

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In The Matter Of)
)
VisionStar Incorporated) **SAT-MOD-20020430-00075**
)
Application For Modification of)
Authority To Construct, Launch)
And Operate A Ka-band Satellite)
System In The Fixed Satellite)
Service)

To: The Commission

PETITION TO DENY
BY THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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TABLE OF CONTENTS

SUMMARY iii

I. NRTC BACKGROUND..... 3

II. COMMENTS..... 4

A. EchoStar’s Motives In Filing The Extension Request Are Suspect.

B. EchoStar Easily Could Have Satisfied Its Milestone Requirements. 7

C. EchoStar Has A Long History of Bad Faith And Disingenuous Behavior With The Commission. 10

D. Echostar Is Undermining The Ka-Band Industry To Promote Its Proposed Merger With Hughes. 14

E. The Commission Should Revoke EchoStar’s License And Award It To A New Licensee Committed To Ka-band Deployment.

F. If EchoStar’s Extension Request Is Granted, The Commission Will Be Forced To Issue Extensions To All Ka-band Licensees. 18

III. CONCLUSION. 19

EXHIBIT A: ECHOSTAR/DIRECTV “FLIP FLOP” CHART
EXHIBIT B: Ka-BAND MILESTONE CHART

SUMMARY

By failing to fund its VisionStar Ka-band project, EchoStar is attempting to demonstrate that only the proposed EchoStar/Hughes Merger will allow for the universal deployment of broadband satellite services. By abandoning its VisionStar obligation -- just as it abandoned WildBlue and StarBand -- EchoStar is attempting to “prove” that broadband deployment cannot occur without the Merger.

In its *Extension Request*, EchoStar argues that an economic downturn affecting financing of all Ka-band satellite projects justifies an extension of its milestone obligations. When examined in the context of EchoStar’s overall fiscal well being, however, EchoStar seems to have missed its Ka-band milestones not as a result of the financial community’s mood, but because of EchoStar’s calculated business decisions.

In the last several quarters, EchoStar has disclosed to the Securities Exchange Commission (SEC) a series of highly lucrative earnings reports -- each seemingly better than the last. Revenues are up. EBITDA is up. Cash, cash equivalents and marketable investment securities are up. EchoStar’s financial situation is strong enough to enable it to commit billions of dollars to to a monopoly Merger bid and other satellite projects -- but not to VisionStar.

As the Commission is well aware, EchoStar’s regulatory history is rife with troubling conduct: willful violations of the Communications Act, knowing disregard for the Commission’s Rules and Regulations and a complete disrespect for the Commission’s authority. Like a story that keeps repeating itself, EchoStar again comes before the Commission -- like so many times before -- asking for forgiveness rather than permission.

After publicly disclosing months ago the need to file an extension of its Ka-band milestones, EchoStar waited until the last possible moment (*i.e.* the last day of the last month of

its “complete construction” milestone) to seek an extension -- just as EchoStar had done in response to the Commission’s Request for Information in the EchoStar/Hughes Merger proceeding. Compounding its tardiness, EchoStar gives one excuse for its milestone failure to the FCC (a depressed financial market) and another to the SEC (a change in satellite design).

EchoStar’s lack of candor with the Commission should be dealt with swiftly and decisively. The Commission should revoke EchoStar’s Ka-band license and reassign it to a new licensee with an extended May 2005 milestone. To do otherwise would simply reward EchoStar for its misconduct.

At a minimum, the Commission should thoroughly investigate EchoStar’s claims in its *Extension Request*. In particular, it should subpoena witnesses, examine documents and conduct a full investigation as to why and how EchoStar was “forced” to miss payments to its satellite contractor, as it claims. The Commission should seek the same information from the satellite contractor.

EchoStar has placed the Commission in an awkward position. If EchoStar’s claims of a broad economic downturn are considered to be sufficient to justify its *Extension Request*, the Commission will be forced to grant similar extension requests to other similarly situated Ka-band licensees. If the *Extension Request* is denied, the orbital slot will need to be re-licensed. Either way, EchoStar’s actions will have delayed its own Ka-band broadband deployment, chilled investment by others, and provided fodder for its proposed Merger.

This type of disingenuous behavior has become EchoStar’s trademark, and it should not be countenanced further by the Commission. The Commission should revoke EchoStar’s Ka-band license and award it to a new licensee.

