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

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

To: The Commission

RESPONSE OF SES AMERICOM, INC. TO JOINT OPPOSITION AND REPLY COMMENTS

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SUMMARY

In its Comments in this proceeding, SES AMERICOM asked the Commission to defer processing of the NEW ECHOSTAR 1 Application until the fundamental technical data and analysis required under Section 100.21 of the Commission's Rules are provided by the Applicants. In their Opposition, the Applicants brush aside this concern, and argue that the data and analysis are irrelevant to the satellite proposed by SES AMERICOM at 105.5° W.L. (known for ITU purposes at "USAT-S1"), despite the fact that USAT-S1 has ITU priority over NEW ECHOSTAR 1. According to the Applicants, SES AMERICOM has no standing in this proceeding because, even if the analysis shows that USAT-S1 is affected by NEW ECHOSTAR 1, USAT-S1 is not entitled to protection.

The Applicants have provided no justification for the Commission to depart from clear Commission and ITU rules and precedent requiring coordination with an affected system having higher priority. Moreover, the Applicants' arguments are directly contrary to the positions that they have taken with respect to certain of their previous satellite applications, and with the requirements and conditions that have been explicitly applied by the Commission in granting previous satellite licenses to the Applicants. Similarly, the Applicants' contentions that USAT-S1 is not subject to interference protection are baseless. SES AMERICOM's proposal for the use of that satellite is fully consistent with ITU rules, and all steps required to entitle that satellite to protection are being taken by SES AMERICOM and by the licensing Administration for the USAT-S1 satellite. The Applicants should not be permitted to violate the applicable coordination requirements.

The FCC should therefore reject the Opposition and (1) defer processing of the NEW ECHOSTAR 1 Application until the necessary data and analysis are submitted, and interested parties are given a meaningful opportunity to comment on such submission(s), and (2)

authorize the NEW ECHOSTAR 1 satellite only with an explicit condition that the Applicants must coordinate with all systems having higher ITU priority that are potentially affected by NEW ECHOSTAR 1. These actions are necessary to prevent unresolved interference issues from thwarting the introduction of competitive DBS services in the U.S. marketplace.

In addition, as detailed in the SES AMERICOM Comments, important public interest issues are raised by the NEW ECHOSTAR 1 Application in the context of the proposed merger of Hughes and EchoStar. This merger would result in the consolidation of almost all of the spectrum and orbital resources necessary to provide a competitive DBS service into one entity. The FCC should mandate that these resources be used in a manner that serves the public interest, by requiring the merged entity to make the local television channels in the "Local Channels, All Americans" plan available to competing DBS providers on wholesale, commercially reasonable terms and conditions.

The Opposition fails to dispute the key factual points made by SES AMERICOM in support of this open access requirement. Moreover, the Applicants have provided no valid reason why the Commission should not impose such an open access condition on the merger, in order to encourage competition in the DBS industry. Accordingly, the Commission should require New EchoStar to allow competing DBS providers to resell the local television channels in the Local Channels, All Americans plan.

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TO JOINT OPPOSITION AND REPLY COMMENTS

SES AMERICOM, Inc. ("SES AMERICOM"), by its attorneys, hereby responds to the Joint Opposition and Reply Comments (the "Opposition") filed by EchoStar Satellite Corporation and Hughes Electronics Corporation (the "Applicants") on May 30, 2002, with respect to their application for authority to launch and operate a direct broadcast satellite service ("DBS") satellite referred to as "NEW ECHOSTAR 1" at the 110° W.L. orbital location.[1] The Opposition replies, in part, to comments filed by

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[1] 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 (the "NEW ECHOSTAR 1 Application"), and Technical Supplement, March 28, 2002 (the "NEW ECHOSTAR 1 Technical Supplement"); Public Notice, DA 02-922 (Apr. 19, 2002) (the "NEW ECHOSTAR 1 Public Notice").

The NEW ECHOSTAR 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 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"). NEW ECHOSTAR 1 Application at 4-5. See also EchoStar Communications Corporation, General Motors

SES AMERICOM on May 20, 2002, in the instant proceeding (the "SES AMERICOM Comments").

I. INTRODUCTION

As demonstrated in the SES AMERICOM Comments, the NEW ECHOSTAR 1 Application is lacking fundamental technical data and analysis required under Section 100.21 of the Commission's Rules, and therefore processing should be deferred until such information is provided by the Applicants. In their Opposition, the Applicants brush aside this concern, and argue primarily that the data and analysis are irrelevant to the satellite proposed by SES AMERICOM at 105.5° W.L. (known for International Telecommunication Union ("ITU") purposes as "USAT-S1"), despite the fact that USAT-S1 has ITU priority over NEW ECHOSTAR 1.[2] The Applicants argue

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Corporation, and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control. 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. NEW ECHOSTAR 1 Public Notice at 3.

[2] On April 25, 2002, SES AMERICOM filed a petition (the "SES AMERICOM Petition") with the Commission 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 in the Caribbean. SES AMERICOM will offer this capacity on a satellite licensed by the Government of Gibraltar at 105.5° West Longitude ("W.L."). The satellite will use the 12.2-12.7 GHz downlink frequencies and 17.3-17.8 GHz feeder link frequencies that have been allocated and are currently used in Region 2 (including the United States) for DBS. SES AMERICOM proposes to provide a platform -- to be known as "AMERICOM2Home" -- for others to offer a broad range of innovative services to consumers in the United States and certain British Overseas Territories in the Caribbean. SES AMERICOM, while providing DBS transponder capacity to third parties, will not itself offer any retail or consumer services. See 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; Public Notice, Report No. SAT-00110 (May 17, 2002).

that, even if the analysis shows that USAT-S1 is affected by NEW ECHOSTAR 1, USAT-S1 is not entitled to protection, and therefore SES AMERICOM has no standing in this proceeding.[3]

As detailed herein, the Opposition provides no reason whatsoever why the Commission should depart from its clear rules and precedent in order to ignore, as the Applicants request, the requirement under Commission and ITU rules of coordination with an affected system having higher priority. The Commission should therefore reject the Opposition and (1) defer processing of the NEW ECHOSTAR 1 Application until the necessary data and analysis are submitted by the Applicants, and interested parties are given a meaningful opportunity to comment on such submission(s), and (2) proceed to authorize the NEW ECHOSTAR 1 satellite only with an explicit condition that the Applicants must coordinate with all systems having higher ITU priority that are potentially affected by their proposed satellite. The requested action is necessary to prevent unresolved interference issues from thwarting introduction of competitive DBS services in the U.S. marketplace.

