

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

In the Matter of)	
)	
EchoStar Satellite Corporation)	CS Docket No. 01-348
and Hughes Electronics Corporation)	
)	SAT-LOA-20020225-00023
For Authority to Launch and Operate)	
NEW ECHOSTAR 1 (USABSS-16))	
)	

To: The Commission

COMMENTS OF SES AMERICOM, INC.

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May 20, 2002

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SUMMARY

The application of EchoStar Satellite Corporation and Hughes Electronics Corporation for authorization of the “NEW EHOSTAR 1” DBS satellite is lacking fundamental data and analysis necessary to assess the applicants’ technical qualifications. Moreover, in the context of the proposed EchoStar/Hughes merger, if the application is granted, safeguards are necessary to ensure that this combination does not foreclose entry by potential DBS competitors.

Recently, SES AMERICOM requested from the Commission a declaratory ruling that it is in the public interest for SES AMERICOM to offer satellite capacity to third parties via a service platform – to be known as “AMERICOM2Home” – that will employ a Gibraltar-licensed satellite operating in the DBS frequency bands at 105.5° W.L, directly adjacent to the proposed NEW EHOSTAR 1 satellite. The AMERICOM2Home satellite has ITU priority over NEW EHOSTAR 1.

The Commission’s technical rules for DBS space stations require interference analyses of the proposed system with respect to other DBS systems, as well as with other co-frequency radiocommunication systems. These analyses, which derive from ITU rules, take into account the respective international filing priority of the systems concerned. The NEW EHOSTAR 1 application does not contain the results of any interference analysis. Furthermore, critical pieces of technical information, which would allow the FCC or other parties to perform independent interference analysis, are missing. Therefore, the FCC cannot assess the impact of NEW EHOSTAR 1 on any satellite having ITU priority over it, and whether coordination appears reasonably feasible. The Commission should therefore consider the application incomplete, and

defer processing of the application, until the results of this interference analysis, as well as other missing critical technical information described in these comments, are submitted by the applicants.

If the necessary technical information is provided and the Commission chooses to proceed with processing of the application, it should, as a condition of any grant of the application, and as a condition to any approval of the EchoStar/Hughes merger, require that the merged company (“New EchoStar”) offer to requesting DBS providers, on reasonable terms and conditions, access to the local television channels being offered on the New EchoStar platform. As the applicants acknowledge, with the addition of NEW ECHOSTAR 1, only New EchoStar would be able to provide local television programming to all Americans via satellite. Requiring New EchoStar to grant competitors access to its local television programming would not harm New EchoStar, is technically feasible, and is analogous to the approach to local exchange carriers taken by the Congress in the Telecommunications Act of 1996.

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To: The Commission

COMMENTS OF SES AMERICOM, INC.

SES AMERICOM, Inc. (“SES AMERICOM”), by its attorneys and pursuant to Section 25.154 of the Rules of the Federal Communications Commission (the “FCC” or “Commission”),¹ hereby submits these comments in response to the application of EchoStar Satellite Corporation and Hughes Electronics Corporation (the “Applicants”) for authority to launch and operate a direct broadcast satellite service (“DBS”) satellite referred to as “NEW EHOSTAR 1” at the 110° W.L. orbital location.²

The NEW EHOSTAR 1 Application states that the Applicants’ proposal is made subject to, and contingent upon, grant of the Applicants’ transfer of control application (the “Merger Application”) currently under review by the Commission, which

¹ 47 C.F.R. § 25.154.