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The National Rural Telecommunications Cooperative (NRTC), by its attorneys, hereby submits this Petition to Deny in response to the modification request filed by VisionStar Incorporated (VisionStar) in the above captioned proceeding (*Extension Request*).¹ VisionStar is a majority-owned -- 90% -- indirect subsidiary of EchoStar Communications Corporation (EchoStar).² For all practical purposes, VisionStar is EchoStar. EchoStar requests an extension of its construction completion date for its Ka-band satellite from April 2002 to April 2005, and an extension of its launch date from May 2002 to May 2005. The EchoStar Ka-band satellite is authorized for the 113° W.L. orbital location.³

¹ VisionStar Corporation Request for Extension of Time To Complete Construction and To Launch Fixed Satellite Service Satellite, File Nos. SAT-LOA-19950929-00156, SAT-T/C-20011215-00163 (filed April 30, 2002); See also Federal Communications Commission Report No. 00110, *Satellite Space Applications Accepted for Filing*, SAT-MOD-20020430-00075 (released May 17, 2002).

² SEC Form 10K, filed by EchoStar Communications, Inc., p. 10, February 28, 2002 (*EchoStar 10K*).

³ Order And Authorization, *VisionStar, Inc. Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service*, 13 FCC Rcd 1428, DA 97-980 (released May 9, 1997) (*VisionStar Authorization*); See also Order And Authorization, *Application of VisionStar, Incorporated, Licensee, Shant Hovnanian, Transferor And Echostar Visionstar Corporation, Transferee*, 24 CR 1326, ¶30 (released October 30, 2001) (*EchoStar/VisionStar Authorization*).

In filing its *Extension Request*, it is apparent that EchoStar -- as the Commission has found in the past -- is once again acting in bad faith. The *Extension Request* has absolutely nothing to do with EchoStar's failure to achieve its milestones, and everything to do with EchoStar's proposed merger with Hughes Electronics Corporation (Hughes) (the Merger).⁴ By single-handedly undermining the Ka-band market, EchoStar is attempting to demonstrate that only the Merger will allow for the universal deployment of broadband satellite services.

EchoStar's Ka-band milestones were easily obtainable for a company of its stature. Of the 24 Ka-band licensees, EchoStar was clearly the best suited to satisfy its construction and launch requirements. Yet while EchoStar has spent or committed to spend billions of dollars elsewhere, it has been unable fund a single satellite pursuant to a schedule established by the Commission and accepted by EchoStar when it received its VisionStar license last year. It failed to achieve its milestones not as a result of any market downturn, but because of a calculated business decision.

EchoStar has placed the Commission between a rock and a hard place. If the Commission finds that the current economic climate justifies EchoStar's failure to meet its milestones, then EchoStar will have effectively forced the Commission to grant extensions to all other similarly situated Ka-band licensees who face the same financial environment. If the *Extension Request* is denied, the orbital slot will need to be relicensed. Either way, EchoStar

⁴ Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, Transferor; and EchoStar Communications Corporation, Transferee, For Authority to Transfer Control, File Number 01-348, p. 6 (filed December 3, 2001) (*Application*). See also Cable Service Bureau Action, EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control, CS Docket No. 01-348, DA 01-3005 (released December 21, 2001). NRTC filed a Petition to Deny the *Application*; See Petition to Deny of the National Rural Telecommunications Cooperative, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348 (filed February 4, 2002) (*NRTC Petition*).

will have successfully warehoused its Ka-band license and advanced its self-serving argument that broadband deployment is not possible unless the pending Merger is approved.⁵

I. NRTC BACKGROUND.

1. NRTC is a not-for-profit cooperative comprised of 705 rural electric cooperatives, 128 rural telephone cooperatives and 189 independent rural telephone companies located throughout 46 states. Since 1986, NRTC's mission has been to provide advanced telecommunications technologies and services to rural America. NRTC has long represented the views of rural Americans before the FCC, the National Telecommunications and Information Agency (NTIA), and the United States Congress.

2. In 1994, NRTC assisted in capitalizing the launch of the DIRECTV satellite business. Through a Distribution Agreement between NRTC and Hughes Communications Galaxy, Inc. (DIRECTV's predecessor-in-interest), NRTC received exclusive program distribution and other rights to market DIRECTV's Direct Broadcast Satellite (DBS) programming and other services throughout much of rural America. NRTC, its members and affiliates currently distribute DIRECTV programming to approximately 1,800,000 rural households. Additionally, NRTC provides dial-up Internet access, 220 MHz wireless services, long distance telephone services, automated meter reading and other telecommunications services to its members and affiliates who in turn provide these services to rural consumers.

