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September 27, 2002

RECEIVED

SEP 27 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand

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

Re: *Ex Parte Notice*: Consolidated Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation for Authority to Transfer Control
CS Docket No. 01-348

Dear Ms. Dortch:

The undersigned today sent the enclosed *ex parte* communication to W. Kenneth Ferree of the FCC's Media Bureau. Please associate this communication with the above-referenced file.

Respectfully submitted,

Phillip L. Spector

Phillip L. Spector

Enclosure

cc: W. Kenneth Ferree

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September 27, 2002

BY HAND

Hon. Charles A. James, Jr.
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Mr. W. Kenneth Ferree
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Merger of EchoStar Communications Corporation and Hughes Electronics Corporation, and its Potential Impact on the Proposed AMERICOM2Home DBS Platform
FCC CS Docket No. 01-348

Dear Mr. James and Mr. Ferree:

On behalf of SES AMERICOM, Inc. ("SES AMERICOM"), we are writing to inform the U.S. Department of Justice (the "DOJ") and the Federal Communications Commission (the "FCC" or "Commission") about certain matters relating to a new and innovative direct broadcast satellite ("DBS") service, known as "AMERICOM2Home," being developed by SES AMERICOM. This service will compete with the DBS offerings of EchoStar Communications Corporation ("EchoStar") and the Hughes Electronics Corporation ("Hughes") subsidiary, DIRECTV, Inc. ("DIRECTV"), and is expected to benefit U.S. consumers, by creating an alternative and unique means of program distribution for providers of satellite television content.

The pending merger of EchoStar and Hughes (the "Merger") threatens to impede the deployment and ultimate success of the AMERICOM2Home venture. Unless

certain conditions are imposed on the Merger, the newly combined entity ("New EchoStar") will have the necessary market power and incentive to prevent AMERICOM2Home from becoming a competitive force in the DBS arena. Accordingly, SES AMERICOM hereby requests that, if the DOJ and the FCC permit the consummation of the Merger, certain conditions be imposed on New EchoStar's future practices and operations, in order to allow the development of AMERICOM2Home as a competitive alternative to New EchoStar's service offerings, and thereby to enhance competition in the DBS and other multichannel video programming distribution ("MVPD") sectors.

I. SES AMERICOM

SES AMERICOM provides U.S. and international communications services through a fleet of 16 geosynchronous satellites. Headquartered in Princeton, New Jersey, SES AMERICOM is one of the largest U.S. providers of fixed satellite service ("FSS") transponder capacity for the transmission of cable and broadcast programming to cable head ends and broadcast networks. SES AMERICOM transmits television programming to approximately 10,000 cable head ends serving over 80 million subscribers in the United States. Virtually every U.S. cable and DBS household receives some of its programming indirectly via the SES AMERICOM fleet. SES AMERICOM also has licenses from the FCC for the development and provision in the United States of interactive broadband information services.[1]

SES AMERICOM's parent company, SES GLOBAL, owns SES ASTRA, a leading European provider of satellite capacity. While not a retail provider of DBS service, SES ASTRA owns and operates Europe's largest fleet of Ku-band satellites, which support the operation of multiple (and competing) DBS offerings by major media groups across the European continent. SES AMERICOM intends to leverage the unique DBS knowledge and experience of SES ASTRA to create a similar, open DBS platform in the United States.

II. AMERICOM2HOME

On April 25, 2002, SES AMERICOM announced the initiation of the AMERICOM2Home venture, and filed a Petition for Declaratory Ruling (the "PDR") with the FCC, seeking authorization to provide the AMERICOM2Home platform in the

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[1] The FCC authorized SES AMERICOM's predecessor, GE American Communications, Inc. ("GE Americom"), to provide such services in the portion of the frequency spectrum commonly referred to as the Ka-band. See GE American Communications, Inc., 12 FCC Rcd 6475 (Int'l Bur. 1997); GE American Communications, Inc., DA 01-225 (Int'l Bur., Jan. 31, 2001).

United States.[2] Modeled after the SES ASTRA system in Europe, AMERICOM2Home will be an open DBS platform on which television program providers and other content owners will lease capacity in order to offer television programming directly to consumers.

The AMERICOM2Home system will compete with the DBS offerings of EchoStar and DIRECTV, as well as with other MVPD operators, by providing an attractive alternative distribution outlet for content providers, and new opportunities for service providers and distributors. Niche, foreign language, and special interest programmers, for example, who may have trouble obtaining carriage by the incumbent DBS and cable operators, will be able to offer free-to-air, monthly subscription, and/or pay-per-view television programming directly to consumers who have installed a small satellite dish and other necessary receiving equipment.

The platform will use a satellite licensed by the Government of Gibraltar, with which SES AMERICOM has a longstanding relationship on satellite regulatory and licensing matters.[3] The new satellite, on which SES AMERICOM hopes to complete construction by late 2004, will be placed at the 105.5° W.L. orbital location, which is in-between the 101° W.L. and 110° W.L. orbital positions occupied by DIRECTV's and EchoStar's DBS satellites. Ultimately the AMERICOM2Home DBS platform at 105.5° W.L. will be bundled with high-speed, two-way Internet access and other advanced data services from the 105° W.L. orbital slot.[4]

SES AMERICOM hopes to obtain the required regulatory approvals for the deployment of the AMERICOM2Home system in the near future. In anticipation of the launch of this DBS platform, SES AMERICOM now seeks the assistance of the DOJ and the FCC in clearing other potential impediments to the success of this venture, by taking steps to ensure that the Merger does not adversely affect the development of AMERICOM2Home as a platform for competitive providers of DBS service.

