significant until now. In its Auction 52 Public Notice, the Commission stated that “the technical parameters of the ITU Region 2 Band Plan provide for coverage areas for national service to the United States with incidental service to neighboring territories.”²⁶ The Commission argued that because “DBS providers who operate under licenses for the eight orbital locations assigned to the United States under the Plan must comply with these technical parameters,” DBS service will be, at most, incidentally international and therefore not come within the ORBIT Act’s prohibition on auctions.²⁷ The belated discovery of the ostensible shackles imposed by the ITU is certainly convenient for those who desire to auction off DBS licenses. As discussed below, however, those shackles are not even remotely as tight as the Commission now wishes to make them seem.

²⁶ Auction 52 Public Notice at 2.

²⁷ *Id.* at 3.

3. ITU Regulations Do Not Transform International DBS Services Into Domestic Services

In its March 3 Public Notice on Auction 52, the Commission speaks of the ITU Region 2 DBS Band Plan as if it were sacrosanct and unalterable. In reality, however, the Commission routinely obtains modifications of the Band Plan in order to facilitate DBS operations. The Commission recently observed that, “in general, the DBS satellites have characteristics that require modification to the [Band] Plan assignments.”²⁸ In practice, modification of the Band Plan has become the rule rather than the exception.

Just last year, the Commission authorized EchoStar to launch a DBS satellite (EchoStar 7) that will aim a spot beam directly and purposefully (not merely incidentally) at Mexico City, in clear derogation of the Region 2 Band Plan.²⁹ The Commission determined that the launch of EchoStar 7 would be in the public interest in part because “the Commission permits DBS licensees to provide DBS service in other countries, in accordance with U.S. treaty obligations, from U.S. DBS orbit locations, provided the satellite operator obtains all necessary approvals from the foreign administration.”³⁰ As of last year, then, the Commission was still treating DBS as an international satellite service, despite the existence of the Band Plan.

²⁸ *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the KU-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9652, ¶ 87 n.216 (2002).

²⁹ *EchoStar Satellite Corporation Application for Minor Modification of Direct Broadcast Satellite Authorization, Launch and Operating Authority for Echostar 7*, Order and Authorization, File Nos. SAT-MOD-20010810-00071, *et al.*, 17 FCC Rcd 894, 897, ¶ 6 (2002).

³⁰ *Id.* at 896, ¶ 5.

The Commission expressly recognized that it would have to “request modification of the Region 2 [DBS] Plan and its associated Feeder Link Plan” to accommodate this new satellite and its international spot beam.³¹ This is extremely significant: the Commission expressed its willingness to seek, on behalf of EchoStar, a modification to the Region 2 Band Plan to allow DBS satellites to provide more than merely incidental international coverage. Having done that, there is no reason why the Commission should not seek corresponding modifications to the Band Plan for the orbital locations for which Compass has applied. Certainly, after *DISCO I*, nothing in the Commission’s own rules would prevent it from going forward with such a request. Accordingly, in its application, Compass asked the Commission to request such modifications to the Region 2 Band Plan as might be necessary.³²

The modification for Echostar 7 was by no means an isolated event. In recent years, the Commission has also acknowledged the need to modify the Region 2 Band Plan in connection with EchoStar 8,³³ DIRECTV 4S,³⁴ EchoStar 6,³⁵ DBS-1,³⁶ and DBS-

³¹ *Id.* at 897, ¶ 6.

³² Compass Amended Application at 8.

³³ *EchoStar Satellite Corporation Application for Minor Modification of Direct Broadcast Satellite Authorization, Launch and Operating Authority for Echostar VIII*, Order and Authorization, 17 FCC Rcd 11326, 11328, ¶ 5 (2002).

³⁴ *DIRECTV Enterprises, Inc., Application To Launch and Operate a Direct Broadcast Satellite Service Space Station*, Order and Authorization, 16 FCC Rcd 18530, 18531-23, ¶ 6 (2001).