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[3] Opposition at 11. One argument raised by the Applicants in response to the SES AMERICOM Comments can be quickly laid to rest. The Applicants appear to interpret SES AMERICOM's arguments that the Applicants have failed to meet the Commission's technical requirements (in Section 100.21 of the Commission's Rules), as an attack on the Applicants' technical abilities to launch and operate a satellite. SES AMERICOM has nowhere implied, as the Applicants state (see Opposition at 11, 13) that the Applicants are in any way lacking in technical resources or expertise with respect to operation of DBS satellites, such as NEW ECHOSTAR 1. The Applicants' protests in this regard are a red herring. As the Applicants well know, technical ability is a totally separate issue from the requirement to comply with all of the Commission's technical requirements for DBS systems. Unless these requirements are met, the Applicants are not technically qualified for a license for NEW ECHOSTAR 1.

In addition, as explained in the SES AMERICOM Comments, important public interest issues are raised by the NEW ECHOSTAR 1 Application in the context of the proposed merger of Hughes and EchoStar. This merger, if approved, would result in the combination of the only two current U.S. DBS providers. 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. The Applicants have provided no valid argument as to why they should not be required to make the channels in the "Local Channels, All Americans" plan available to competing DBS providers, for resale purposes, on commercially reasonable terms and conditions, in order to maintain competition in the DBS industry.

II. THE COMMISSION SHOULD DEFER PROCESSING OF THE NEW ECHOSTAR 1 APPLICATION UNTIL THE APPLICATION IS MADE COMPLETE.

As discussed in the SES AMERICOM Comments, the Commission's Rules for DBS space stations specify, in Section 100.21, that interference analysis be conducted for any proposals, such as the Applicants', which would require modification of the Region 2 Plans for BSS systems.[4] More specifically, Section 100.21 requires an "adequate showing" that the proposal "does not result in interference to other operational or planned systems in excess of that determined in accordance with" the criteria now

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[4] 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 ECHOSTAR 1, whose technical parameters differ from the original Plan assignments.

incorporated into Annex 1 of Appendices 30 and 30A of the ITU Radio Regulations. In other words, if the proposal does not correspond to the technical characteristics of an original BSS Plan assignment, the applicant must demonstrate that the proposal is capable of being entered into the Plan in accordance with the modification procedures of Appendix 30 and 30A.[5]

Neither the NEW ECHOSTAR 1 Application nor the March 28, 2002, Technical Supplement contains any interference analysis whatsoever with respect to the sharing criteria in Appendices 30 and 30A of the ITU Radio Regulations. In particular, they do not present the results of analysis identifying which, if any, BSS networks are affected by the proposals contained in the Application. The Application explained that this part of the analysis "will be performed in the near future for NEW ECHOSTAR 1 to determine if coordination with other administrations is required," and "will be provided at a later date."[6]

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[5] 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 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.

[6] NEW ECHOSTAR 1 Application at 12, Technical Annex at 3. In the absence of data and analysis necessary to determine compliance with Section 100.21 of the Commission's Rules, it is not clear why this application was put on public notice as "acceptable for filing." As explained in the SES AMERICOM Comments, not only did the Applicants fail to provide the necessary interference analysis, but they also failed to provide information that would be needed for the Commission or other interested parties to perform the interference analysis themselves. In particular, Appendix 4 information describing the technical characteristics of the feeder links, which is necessary to perform an MSPACE analysis or uplink interference analysis, was not included in either the Application or Technical Supplement. See SES AMERICOM Comments at 7.

In their Opposition, filed just five days ago, the Applicants supplemented their technical showing. However, that new technical showing (the "Revised Technical Annex") still fails to contain any analysis whatsoever on the impact of NEW ECHOSTAR 1 on other Region 2 BSS systems. Therefore, the Applicants have still not demonstrated whether USABSS-16 (the ITU name for NEW ECHOSTAR 1) exceeds the Appendix 30 criteria with respect to Region 2 BSS systems, and if so, how the Applicants propose to ensure that USABSS-16 can be eventually entered into the BSS Plan for Region 2.[7] The Applicants continue to indicate that the necessary analysis "will be performed,"[8] without any indication as to when this task will be completed, or when the results will be submitted to the Commission.[9]

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[7] As explained in the SES AMERICOM Comments, at 5-6, the original U.S. Plan assignments at 110° W.L. are for eastern U.S. beams (i.e., they do not cover the entire CONUS, but just the eastern portion), 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 United States. Therefore, the ability of NEW ECHOSTAR 1 to meet the relevant Appendix 30/30A criteria for entry into the Plan, or to coordinate in cases where these criteria are not met, are legitimate concerns that must be addressed prior to licensing.

[8] NEW ECHOSTAR 1 Revised Technical Annex at 21, 29. Even in the Revised Technical Annex, not all downlink information is provided. For instance, there is still no technical description of the 18 x 22-inch receiving antenna specified in the Application, a required element of the downlink Appendix 4 information. 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.