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[2] SES AMERICOM, Inc., Petition for Declaratory Ruling To Serve the U.S. Market Using BSS Spectrum from the 105.5° W.L. Orbital Location, SAT-PDR-20020425-00071 (filed April 25, 2002).

[3] SES AMERICOM's subsidiary has employees in Gibraltar who operate a satellite control center in Gibraltar. SES AMERICOM, through a joint venture, also provides satellite service in Asia through a Gibraltar-licensed satellite. Prior to its acquisition by SES GLOBAL, GE Americom had developed a strong relationship with the Government of Gibraltar.

[4] SES AMERICOM is authorized by the FCC to operate in the Ka-band and the Ku-band from the 105° W.L. orbital location. See note 1 supra (Ka-band); GTE Spacenet Corporation, Order and Authorization, 3 FCC Rcd 6986 (1988) (Ku-band).

III. SUGGESTED MERGER CONDITIONS

The Merger threatens to consolidate under the aegis of one entity an enormous amount of the limited satellite resources available for the provision of direct-to-home satellite services in the United States. The merged entity, New EchoStar, would own 100% of the prime satellite orbital slots and frequencies licensed by the FCC that offer full coverage of the continental United States ("CONUS") and are designated for DBS.[5] As a result, New EchoStar could become the only provider of DBS in the United States, and the sole MVPD service supplier in many rural and hard-to-reach areas. With over 18 million North American television households (over 45 million viewers) representing nearly 20% of the U.S. MVPD market, New EchoStar's subscriber base would exceed that of any other U.S. MVPD operator.[6] New EchoStar will also control or have interests in a significant portion of the orbital and spectrum resources available in the United States for the provision of broadband Internet access service directly to consumers via satellite.

No company today offers an open platform for the provision of DBS in the United States, as SES ASTRA does in Europe, or otherwise competes with DIRECTV and EchoStar in the provision of DBS service. The New EchoStar DBS monopoly would further stifle such competition, to the detriment of consumers and content providers. SES AMERICOM believes that the imposition of certain conditions on the Merger is necessary in order to curb New EchoStar's ability to affect adversely the establishment and operation of the AMERICOM2Home platform, as well as other competitive service offerings. Accordingly, assuming the Merger is allowed to go forward, SES AMERICOM hereby urges the DOJ and the FCC to impose the conditions discussed below with respect to the operations of New EchoStar.

A. Coordination of the AMERICOM2Home Satellite

SES AMERICOM recently sent a letter to Donald Abelson, the Chief of the FCC's International Bureau (copy enclosed) (the "Abelson Letter"),[7] requesting the

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5 See Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation for FCC Consent to a Transfer of Control, Att. B, at 4-7; Att. C (filed Dec. 21, 2001).

6 See Statement of Marshall Pagon, Pegasus Communications Corporation, Oversight Hearing on the Status of Competition in the Multi-Channel Video Programming Distribution Marketplace, Before the Committee on the Judiciary, Subcomm. on Telecom and the Internet, 107th Cong. (2001).

7 Letter from Phillip L. Spector, Attorney for SES AMERICOM, to Donald Abelson, FCC, Aug. 23, 2002.

Commission's assistance in bringing EchoStar and DIRECTV to the negotiation table for operator-to-operator discussions about AMERICOM2Home. While alleging that they have interference concerns about the AMERICOM2Home proposal,[8] the two DBS incumbents have refused to meet operator-to-operator with SES AMERICOM -- a refusal that, as explained in the Abelson Letter, "can be motivated only by a desire to stall the advent of the competing AMERICOM2Home system."[9] Instead of such discussions, the DBS incumbents have insisted on meetings at which FCC and United Kingdom government representatives would have to be present,[10] and indeed the U.K. Government and the FCC have now scheduled an administration-to-administration coordination meeting for several months from now, in mid-December 2002.

As detailed in the Abelson Letter, these meetings between the administrations are no substitute for operator-to-operator discussions. Administration meetings involve too many unnecessary parties (such as lawyers and government officials), are difficult to schedule and cumbersome to conduct, and waste valuable government resources. Operator-to-operator meetings, on the other hand, should allow the parties' engineers quickly to home in on, and resolve, important technical issues, thereby expediting the deployment of the competitive AMERICOM2Home platform.

To thwart any effort by New EchoStar to use purported technical concerns and scheduling difficulties to obstruct or delay market entry of the AMERICOM2Home system,[11] the DOJ and the FCC should impose a condition on the merger requiring New EchoStar to use its best efforts to complete coordination, as quickly as possible, between New EchoStar's satellites and SES AMERICOM's proposed DBS satellite. The condition would require New EchoStar to have its engineers meet regularly with those of SES AMERICOM, outside the presence of lawyers and other unnecessary participants, and to work diligently and in good faith to address any legitimate concerns regarding alleged interference.