² See EchoStar Satellite Corporation and Hughes Electronics Corporation, Application for Authority to Launch and Operate NEW EHOSTAR 1 (USABSS-16), SAT-LOA-20020225-00023, February 25, 2002 (the “NEW EHOSTAR 1 Application”), and Technical Supplement, March 28, 2002 (the “NEW EHOSTAR 1 Technical Supplement”); Public Notice, DA 02-922 (Apr. 19, 2002) (the “NEW EHOSTAR 1 Public Notice”).

would result in the merger of Hughes Electronics Corporation (“Hughes”) and EchoStar Satellite Corporation’s parent EchoStar Communications Corporation (“EchoStar,” and the combined company, “New EchoStar”).³ The Commission has found that the NEW ECHOSTAR 1 Application constitutes a major amendment to the Merger Application, and has requested comments on the specific technical merits of the NEW ECHOSTAR 1 Application, as well as comments evaluating the proposed transfer of control in light of this major amendment.⁴

I. INTRODUCTION

SES AMERICOM provides U.S. and international communications services through a fleet of 16 geosynchronous satellites. It 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 network affiliates across the United States.⁵ Its parent company, SES GLOBAL, holds interests in providers of satellite services (including DBS services) in the Americas, Asia and Europe.⁶ SES AMERICOM also has significant existing and potential future

³ NEW ECHOSTAR 1 Application at 4-5. See EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control, Public Notice, DA 01-3005 (Dec. 21, 2001).

⁴ NEW ECHOSTAR 1 Public Notice at 3.

⁵ SES AMERICOM established one of the first cable satellite “neighborhoods” more than 15 years ago, and today distributes cable TV programming for the major cable networks. Virtually every U.S. cable and DBS household receives some of its programming indirectly via the SES AMERICOM fleet. SES AMERICOM also has the largest satellite “neighborhood” for the U.S. radio programming industry.

⁶ SES GLOBAL, through its wholly owned subsidiary, SES ASTRA, is directly involved in the provision of DBS services in Europe. While not a retail provider of

involvement in satellite broadband services (“SBBS”) and Internet access markets in the United States and elsewhere in the world.⁷

Recently, SES AMERICOM filed with the Commission a petition (the “SES AMERICOM Petition”) requesting a declaratory ruling that it is in the public interest for SES AMERICOM to offer satellite capacity to third parties that will provide direct-to-home services to consumers in the United States and certain British Overseas Territories.⁸ This service platform – to be known as “AMERICOM2Home” – will employ a satellite licensed by the Government of Gibraltar to operate in the 12.2-12.7 GHz (downlink) and 17.3-17.8 GHz (feeder link) frequency bands at 105.5° West Longitude (“W.L.”). The satellite will be located between two U.S. DBS orbital locations – 101° W.L. and 110° W.L.; the latter is the proposed location of the NEW ECHOSTAR 1 satellite.

Several public interest issues are raised by the NEW ECHOSTAR 1 Application, including issues arising in the context of the proposed merger of Hughes and EchoStar. This merger, if approved, would result in the combination of the only two

DBS service, SES ASTRA owns and operates Europe’s largest fleet of Ku-band satellites, which support the operation of multiple DBS offerings by major media groups across the European continent.

⁷ In particular, the company owns approximately 18% of Gilat Satellite Networks, which in turn has a significant ownership interest in StarBand Communications, one of only two current U.S. providers of SBBS. Moreover, SES ASTRA is the operator of the world’s first commercial Ka-band satellite payload through its *BroadBand Initiative* (“BBI”) venture in Europe on the Astra 1H satellite. SES AMERICOM also holds Ka-band satellite licenses in the United States and is building Ka-band satellites to provide SBBS services to U.S. consumers.

⁸ 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, April 25, 2002.

current U.S. DBS providers; as discussed below, safeguards are necessary to ensure that this DBS combination does not foreclose entry by potential new DBS competitors, such as content providers offering services via the AMERICOM2Home platform. Moreover, the NEW EHOSTAR 1 satellite may raise interference issues with respect to the AMERICOM2Home satellite at 105.5° W.L., which has International Telecommunication Union (“ITU”) priority over NEW EHOSTAR 1. As shown below, the NEW EHOSTAR 1 Application lacks sufficient information to assess these interference issues and related questions.

