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Proprietary Treatment Requested

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BUSINESS PROPRIETARY VERSION

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Federal Communications Commission
Office of Secretary

July 10, 2006

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Telesat Canada, Request for Confidential Treatment of Anik F3 Construction Contract Pursuant to Sections 0.457 and 0.459 of the Commission's Rules**

EchoStar Satellite L.L.C., Request for Bond Reduction
File Nos. SES-LFS-20040831-01253, SES-LIC-20050621-00799

Telesat Canada, Petition for Declaratory Ruling to Add Anik F3 to the Permitted List, File No. SAT-PPL-20060516-00061; Call Sign S2703

Dear Ms. Dortch:

Telesat Canada ("Telesat"), by its attorneys, respectfully requests that, pursuant to Sections 0.457 and 0.459 of the Commission's rules, 47 C.F.R. §§ 0.457 & 0.459, the Commission withhold from public inspection and accord confidential treatment to the attached contract dated March 30, 2004 between Telesat and EADS Astrium SAS ("Astrium") for construction of the Anik F3 satellite, including the appendices and attachments ("Contract").

On December 20, 2005, the Commission granted EchoStar Satellite, L.L.C. ("EchoStar") a blanket authorization to provide Direct-to-Home Fixed Satellite Service to earth stations in the United States using Anik F3, which is owned and will be operated by Telesat pursuant to a Canadian license.[1] On January 19, 2006, EchoStar submitted a $3 million bond and simultaneously requested that it be permitted to reduce the amount of the bond from $3 million to $750,000 because it

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[1] *EchoStar Satellite, LLC; For Blanket Authorization To Operate 1,000,000 Receive-Only Earth Stations To Provide Direct-to-Home Fixed Satellite Service in the United States Using the Canadian-Authorized ANIK F3 Satellite at the 118.7 [degrees] W.L. Orbital Location; For Authority to Operate Two 9.0 Meter Antennas in the Ka-Band in Cheyenne, Wyoming*, Order and Authorization, 20 FCC Rcd 20083 (2005).

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version being submitted for the FCC's review still contains commercially sensitive information that falls within Exemption 4 of the Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d).

Exemption 4 permits parties to withhold from public information "trade secrets and commercial or financial information obtained from a person and privileged or confidential-categories of materials not routinely available for public inspection." *Id.* Applying Exemption 4, the courts have stated that commercial or financial information is confidential if its disclosure will either (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted); *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-80 (D.C. Cir. 1992), *cert denied*, 507 U.S. 984 (1993).

Section 0.457(d)(2) allows persons submitting materials that they wish be withheld from public inspection in accordance with Section 552(b)(4) to file a request for non-disclosure, pursuant to Section 0.459. In accordance with the requirements contained in Section 0.459(b) for such requests, Telesat hereby submits the following:

(1) *Identification of Specific Information for Which Confidential Treatment is Sought (Section 0.459(b)(1)).* Telesat seeks confidential treatment for the enclosed binding non-contingent agreement between Telesat and Astrium for construction of the Anik F3 satellite. The agreement contains commercially sensitive information that falls within Exemption 4 of FOIA, and such information is inextricably intertwined with other provisions of the Contract. *See Mead Data Cent. v. United States Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

(2) *Description of Circumstances Giving Rise to Submission (Section 0.459(b)(2)):* Telesat submits this Contract to demonstrate compliance with the first

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(Continued . . .)
with the licensee's milestones; and (4) require the licensee to make significant initial payments and the majority of payments well before the end of the construction period. *See* Letter from Robert G. Nelson, Chief, Satellite Division, International Bureau, to Bettina Eckerle, General Counsel, DigitalGlobe, Inc., Re: DigitalGlobe, Inc, Request for Public Notice of Milestone Completion; File No. SAT-MOD-20040728-00151; Call Sign: S2129, DA 06-862 (rel. Apr. 14, 2006).

milestone for construction of Anik F3, in support of EchoStar's request for reduction of the bond associated with its blanket earth station authorizations and in support of Telesat's request for bond reduction or waiver.