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8 See Comments of EchoStar Satellite Corporation, File No. SAT-PDR-20020425-00071 (filed June 17, 2002); Opposition of DIRECTV, Inc., File No. SAT-PDR-20020425-00071 (filed June 17, 2002).

9 Abelson Letter at 5.

10 The United Kingdom handles International Telecommunication Union matters for Gibraltar.

11 SES AMERICOM's concerns in this regard are rooted in the DBS incumbents' behavior to date with respect to the proposed competition from AMERICOM2Home. Apart from "anticompetitive" animus, "[t]here is no . . . way to explain why these incumbents would ask the FCC to deny a potential competitor's request for market entry, prior to any technical discussions or studies with the potential new entrant." Abelson Letter at 5 (emphasis in original).

Such a requirement to negotiate in good faith could be difficult to enforce. There are, however, precedents for creating a structure that would help to ensure that New EchoStar does in fact negotiate with SES AMERICOM in good faith to resolve valid concerns. For example, as the Federal Trade Commission (the "FTC") did in the context of the AOL-Time Warner merger, the DOJ or the FCC could appoint a "Monitor Trustee" with "the power and authority to monitor [New EchoStar's] compliance" with the good faith negotiation requirement.[12] Such a Monitor Trustee would have "full and complete access to all personnel, books, records, documents and facilities of [New EchoStar] related to compliance."[13] Moreover, to ensure that New EchoStar does not delay the coordination process, the Monitor Trustee could essentially act as a mediator in the coordination, setting reasonable timetables and deadlines for submissions and meetings, and possibly imposing sanctions for any failure by New EchoStar to comply with the DOJ's and/or the FCC's stated conditions. The Monitor Trustee could also help to ensure New EchoStar's compliance with the other merger conditions proposed below.

B. Access to Customer Premises Equipment

In the current U.S. DBS market, customer premises equipment ("CPE"), including the satellite receiving antenna ("dish") and connected receiver, acts as a "last mile" bottleneck into satellite households. Control of that bottleneck facility creates a natural monopoly, and gives an incumbent DBS provider an unfair advantage over would-be competitors seeking to offer service to the incumbent's subscribers. These customers are generally unwilling to replace their existing satellite dish and receiver, or to add a second set of equipment, in order to receive the services offered by a DBS competitor. Thus, the fact that subscribers have to install additional equipment in order to receive the service of potential competitors generally has the anticompetitive effect of preventing such would-be competitors from gaining a foothold in the market.

If the Merger is approved, New EchoStar will control the bottleneck "last mile" facility into virtually every satellite television household in the country, thus giving it the ability to keep competitive DBS providers out of the market. In order to spur competition in the DBS industry after the Merger, and to facilitate the development of services such as those that will be offered by AMERICOM2Home providers, it is imperative that the DOJ and the FCC impose conditions on the Merger that result in

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[12] America Online, Inc. and Time Warner, Inc., FTC Docket No. C-3989, Agreement Containing Consent Orders, Decision and Order, 2000 WL 1843019, at § V (FTC, Dec. 14, 2000) ("AOL TW Consent Order"). In that case, the FTC did in fact appoint a monitor to ensure compliance with certain obligations of the consent decree.

[13] Id. New EchoStar would bear the cost and expense of the Monitor Trustee, who would also be required to sign an appropriate confidentiality agreement. See id.

potential competitors of New EchoStar's gaining access to the satellite dish and receiver used for the reception of New EchoStar's programming.

1. Satellite Dish

With respect to access to the New EchoStar satellite dish, a competitor such as AMERICOM2Home should be permitted to replace the satellite dish of a New EchoStar subscriber with a new dish capable of receiving not only the New EchoStar signals, but also those of the competitor, and potentially of other service providers. AMERICOM2Home should therefore be allowed to deploy satellite dishes capable of simultaneously receiving New EchoStar's programming and AMERICOM2Home's offerings. The competitor to New EchoStar, such as SES AMERICOM or its programmer customers, would bear the cost of developing and installing new satellite dishes for consumers who desire to subscribe to the AMERICOM2Home service.

The capability to design, manufacture, and install antennas capable of receiving both the New EchoStar service and a competitor's service is critical to the development of DBS competition. This is true for a simple, intuitively obvious reason: consumers resist placing two satellite dishes on their roofs.[14] For example, if a consumer has to place a second dish on his/her roof to receive AMERICOM2Home services, the consumer is likely, in most cases, to decide not to proceed with AMERICOM2Home. But if the consumer can exchange his/her New EchoStar dish for a single dish capable of receiving both New EchoStar and AMERICOM2Home, he/she is far more likely to order the AMERICOM2Home service.

New EchoStar should be prohibited from discriminating in any manner against a customer who has installed such an AMERICOM2Home-provided satellite dish, and required to continue to treat such a customer in the same manner as it treats any other New EchoStar customer. This Merger condition should, for example, prohibit New EchoStar from: (a) voiding receiver warranties based on the use of such dishes; (b) distributing new models of receivers designed to work only with New EchoStar-supplied dishes; (c) charging additional fees to customers using dishes not supplied by New EchoStar; or (d) otherwise discouraging subscribers from allowing their equipment to be switched to a system compatible with AMERICOM2Home.