3. NRTC also provisions its members as Internet Service Providers and distributes broadband Internet access services via Ku-band satellite pursuant to agreements with StarBand Communications, Inc. (previously controlled by EchoStar) and Hughes Network Systems.

⁵ See Memorandum Opinion and Order, *PanAmSat Licensee Corp.*, 16 FCC Rcd 11534, ¶12 (released May 25, 2001); Order, *VisionStar, Inc.*, 16 FCC Rcd 11034, ¶4 (released May 25, 2001) (stating that warehousing is adverse to the public interest because it eliminates the "availability of services at the earliest possible date by blocking entry

During the past few years, NRTC has been actively involved in broadband deployment for rural Americans, supporting and serving its members who utilize wireline (DSL, cable modem) and wireless (terrestrial and satellite) technologies. NRTC and its members are even testing the feasibility of broadband delivery via electric power lines.

4. NRTC is convinced that the Ka-band will be an essential tool for the deployment of advanced telecommunications services to rural Americans. The Ka-band is a national resource that should not be jeopardized through one company's attempt to warehouse a U.S. license in order to gain a DBS and broadband monopoly.

II. COMMENTS.

A. EchoStar's Motives In Filing The Extension Request Are Suspect.

5. The Commission's analysis of the *Extension Request* could begin with any number of questions. Why did EchoStar wait until the eleventh hour to ask the Commission for an extension? Why is EchoStar telling the Commission and the SEC different stories about its failure to achieve its milestones? How can EchoStar afford billions of dollars for a Merger and other satellite projects but cannot fund a single Ka-band satellite for VisionStar? No answers are provided in the *Extension Request*.

6. Months before EchoStar came to the Commission seeking an extension of time, it publicly disclosed that it would be unable to meet its milestones. On January 25, 2002 -- more than three months before filing its *Extension Request* -- EchoStar informed the SEC that "it is unlikely that we will meet [our Ka-band] milestones and we may need to request an extension

by other entities willing and able to proceed immediately with the construction and launch of their satellite systems); Memorandum Opinion and Order, *National Exchange Satellite, Inc.*, 7 FCC Rcd 1990, 1991 ¶8 (1992).

from the FCC.”⁶ One month later, in February 28, 2002, EchoStar confirmed with the SEC that it “will have to ask the FCC for an extension.”⁷

7. Yet despite having this information no later than February 28, 2002 (and probably much earlier), EchoStar waited until the April 30, 2002, to file its *Extension Request* with the Commission. In fact, its *Extension Request* was filed on the very last day of the month in which it was required to complete construction of its satellite. This is the same tactic -- waiting until the last minute to respond to a Commission requirement -- for which the Commission previously chastised EchoStar in the Merger proceeding.⁸

8. Clearly, the fact that a licensee of a scarce Ka-band authorization will miss a crucial FCC milestone is important information that the Commission deserves to receive as soon as it becomes available.⁹ After all, the core assets -- the spectrum and orbital slots -- belong to the American public, not to EchoStar. But for whatever reason, EchoStar informed the SEC and the investing public that it would miss this crucial milestone months before it so advised the Commission.

9. The Commission has stated that a Ka-band licensee who “reasonably could not have believed” it was in milestone compliance was “*required* to file a request for an extension of the

⁶ SEC Form S-3/A, filed by EchoStar Communications, Inc., p. 19, January 25, 2002 (*EchoStar S-3A*).

⁷ SEC Form 10-K405, filed by EchoStar Communications, Inc., p. 10, February 28, 2002 (stating that EchoStar “will not complete construction or launch of the satellite by [its milestone] dates and will have to ask the FCC for an extension.”) (*EchoStar 10-K405*).

⁸ Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (March 7, 2002); *See also* Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (February 4, 2002).

⁹ *See e.g.*, 47 C.F.R. § 1.65 (stating that applicants are responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Applicants are required to notify the Commission of any changes “as promptly as possible and in any event within 30 days.”).

milestones *prior* to [its milestone date].”¹⁰ EchoStar reasonably could not have believed months prior to April 2002 that it would achieve its milestone date. In fact, according to its SEC filing, EchoStar clearly *knew* that it would not achieve its assigned milestone date. Still, it remained silent with the Commission until the last minute.