[9] It has not been possible during this public notice period for interested third parties to perform such analysis themselves. Key technical data – the electronic version of the satellite antenna gain contours, or "GXT" files – which EchoStar stated in its Technical Supplement had been submitted for the record (see Technical Supplement,

For the above reasons, the NEW ECHOSTAR 1 Application is lacking fundamental technical data required to assess the Applicants' compliance with the Commission's technical requirements for DBS systems. The Commission should therefore consider the Application incomplete, and defer processing of the Application, until this critical information is submitted by the Applicants. Furthermore, once this information is submitted by the Applicants, interested parties should have a meaningful opportunity to review and comment on the submissions.

III. THE COMMISSION SHOULD INCLUDE A CONDITION IN ANY NEW ECHOSTAR 1 AUTHORIZATION REQUIRING APPLICANTS TO COORDINATE WITH AFFECTED SYSTEMS.

A. The Relief Requested by SES AMERICOM Is Fully Consistent with the Commission's DBS Rules, Policies and Precedent.

The Applicants argue that "the relative ITU 'priority' of SES's satellite vis-à-vis other U.S. DBS satellites is irrelevant to the consideration of the Application."[10] This is clearly not the case. As discussed further below, the Commission's technical rules and procedures for DBS systems essentially incorporate the ITU procedures for modifying the Region 2 BSS Plan to accommodate systems, such as NEW ECHOSTAR

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cover letter, indicating that enclosed is a CD-ROM as referenced in Item B.3(g)(5) of the Technical Annex) could not be obtained from the Commission, and, despite requests, was not made available to SES AMERICOM by EchoStar or DIRECTV. Further, unlike the GXT files for USAT-S1 (see IFIC 2466), the files were not available publicly on an ITU IFIC, as part of the ITU's pre-published backlog information. These files are necessary to perform an analysis with the MSPACE software used by the ITU to determine whether coordination is required with other Region 2 DBS/BSS systems pursuant to Section 2 of Annex 1. SES AMERICOM only recently received these files from the Commission. Moreover, as noted above, feeder link information necessary for MSPACE was provided by the Applicants only five days ago, in the Applicants' Opposition. Therefore, SES AMERICOM has not been able to perform an MSPACE analysis for the NEW ECHOSTAR 1 satellite.

[10] Opposition at 12.

1, whose technical parameters differ from the Plan assignments. These procedures are contained in Appendices 30 and 30A of the ITU Radio Regulations, and the Commission has followed and relied on those procedures with respect to every prior U.S. DBS satellite, including EchoStar's and DIRECTV's satellites.

As also explained below, those procedures prescribe coordination in the case of proposed modifications that "affect" assignments or proposed modifications having higher filing priority.[11] Moreover, the Commission has routinely and clearly stated in its authorizations in relevant cases that its DBS licensees must coordinate with systems that have been or may be identified as affected under ITU rules. Finally, EchoStar itself has acknowledged the applicability of these rules to its proposed systems, and has even proposed that a coordination condition be placed on one of its prior licenses.

1. The Commission's Rules require U.S. DBS licensees to adhere to the Plan modification procedures in Appendix 30 of the Radio Regulations.

As the Commission knows, the ITU rules for Region 2 BSS systems contain original Plan assignments and a detailed procedure for introducing modifications to the Plan. The modification procedure is a critical aspect of the Region 2 BSS Plan. Indeed, all of the current U.S. operational DBS systems constitute modifications to the Plan, including the operational and proposed EchoStar and DIRECTV satellites.

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[11] The ITU assesses the potential impact of a new DBS system on previously-filed DBS systems in the same ITU region. If the results of the analysis indicate that a space station having ITU priority over the new space station is affected by the new space station, coordination is required. In addition, Appendices 30 and 30A specify various other calculations to determine whether other co-frequency services, such as systems in the fixed-satellite service in another region, are affected.

As explained in the SES AMERICOM Comments and in Section II above, the Commission's Rules, in Section 100.21, clearly specify that interference analysis be conducted for any proposals that would require modification of the Plans. The Commission's Rules contain no other technical requirements for DBS satellites. Clearly the intent is to follow the rules and procedures adopted by the ITU for this internationally planned band. Moreover, as detailed in Section III.A.3 below, the Commission's statements and actions in processing U.S. DBS applications leave no room for doubt that this is the case.

2. The Plan modification procedures require coordination when a proposed modification affects a previously-filed proposed modification, regardless of whether the Plan modification procedure has been completed for the higher priority system.

According to Appendices 30 and 30A, all Plan assignments and modifications to the Plans having higher priority than the new proposed modification should be taken into account in these analyses.[12] There is no distinction made between modifications that have been successfully entered into the Plan and proposed modifications that remaining pending before the ITU.

Notwithstanding this provision, the Applicants argue that the use of the term "operational and planned systems" in Section 100.21 refers only to systems that are operational or are already incorporated into Appendix 30, to the exclusion of proposed

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[12] Specifically, Section 4.2.3 (of Article 4) of Appendix 30 requires that administrations proposing new systems must coordinate with administrations whose "... c) . . . proposed modifications to the Plan were received previously" and " . . . g) whose services are considered to be affected." Section 4.2.5 specifies that systems are affected if the criteria in Annex 1 of Appendix 30 are exceeded.

modifications.[13] Such an interpretation cannot be supported within the context of Appendix 30 and its annexes, or the Commission's historical application of Section 100.21.

First, it is unquestionably the case that a proposed modification has a right to be taken into account by later-filed proposed modifications.[14] Indeed, given the substantial backlog in the processing of proposed modification, and hence the very long pendency of proposed modifications, this is a right that all U.S. DBS licensees, including EchoStar and DIRECTV, rely upon.[15] In fact, to date only four U.S. proposed modifications have been formally entered into the Plan (USABSS-1, -2, 2A and 3).[16] The Applicants provide no logical reason why the Commission's Rules would depart from such a fundamental and important principle of Appendices 30 and 30A.