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[14] See, e.g., National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, Declaratory Ruling and Order, DA 02-765, at ¶ 2 (Media Bureau, Apr. 4, 2002) (finding that EchoStar's requiring some subscribers to install a second dish in order to obtain local channels is unlawfully discriminatory).

New EchoStar should also be required to design the components in its satellite dishes based on common, industry-accepted standards, so that competitors can readily manufacture "universal" satellite dishes. Thus, for example, New EchoStar should not be permitted to incorporate proprietary features into its transmissions or earth station hardware that make it unreasonably burdensome for competitors to design and manufacture dishes capable of receiving multiple services.

2. Receiver

The second part of the CPE bottleneck is the receiver, sometimes known as a "set-top box," inside the home of each subscriber. Open access must also be granted to competitors for that equipment. To do this, the DOJ and the FCC should require New EchoStar to develop receivers based on common industry standards. Such receivers would be capable, for example, of incorporating multiple conditional access systems to enable users to access content from different service providers. Technically adequate standards are currently available for the manufacture of such boxes, but a monopoly-bent DBS incumbent would have no incentive to use such standards unless mandated to do so. The use of such common standards would allow the development of receivers capable of receiving a competitor's offerings, without diminishing the consumer's ability to receive the incumbent's programming. Because such open standards are good for competition, the DOJ and the FCC should mandate their use.

The use of such open standards would not affect New EchoStar's ability to incorporate its own proprietary conditional access system, so long as another service provider were able to obtain appropriate intellectual property licenses that enabled them to distribute receivers that contain New EchoStar's as well as the competitor's conditional access technology. Subscribers would thus, for example, be able to purchase one receiver, while subscribing to offerings from New EchoStar, AMERICOM2Home, and/or any other potential future competitors. Users would also be given the capability of switching from one provider to another without purchasing and installing a new receiver. Similar non-discriminatory requirements to those discussed above would also have to be imposed on New EchoStar in connection with such satellite receivers. New EchoStar should not, for example, be permitted to distribute television content that cannot be received by, or is transmitted in an inferior manner to, customers using their receiver to obtain a DBS competitor's service.

3. Benefits of Access to CPE

The proposed open access requirements would serve the interest of the public in the development of competition, without causing undue harm to New EchoStar. EchoStar and DIRECTV have announced that they will be replacing the existing satellite dishes and receiving equipment of their customers after consummation of the Merger in

any event. It should therefore not be particularly burdensome to require the use of CPE based on common standards, thereby allowing other service providers to manufacture replacement units capable of receiving the competitors' and New EchoStar's services. Such a framework would also benefit New EchoStar, as it could use its own competitive offerings to entice AMERICOM2Home's subscribers, or to win back its own subscribers, without requiring such consumers to change their equipment. Moreover, to the extent that New EchoStar is required to license any proprietary technology to other providers, New EchoStar would be compensated through reasonable, cost-based licensing fees.

Access to such CPE would facilitate the development by SES AMERICOM and other companies of services to supplement those offered by New EchoStar, including value-added services that New EchoStar either could not, or may choose not to, provide. For example, AMERICOM2Home providers could offer local, foreign language or special interest channels that might not be available from New EchoStar. Moreover, pay-per-view movies, in a wider variety or at cheaper prices than those offered by New EchoStar, could bring additional choices to consumers. Similarly, new free-to-air channels and interactive video television offerings could be offered via AMERICOM2Home to New EchoStar's subscribers.

The ability of AMERICOM2Home providers to offer these and other enhanced services to the large group of existing DBS subscribers would stimulate the growth of competition in the market for satellite television and multimedia services, and might diminish some of the anticompetitive impacts of the Merger. Consumers' ability to buy "universal" satellite receiving equipment without being wedded to one provider, and to switch service providers or order a variety of content and services from different providers as they wish, would result in lower prices, better services and more choices. The elimination of proprietary CPE as a barrier to market entry is therefore squarely in the public's interest. The DOJ and the FCC, as a condition of the Merger, should impose conditions eliminating such barriers.

C. Access to Local Television Channels

In connection with their Merger, EchoStar and Hughes have sought FCC authorization for the launch by New EchoStar of a satellite, "NEW ECHOSTAR 1," that would allow the combined entity to provide all of the local channels in the United States to its subscribers.[15] According to EchoStar and Hughes, "only New EchoStar will be able to undertake this 'Local Channels, All Americans' service plan because only the merger

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[15] See EchoStar Satellite Corporation and Hughes Electronics Corporation, Application for Authority to Launch and Operate NEW ECHOSTAR 1 (USABSS-16), SAT-LOA-20020225-00023, February 25, 2002.

will end inefficient use of the DBS spectrum by eliminating the need for each of DIRECTV and EchoStar to transmit more than 500 channels of duplicative programming."[16]

SES AMERICOM agrees that, if the Merger is approved without certain conditions, only New EchoStar would be able to provide local television programming to all Americans via satellite. No other DBS provider would be in a position to amass the DBS orbital and frequency resources needed to offer to its customers anything close to the combined entity's local television offerings. Moreover, even assuming that a competitor could gain access to sufficient orbital slots and frequencies to offer a package similar to the "Local Channels, All Americas" plan, that competitor would have to use up those valuable resources in the same inefficient, duplicative manner that New EchoStar desires to avoid, thereby leaving little additional capacity for other channels.