II. THE NEW EHOSTAR 1 APPLICATION IS LACKING FUNDAMENTAL DATA AND ANALYSIS NECESSARY TO ASSESS THE APPLICANTS’ TECHNICAL QUALIFICATIONS.

The Commission’s technical rules for DBS space stations include a requirement, contained in Section 100.21 of the Commission’s rules, that an analysis be performed with respect to the sharing criteria in Annex 1 of Appendices 30 and 30A of the ITU Radio Regulations, in order to determine if the services of other Administrations, or other U.S. systems, are affected by the proposed system.⁹ One component of this analysis assesses the potential impact of a new space station on other DBS space stations in the same ITU region.¹⁰ If the results of the analysis indicate that a space station having

⁹ Appendices 30 and 30A of the ITU Radio Regulations contain the Region 2 “BSS Plan” and associated “Feeder Link Plan” (collectively, the “Plans”) that assign orbital slots and frequencies for broadcasting-satellite service (“BSS”) satellites. BSS is the terminology used by the ITU and internationally to describe what is referred to in the United States as “direct broadcast satellite” or “DBS” service. Appendices 30 and 30A include procedures for modifying the Plans to accommodate systems, such as NEW EHOSTAR 1, whose technical parameters differ from the planned assignments.

¹⁰ The ITU uses the MSPACE computer program to perform its interference assessment. The Commission has accepted MSPACE analysis (in the case of DirecTV 4S, for

ITU priority over the new space station is affected by the new space station, coordination is required.

The NEW EHOSTAR 1 Application does not contain interference analysis performed with respect to the sharing criteria in Appendices 30 and 30A of the ITU Radio Regulations. In particular, the Application does not present the results of analysis to identify which, if any, DBS networks are affected by the proposals contained in the Application.¹¹ The Application explains that this part of the analysis “will be performed in the near future for NEW EHOSTAR 1 to determine if coordination with other administrations is required,” and “will be provided at a later date.”¹² To SES AMERICOM’s knowledge, this analysis has never been provided to the Commission.

The results of the Appendix 30/30A analysis are necessary to determine the technical qualifications of the Applicants with respect to the instant Application. Indeed, this analysis is essentially the only technical qualification the Commission imposes on DBS applications. Moreover, the results assist the Commission in ascertaining whether USABSS-16 (the ITU name for NEW EHOSTAR 1) can be successfully entered into the BSS Plan for Region 2. It should be noted that the original U.S. Plan assignments at 110° W.L. are for eastern U.S. beams (i.e., they do not cover the

example), or alternative interference analysis (in the cases of the MCI satellites at 110° W.L. and EchoStar 6 at 119° W.L., for example), such as carrier-to-interference ratio calculations, in its assessment of the potential impact of a proposed DBS system.

¹¹ The Applicants did submit additional technical information on the characteristics of NEW EHOSTAR 1 following submission of the Application. See note 2 supra. However, this submission did not include any of the Appendix 30/30A analysis, or any technical description of the feeder link portion of the system.

¹² NEW EHOSTAR 1 Application at 12, Technical Annex at 3.

entire CONUS, but just the eastern portion),¹³ and the previously licensed U.S. networks at this location employ full CONUS beams. NEW ECHOSTAR 1, with its spot-beam design, exceeds the equivalent isotropically radiated power (“EIRP”) of both previously-licensed U.S. CONUS networks and the eastern U.S. beams of the original U.S. Plan assignments at this orbital location in certain geographical areas, particularly in the western U.S.¹⁴ Therefore, the need to coordinate this proposed satellite with satellites having ITU priority, and the feasibility of doing so, are matters that must be addressed prior to licensing.