³⁵ *EchoStar Satellite Corporation Application for Authority to Make Minor Modifications to Direct Broadcast Satellite Authorizations, Launch and Operation Authority*, Memorandum Opinion and Order, 15 FCC Rcd 23636, 23641, ¶ 11 (2000).

³⁶ *DIRECTV Enterprises, Inc., Application for Modification of Direct Broadcast Satellite System and for Authorization to Relocate DBS-1 Satellite to the 109.8° W.L. Orbital Location*, Order and Authorization, 15 FCC Rcd 6738, 6739-40, ¶ 5 (1999).

1R,³⁷ to name just a few satellites. Indeed, the order approving EchoStar 7 stated that “[m]odifications of the BSS plans are expected not only to continue, but also to increase, in the future.”³⁸ These examples illustrate that the ITU Band Plan in practice represents more of a procedural hurdle than a substantive constraint on DBS operations. The Plan does not, without more, transform an international satellite service into a purely domestic one, as the Commission now wishes.

Another stark example of this principle is provided by SES AMERICOM, which requested permission to use a satellite licensed by the government of Gibraltar at the 105.5° W.L. orbital location to provide DBS service to the United States and to certain British Overseas Territories in the Caribbean.³⁹ The resulting service would surely be an international satellite service, and it would be offered from an orbital location outside the Region 2 Band Plan. If the Commission seriously believed that the Region 2 Band Plan defines the limits of acceptable DBS service, then it could not have accepted SES AMERICOM’s request for filing. Yet the Commission *did* accept it for filing on May 17, 2002 (and did so without calling for competing applications or otherwise indicating that it was considering an auction of the right to provide the service SES AMERICOM had proposed).

The orbital locations slated to be sold in Auction 52 are no less suitable for the provision of international service and no more constrained by ITU Band Plans than the

³⁷ *DIRECTV Enterprises, Inc., Application for Authority To Launch and Operate a Replacement Direct Broadcast Satellite Service Space Station*, Order and Authorization, File No. SAT-LOA-19990331-00035, 14 FCC Rcd 13159, 13160-61, ¶ 5 (1999).

³⁸ 17 FCC Rcd at 897, ¶ 7 n.21.

³⁹ *See Satellite Space Applications Accepted for Filing*, Public Notice, Report No. SAT-00110 (May 17, 2002).

105.5° W.L. location that SES AMERICOM proposes to use. In fact, they are *more* suitable. The far western orbital locations designated for Auction 52 are located over the Pacific Ocean rather than mid-continent over the CONUS. Accordingly, the Commission has no justification for supposing that DBS service from those locations will be purely domestic – especially in light of Compass’s expressed desire to use them for international service. Therefore, the Commission has no legal basis for distributing these locations via auction.

B. DBS and MVDDS Rely Upon Spectrum Used for the Provision of International or Global NGSO FSS

Even assuming, *arguendo*, that the Commission is correct in concluding that DBS is not itself an “international or global satellite communications service” for purposes of the ORBIT Act, it does not follow that the Commission is free to auction off DBS licenses – or MVDDS licenses, either, for that matter. This is because, at least since the Commission adopted its First Report and Order in ET Docket 98-206,⁴⁰ DBS and MVDDS have used the same spectrum, including the 12.2-12.7 GHz downlink band, as NGSO FSS, which indubitably is an international or global satellite communications service.

The ORBIT Act on its face prevents the FCC from auctioning “spectrum used for the provision of international or global satellite communications services.”⁴¹ The statute thus limits the Commission’s authority based on the *portion of the spectrum being licensed*, not by who is receiving the license or what that particular license will be used

⁴⁰ *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, First Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 4096 (2000).

⁴¹ 47 U.S.C. § 765f.

for.⁴² The DBS and MVDDS licenses the Commission now wishes to auction carry with them the right to provide service in the *very same spectrum* to be used by NGSO FSS.