10. With its *Extension Request*, EchoStar apparently thought it best to seek forgiveness, rather than to ask permission. Perhaps EchoStar simply forgot. Perhaps EchoStar was too busy spending money on its proposed Merger and other satellite projects to inform the Commission that it would miss its Ka-band milestones. Regardless, its decision to withhold this information from the Commission represents either a lack of concern or candor. As discussed below, in light of EchoStar’s well-known track record at the Commission, the latter scenario seems much more likely. In any event, as a result of EchoStar’s inaction, the Commission has been robbed of valuable time to ensure prompt deployment of a Ka-band satellite at the 113° W.L. orbital position.

11 EchoStar’s further lack of candor can be found by contrasting the content of its *Extension Request* before the Commission with its SEC filings regarding the same topic. In its SEC filings, EchoStar claims that its milestone failures were a result of “among other things . . . changes in the VisionStar satellite design due to the recent failure of the Astrolink Ka-band satellite venture.”¹¹ Nowhere in the SEC filings does EchoStar go into the apparent lack of funding in the Ka-band industry.

12. Yet funding problems are the only grounds articulated by EchoStar in the *Extension Request*. EchoStar makes no mention of the satellite design or any specific impact of the Astrolink failure, only the overall bleak financial environment facing the entire Ka-band

¹⁰ Memorandum Opinion and Order, *Norris Satellite Communications, Inc.*, 12 FCC Rcd. 22299, ¶20 (released October 10, 1997) (emphasis added).

industry.¹² Perhaps EchoStar pursued this course because it is well established that a change in satellite design is a business decision that does not provide a basis for an extension of a Commission milestone.¹³

13. The *Extension Request* raises questions regarding EchoStar's good faith. EchoStar knowingly withheld critical information from the Commission. It filed its *Extension Request* at the last minute. It reported conflicting reasons for its milestone failure. Further, it claimed that its inability to construct and launch a single Ka-band satellite was due solely to a flat financial market.

B. EchoStar Easily Could Have Satisfied Its Milestone Requirements.

14. The *Extension Request* is peppered with comments that emphasize EchoStar's alleged financial woes. EchoStar says it has been adversely impacted by a "drought of funds"¹⁴ and has been "forced to delay certain payments."¹⁵ It is difficult to perceive, however, how EchoStar cannot obtain financing for a single Ka-band satellite when it is reporting phenomenal earnings and committing huge amounts of capital to countless other projects (including a proposed Merger). Indeed, EchoStar seems to have missed its Ka-band milestones not as a result of the financial community's mood, but because of EchoStar's calculated business decisions.

15. EchoStar appears willing to commit funds towards almost any project so long as it is not related to its Ka-band obligations. For example, EchoStar has indicated that it will commit at

¹¹ *EchoStar S-3A*, p. 19.

¹² Moreover, far from painting Ka-band investments as a risky venture, EchoStar told the SEC in February 2002 that it "believe[s] that spot beam Ka-band satellites could become a cost effective way to offer consumers high-speed tow-way internet access in the future," and that it could be "successfully offered in urban and suburban areas." *EchoStar 10-K405*, p. 10.

¹³ Memorandum Opinion and Order, *Advanced Communications Corporation*, 11 FCC Rcd 3399, 3404 (1995).

¹⁴ *Extension Request*, p. 6.

¹⁵ *Extension Request*, p. 3 (emphasis added).

least \$7.0 billion to the proposed Merger.¹⁶ Only a few weeks prior to filing its *Extension Request*, EchoStar also asked the Commission for authority to launch and operate three new satellites for a yet-to-be established service at a potential cost of more than one billion dollars.¹⁷ EchoStar's willingness to commit billions to the Merger and other projects while professing poverty when confronted with its VisionStar Ka-band obligations -- undermines its credibility, to say the least.¹⁸

16. EchoStar's stinginess towards its Ka-band obligations is readily apparent in its most recent Annual Report with the SEC. In that filing, EchoStar disclosed that it spent only a total of approximately \$2.8 million on the EchoStar acquisition and has made loans to VisionStar totaling approximately \$4.6 million as of December 31, 2001.¹⁹ This is an absolute pittance compared with its Merger and other expenditures. In fact, its VisionStar expenditures are a mere *one tenth of one percent* compared to the amounts spent or proposed in its Merger with Hughes.