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[13] Opposition at 13.

[14] See Appendix 30, Section 4.2.3 c).

[15] Moreover, nowhere in Appendix 30 or the Commission's Rules is any distinction made between modifications filed at original Plan locations and those filed for new orbital locations. As discussed in Section III.B.1 below, the United States has actively applied the Article 4 procedure for modifications to the Regions 1 and 3 Plans, as well as the Region 2 Plans, at locations that did not exist in either of the original Plans. Furthermore, the term "modification" to the Plan is somewhat of a misnomer. To SES AMERICOM's knowledge, no U.S. BSS modification to the Plan has actually modified any original U.S. Plan assignments. Instead, they are filed as additional frequency assignments, in addition to the original U.S. Plan assignments at the same location. As such, all of the U.S. modifications are the same as USAT-S1 in view of the ITU, i.e., additional frequency assignments pursuant to Appendix 30, Section 4.2.1(b) and not modifications of original Plan assignments pursuant to Section 4.2.1(a). See, e.g., FCC letter to Director, Radiocommunication Bureau (the "BR" or "Bureau") (Feb.12, 1996), initiating the Article 4 modification process for USABSS-5 and -6 (provided on ITU IFIC 2463). In the opening sentence, the FCC states that "the United States is applying the Article 4 procedure...to modify the Region 2 BSS and Feeder link Plan to *add* two assignments." (emphasis added)

[16] See ITU Space Network List, dated May 28, 2002.

Finally, the Applicants argue that their interpretation is consistent with the Commission's rule requiring a fixed-satellite service ("FSS") applicant to make a showing of compliance with the Commission's two-degree spacing policy for that service.[17] The Applicants claim that SES AMERICOM seeks more rights in the BSS planned band than it would have in an unplanned band.[18] However, the Applicants' comparison is without foundation. The Commission has detailed technical rules governing the unplanned FSS bands. A specific rule, 47 C.F.R. § 25.140(b)(2), requires a showing of compliance with the two-degree spacing policy. There is no analogous rule in the BSS context. On the contrary, it is the very fact that the BSS is a planned band, and that the Commission's Rules follow the procedures adopted for that Plan, that dictates an interpretation of Section 100.21 based on unambiguous Appendix 30 provisions.

The Applicants' reading of Section 100.21 of the Commission's Rules would leave an unwarranted and problematic gap in the Commission's procedures. It would permit licensing of a satellite that could be incapable of being entered into the Region 2 BSS Plan, which would thwart the purpose of Section 100.21. It would render unclear the status of all of the DBS applications currently before the Commission, and the status of all but three of the operational U.S. DBS systems, none of which have already been entered into the Plan.[19] This cannot reasonably be argued to have been the intent of

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[17] Opposition at 14.

[18] Id.

[19] As noted above, four U.S. modifications to the Plan have successfully completed the Plan modification procedure (Article 4 of Appendix 30) – USABSS-1, 2, 2A, and 3. However, because the satellite associated with USABSS-1 is no longer at 101° W.L.

a rule that, on its face, quite clearly is meant to incorporate the ITU procedures into the Commission's Rules.

3. The Commission has recognized the coordination requirement in its DBS authorizations.

The Commission has consistently emphasized this coordination requirement in its authorizations. In the Commission's authorization of EchoStar 4, for example, the Commission noted that the proposed system deviated from the standards of Appendix 30, and stated that it would therefore need to initiate modification of the Plan.[20] More generally, the Commission stated that "[o]ur rules effectively require that licensees meet the limits specified in Annex 1 to Appendix S30," and that, "[i]f the limits in Annex 1 to Appendix S30 are exceeded by a proposed system (i.e. proposed modification to the Plans) according to the ITU's analysis, the agreement of all affected administrations must be obtained."[21]

In authorizing EchoStar 6 at 119.05° W.L., the Commission also noted that the proposed satellite would affect systems of other Administrations, and stated clearly that the licensee must therefore coordinate with any affected Administration.[22]

(having been moved to 110° W.L., and now identified as USABSS-1M), only three operational U.S. BSS systems have been incorporated into the Plan.

[20] EchoStar Satellite Corporation, Directsat Corporation, EchoStar DBS Corporation, 13 FCC Rcd, 8598, 8603 (Int'l Bur., Apr. 27, 1998) ("EchoStar 4 Order").

[21] Id. at 8606. In particular, EchoStar 4 exceeded the coordination trigger specified in Annex 1 to Appendix 30 to protect terrestrial services in eastern Siberia. The Commission thus stated that EchoStar must coordinate with the affected Administration. Id.

[22] EchoStar Satellite Corporation, 15 FCC Rcd 23636, 23640-1 (Int'l Bur., Nov. 27, 2000) ("EchoStar 6 Order").

Specifically, the Commission stated that "the operations of EchoStar 6 exceed the power levels allowed in Section 100.21," and that "Section 100.21 requires that DBS satellites be operated in accordance with Appendices 30 and 30A of the ITU Radio Regulations."[23] As discussed further below, EchoStar, recognizing that it affected other Administration(s) pursuant to Appendices 30 and 30A, requested a waiver of 100.21. The Commission granted EchoStar's waiver request in this case, emphasizing that EchoStar acknowledged that it must coordinate with any affected Administration.[24] EchoStar was "required to provide continuing documentation as necessary for the international coordination of EchoStar 6."[25]

In the case of EchoStar 7, the outcome of the Appendix 30/30A studies is not clear, at least from the public record. The Commission did not address any analysis in the license, but stated that if systems were affected pursuant to Appendices 30 and 30A, "the system must be coordinated with the affected systems or services."[26]

Ignoring these precedents contained in their own authorizations, the Applicants point only to the fact that an FCC license was granted for DIRECTV 4S

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[23] Id. at 23640.