By its plain terms, the ORBIT Act prevents distributing such licenses via auction.

II. The Commission May Not Discriminate Against Compass

That Compass's application was held in limbo for a year and then dismissed leaves Compass far worse off than similarly situated applicants for international DBS service, including SES AMERICOM and EchoStar, as described above. In addition, Compass is being treated less favorably than the 11 satellite operators who received licenses to use 34 geostationary orbital locations and 66,000 MHz of spectrum in the Ka Band without an auction from the Commission's International Bureau as recently as August of 2001.⁴³ Simple fairness, as well as the principles of orderly administration reflected in the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, require that the Commission treat Compass at least as well as others who wish to provide international geostationary satellite services.

With respect to the integrated terrestrial platform that Compass proposes to use, there is no basis in Compass's application to treat this terrestrial component as if it were an application for an MVDDS license – particularly since the Commission had adopted no service rules for MVDDS at the time Compass filed its application. Only thanks to the arbitrary delay of Commission staff in addressing the application could staff even

⁴² The statute thus presents precisely the converse of the situation in *National Public Radio v. FCC*, 354 F.3d 226 (D.C. Cir. 2001), where the court enforced a statute that prohibited auctions based on the identity of the entity receiving the license, rather than the portion of the spectrum in which the licensee would operate.

⁴³ See generally *Second Round Assignment of Geostationary Satellite Orbit Locations to Fixed Satellite Service Space Stations in the Ka-Band*, Order, DA 01-1693 (IB rel. Aug. 3, 2001).

argue – albeit incorrectly – that Compass should be forced to submit an MVDDS application. Compass did not apply for and does not wish to have authorization to operate a stand-alone terrestrial system; it wishes to use a terrestrial platform in order to wring additional spectrum efficiencies out of its proposed international DBS service.⁴⁴

As noted above, the Commission supported precisely such ancillary terrestrial use of satellite spectrum by MSS operators earlier this year. The Commission determined that allowing such flexible use of spectrum allocated to MSS would “quickly achiev[e] the public-interest benefits of improved spectrum efficiency, reduced costs and increased competition.”⁴⁵ Precisely these same benefits can be had by granting similar flexibility to Compass. As described in the Compass application, Compass’s proposed satellite-terrestrial system is at least 50 times more spectrum efficient than comparable satellite-only systems. Because it is so spectrum efficient, the Compass system needs fewer head-ends than comparable terrestrial-only systems, thereby reducing costs. Compass will provide much needed competition to the MVPD market, offering 300 video channels (including local programming) and high-speed Internet access at a downstream speed of 2 Mbps. There is no reason for the Commission to refuse even to accept Compass’s application for filing and at least seek comment on Compass’s very attractive proposals.

Nor is the MSS Order the first time the Commission has proposed to allow flexible terrestrial use of spectrum allocated to satellite systems: the Commission proposed in 1997 to authorize licensees of Digital Audio Radio Services (“DARS”), the

⁴⁴ See Compass Amended Application at 18 (“[Compass] is not requesting the Commission to assign [Compass] a terrestrial license under these new [MVDDS] rules. Rather, [Compass] is requesting its ITP to be authorized as an ancillary part of its DBS license.”).

⁴⁵ *MSS Flexibility Order* ¶ 65.

satellite radio equivalent of DBS, to operate networks of ancillary terrestrial repeaters in conjunction with their satellite-based audio programming services.⁴⁶ In 2001, the Commission authorized DARS licensees to operate terrestrial networks using their DARS satellite spectrum assignments pursuant to special temporary authority.⁴⁷ A similar example of flexible spectrum use was the Commission’s decision to allow authorized Instructional Television Fixed Service and Multichannel Multipoint Distribution Service licensees to offer mobile services using their fixed service spectrum assignments.⁴⁸

Congress has expressly authorized and encouraged the Commission to manage spectrum “so as to provide flexibility of use” if doing so serves the public convenience, interest, and necessity and the following criteria are met:

- (1) such use is consistent with international agreements to which the United States is a party; and
- (2) the Commission finds, after notice and an opportunity for public comments, that—

⁴⁶ *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5810, ¶ 138 (1997).

