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Policy Branch  
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April 26, 2004

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Via HAND DELIVERY

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

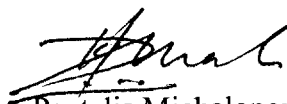
Re: **In the Matter of DIRECTV Enterprises, LLC – Blanket Receive-Only Earth Station Application to Provide DBS in the U.S. Market From the Canadian BSS Position at 72.5° W.L. – SAT-LFS-20040112-00023; Call Sign E040024**

Dear Ms. Dortch,

Please find enclosed an original plus four copies of the Comments of EchoStar Satellite L.L.C. for filing in this proceeding. Additional copies are being served on the parties indicated in the certificate of service.

Please contact the undersigned if you have any questions about this pleading.

Yours sincerely,



Pantelis Michalopoulos  
Daniel C.H. Mah  
*Counsel for EchoStar Satellite L.L.C.*

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
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DIRECTV ENTERPRISES, LLC )  
)  
Blanket Receive Only Earth Station )  
Application to Provide DBS Service in the )  
U.S. Market from the Canadian BSS )  
Position at 72.5° W.L. )

File No. SAT-LFS-20040112-00023  
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Policy Branch  
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COMMENTS OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. ("EchoStar") hereby submits its Comments on the

above-referenced Application filed by DIRECTV Enterprises, LLC ("DIRECTV") requesting a blanket license for 1,000,000 receive-only earth stations to receive Direct Broadcast Satellite ("DBS") service from DIRECTV 5 at the 72.5° W.L. orbital location.<sup>1</sup> According to the filing, the DIRECTV 5 satellite will be licensed by the Government of Canada to Telesat Canada, but DIRECTV will retain use of transponder capacity of DIRECTV 5 to provide service to the United States.<sup>2</sup>

EchoStar supports in principle the concept of broad-based access to the U.S. market from foreign DBS slots. It is important, however, that such access rights be granted in an evenhanded manner, and not by a process of piecemeal adjudication. Moreover, the currently applicable standard is one of reciprocity, and yet the Bureau has granted two such requests on the basis of exceptions to the reciprocity requirement. A rulemaking is a more appropriate vehicle

<sup>1</sup> See Public Notice, Report No. SES-00590 (released Mar. 25, 2004).

<sup>2</sup> See Application at Exhibit A, pp. 2-3, filed in Blanket Receive Only Earth Station Application to Provide DBS Service in the U.S. Market from the Canadian BSS Position at 72.5° W.L., SAT-LFS-20040112-00023 (filed Jan. 12, 2004) ("Application").

than a series of adjudications creating ever widening exceptions to that standard. This is especially so because an exception to the reciprocity requirement allowing the single largest DBS provider to serve the U.S. market would risk nullifying the standard altogether. While EchoStar does not take a position on whether this would be appropriate as a policy matter, the better forum to consider such questions is a rulemaking.

A rulemaking will also allow the Commission to consider the implications of this proposal for the opportunity to serve the U.S. from other neighboring foreign DBS slots. Indeed, DIRECTV's proposal would affect one or possibly two slots allotted to Mexico, a country that has already reached a DBS/DTH protocol with the United States. Finally, DIRECTV should not receive special treatment in licensing proceedings simply because it has been required to provide expanded local-into-local service by the end of 2004 as a condition of the News Corp./Hughes merger.

**I. A RULEMAKING SHOULD BE CONDUCTED TO SET AND CLARIFY STANDARDS FOR ACCESS TO THE U.S. MARKET BY FOREIGN-LICENSED DBS SATELLITES**

As EchoStar has noted in its comments in related proceedings,<sup>3</sup> EchoStar supports the concept of allowing broader access to the United States from non-U.S. DBS orbital locations. These DBS slots are one possible means for curing the bandwidth constraints that now hamper DBS providers' efforts to compete on an equal footing with digital cable operators. However,

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<sup>3</sup> EchoStar hereby incorporates by reference these comments. *See* Comments of EchoStar Satellite L.L.C. and Reply Comments of EchoStar Satellite L.L.C., filed in *DIRECTV Enterprises, LLC Application for Special Temporary Authority to Relocate DIRECTV 5 to 72.5° W.L. and to Conduct Telemetry, Tracking and Command Operations for an Interim Period*, SAT-STA-20040107-0002 (filed Feb. 17, 2004 and Mar. 10, 2004 respectively); Comments of EchoStar Satellite LLC With Respect to Information Filed Pursuant to Protective Order, filed in *DIRECTV Enterprises, LLC Request for Special Temporary Authority to Relocate DIRECTV 3 to 82° W.L. and to Conduct Telemetry, Tracking and Command Operations for an Interim Period*, SAT-STA-20030903-00300, SAT-STA-20040107-0002 (filed Apr. 5, 2004).