With respect to the showing required, Appendix 30/30A dictates that the analysis be conducted with respect to all Plan assignments and modifications to the Plans having higher priority than the new proposed modifications. As the Commission is aware, the Radiocommunication Bureau of the ITU (the “BR”) is experiencing a significant backlog in publishing proposed modifications to the Plans, and, until recently, data on proposed modifications having a higher priority than a new proposed modification was often unavailable. However, the BR now makes publicly available information on the proposed modifications to the Plan that have not yet been processed and officially published by the BR. To be useful, the interference analysis for

¹³ See, e.g., EchoStar Satellite Corp, DA 02-1163, at ¶ 3 & n.4 (Satellite Div., May16, 2002).

¹⁴ For example, USABSS-6 (the U.S. proposed modification to the Region 2 Plan at 110.2° W.L., which has the higher EIRP of the two U.S. modifications at the 110° W.L. nominal orbit location) has an EIRP of approximately 51.3 dBW towards southern California. NEW ECHOSTAR 1 spot beam #5 (US16BS05) towards southern California has a maximum EIRP of 54.2 dBW (see Tables 1 and 2 of the Appendix 4 information for USABSS-16, NEW ECHOSTAR 1 Technical Supplement at 4-6).

USABSS-16 should contain results showing the impact of that satellite on all prior proposed modifications.¹⁵ This includes the United Kingdom ITU filing for the AMERICOM2Home satellite to be placed at 105.5° W.L. (identified for ITU purposes as “USAT-S1”).

In addition to interference analyses, other important technical information is missing from the NEW ECHOSTAR 1 Application as well. Notably, the NEW ECHOSTAR 1 Technical Supplement does not contain any information on its feeder links. Both the Appendix 4 information describing the technical characteristics of the feeder links, and the interference analysis in accordance with Annex 1 of Appendix 30A, are missing.¹⁶ The Appendix 4 information serves as a basic technical description of the feeder links, and is necessary to perform any interference analyses.¹⁷ As a result, neither the Commission nor other interested parties can perform an interference analysis of the proposed system.

Finally, not all downlink information is provided. For instance, there is no technical description of the 18 x 22-inch receiving antenna specified in the Application, a

¹⁵ In the SES AMERICOM Petition, SES AMERICOM included MSPACE results for the proposed 105.5° satellite with respect to all Plan assignments and all proposed modifications for which information was publicly available, regardless of whether the proposed modifications had been formally published by the BR. SES AMERICOM Petition, Technical Appendix at 30.

¹⁶ The only technical information available on the NEW ECHOSTAR 1 feeder links is provided in the original Technical Annex (in the original application), which does not contain enough information to perform any technical analysis.

¹⁷ Feeder link information is required to perform an uplink interference analysis. In addition, to perform an MSPACE analysis, which is an “overall” (considering uplink and downlink simultaneously) analysis, information on both the uplink and downlink is required.

required element of the downlink Appendix 4 information.¹⁸ Similarly, although the Technical Supplement refers to the service area diagram (see Appendix 4, C.11.b), the actual diagram is not contained in the filing.

For the above reasons, the NEW ECHOSTAR 1 Application is lacking fundamental technical data required to assess the technical qualifications of the Applicants' proposal. The Commission should therefore consider the Application incomplete, and defer processing of the Application, until this critical information is submitted by the Applicants.

III. THE COMMISSION SHOULD REQUIRE NEW ECHOSTAR TO GRANT TO COMPETING PROVIDERS ACCESS TO LOCAL PROGRAMMING TRANSMITTED ON THE NEW ECHOSTAR PLATFORM.

New EchoStar proposes to use the NEW ECHOSTAR 1 satellite in the provision of local television programming to all 210 Designated Market Areas ("DMAs") in the United States.¹⁹ According to New EchoStar, EchoStar and DIRECTV today each transmit numerous identical channels, and "[c]onsumers will benefit from the massive increase in Direct Broadcast Satellite ('DBS') capacity that will result from the elimination of this duplicative programming."²⁰ According to the NEW ECHOSTAR 1 Application, "only New EchoStar will be able to undertake this 'Local Channels, All

¹⁸ See NEW ECHOSTAR 1 Application at 2 (describing a new satellite dish that will enable receipt of signals from New EchoStar's multiple orbital locations). For Appendix 30 purposes, Appendix 4 requires submission of information on the receive earth station characteristics (see Appendix 4, C.10.b - C.10.c.6).