⁴⁷ See *Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeater*s, DA 01-2171, File No. SAT-STA-20010724-00064 (rel. Sept. 17, 2001) (granting STA to Sirius Satellite Radio Inc.) (“Sirius STA”); *Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeater*s, DA 01-2172, File No. SAT-STA-20010724-00063 (rel. Sept. 17, 2001) (granting STA to XM Radio Inc.) (“XM STA”). In the STA proceedings, the Commission indicated its likely intention to authorize terrestrial repeaters on a permanent basis, noting that the Commission “clearly contemplated that the repeaters were to be part of the proposed satellite systems.” Sirius STA at ¶ 7; XM STA at ¶ 7.

⁴⁸ See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, First Report and Order and Memorandum Opinion and Order, 16 FCC Rcd 17222, 17223, ¶ 2, 17233, ¶ 20 (2001) (“We find that adding a mobile allocation to the 2500-2690 band will further promote the public interest by providing an additional option to service providers in the band.”).

- (A) such allocation would be in the public interest;
- (B) such use would not deter investment in communications services and systems, or technology development; and
- (C) such use would not result in harmful interference among users.

47 U.S.C. § 303(y). Compass's request for authorization to operate the Compass ITP satisfies each of these criteria. The Commission previously determined that ancillary terrestrial operation using DBS spectrum: (i) is not in violation of any international agreements if appropriate service rules are adopted relating to licensee operations near the Canadian and Mexican borders;⁴⁹ (ii) is in the public interest;⁵⁰ (iii) will not deter investment;⁵¹ and (iv) will not cause harmful interference.⁵²

The Commission should at least consider whether granting Compass's application for flexible use would be in the public interest. Not only would Compass bring much-needed competition to the MVPD market in general and the DBS segment in particular but it would do so with a conspicuously more efficient use of spectrum than either a purely terrestrial or purely satellite-based system. Furthermore, Compass specifically proposed to bring its highly efficient system to unserved and underserved residents of Alaska and Hawaii. It is noteworthy that the State of Hawaii and other parties recently filed complaints with the Commission seeking to compel DIRECTV to honor its

⁴⁹ *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 4096, 4213, ¶¶ 309-310 (2000).

⁵⁰ *Id.* at 4161, ¶ 167 (“We find that the public interest would be served by allowing MVDDS operations in this band.”).

⁵¹ The Commission noted that terrestrial licenses would be used to provide “a wide array of video programming . . . and data services . . . in both urban and rural areas.” *Id.* Such new services are likely to cause, rather than deter, investment.

⁵² *Id.* at 4099, ¶ 1 (“[W]e conclude that a new terrestrial fixed [service] can operate in the 12.2-12.7 GHz band on a non-harmful interference basis with incumbent [DBS], and on a co-primary basis with the NGSO FSS.”).

regulatory obligations to provide full service to these non-CONUS states.⁵³ The conspicuous failure of the existing DBS operators to serve Alaska and Hawaii properly makes Compass's explicit commitment to serve these areas all the more relevant to the Commission's analysis of whether granting Compass's application would be in the public interest.

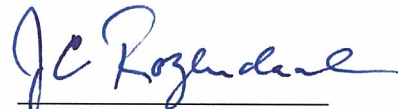
Conclusion

For the foregoing reasons, Compass's application for authority to construct an international DBS system should be accepted for filing and granted.

Dated: April 2, 2003

Respectfully submitted,

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⁵³ See *Media Bureau Action: Request For Comment on Petitions Regarding DIRECTV's DBS Service to the States of Alaska and Hawaii*, Public Notice at 1, DA 03-862 (MB rel. Mar. 25, 2003) (seeking comments on complaints contending "that DirecTV is violating the Commission's DBS geographic service rules (47 C.F.R. § 25.148(c)),” by failing to provide adequate service to Alaska and Hawaii).