[24] Id. at 23641. This is in sharp contrast to the instant scenario, in which the Applicants vehemently deny that any coordination is necessary. See, e.g., Opposition at 11.

[25] EchoStar 6 Order, 15 FCC Rcd at 23641.

[26] EchoStar Satellite Corporation, 17 FCC Rcd 894, 897 (Int'l Bur., Jan. 16, 2002). See also Application of EchoStar Satellite Corporation for Minor Modification of DBS Authorization, Launch and Operation Authority for EchoStar 7, File Nos. SAT-MOD-20010810-00071, SAT-A/O-20010810-00073, Technical Annex at 10, Appendix 3 to Technical Annex at 1 (filed August 10, 2001).

despite the fact that it affected some Canadian test points located in the United States.[27] However, this argument is essentially irrelevant; SES AMERICOM is not arguing that the Applicants should not be granted a license for NEW ECHOSTAR 1. Moreover, nowhere in its DIRECTV 4S authorization did the Commission deny Canada's rights to coordination, as the Applicants appear to argue.[28] Nor was DirecTV trying to evade coordination with prior affected systems. In its application, it stated that its interference analysis determined that coordination with Canada and Mexico would be required, and described the steps being taken to achieve successful coordination.[29]

In sum, the requirement for any U.S. DBS licensee to coordinate with any affected Plan assignment or proposed modification is well-entrenched in Commission rules and procedures. In this instance, the Commission should recognize this condition, in an explicit manner, particularly given the Applicants' neglect of this clear obligation in

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[27] Opposition at 15.

[28] DIRECTV Enterprises, Inc., 16 FCC Rcd 18530, 18532 (Int'l Bur., Oct. 26, 2001) ("DIRECTV 4S Order"). It should be noted that service in the U.S. from a Canadian-licensed DBS satellite was at the time, and remains, unlikely, given Canadian laws that prevent Canadian providers from satisfying the ECO-sat test, as required for entry into the U.S. market by a foreign-licensed DBS satellite. See Annex C of the "Policy Framework for the Provision of Fixed Satellite Services," published by Industry Canada in December 1998 (prohibiting the use of U.S.-licensed satellites to offer one-way subscription video programming service to the Canadian public). Nonetheless, the Commission stated that, if it allows Canadian DBS systems to provide service in the United States in the future, it will re-examine protection of the U.S. test points. DIRECTV 4S Order at 18532 n.16.

[29] DIRECTV Enterprises, Inc., Application for Authority to Launch and Operate DIRECTV 4S (USABSS-13), File No. SAT-LOA-20010518-00045, May 18, 2001, at 4. In fact, DIRECTV modified its application following coordination discussions with Telesat Canada. Letter from Gary Epstein, DirecTV Counsel, to Magalie Roman Salas, FCC Secretary, August 14, 2001.

their Application, Technical Supplement, and Revised Technical Annex, and their vehement efforts to deny its existence in their Opposition.

4. EchoStar itself has recognized the coordination requirement with respect to its prior licenses.

Until now, EchoStar has consistently recognized the need to coordinate with affected systems, without discrimination. For example, in EchoStar's request for a waiver of Section 100.21 with respect to its proposal to operate EchoStar 6 at 119.05° W.L., EchoStar acknowledged that its proposal may exceed the criteria of Section 2 of Annex 1 of Appendix 30, and committed to "coordinating with any affected Administration."[30] EchoStar even proposed that the waiver be "*conditioned, if necessary, on ESC's operation of EchoStar 6 in coordination with any affected Administration* and on a non-interference basis until such coordination is complete."[31]

Moreover, EchoStar's arguments regarding the status of proposed modifications are at odds with its treatment of other proposed modifications in various technical annexes filed in support of its applications. EchoStar appears routinely to assess whether its proposed system would affect, within the meaning of Appendices 30 and 30A, certain proposed modifications that are not in the Plan, and not necessarily published or operational, including foreign proposed modifications to serve the United States.[32]

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[30] EchoStar Satellite Corporation, Request of EchoStar Satellite Corporation for Waiver of Section 100.21 of the Commission's Rules, File No. DBS-88-01, August 3, 2000 ("EchoStar 6 Waiver Request"), at 4.

[31] Id. at 5 (emphasis added).

[32] See, e.g., Revised Technical Annex, Appendix 3, at 1-2; EchoStar Satellite Corporation, Application for Minor Modification of DBS Authorizations, Launch and

It is unclear why EchoStar has performed analysis with respect to proposed modifications in the past, and committed to coordination with respect to affected Administrations, yet now claims, in concert with DirecTV, that Commission rules and precedent do not require such analysis or coordination in accordance with ITU rules.

5. Proper recognition of the coordination requirement in any NEW ECHOSTAR 1 authorization is fully warranted.

The Applicants note that the Commission already places a formal condition in each DBS license, providing that, until the Region 2 BSS Plan and its associated Feeder Link Plan are modified to include the technical parameters of an authorized U.S. DBS satellite, the satellite is not guaranteed protection from systems licensed by other Administrations operating in accordance with the ITU Radio Regulations and shall cause no greater interference to such operating systems than that which would occur from the current U.S. Plan assignments at the relevant orbital location.[33] The Applicants argue that such a condition is sufficient in this case as well.[34]

While SES AMERICOM recognizes the importance of this formal condition in satisfying, in part, the United States' international obligations with respect to the BSS Plans, this condition does not address the specific concerns of SES

Operation Authority, File Nos. SAT-MOD-20020607-00099, June 7, 2000 ("EchoStar 6 Application"), Appendix B at 2.

[33] Opposition at 16.

[34] Id.