¹⁹ To the extent that New EchoStar uses other satellites to transmit local television channels, the comments herein apply equally to such other satellites. For this purpose, these comments are being submitted in the Commission's docket relating to the Hughes/EchoStar merger.

²⁰ NEW ECHOSTAR 1 Application at 2.

Americans' service plan because only the merger 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.”²¹

A. Requiring Open Access to the New EchoStar Local Channels Platform is in the Public Interest.

SES AMERICOM agrees that, if the Commission grants the NEW ECHOSTAR 1 Application, only New EchoStar would be able to provide local television programming to all Americans via satellite. After the merger of EchoStar and Hughes, no other DBS provider would be in a position to amass the 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 the Commission is required to ensure that it is used in a manner that serves the public interest. There are insufficient spectrum and orbital resources available for a competitor of New EchoStar's to compete effectively with the local channels platform being proposed in the NEW ECHOSTAR 1 Application. The Commission should thus require New EchoStar 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

²¹ Id. at 3.

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 market 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. 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.

B. Open Access Would Facilitate the Development of Competing Services, such as the AMERICOM2Home Platform.

Imposing an access condition on the grant of the NEW ECHOSTAR 1 Application would facilitate in important ways the development of DBS offerings that compete against those of New EchoStar, such as the one being developed by SES AMERICOM. While a system such as the AMERICOM2Home platform is clearly in the public interest, those who seek to offer programming over its system²² will have enormous difficulty competing against New EchoStar unless they can offer the same local television programming in each DMA that New EchoStar will be able to provide.

²² As discussed in the SES AMERICOM Petition (at 2, 5, 14-15), SES AMERICOM will not itself offer retail DBS services to consumers. Rather, it will provide DBS satellite capacity to third parties, which in turn will offer service to the public.

As EchoStar and DirecTV 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.

The stark reality, however, is that there are not enough spectrum and orbital resources available to permit AMERICOM2Home providers to offer a competitive local television package over the single satellite that they would have available for DBS services. Accordingly, in order to facilitate competition by AMERICOM2Home and other potential DBS market entrants, the Commission should allocate the limited DBS resources in an efficient manner that facilitates the development of such competing offerings.

C. Open Access to the New EchoStar Local Platform is Technically Feasible.

The Amercom2Home platform will exist on a satellite located at 105.5° W.L., which is directly between the orbital slots to be used by New EchoStar in the provision of DBS service. Accordingly, access to the New EchoStar local channels at 110° W.L. or other New EchoStar orbital slots would be technically feasible using a single, appropriately designed, customer receiving terminal. Subscribers to the programming offered on the AMERICOM2Home platform would not need to repoint their dishes in order to receive programming from the NEW ECHOSTAR 1 satellite. New EchoStar would have to provide, to SES AMERICOM and other requesting DBS providers, access to the technology necessary to enable subscribers of these competitors -- once each subscriber has agreed to pay for local television programming -- to decrypt

the local television signals being transmitted by NEW ECHOSTAR 1.

D. Congress and the FCC Have Adopted Similar Access Requirements in Other Areas.

The access requirement being proposed here by SES AMERICOM is analogous to the access requirements imposed on AOL and Time Warner in the context of their merger.²³ In that case, the combined company was required to allow at least three other Internet Service Providers -- in addition to AOL -- to offer service to AOL-Time Warner's cable customers over the AOL-Time Warner cable lines.²⁴ This requirement was viewed by the Commission as necessary to encourage competition in the broadband Internet access market in AOL-Time Warner's cable service areas.²⁵