EXHIBIT A

DBS ORBITAL/CHANNEL ASSIGNMENTS

Western Positions





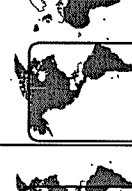


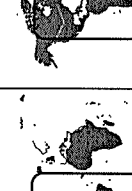
Eastern Positions

		Full-CONUS							
		175° W.	166° W.	157° W.	148° W.	119° W.	110° W.	101° W.	61.5° W.
<u>Orbital Position</u>									
<u>Operator/Channels</u>		DBSC: 11 Direcsat: 11 Unassigned: 10 [EchoStar Request Pending: 11]	Tempo: 11 Continental: 11 Dominion: 8 Unassigned: 2	DIRECTV: 27 Unassigned: 5	EchoStar: 24 USSB: 8	EchoStar: 11 Direcsat: 10 Tempo: 11	MCI: 28 USSB: 3 Direcsat: 1	DIRECTV: 27 USSB: 5	DBSC: 11 Continental: 11 Dominion: 8 Unassigned: 2
<u>Coverage</u>									

DBS ORBITAL/CHANNEL ASSIGNMENTS

Western Positions

Eastern Positions

Full-CONUS									
<u>Orbital Position</u>	175° W.	166° W.	157° W.	148° W.	119° W.	110° W.	101° W.	61.5° W.	
<u>Operator/Channels</u>	1. DRSTK 2. DBSCL 3. DRSTK 4. DBSCL 5. DRSTK 6. DBSCL 7. DRSTK 8. DBSCL 9. DRSTK 10. DBSCL 11. DRSTK 12. DBSCL 13. DRSTK 14. DBSCL 15. DRSTK 16. DBSCL 17. DRSTK 18. DBSCL 19. DRSTK 20. DBSCL 21. DRSTK 22. DBSCL 23. ██████████ 24. ██████████ 25. ██████████ 26. ██████████ 27. ██████████ 28. ██████████ 29. ██████████ 30. ██████████ 31. ██████████ 32. ██████████	1. GNTO 2. DMN/n 3. GNTO 4. DMN/n 5. GNTO 6. DMN/n 7. GNTO 8. DMN/n 9. GNTO 10. DMN/n 11. GNTO 12. DMN/n 13. GNTO 14. DMN/n 15. GNTO 16. DMN/n 17. GNTO 18. ██████████ 19. GNTO 20. DMN/n 21. GNTO 22. DMN/n 23. DMN/n 24. DMN/n 25. DMN/n 26. DMN/n 27. DMN/n 28. DMN/n 29. DMN/n 30. DMN/n 31. DMN/n 32. DMN/n	1. DTV/g 2. DTV/g 3. DTV/g 4. DTV/g 5. DTV/g 6. DTV/g 7. DTV/g 8. DTV/g 9. DTV/g 10. DTV/g 11. DTV/g 12. DTV/g 13. DTV/g 14. DTV/g 15. DTV/g 16. DTV/g 17. DTV/g 18. DTV/g 19. DTV/g 20. DTV/g 21. DTV/g 22. DTV/g 23. ██████████ 24. DTV/g 25. DTV/g 26. DTV/g 27. DTV/g 28. DTV/g 29. DTV/g 30. DTV/g 31. ██████████ 32. DTV/g	1. ECHO/p 2. ECHO/p 3. ECHO/p 4. ECHO/p 5. ECHO/p 6. ECHO/p 7. ECHO/p 8. ECHO/p 9. ECHO/p 10. ECHO/p 11. ECHO/p 12. ECHO/p 13. ECHO/p 14. ECHO/p 15. ECHO/p 16. ECHO/p 17. ECHO/p 18. USSB/a 19. ECHO/p 20. USSB/b 21. ECHO/p 22. USSB/a 23. ECHO/p 24. USSB/b 25. ECHO/p 26. USSB/a 27. ECHO/p 28. USSB/b 29. ECHO/p 30. USSB/d 31. ECHO/p 32. USSB/d	