AMERICOM.[35] The Applicants have failed to demonstrate, in their Application or Revised Technical Annex, that no BSS filing, whether domestic or foreign, having higher ITU priority than their own, is "affected." Moreover, the Applicants now appear to deny that any obligation to coordinate with such affected systems even exists. For these reasons, the Commission should clearly indicate in any NEW ECHOSTAR 1 authorization that the Applicants are required to coordinate with any potentially affected systems, including USAT-S1.

This request is not extraordinary or burdensome. Moreover, as noted above, EchoStar has itself proposed such a condition on its operation of EchoStar 6. If the Applicants do not seek coordination with potentially affected systems, such as USAT-S1, effective use of the available spectrum, and entry of competitive DBS systems, may be thwarted.

B. The AMERICOM2Home Proposal Is Fully Consistent with the ITU Radio Regulations.

The Applicants argue that, "unless and until the FCC grants SES's petition and allows it to serve the U.S. DBS market from a proposed foreign-licensed satellite, its

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[35] Moreover, if an affected BSS system (modification or Plan assignment) does become operational, the U.S. system would have to operate in a fashion so as not to exceed the interference from the original US Plan assignments (as no U.S. proposed modifications at 110° W.L. are in the Plan or even published). As the original Plan assignments at 110° W.L. cover only the eastern CONUS, this would mean full CONUS beams and any western spot beams would potentially need to be turned off. This is clearly not a desirable situation from the point of view of providing continuous service to U.S. DBS consumers. In the past, perhaps, this approach had a greater potential for success, as only U.S. proposed modifications to the Plan had been implemented. Now, however, as other Administrations begin implementing BSS systems (e.g., Canada), this condition may no longer meet the Commission's needs. Requiring coordination at an early stage, before any actual interference issues arise, would be the best way to ensure continued operation of U.S. DBS systems, no matter how many Plan assignments or modifications are brought into use.

petition has absolutely no status at the FCC for purposes of conducting interference analysis."[36] However, SES AMERICOM is not claiming that there is a coordination requirement based on its pending petition before the Commission; rather, the requirement arises by virtue of the ITU filing for the USAT-S1 satellite, submitted by the United Kingdom prior to the U.S. filing for the NEW ECHOSTAR 1 satellite. If the NEW ECHOSTAR 1 satellite affects the USAT-S1 satellite, coordination is required under Commission and ITU rules and precedent.

The Applicants go on to argue that SES AMERICOM's proposal to provide DBS service in the United States "may be inconsistent with the ITU Radio Regulations."[37] The Applicants' various attempts to denigrate the status of the USAT-S1 ITU filing, and thereby SES AMERICOM's standing in this proceeding, are baseless.

1. The status of the USAT-S1 filing is not contingent on prior U.S. consent under Article 23 of the Radio Regulations.

The Applicants' primary argument in this regard is that they are unaware of any agreement with the United States for USAT-S1 to serve the United States pursuant to Article 23 of the Radio Regulations.[38] The Applicants appear to claim that this Article requires that the United States grant prior consent before a foreign Administration can make an ITU filing providing U.S. coverage, or before such a filing can legitimately be considered in the Appendix 30 coordination process. However, the Applicants'

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[36] Opposition at 12.

[37] Id. at 14 n.21.

[38] Id.

interpretation of Radio Regulation Article 23, and its sub-provisions 23.13A-C, is counter to both the Radio Regulations themselves and long-standing U.S. policy.[39]

The Applicants' interpretation does not accurately reflect the process created at WRC-2000 to implement provision 23.13. Provision 23.13 does not require prior consent of the Administrations included in the service area before a filing can be made under Appendix 30, nor is any prior consent required before these filings are legitimately considered in the Appendix 30 coordination process. In fact, there is no mention of provision 23.13 in Appendix 30.[40]

To understand the process under 23.13, one must consider sub-provisions 23.13A, B and C, which were adopted by WRC-2000 to clarify and resolve previous controversy associated with 23.13. Pursuant to 23.13B and C, action with respect to 23.13 is taken only once the network is published by the Bureau.[41] At the time of publication, an Administration included in the service area has four months to object to

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[39] It is peculiar that the Applicants raise this argument now; to SES AMERICOM's knowledge, they have never attempted to do so in analogous situations. For example, in the EchoStar 6 application to operate from 119.05° W.L., EchoStar provided and discussed its ability to co-exist with Mexican and Canadian proposed modifications to serve the U.S., without ever claiming that the proposed modifications violate Article 23. EchoStar 6 Application, Appendix 2, at 2.

[40] The United States stated its view that the current separation of Appendix 30 and 23.13 should be maintained as part of CITEL's proposals to WRC-2000. See CITEL Administrations Proposal for the Work of the Conference, Addendum 1 to Document WRC-2000/14, dated March 27, 2000 (the "CITEL Proposal"), at 94.

[41] Given the processing backlog at the Bureau for Appendix 30 and 30A modifications of approximately six years, it will be some time before any filing made in 2001, such as USAT-S1, will be published. The Bureau only recently published an INTELSAT proposed modification to the Region 2 Plans that was filed in 1996 (INTELSAT KUEXT 304E). See ITU Space Network List and IFIC 2465 (dated March 19, 2002).

the inclusion of its territory.[42] So, it is not until the USAT-S1 filing is published that any action can be taken, and consequently addressed, pursuant to 23.13 and its sub-provisions. Importantly, this does not affect in any way the status of the proposed modification in the meantime.

It should be kept in mind that this same procedure is applicable to Appendix 30 filings made by the United States for systems covering the territory of other Administrations. Examples of such BSS filings under Appendices 30 and 30A are the submission corresponding to EchoStar 7, which includes a spot beam over Mexico; USASAT-29G through R, which include coverage of many Administrations throughout Regions 1, 2 and 3;[43] and any U.S. modification to the Plan to serve Puerto Rico and the U.S. Virgin Islands, due to the inherent coverage of other administrations in the Caribbean. Indeed, in defending its own proposals to cover foreign territories, EchoStar has stated that "the Commission has explicitly authorized and indeed encouraged service to other countries from U.S. DBS slots." [44] The Applicants cannot mean to argue that prior consent from foreign jurisdictions is required in these cases before the ITU filings

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[42] If comments are made, then the Administrations concerned enter into a bilateral negotiation to resolve the issue. Only if agreement cannot be reached during these negotiations does the Bureau modify the service area of the proposed system.