principles of fundamental fairness require that the Commission authorize such access even-handedly, in accordance with clear standards that apply to all DBS providers. A rulemaking should accordingly be initiated to address the appropriate standards for DBS providers to access the U.S. market via non-U.S. DBS slots. The record developed in such a rulemaking proceeding would provide a more solid foundation for the implementation of meaningful, equitable standards than piecemeal adjudication of STA requests or earth station applications. Moreover, if the Commission decides to conduct the rulemaking requested by DIRECTV on the question of reduced orbital spacing of DBS slots, it should evaluate both questions of foreign access and reduced orbital spacing in the same proceeding. Regardless of the procedural path chosen by the Commission, it should defer action on DIRECTV's applications until such proceedings are completed.

## **II. A RULEMAKING IS APPROPRIATE**

The currently applicable standard for access to the U.S. market from foreign DBS slots is one of reciprocity. It is unclear whether Canada meets that test, since DIRECTV has not updated the existing record in that regard. To date, the International Bureau has found twice that Canada does not meet that test, but that the lack of reciprocity is outweighed by the public interest. On that basis, the Bureau has authorized Digital Broadband Applications Corporation,<sup>4</sup> and then Pegasus Development Corporation,<sup>5</sup> to provide DBS service to the U.S. from Canadian broadcasting-satellite service ("BSS") orbital positions. Now, DIRECTV is seeking access to the

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<sup>4</sup> *In the Matter of Digital Broadband Applications Corp.*, 18 FCC Rcd. 9455 (Int'l Bur. 2003).

<sup>5</sup> *In the Matter of Pegasus Development Corp.*, DA 04-909, Order, SES-LIC-20011121-02186, SES-LIC-20020111-00075 (released Mar. 31, 2004).

U.S. DBS market from a Canadian-licensed satellite on the ground that the public interest trumps the reciprocity requirements in its case too.

Grant of this proposal by DIRECTV, the single largest DBS provider, would mark the point where the public interest exception to the reciprocity requirement would swallow the rule. The Commission's review of such access requests would become indistinguishable from the general public interest analysis the Commission undertakes to evaluate requests for U.S. satellite licenses. The role of reciprocity in that analysis would amount to almost nothing. While EchoStar takes no position on whether this would be good policy, it is unquestionable that such a major change in the manner the Commission processes such requests is better achieved through rulemaking than through piecemeal adjudication.

### **III. THE COMMISSION SHOULD ALSO STUDY THE IMPLICATIONS OF THE PROPOSAL FOR ACCESS TO THE UNITED STATES FROM OTHER SLOTS**

The United States has bilateral agreements with Mexico and Argentina regarding the provision of DBS and Direct-to-Home services.<sup>6</sup> Under the Commission's rules, the review of applications to access the U.S. from a DBS slot allotted to these countries is "based on a presumption that entry will promote competition."<sup>7</sup> No similar presumption applies to

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<sup>6</sup> See *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* (1996), available at [http://www.fcc.gov/ib/sand/agree/mex\\_satellite.html](http://www.fcc.gov/ib/sand/agree/mex_satellite.html) (last visited Apr. 21, 2004); *Agreement Between the Government of the United States of America and the Government of the Argentine Republic Concerning the Provision of Satellite Facilities and the Transmission and Reception of Signals to and From Satellites For the Provision of Satellite Services to Users in the United States of America and the Argentine Republic* (1998), available at <http://www.fcc.gov/ib/sand/agree/others.html> (last visited Apr. 21, 2004).

<sup>7</sup> *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 Order").

applications to provide DBS services to the United States from a satellite licensed by Canada or other countries with which the U.S. does not have a bilateral agreement.<sup>8</sup>

To date, the Commission has not considered the impact of authorizing the provision of DBS service from Canadian satellites on the opportunity to serve the U.S. from other foreign DBS slots. For example, licensing DIRECTV to provide DBS service to the United States from DIRECTV 5 at 72.5° W.L. could hamper Mexican-licensed satellites from doing the same using the Mexican BSS orbital positions at 69° W.L. and 78° W.L.<sup>9</sup> This possibility is real as Mexico is apparently planning to auction BSS spectrum at one or more of its orbital slots soon.<sup>10</sup> The argument made by DIRECTV in related proceedings that Mexico has not objected to Canada's ITU filings with respect to that slot does not answer that question.<sup>11</sup> The question is not whether DIRECTV's use of the 72.5° W.L. slot will inhibit the use of 69° or 78° W.L. to serve *Mexico*. Rather, the question is whether DIRECTV's proposal would hamper a future modification of the allotment plan to permit use of the Mexican slot for service to the *United States*.

