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Via ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20054

Re: Written Ex Parte Presentation – In the Matter of Amendment of the Commission's Space Station Licensing Rules and Policies; 2000 Biennial Regulatory Review - Streamlining and Other Revisions of Part 25 of the Commission's Rules – IB Docket No. 02-34, IB Docket No. 00-248

Dear Ms. Dortch,

In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, EchoStar Satellite LLC ("EchoStar") submits this letter in the record of the above-captioned proceedings to express its support for the Commission's proposal to permit the establishment of an escrow account in lieu of posting a performance bond as security for enforcing the Commission's new satellite implementation milestones,[1] and to propose the use of an irrevocable letter of credit as another alternative to the bond requirement.

EchoStar's recent experience with obtaining such performance bonds demonstrates that the transaction and related costs are significant. Not only must a licensee purchase a bond made payable to the U.S. Treasury, but the surety company typically requires the licensee to post an irrevocable letter

[1] *See* Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking in IB Docket No. 02-34,* FCC 03-102 ¶ 335 (rel. Mar. 19, 2003).

of credit, the practical equivalent of setting aside funds equal to the amount of the bond, as security for the bond. In other words, EchoStar and other satellites licensees must pay twice for compliance with the Commission's bond requirement. By contrast, other options such as placing funds in an escrow account would afford a less expensive alternative for satellite licensees, but provide the same level of protection against speculative applications and spectrum warehousing.

EchoStar is not alone in holding this view. The Satellite Industry Association, for example, supports the escrow account option to the extent the Commission retains a bond requirement.[2] In a joint filing, The Boeing Company, Hughes Network Systems, Inc., Iridium Satellite LLC, Lockheed Martin Corporation, Loral Space & Communications Ltd., Mobile Satellite Ventures LP, PanAmSat Corporation, and SES Americom, Inc. have similarly acknowledged that the option of an escrow account would be preferable to the bond requirement.[3] Moreover, Intelsat LLC (the initial proponent of the bond requirement) also "does not object to the option of employing an escrow, provided that the FCC perfects a security interest in the escrow that will survive bankruptcy and asserts equitable subordination against any capital structure designed to evade financial forfeiture."[4]

Based on its recent experience, EchoStar can supplement the record regarding the costs associated with obtaining a performance bond. Surety companies charge yearly fees of between one and three percent for licensees with good credit. Additionally, surety companies typically require 100% collateral in the form of an irrevocable letter of credit to support their financial obligation. In order to secure a letter of credit, licensees would likely be required to restrict the full amount of the letter of credit and pay yearly fees ranging from 40 to 50 basis points or more of the principal to the issuer.[5] Thus, the annual transaction cost of just one $5 million performance bond could be in the hundreds of thousands of dollars, plus the added cost of being unable to access the funds restricted under the letter of

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[2] *See* Petition for Reconsideration and Clarification and Comments of the Satellite Industry Association, IB Docket No. 02-34 (filed Sept. 26, 2003) ("To the extent the Commission retains bond requirements, SIA supports the Commission's proposal to allow the establishment of an escrow account as an alternative to posting a bond for U.S. space station licenses . . . .").

[3] Reply to Opposition of The Boeing Company, *et. al.*, IB Docket No. 02-34 (filed Nov. 19, 2003).

[4] *See* Comments of Intelsat LLC, IB Docket No. 02-34 (filed Sept. 26, 2003).

[5] The yearly fees associated with an irrevocable letter of credit could vary based on the licensee's creditworthiness, relationship with the issuing bank and other factors.

credit. As pointed out by interested parties in this proceeding, "an operator with more than one license will face a much greater expense, because it will have to pay similar fees for each bond issued."[6]

By contrast, the establishment of an escrow account to secure performance should be a much less expensive alternative. Providing for this option will eliminate most annual fees, and permit operators to re-invest the interest earned on the escrow account.[7] Finally, because the possibility of forfeiture of an escrow account would be identical to that of a performance bond (but without the additional and burdensome costs), the escrow option would have the same deterrent effect on warehousing and speculative applications.

In addition to the escrow account, however, the Commission should allow another alternative -- the option of establishing an irrevocable letter of credit in lieu of a performance bond that would be payable under the same conditions. That option is in fact advantageous over an escrow account for two reasons: First, while the funds effectively have to be set aside in the same way, the licensee has greater flexibility in earning interest on those funds. Second, and perhaps most important, EchoStar understands that there may be certain bankruptcy-related concerns associated with the escrow account option. An irrevocable letter of credit would alleviate bankruptcy concerns because, as a third party payment obligation, it is generally not considered part of a bankruptcy estate.[8] In addition, because a performance bond generally requires the issuance of an underlying letter of credit to support the bond, an irrevocable letter of credit option would eliminate the additional and unnecessary expense of obtaining a bond from a surety company.

For the reasons outlined above, to the extent the Commission retains a bond requirement as part of its satellite licensing procedures, it should also afford satellite licensees the options of putting funds in escrow and establishing an irrevocable letter of credit to satisfy the Commission's

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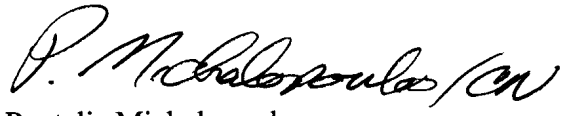
[6] *See, e.g.*, Petition for Reconsideration and Comments of SES Americom, Inc., IB Docket No. 02-34 (filed Sept. 26, 2003).

[7] *See* Petition for Reconsideration and Comments of The Boeing Company, *et al.*, IB Docket No. 02-34 (filed Sept. 26, 2003).

[8] Because letters of credit are tri-party transactions with independent payment obligations on the part of issuing banks, letters of credit (and the proceeds therefrom) are generally not considered property of a debtor's bankruptcy estate. *See In re Air Conditioning*, 845 F.2d 293, 296 (11th Cir. 1998). Thus, in most circumstances, the Commission could draw on an irrevocable letter of credit issued for its benefit to satisfy the obligations of a licensee, even in the face of the stay that would generally be imposed in the context of a licensee's bankruptcy. *See In re Security Services, Inc.*, 132 B.R. 411, 415 (Bankr. W.D. Mo. 1991).

requirements. The Commission should establish an irrevocable letter of credit option whether or not it accepts the escrow option.

Respectfully submitted,



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