[43] In 1995, the United States filed for 12 modifications (two to the Region 2 Plans and ten to the Region 1 and 3 Plans) to provide BSS throughout the world. The United States actively pursued these modifications, culminating in the inclusion of five U.S. BSS systems in the Region 1 and 3 "List" for BSS downlinks. These modification were associated with the Application of Hughes Communications Galaxy, Inc., for Authority to Construct, Launch and Operate Galaxy/Spaceway, File Nos. 174-SAT-P/LA-95 – 181-SAT-P/LA-95 (filed Sept. 29, 1995).

[44] EchoStar Satellite Corp., Opposition of EchoStar Satellite Corporation and Motion to Strike, File Nos. DBS 88-01, DBS 88-02; SAT-MOD-20010810-00071; SAT-A/O-20010810-00073, Oct. 4, 2001, at 2.

have legitimate status. For example, the EchoStar 7 application and subsequent pleadings admit that the authorization of the Mexican Government is still required and give no indication of an agreement pursuant to 23.13.[45]

Furthermore, the Applicants' position is inconsistent with the long-standing policy of the United States Government to oppose any provisions that would restrict the free flow of information. Instead of promoting use of 23.13 to require prior consent, the United States has stated that 23.13 was "intended as a statement of good engineering practice to reduce BSS interference with the terrestrial services outside of the intended service area" by the Conference that originally adopted it.[46]

In addition, the United States had expressed concerns about potentially serious impediments to BSS systems with supranational coverage.[47] If prior consent were allowed, an Administration, with no technical basis, could stall ITU BSS filings including its territory, or prevent such filings from even being made, in order to restrict content or to further anti-competitive objectives to protect incumbent national operators.

Any interpretation of Article 23 to mean that agreement with the United States to serve its territory is required before the USAT-S1 satellite can be taken into account in inter-system satellite coordination is clearly equivalent to prior consent and

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[45] See, e.g., EchoStar Satellite Corp., Opposition of EchoStar Satellite Corporation and Motion to Strike, File Nos. DBS 88-01, DBS 88-02; SAT-MOD-20010810-00071; SAT-A/O-20010810-00073, Oct. 4, 2001, at 8.

[46] This United States view became part of CITEL's proposals to WRC-2000. See United States preliminary view for agenda item 1.19*bis,* Document PCC.III/1210/99, dated 6 April, 1999; CITEL Proposal at 94.

[47] United States Delegation Report, World Radiocommunication Conference 2000, pages 60-61.

inconsistent with U.S. policy. Moreover, such a position would be detrimental to U.S. satellite operators attempting to provide BSS to other countries, such as those noted above. It is indeed surprising that U.S. operators seeking to serve foreign territories would take such a position.

2. The SES AMERICOM proposal is fully consistent with ITU Appendix 30 requirements.

The Applicants also claims that the SES AMERICOM proposal "does not meet certain criteria set forth in Appendix S30."[48] However, as explained in detail in its Petition, the AMERICOM2Home proposal is fully consistent with Appendix 30.[49] As discussed above, Appendix 30 contains a modification process (Article 4 of Appendix 30) that allows administrations to modify their existing plan assignments, or to apply for additional frequency assignments. The United Kingdom, on behalf of Gibraltar, has initiated the Plan modification process for USAT-S1.

This Plan modification process sets out a procedure for coordination of proposed modifications with any affected administrations. To this end, and to fulfill its obligations under Appendix 30, the U.K. Administration has sent a letter to the FCC, requesting coordination of USAT-S1 with the potentially affected U.S. BSS systems.[50]

The modification sought by the USAT-S1 filing is fully contemplated by the Appendix 30 procedures, and all ITU requirements are being followed to pursue its eventual incorporation into the Region 2 BSS Plan, including coordination with affected

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[48] Opposition at 14, n.21.

[49] SES AMERICOM Petition at 6-11.

[50] Letter dated 7 May, 2002, from Pat Strachan, U.K. Radiocommunications Agency, to Thomas Tycz, FCC.

proposed modifications. There is simply no argument that the Applicants are in any way entitled to ignore this filing with respect to their later-filed NEW ECHOSTAR 1 satellite.

IV. THE APPLICANTS HAVE NO VALID ARGUMENTS AS TO WHY THE COMMISSION SHOULD NOT IMPOSE AN OPEN ACCESS CONDITION WITH RESPECT TO LOCAL TV CHANNELS.

In the SES AMERICOM Comments, SES AMERICOM asked the Commission to require the Applicants to grant to competing DBS providers access to the local television programming, transmitted by the Applicants post-merger on the NEW ECHOSTAR 1 platform or otherwise, for resale purposes on market terms and conditions. Pointing to the fact that New EchoStar would control almost all of the limited spectrum and orbital resources available for U.S. DBS service, SES AMERICOM explained that, without an open access requirement, no other U.S. DBS provider would be able to compete effectively with New EchoStar.

In their Opposition, the Applicants assert that the kind of open access condition proposed by SES AMERICOM is considered only where there is a demonstration of market power.[51] According to the Applicants, the merger of Hughes and EchoStar would not result in market power or control of any bottleneck facility that would necessitate an open access requirement.[52] Because the FCC has not imposed an industry-wide open access requirement for cable television, the Applicants assert, the FCC need not impose such a requirement on New EchoStar.[53] These arguments are entirely without merit.

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[51] Opposition at 16-17.

[52] Id.

[53] Id. at 16-17.