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<sup>8</sup> Compare *DISCO II Order* at ¶ 98 (“We will apply the ECO-Sat test to requests involving provision of DTH, DBS, and DARS by non-U.S. satellites.”) with *id.* at ¶ 98 n.174 (“[W]e will not apply the ECO-Sat test to requests to provide these services by entities licensed by nations with which we have bilateral agreements.”).

<sup>9</sup> ITU Rad. Reg., App. 30, Art. 10 (BSS Plan for Region 2).

<sup>10</sup> See *World Watch: Mexico to Issue Bid Rules for Spectrum Auction*, WALL ST. J., Apr. 2, 2004, at A7 (“Bidding rules for Mexico's 77 degrees West satellite orbit, though, may take longer. The buyer of the orbit will be able to bring direct-to-home, or DTH pay-TV services, to customers in the U.S., Canada and Mexico.”).

<sup>11</sup> See *Opposition and Reply Comments of DIRECTV Enterprises, LLC* at 12-13 (noting that Mexico did not comment on Canada's U.S.-coverage modification at 72.5° W.L., and therefore, in accordance with the ITU Radio Regulations, “is deemed to have agreed to the proposed assignment”), filed in *Request for Special Temporary Authority to Relocate DIRECTV 5 to 72.5° W.L. and to Conduct Telemetry, Tracking and Command (“TT&C”) Operations for an Interim Period*, SAT-STA-20040107-00002 (filed Mar. 3, 2004).

This is an important point of intersection between the question of access to the U.S. from a foreign DBS slot and the related question of whether 4.5 degree spacing between DBS satellites is appropriate – a question on which DIRECTV itself has filed a petition for rulemaking.<sup>12</sup> EchoStar does not take a position on whether a rulemaking is appropriate for the adoption of 4.5 degree spacing, which presents more intensely technical issues as opposed to policy issues. Nevertheless, EchoStar stresses again that, if the Commission were to grant DIRECTV’s rulemaking petition for 4.5 degree spacing, it should consolidate the two proceedings in a single rulemaking. In any event, the question of U.S. access from foreign DBS slots should be addressed in a rulemaking. Only once the policy framework is in place should the Commission and the Bureau decide individual applications.

**IV. DIRECTV CANNOT CONVERT ITS OBLIGATION TO PROVIDE LOCAL-INTO-LOCAL SERVICE IN AN EXPANDED NUMBER OF DMAs INTO A JUSTIFICATION FOR SPECIAL TREATMENT**

When the Commission approved the merger of News Corp. and Hughes Electronics Corporation (the parent of DIRECTV), it imposed a condition requiring DIRECTV to deliver local-into-local service in an expanded number of Designated Market Areas (“DMAs”) by the end of 2004.<sup>13</sup> DIRECTV argues that the grant of its application in this case is in the public interest because it is “necessary . . . to fulfill the Commission’s mandate to deliver local broadcast channels in 130 local television markets.”<sup>14</sup> Such a view should be rejected. Neither

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<sup>12</sup> See *Petition of DIRECTV Enterprises, LLC For a Rulemaking on the Feasibility of Reduced Orbital Spacing in the U.S. Direct Broadcast Satellite Service* (filed Sept. 5, 2003). This petition was placed on public notice on December 16, 2003. See Public Notice, Report No. SPB-196, DA 03-3903 (released Dec. 16, 2003).

<sup>13</sup> See *General Motors Corp. and Hughes Electronics Corp. (Transferors) and The News Corp. Ltd. (Transferee)*, FCC 03-330, Memorandum Opinion and Order, MB Docket No. 03-124, at ¶ 334 Appendix F, Section VI (released Jan. 14, 2004).

<sup>14</sup> Application at Exhibit A, p.4.

the Bureau nor the Commission should treat DIRECTV's binding commitment to provide expanded local-into-local service as a public interest justification for granting DIRECTV the requested authorization. DIRECTV's ability to provide expanded local-into-local service was supposed to result from merger efficiencies, and the merger condition was simply a means of ensuring that these efficiencies would in fact be realized.<sup>15</sup> DIRECTV should not receive a special advantage when requesting spectrum that its competitors would not enjoy simply because of that condition.

## V. CONCLUSION

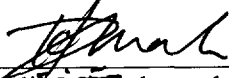
For the reasons given above, the Commission should initiate a rulemaking to establish a consistent and competitively-neutral standard for access to the United States from foreign-licensed DBS satellites.

Respectfully submitted,

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Dated: April 26, 2004

  
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<sup>15</sup> *Id.* at ¶¶ 331, 334.



**CERTIFICATE OF SERVICE**

I, Chung Hsiang Mah, hereby affirm that a true and correct copy of these  
Comments was sent this 26th day of April, 2004, via first-class mail, postage prepaid, to the  
following persons:

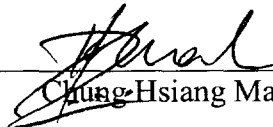
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