The frequency spectrum is a scarce public resource, and there are insufficient spectrum and orbital resources available for a competitor of New EchoStar's to compete effectively with the local channels platform being developed by EchoStar and DIRECTV. New EchoStar should thus be required to make the local channels on this platform available, at reasonable rates, to competitors desiring to provide the same local programming to their subscribers. Such sharing of increasingly scarce spectrum and orbital resources would serve the public interest, as it would greatly reduce the inefficient, duplicative use of limited spectrum, and would open the door for competitors of New EchoStar's to offer services comparable to those of the merged company.

Requiring New EchoStar to grant competitors access to its local television programming would not harm New EchoStar. Its competitors would be required to pay reasonable, cost-based, wholesale rates to New EchoStar for access to its local platform; thus, far from harming New EchoStar, such access would help it, because the cost of the NEW ECHOSTAR 1 satellite would be amortized over a larger base of paying subscribers.[17] In addition, New EchoStar would retain the orbital and spectrum resources and hence have the ability to offer additional programming in an attempt to maintain its competitive advantage over other companies.

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[16] Id. at 3.

[17] EchoStar itself has indicated that it is "intensely interested in providing wholesale services" and that "such service offers a unique opportunity to generate two revenue streams by using the same facilities." See Comments of EchoStar Satellite Corporation and DirectSat Corporation at 55, In the Matter of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168 (filed Nov. 20, 1995).

Imposing an access condition on New EchoStar's local offerings would facilitate in important ways the development of DBS offerings that compete against those of New EchoStar, such as AMERICOM2Home. Those who seek to offer programming over the AMERICOM2HOME system will have enormous difficulty competing against New EchoStar unless they can offer the same local television programming in each local market that New EchoStar will be able to provide. As Congress long ago recognized, it is simply not possible to develop a DBS service that competes effectively with cable television systems (and now with the two entrenched DBS companies) unless local channels are offered to consumers as part of the programming package.[18]

The stark reality, however, is that there are not enough DBS spectrum and orbital resources available to permit AMERICOM2Home providers to offer a competitive local television package over the single DBS satellite that they would have available for other DBS services. Accordingly, in order to facilitate competition by AMERICOM2Home providers and other potential DBS market entrants, the DOJ and the FCC should impose an open access condition with respect to New EchoStar's local channels, and thereby compel the use of the limited DBS resources in an efficient manner that facilitates the development of viable competing offerings.

Because the Amercom2Home platform will exist on a DBS satellite located between the orbital slots to be used by New EchoStar in the provision of DBS service, access to the New EchoStar local channels at 110° W.L. or other New EchoStar orbital slots would be technically feasible using the kind of industry standard, open access CPE discussed above. Subscribers to the programming offered on the AMERICOM2Home platform would not need to repoint their dishes or buy separate equipment in order to receive local programming from the NEW ECHOSTAR 1 satellite. Such subscribers would simply pay the relevant AMERICOM2Home service provider a monthly fee in order to decrypt such programming.[19] Consumers desiring to subscribe to AMERICOM2Home service would therefore not have to face the difficult choice of relinquishing their local channels, thereby making AMERICOM2Home a truly viable

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[18] See Satellite Home Viewer Improvement Act of 1999, as amended ("SHVIA"), enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, Public Law No. 106-113, 113 Stat. 1501, Appendix I (1999). In recognition of the importance to competition of DBS providers' ability to provide local channels, SHVIA permits DBS operators to retransmit local broadcast signals, and spells out the terms and conditions under which operators must seek consent from broadcasters for such retransmission.

[19] The precise structure of such a resale arrangements need not be finalized at this time. Such terms can be worked out by New EchoStar and potential competitors pursuant to a mandate from the DOJ and/or the FCC that New EchoStar make local television channels available for resale, subject to reasonable terms and conditions.

competitive option.

D. Access to Retail Distribution Chain and Content Providers

Other potential barriers to entry for would-be competitors of New EchoStar are the retail distribution chain for New EchoStar's products and services, and the content providers for New EchoStar's programming. Because New EchoStar will be so dominant in the DBS industry, and initially the sole provider of DBS service in the United States, it will hold tremendous economic power over content providers and retail distributors. New EchoStar would possess the market power and economic incentive to strike deals with those entities that make it undesirable, or indeed detrimental, for them to enter into arrangements with competitors of New EchoStar's. The mere threat of retaliation, without any outward action by New EchoStar, will often be sufficient to prevent content providers and distributors from signing contracts with competitors of New EchoStar, such as AMERICOM2Home.

To prevent New EchoStar from stifling DBS competition, we strongly recommend that the DOJ and the FCC, as a condition of the Merger, forbid any such anticompetitive transactions or behavior between New EchoStar and its retail distributors. Distributors should be free to promote and sell the satellite dishes, receivers and service of New EchoStar's competitors, including AMERICOM2Home providers, without suffering dire consequences at the hands of New EchoStar, such as blacklisting or other forms of discrimination. Exclusive arrangements, in particular, should be clearly prohibited. In addition, New EchoStar should not be permitted to offer pricing or bonus incentives to distributors that make it beneficial for them to favor New EchoStar's products and services over those of its competitors.