Another analogy is provided by the approach to local exchange carriers ("LECs") taken by the Congress in the Telecommunications Act of 1996. Recognizing that incumbent LECs control bottleneck facilities essential for the development of competing alternatives, the Act mandates, for example, that competing carriers have "nondiscriminatory access to network elements on an unbundled basis" at "reasonable" rates, and that an incumbent LEC "offer for resale at wholesale rates" certain services that the LEC "provides at retail."²⁶

²³ Time Warner-AOL Order, 16 FCC Rcd at ¶¶ 17, 122, 126; America Online, Inc. and Time Warner, Inc., FTC Docket No. C-3989, Agreement Containing Consent Orders, Decision and Order, 2000 WL 1843019 (FTC) (Dec. 14, 2000) ("AOL-TW Consent Order").

²⁴ AOL-TW Consent Order.

²⁵ Id.

²⁶ 47 U.S.C. § 251(c)(3), (4).

The situation with respect to New EchoStar, after the merger, would be similar. The combined company, by virtue of its control over DBS orbital and spectrum resources, would effectively have a bottleneck position, as discussed above, that would block any potential competitor from offering all local channels in all DMAs. As with the incumbent LECs, however, there is a means available for opening the bottleneck, by requiring the unbundling of local television services from other New EchoStar channel offerings, and 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.

IV. CONCLUSION

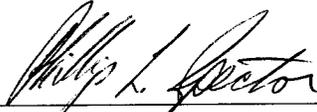
For the foregoing reasons, the Commission should defer processing of the NEW ECHOSTAR 1 Application until all technical information necessary to assess compliance with the Commission's Rules is provided. Only after such information is provided will the public, and ultimately the Commission, be able to make determinations regarding such critical issues as whether the proposed new system can be successfully coordinated with other, previously filed systems having priority for ITU purposes, and whether the proposed system can be successfully entered into the BSS Plan for Region 2.

Once the necessary technical information is provided and the Commission proceeds with processing of the Application, the Commission should take steps to ensure that DBS competitors will have an opportunity to emerge. To this end, the Commission should, as a condition of any grant of the NEW ECHOSTAR 1 Application, and as a condition to any approval of the EchoStar/Hughes merger, require that New EchoStar

offer to requesting DBS providers, on reasonable terms and conditions, access for resale purposes to the local television channels being offered on the New EchoStar platform.

Respectfully submitted,

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May 20, 2002

UNSWORN DECLARATION

NANCY J. ESKENAZI hereby states the following:

1. I am Vice President and Associate General Counsel of SES AMERICOM, Inc., a petitioner before the Federal Communications Commission for a declaratory ruling that it is in the public interest for SES AMERICOM, Inc. to offer satellite capacity to third parties for direct-to-home services to customers in the United States and certain British Overseas Territories in the Caribbean.
2. I have reviewed the application of EchoStar Satellite Corporation and Hughes Electronics Corporation for authority to launch and operate NEW ECHOSTAR 1.
3. I have reviewed the Comments of SES AMERICOM, Inc. to which this declaration is attached.

I hereby verify under penalty of perjury that the facts stated herein and in the Comments of SES AMERICOM, Inc. are true and correct to the best of my knowledge and belief.

Executed this 20th day of May, 2002


Nancy J. Eskenazi

**CERTIFICATION OF PERSON RESPONSIBLE FOR
PREPARING ENGINEERING INFORMATION**

I hereby certify that I am a technically qualified person responsible for preparation of the engineering information contained in these Comments of SES AMERICOM, Inc., that I am familiar with Parts 25 and 100 of the Commission's Rules, and that I have either prepared or reviewed the engineering information submitted in these Comments, and that it is complete and accurate to the best of my knowledge.

By:



Kimberly M. Baum
Manager, Satellite Market
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SES AMERICOM, Inc.

May 20, 2002

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2002, a copy of the foregoing Comments of SES AMERICOM, Inc., was served via first class United States mail, postage prepaid, on the following:

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