17. EchoStar claims that the sour mood of the financial community not only has hampered EchoStar's ability to obtain *outside* funding, but has dried up *internal* funding for its Ka-band project as well.²⁰ Yet this purported lack of internal funding flies in the face of EchoStar's published earnings.

18. While some companies in today's financial market are truly experiencing a dearth of funds, EchoStar is not one of them. A mere two days after filing its *Extension Request*, EchoStar filed its First Quarter earnings results for 2002. EchoStar's total revenue for the First Quarter

¹⁶ *EchoStar 10K*, p. 3.

¹⁷ Application of EchoStar Satellite Corporation For Authority to Construct, Launch and Operate a Direct Broadcast Satellite System in the 17 GHz and 25 GHz Bands, SAT-LOA-20020328-00050, SAT-LOA-20020328-00050, SAT-LOA-20020328-00050 (filed March 28, 2002).

¹⁸ Ex Parte Reply to Opposition of the National Rural Telecommunications Cooperative, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348, pp. 36-41 (filed April 4, 2002) (*NRTC Reply*); See also n. 45, *infra*.

¹⁹ *EchoStar 10K*, p. 10.

2002 was \$1.1 billion, which exceeded revenue for the same period in 2001 by 28%.²¹ Revenues are expected to increase by 20% - 25% in 2002 as compared to 2001.²² With respect to EBIDTA, EchoStar reported \$178 million during the First Quarter 2002. It anticipates that EBIDTA will increase approximately 80% - 100% in 2002 as compared to 2001.²³ Moreover, as of March 31, 2002, its cash, cash equivalents and marketable investment securities totaled \$4.5 billion.²⁴ From this, EchoStar says that it could not extract enough money to make good on its commitments to the Commission to build, launch and operate a single Ka-band satellite on schedule.

19. EchoStar's claims regarding a drought of internal funds also ring hollow when contrasted to EchoStar's investments in *other* Ka-band projects. For example, EchoStar has spent \$75.4 million on its Ka-band authorization at the 121° W.L. orbital slot.²⁵ This substantial investment in time and money was made despite the fact that the milestone for that orbital slot is three years away.²⁶ In addition, EchoStar has invested \$50 million in WildBlue, another Ka-band licensee with a June 2005 launch milestone.²⁷ But how much has EchoStar invested in VisionStar? Only \$4.6 million as of December 2001,²⁸ and now it claims that it cannot proceed further because the financial market has dried-up.

²⁰ *Extension Request*, p. 7.

²¹ SEC Form 10-Q, filed by EchoStar Communications, Inc., p. 2, May 6, 2002 (*EchoStar 10-Q*); See also SEC Form 425, filed by EchoStar Communications, Inc., p. 10, May 6, 2002 (*EchoStar 425*).

²² *EchoStar 10-Q*, p. 17.

²³ *EchoStar 10-Q*, p. 22. Previous earnings reports from EchoStar are equally impressive. For example, in its final earnings report for 2001, EchoStar reported a 47% increase in revenues over the previous year, and projected revenues for 2002 to be 20 to 25% higher. SEC Form 425, filed by EchoStar Communications, Inc., March 4, 2002 (*EchoStar Investment Call*) At the same time, they reported a 47% increase in revenues over the previous year. *Id.*

²⁴ *EchoStar 10-Q*, p. 23.

²⁵ *Extension Request*, n. 7.

²⁶ Order and Authorization, *EchoStar Satellite Corporation*, 16 FCC Rcd. 2453, ¶21 (released January 31, 2001) (*EchoStar Authorization*).

²⁷ *Extension Request*, n. 7.

²⁸ *EchoStar 10K*, p. 10.

20. A drought of funds indeed. EchoStar's financial woes are an apparent result of its lack of commitment to the Ka-band and its Merger strategy, not the financial community's sour mood. A little more than a year and half ago, EchoStar told the Commission that its combination with VisionStar would "create the critical mass, scale efficiencies and realistic chances of commercial success that will help both companies to deploy Ka-band satellites as expeditiously as possible."²⁹ These representations, as with others by EchoStar, ultimately proved to be untrue.

21 EchoStar consciously determined not to fund the VisionStar satellite. It chose to cease funding the WildBlue Ka-band project. It chose to withdraw from StarBand's Ku-band project. All of these actions were taken not as a result of EchoStar's dearth of funding, but to paint the false picture that satellite broadband deployment cannot proceed unless the Commission authorizes the proposed EchoStar/Hughes Merger.