Arrangements that adversely impact AMERICOM2Home's ability to establish relationships with content providers should also be prohibited as a condition of the Merger. As Congress and the FCC have recognized in the context of cable television (and at the behest of the DBS industry), these kinds of arrangements are inherently anticompetitive, and thus unlawful.[20] New EchoStar should thus, for example, be prohibited from becoming affiliated with content providers in a manner that allows New

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[20] In this regard, Section 628(b) of the Communications Act, and the FCC's Rules implementing that section make it unlawful for cable operators, and satellite cable and broadcast programming vendors in which a cable operator has an attributable interest, from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming." 47 U.S.C. § 548(b). One specific limitation promulgated under this general provision is a prohibition on exclusive contracts between cable operators and their affiliated programming suppliers. See id. at § 548(c)(2)(D); 47 C.F.R. § 76.1002(c)(2).

EchoStar to prevent or discourage such providers from doing business with AMERICOM2Home. Discrimination against a content provider that distributes its programming on AMERICOM2Home's platform should also be forbidden.

E. Analogous Conditions in Other Areas

There is substantial precedent for the kinds of open access and non-discrimination requirements that SES AMERICOM is here urging be imposed on New EchoStar. For instance, some of those conditions are comparable to a condition imposed on AOL and Time Warner in the context of their merger.[21] In that case, the combined company was required to allow at least three other Internet Service Providers ("ISPs") -- in addition to AOL -- to offer service to AOL Time Warner's cable customers over the AOL Time Warner cable lines.[22]

Another analogous solution was introduced at the time of the breakup of AT&T as a monopoly local and long distance telephone service provider in 1982.[23] There, it was clear that, with AT&T's virtual monopoly over the "last mile" into almost every U.S. household, it would be difficult or impossible for competition in the long distance market to flourish. To address this problem, the Consent Decree entered into by AT&T required that the company be broken up into several Regional Bell Operating Companies ("RBOCs"), with each of them largely restricted to the provision of local telephony.[24] A separate AT&T was created for the provision of long distance services. Importantly, each RBOC was required to grant nondiscriminatory access to the "local loop" for all long distance companies, and was barred from treating AT&T more favorably than any other long distance carrier.[25]

More recently, in the Telecommunications Act of 1996, RBOCs and other incumbent local exchange carriers ("ILECs") were required to grant competitive local carriers access to the local loop, at reasonable rates, for the provision of competitive local services. Recognizing that ILECs control bottleneck facilities essential for the

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21 See Time Warner-AOL Order, 16 FCC Rcd at ¶¶ 17, 122, 126; AOL TW Consent Order. See also text at notes 12-13 supra (Monitor Trustee).

22 AOL-TW Consent Order, note 12, supra, at § II.

23 See generally United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1983); HAMBURG & BROTMAN, COMMUNICATIONS LAW AND PRACTICE § 4.05 (1995).

24 AT&T, 552 F. Supp. At 225-234.

25 Id.

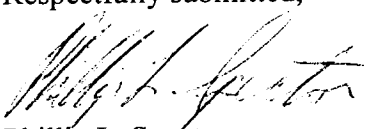
development of competing alternatives, the Act mandates that competing local carriers have "nondiscriminatory access to network elements on an unbundled basis" at "reasonable" rates, and that an ILEC "offer for resale at wholesale rates" certain services that the ILEC "provides at retail."[26] Precedents also abound for rules prohibiting anticompetitive or discriminatory arrangements between MVPD providers and their programming suppliers or retail distributors.[27]

The DOJ and the FCC should take a similar approach with respect to the pending Merger, and require New EchoStar to open its CPE (the functional equivalent of the RBOCs' local loop) to competing satellite service providers. The local channels bottleneck should also be opened by mandating that DBS competitors be able to purchase New EchoStar's local television transmissions, on a wholesale basis at reasonable rates, for resale to the competitors' customers. Finally, anticompetitive arrangements between New EchoStar and its distributors and content providers, that have the effect of discouraging or preventing such entities from doing business with AMERICOM2Home, should be forbidden as a condition of the Merger.

* * * *

We will shortly be contacting your offices, to seek meetings with you and your colleagues to discuss these matters further.

Respectfully submitted,



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Enclosure

cc: James Barker, Esq.
Attorney for DIRECTV, Inc.

Pantelis Michalopoulos
Attorney for EchoStar Communications Corporation

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[26] 47 U.S.C. § 251(c)(3), (4).

[27] See, e.g., note 20, supra.

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August 23, 2002

BY HAND

Mr. Donald Abelson
Chief, International Bureau
Federal Communications Commission
445 - 12th St., S.W.
Washington, DC 20554

Re: SES AMERICOM, Inc., Petition for Declaratory Ruling
SAT-PDR-20020425-00071

Dear Mr. Abelson:

On behalf of SES AMERICOM, Inc. ("SES AMERICOM"), we write to bring to your attention the refusal to date by EchoStar Communications Corporation ("EchoStar") and DIRECTV, Inc. ("DIRECTV"), to meet with SES AMERICOM in order to commence coordination discussions pursuant to the Radio Regulations of the International Telecommunication Union ("ITU"). The coordination is related to the proposed satellite that is the subject of the above-captioned Petition for Declaratory Ruling (the "PDR").[1] We believe that these incumbent direct broadcast satellite ("DBS") companies' refusal to meet with SES AMERICOM is counter to the rules and policies of the ITU and the FCC. Accordingly, we hereby request your assistance in bringing these incumbent operators to the negotiation table.