A. The Opposition Fails to Dispute the Key Points Made by SES AMERICOM in Support of the Open Access Requirement.

SES AMERICOM, in its Comments, premised its analysis of the need for open access on several key facts. These facts were not disputed in any way by the Applicants in the Opposition, and thus must be taken as true for purposes of the record in this proceeding. The relevant, undisputed facts include the following:

- The offering by a competing DBS provider of a local channels package that is comparable to the Local Channels, All Americans plan is essential to the success of any potential competitor's service.[54]
- No other DBS provider would be able to amass the resources needed to offer to its customers a comparable local television offering.[55]
- Even if a competing carrier could amass the necessary resources, any attempt to duplicate New EchoStar's local channels package would result in inefficient, duplicative use of scarce spectrum resources.[56]
- Requiring New EchoStar to grant competitors access to its local television programming would not harm, but would in fact help, New EchoStar, as it would increase the combined entity's revenues.[57]
- The implementation of an open access requirement would be technically feasible.[58]

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[54] SES AMERICOM Comments at 10-11.

[55] Id. at 9.

[56] Id.

[57] Id. at 10.

[58] Id. at 11-12.

B. The Applicants Will Possess Market Power in DBS.

While the Applicants assert that they will possess no market power that would necessitate an open access requirement, they provide no supporting information for this conclusion. To the contrary, the Applicants' own words demonstrate clearly the market power that New EchoStar will possess with respect to offering local channels via satellite, and why an open access requirement is needed in order to maintain competition in the DBS market. According to the Applicants: "Only the merger will rationalize the available DBS spectrum and provide the capacity, scale and subscriber base necessary to achieve full local channels service coverage of every DMA in the United States."[59] Thus, by the Applicants' own admission, no other company could ever amass the spectrum and orbital resources required to compete against New EchoStar with respect to the offering of local channels, because adequate resources are not available.

C. An Open Access Condition Is Necessary to Maintain Competition in the DBS Industry, and Is in the Public Interest.

Given the control that New EchoStar would have over limited DBS spectrum and orbital resources, it is critical for the FCC to ensure that other companies are able to provide competing DBS services. As explained in the SES AMERICOM Comments, the inability to offer the same local television channels as New EchoStar would pose a high barrier to market entry for any company seeking to compete against New EchoStar. Requiring that those local channels be made available to competitors on a wholesale basis, on reasonable terms and conditions, would clearly represent a step toward encouraging meaningful DBS competition.

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[59] Opposition at 6.

Furthermore, contrary to the Applicants' assertion, the Commission can and should impose an open access requirement even if it does not find that New EchoStar would have market power in any relevant market. Nothing in the Communications Act or the Commission's Rules restricts the FCC to imposing access-related conditions only upon a finding of market power. Nor do the cases cited by the Applicants support any such limitation. The Commission's mandate is to ensure that the public interest is served by the use of licensed spectrum and orbital resources, and in this case the public interest requires the imposition of a limited access condition, in order to encourage competition.

Indeed, in one of the cases cited by the Applicants, the FCC declined to mandate open access, not based solely on an analysis of market power, but because of "'the potential for competition from alternative . . . providers'."[60] As the Applicants have admitted, the potential for competition against New EchoStar with respect to the offering of local television channels, which the Applicants do not dispute are critical to any DBS offering, is nonexistent, given the limitations on the available orbital slots and resources for DBS service. If, as the Applicants claim, they "welcome competition and entry into the U.S. MVPD market,"[61] then the Applicants should be prepared to make their local channels platform available to potential competitors.

D. The Open Access Condition Should Apply to the Entire Local Channels, All Americans Package.

The Applicants incorrectly suggest that SES AMERICOM has requested that the open access requirement apply only to the NEW ECHOSTAR 1 satellite, which

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[60] Opposition at 17 n.24, *quoting* *MediaOne Group, Inc.*, 15 FCC Rcd 9816, 9872-73 (2000).

[61] Id. at 11.

the Applicants state will provide a portion of the programming in the Local Channels, All Americans plan.[62] SES AMERICOM believes that the open access requirement should apply to the entire package of local channels to be offered by the Applicants, and thus to all of the capacity necessary for such service. Because the Applicants introduced the local channels platform concept in the context of the NEW ECHOSTAR 1 Application, and described that satellite as a key part of the Local Channels, All Americans plan, that satellite was an important focus of the SES AMERICOM Comments.

SES AMERICOM made clear, however, that its Comments "appl[ied] equally" to any "other satellites used by New EchoStar to transmit local television channels."[63] To that end, the open access condition should be applied as a condition of any FCC approval of the EchoStar/Hughes merger itself, and should apply to the entire local channels platform developed by the merged entity. As stated in the SES AMERICOM Comments, only in this manner can the Commission ensure true competition in the DBS area.

V. 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. Assuming the necessary technical information is provided and the Commission proceeds with processing of the Application, the Commission should grant the Applicants authority for NEW ECHOSTAR 1 only with a clear and explicit condition that the Applicants must

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[62] Id. at 16 n.23.

[63] SES AMERICOM Comments at 8 n.19. See also id. at 13-14.

coordinate with all satellites having higher ITU priority that are potentially affected by its proposed satellite.

Furthermore, 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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June 4, 2002

DECLARATION

I hereby certify that I am a technically qualified person responsible for preparation of the engineering information contained in this Response to Joint Opposition and Reply 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 this pleading. I hereby verify under penalty of perjury that the facts stated herein and in this Response are true and correct to the best of my knowledge and belief.

Executed this 24th day of June, 2002

By: Kimberly M. Baum
Manager, Satellite Market Development
SES AMERICOM, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2002, a copy of the foregoing Response of SES AMERICOM, Inc.,to Joint Opposition and Reply Comments was served via first class United States mail, postage prepaid, on the following:

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