1. ECHO/h 2. DRSTK 3. ECHO/h 4. DRSTK 5. ECHO/h 6. DRSTK 7. ECHO/h 8. DRSTK 9. ECHO/h 10. DRSTK 11. ECHO/h 12. DRSTK 13. ECHO/h 14. DRSTK 15. ECHO/h 16. DRSTK 17. ECHO/h 18. DRSTK 19. ECHO/h 20. DRSTK 21. ECHO/h 22. TMPO/i 23. TMPO/i 24. TMPO/i 25. TMPO/i 26. TMPO/i 27. TMPO/i 28. TMPO/i 29. TMPO/i 30. TMPO/i 31. TMPO/i 32. TMPO/i	1. MCL/p 2. MCL/p 3. MCL/p 4. MCL/p 5. MCL/p 6. MCL/p 7. MCL/p 8. MCL/p 9. MCL/p 10. MCL/p 11. MCL/p 12. MCL/p 13. MCL/p 14. MCL/p 15. MCL/p 16. MCL/p 17. MCL/p 18. MCL/p 19. MCL/p 20. MCL/p 21. MCL/p 22. MCL/p 23. MCL/p 24. DRSTK 25. MCL/p 26. MCL/p 27. MCL/p 28. USSB/b 29. MCL/p 30. USSB/d 31. MCL/p 32. USSB/d	1. DTV/g 2. DTV/c 3. DTV/g 4. DTV/c 5. DTV/g 6. DTV/c 7. DTV/g 8. DTV/c 9. DTV/g 10. DTV/c 11. DTV/g 12. DTV/c 13. DTV/g 14. DTV/c 15. DTV/g 16. DTV/c 17. DTV/g 18. DTV/c 19. DTV/g 20. DTV/c 21. DTV/g 22. DTV/c 23. DTV/j 24. USB2/m 25. DTV/j 26. USB2/m 27. DTV/j 28. USB2/m 29. DTV/j 30. USSB/j 31. DTV/j 32. USSB/j	1. GNTO 2. DBSCL 3. GNTO 4. DBSCL 5. GNTO 6. DBSCL 7. GNTO 8. DBSCL 9. GNTO 10. DBSCL 11. GNTO 12. DBSCL 13. GNTO 14. DBSCL 15. GNTO 16. DBSCL 17. GNTO 18. DBSCL 19. GNTO 20. DBSCL 21. GNTO 22. DBSCL 23. ██████████ 24. ██████████ 25. DMN/n 26. DMN/n 27. DMN/n 28. DMN/n 29. DMN/n 30. DMN/n 31. DMN/n 32. DMN/n	       

Coverage

NUMBER OF DBS CHANNELS BY OWNERSHIP AND ORBITAL LOCATION

Western Positions

Eastern Positions

	Total Channels	Full-CONUS									
		175° W.	166° W.	157° W.	148° W.	119° W.	110° W.	101° W.	61.5° W.		
DirecTV	54			27					27		
USSB	16				8				3		5
EchoStar	35*	*	*		24^	11					
Direcstsat	22	11				10		1			
DBSC	22	11									11
MCI	28								28^		
Tempo	22					11					
Rainbow/ Loral DBS	22					11					11
Dominion	8*		**								8
Unassigned	27	10	10	5							2

* request pending for 11 channels

** request pending for 8 channels

^the Commission conducted an auction for these channels

CERTIFICATE OF SERVICE

I, Carol Inniss, hereby certify that on this 2nd day of April, 2003, copies of the foregoing *Application for Review of Compass Systems, Inc.* were served by e-mail or by hand (marked with asterisk) on the following:

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