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1 *SES AMERICOM, Inc., Petition for Declaratory Ruling To Serve the U.S. Market Using BSS Spectrum from the 105.5° W.L. Orbital Location*, SAT-PDR-20020425-00071 (filed April 25, 2002). ITU coordination is an ongoing process that is pursued separately from the FCC's consideration of any applications, or in this case, the PDR; however, for completeness, we are providing background information herein on the SES AMERICOM PDR.

1. SES AMERICOM Petition

SES AMERICOM filed the PDR with the FCC some four months ago, on April 25, 2002. The PDR detailed SES AMERICOM's plans to establish an open DBS platform on which customers of SES AMERICOM will be able to lease capacity to be used to offer television programming directly to consumers. The venture, known as "AMERICOM2Home," will use a satellite licensed by the Government of Gibraltar, with which SES AMERICOM has had a longstanding relationship on satellite regulatory and licensing matters.[2] The new satellite, on which SES AMERICOM hopes to complete construction by 2004, will be placed at the 105.5° W.L. orbital location, which is in-between the 101° W.L. and 110° W.L. orbital positions occupied by DIRECTV's and EchoStar's DBS satellites.

In the PDR, SES AMERICOM underscored the public interest benefits of its proposed satellite platform. As SES AMERICOM explained, the AMERICOM2Home system will compete with the DBS offerings of EchoStar and DIRECTV, as well as with other multichannel video programming distribution operators, by providing an attractive alternative distribution outlet for content providers. Niche, foreign language, and special interest programmers, for example, who may have trouble obtaining carriage by the incumbent DBS and cable providers, will be able to offer free-to-air, monthly subscription, and/or pay-per-view television programming directly to consumers who have installed a small satellite dish and other necessary receiving equipment.

2. Invitations/ Refusal to Conduct Technical Discussions

The FCC placed SES AMERICOM's PDR on public notice on May 17, 2002, requesting interested parties to file comments on the PDR by June 17, 2002.[3] Starting well in advance of this deadline, SES AMERICOM made offers to have its engineers meet with those of EchoStar and DIRECTV, in order to allow SES AMERICOM to address, on a preliminary basis, any interference or other concerns that the incumbent DBS duopoly providers might have with the AMERICOM2Home proposal.

In one letter, the undersigned, on behalf of SES AMERICOM, explained that "such dialog would be in the public interest because--if the discussions are held prior to the June 17 date for the filing of comments on the Petition -- your better understanding of the AMERICOM2Home proposal should lead to better, more

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[2] The filing at the International Telecommunications Union ("ITU") with respect to this satellite was made by the United Kingdom, which handles ITU matters for Gibraltar.

[3] Public Notice, Report No. SAT-00110, May 17, 2002.

informed comments that will ultimately be of more utility to the FCC."[4] Despite this letter, as well as repeated attempts by e-mail and telephone to arrange meetings before the date for filing FCC comments, EchoStar and DIRECTV refused to meet with SES AMERICOM.

3. Comments/Oppositions and Reply

Numerous parties filed comments at the FCC on June 17, 2002, in support of SES AMERICOM's proposal to offer an open DBS platform in the United States. Only two parties expressed substantial opposition to the AMERICOM2Home proposal: EchoStar and DIRECTV. While touting the PDR as evidence of the potential for competition in the DBS arena after their proposed merger, and thus a reason to approve the merger, these DBS incumbents nevertheless urged the FCC to deny the PDR outright, based on purported interference concerns.

SES AMERICOM filed detailed reply comments with the FCC on July 3, 2002, countering each of the negative allegations made by EchoStar and DIRECTV in their comments and opposition. Squarely taking on the interference claims of its detractors, SES AMERICOM established in its reply comments that, assuming good faith coordination efforts by EchoStar and DIRECTV, the AMERICOM2Home platform can coexist with the current and future DBS satellites of the incumbents. The PDR and related filings are currently under review at the FCC.

4. Further Invitations/Refusal to Conduct Operator-Operator Coordination

In a letter dated May 7, 2002, the Radiocommunications Agency of the United Kingdom (the "UK RA")[5] proposed to the FCC that the coordination process among the AMERICOM2Home system and the affected U.S. systems (EchoStar and DIRECTV) be "carried out on an operator to operator basis."[6] By letter dated June 28, 2002, the FCC replied, indicating that the U.S. "accepts your proposal to permit operator-to-operator negotiations."[7] The FCC's letter went on to designate EchoStar and DIRECTV to represent the United States in operator-to-operator coordination discussions with SES AMERICOM.[8] Pursuant to this letter, SES AMERICOM, on

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[4] Letter from Phillip L. Spector, Attorney for SES AMERICOM, to Gary Epstein, Attorney for DIRECTV, and Pantelis Michalopoulos, Attorney for EchoStar (June 7, 2002).