(3) *Explanation of the Degree to Which the Information is Commercial or Financial, or Contains a Trade Secret or Is Privileged (Section 0.459(b)(3)):* The Contract contains sensitive commercial and financial information that competitors could use to Telesat's disadvantage. The courts have given the terms "commercial" and "financial," as used in Section 552(b)(4), their ordinary meanings. *See Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403 & n.78 (D.C. Cir. 1980). The Commission has broadly defined commercial information, stating that "'[c]ommercial' is broader than information regarding basic commercial operations, such as sales and profits; it includes information about work performed for the purpose of conducting a business's commercial operations." *Southern Company Request for Waiver of Section 90.629 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 1851, 1860 (1998) (*citing Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)).

Certain categories of confidential commercial and financial information appear throughout the Contract, including without limitation: descriptions of technical work programs; spacecraft performance specifications; business planning information; financial terms and conditions; and pricing and financial nonperformance penalties, all of which were negotiated between Telesat and Astrium. The Contract provides for the custom design of Anik F3, a state-of-the-art satellite. The Contract provides insight into the process for developing this modern satellite, its design, and the process of managing construction and placement into service. This information is inextricably intertwined with the other provisions of the Contract. Thus, the Contract in its entirety should be treated as confidential. A decision not to treat this information as confidential could affect the Commission's ability to obtain necessary information in the future, and disclosure likely would cause substantial harm to the competitive positions of Telesat and Astrium.

(4) *Explanation of the Degree to Which the Information Concerns a Service that is Subject to Competition (Section 0.459(b)(4)):* Substantial competition exists in the telecommunications satellite industry. Other players in the geo-stationary satellite services market include Intelsat, SES Americom, Eutelsat, and Satmex, among others. The Contract concerns the design, development, and construction of the Anik F3 satellite, which will compete with satellite services offered by these

other companies, as well as with the services of terrestrial providers. The presence of these many competitors makes imperative the confidential treatment of sensitive commercial information.

(5) *Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm (Section 0.459(b)(5)):* Release of the Contract could have a significant impact on Telesat's commercial operations. If competitors had access to the information for which Telesat seeks confidential treatment, it could be used as the basis for negotiating their own satellite construction contracts to meet their own milestones, to develop a competing satellite network, and/or to develop competing service offerings, whether satellite or terrestrial. If Telesat's competitors obtained access to this information, they would unfairly benefit from the time and resources that Telesat expended in negotiating the Contract and meeting the construction and CDR milestones for Anik F3, and could use this information to negotiate more favorable terms in their own construction contracts. This could allow competitors to better compete against Telesat and could negatively affect Telesat's future negotiations with potential and existing business partners/customers. Thus, it is "virtually axiomatic" that the information qualifies for withholding under Exemption 4 of FOIA, *see National Parks and Conservation Ass'n v. Kleppe,* 547 F.2d 673, 684 (D.C. Cir., 1976), and under Sections 0.457(d)(2) and 0.459(b).

(6) *Identification of Any Measures Taken to Prevent Unauthorized Disclosure (Section 0.459(b)(6)):* Telesat has gone to great lengths to ensure that this Contract is not disclosed to third parties or otherwise disclosed to unauthorized parties. The Contract contains provisions requiring both parties to maintain confidentiality of proprietary information, which includes the terms of the Contract. The Contract includes detailed procedures for use of proprietary information by representatives of both Telesat and Astrium, and requires written consent for the release of any proprietary information.

(7) *Identification of Whether the Information is Available to the Public and the Extent of Any Previous Disclosure of the Information to Third Parties (Section 0.459(b)(7)):* Telesat has not made this Contract available to the public and has not disclosed this Contract to any third parties.

(8) *Justification of Period During Which the Submitting Party Asserts that the Material Should Not be Available for Public Disclosure (Section 0.459(b)(8)):*

Telesat respectfully requests that the Commission withhold this Contract from public inspection for the expected life of the satellite (*i.e.*, at least 15 years from time of launch). On balance, the need to protect Telesat from competitive harm as a result of disclosure of this Contract outweighs any benefit of public disclosure which, in the ordinary course of business, would not otherwise occur.

Accordingly, for the foregoing reasons, Telesat respectfully requests that the information contained in its Contract with Astrium for construction of the Anik F3 satellite be kept confidential and be withheld from public inspection in its entirety .

Please contact the undersigned with any questions.

Respectfully submitted,

Jennifer D. Hindin