[5] The United Kingdom handles ITU matters for Gibraltar. *See* note 2 *supra*.

[6] Letter from Pat Strachan, UK RA, to Thomas Tycz, FCC (May 7, 2002).

[7] Letter from Kathryn O'Brien, FCC, to Pat Strachan, UK RA (June 28, 2002).

[8] Id.

July 12, 2002, again invited EchoStar and DIRECTV to meet to begin the operator-to-operator discussions.[9]

These efforts by SES AMERICOM were to no avail, as each DBS incumbent again declined in similar fashion, and on the same date, to have such discussions. EchoStar insisted that any coordination meeting would have to be attended by the FCC and include consideration of the use by SES AMERICOM of an alternative orbital slot and frequencies,[10] while DIRECTV simply refused to meet with SES AMERICOM, indicating instead that it would air its concerns with the FCC.[11] In follow-up conversations on the subject, these incumbents (through their attorneys) have stuck adamantly to their position.

Recently, by letter dated August 7, 2002, the UK RA indicated its concern regarding the DBS incumbents' refusal to meet with SES AMERICOM. Noting its preference for "operator to operator discussions," the UK agency wrote to the Commission that, in light of the "reservations" about such discussions expressed by EchoStar and DIRECTV, the UK Administration is willing to convene "a special administration to administration meeting . . . as soon as possible."[12] We presume that the Commission will shortly be responding to this UK proposal.[13]

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9 E-mail from Phillip Spector, Attorney for SES AMERICOM, to James Barker, Attorney for DIRECTV, and Pantelis Michalopoulos, Attorney for EchoStar (July 12, 2002).

10 E-mail from Pantelis Michalopoulos, Attorney for EchoStar, to Phillip Spector, Attorney for SES AMERICOM (July 18, 2002).

11 E-mail from James Barker, Attorney for DIRECTV, to Phillip Spector, Attorney for SES AMERICOM (July 18, 2002).

12 Letter from Pat Strachan, UK RA, to Thomas Tycz, FCC (August 7, 2002).

13 Even if the Commission responds affirmatively and an administration-to-administration meeting is scheduled, such a meeting is not, in SES AMERICOM's view, a substitute for the necessary operator-to-operator discussions. The latter discussions would involve just the three directly affected parties, would not consume scarce FCC and UK RA resources, and should be far easier to schedule (no trans-Atlantic travel is involved). Such discussions are far more likely to lead to a resolution that is satisfactory to the incumbents and that allows a new DBS competitor to emerge. Thus, regardless of how the Commission responds to the UK RA's August 7 letter, the Commission should instruct the DBS incumbents to enter into operator-to-operator discussions with SES AMERICOM. In addition, with respect to both operator-to-operator and administration-to-administration meetings, the Commission should establish hard deadlines, in order to ensure that EchoStar and DIRECTV do not exploit scheduling or other difficulties as a way of delaying such meetings.

5. Implications of Incumbents' Refusal to Meet

The continuing refusal by the incumbent DBS providers to commence meaningful intersystem coordination and other technical discussions with SES AMERICOM is not only anticompetitive, but also contrary to FCC policy. Such coordination discussions are required by ITU rules, and are entirely distinct from the FCC's consideration of the merits of the PDR. Indeed, by authorizing "operator-to-operator negotiations as a means of developing a coordination agreement between [the U.S and the U.K.] administrations,"[14] the FCC has embraced this well-established process to resolve the technical issues raised by the incumbent DBS duopoly.

Because such discussions are a critical step in the deployment of a new system, EchoStar's and DIRECTV's refusal to enter into such discussions at this point can be motivated only by a desire to stall the advent of the competing AMERICOM2Home system. There is no other way to explain why these incumbents would ask the FCC to deny a potential competitor's request for market entry, prior to any technical discussions or studies with the potential new entrant.

SES AMERICOM urges the FCC to take steps to require that EchoStar and DIRECTV comply with the FCC's and ITU's rules and policies, by meeting with SES AMERICOM to commence coordination discussions. The public interest benefits from requiring such discussions are compelling, as coordination will benefit all parties involved. If required to work with SES AMERICOM to coordinate its proposed new satellite, the incumbent DBS providers will be able to air their interference concerns in a forum where satellite operators regularly address such issues. Moreover, such coordination discussions will hasten the launch of a new DBS system that will compete with the services offered by the existing DBS providers, to the benefit of the public.

Accordingly, instead of allowing EchoStar and DIRECTV to continue to delay the coordination process mandated by ITU and FCC rules and policies, we ask that the International Bureau immediately direct these DBS providers to promptly hold coordination discussions in good faith with SES AMERICOM. Without a strong message from the FCC on this matter -- informing the incumbents unambiguously that the aforementioned delays are unacceptable -- we believe that EchoStar and DIRECTV will continue to use the coordination process in an effort to delay progress and impede market entry of an alternative service.

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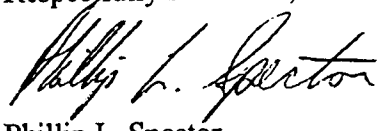
[14] O'Brien Letter, *supra* note 7.

My client and I will shortly be contacting your office, to seek meetings with you and your colleagues to discuss these matters further.

Respectfully submitted,



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