C. EchoStar Has A Long History of Bad Faith And Disingenuous Behavior With The Commission.

22. EchoStar's history of bad faith and disingenuous behavior are extensively detailed in the Commission's own records. A review of EchoStar's previous indiscretions reveals a disturbing pattern.

23. The Commission recently noted that "EchoStar has previously been fined by the Commission for rule violations and admonished for its 'disingenuous' behavior and lack of candor."³⁰ For example, in a June 1998 Notice of Apparent Liability (*First EchoStar Liability Order*), the Commission found it necessary to fine EchoStar the maximum forfeiture amount permitted under the Commission's rules for operating its satellite from a non-authorized

²⁹ *EchoStar/VisionStar Application*, p. 5.

³⁰ Declaratory Ruling And Order, *In the Matter of National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, CSR-5865-Z, n. 116 (released April 4, 2002) (*Two-Dish Order*).

location.³¹ The FCC justified its forfeiture amount based on a laundry list of EchoStar's shortcomings: its degree of misconduct, lack of voluntary disclosure and continuing violation of the Commission's rules.³²

24. In March 2000 (*Second EchoStar Liability Order*), EchoStar tried to disregard Commission requirements by placing all of its public interest programming on secondary satellites in violation of the Commission's DBS rules.³³ Some of the Commission's observations in this instance were especially disturbing. The Commission found that EchoStar had *willfully* violated the Communications Act and the Commission's rules.³⁴ Additionally, EchoStar was found to have been "disingenuous" in its legal interpretations.³⁵ As a result, a forfeiture was imposed by the Commission.³⁶

25. Despite these egregious findings, EchoStar continued the same type of behavior. Although requesting confidentiality for a series of documents from the Commission, EchoStar began publicly disclosing their contents without informing the Commission. In August 2001 (*Young Broadcasting Order*), the Commission found that "EchoStar failed in its duty of candor" by withholding this information from the Commission.³⁷

26. Even in the ongoing Merger proceeding, EchoStar has been chastised for its cavalier and disrespectful attitude towards the Commission. EchoStar was admonished by the

³¹ Notice of Apparent Liability, *In The Matter of EchoStar Satellite Corporation*, 13 FCC Rcd. 16510 (released June 8, 1998) (*First EchoStar Liability Order*).

³² *First EchoStar Liability Order*, ¶5.

³³ Declaratory Ruling and Order, *American Distance Education Consortium Request For An Expedited Declaratory Ruling and Informal Complaint*, 14 FCC Rcd. 19976 (released March 22, 2000) (*Second EchoStar Liability Order*).

³⁴ *Second EchoStar Liability Order*, pp. 5558-5559; *See also Two-Dish Order*, n. 116 (discussing Commission findings related to same).

³⁵ *Second EchoStar Liability Order*, ¶4 (referencing Memorandum Opinion And Order, *Petition for Waiver of Direct Broadcast Satellite Public Interest Obligation Implementation Date*, 15 FCC Rcd. 1814, ¶7 (released December 17, 1999)).

³⁶ *Second EchoStar Liability Order*, ¶8.

Commission for its failure to comply with basic Commission rules governing the production of documents.³⁸ Exhibiting the same behavior as with its *Extension Request*, the Commission admonished EchoStar for requesting an extension “a day before the required response date.”³⁹

27. These findings by the Commission can be summed up as follows: EchoStar has *intentionally* withheld information from the Commission; EchoStar has *knowingly* disregarded Commission Rules; and EchoStar has *willfully* violated the Communications Act. Hardly an impressive description for any FCC licensee, let alone an industry leader.

28. Even more troubling is an examination of what was at stake during EchoStar’s previous transgressions. In these instances, EchoStar had little or nothing -- to gain by acting as it did. In the *First EchoStar Liability Order*, EchoStar operated its satellite from an unauthorized orbital location. Even after becoming aware of the violation, EchoStar continued to operate the satellite.⁴⁰

29. The *Young Broadcasting Order* involved a dispute surrounding a retransmission complaint for the carriage of local stations in Nashville, Tennessee and San Francisco, California.⁴¹ Even though this dispute impacted only two stations in two markets, EchoStar still found it necessary to engage in “an abuse of the Commission’s processes.”⁴²

30. Despite the minimal stakes in these cases, EchoStar still found it necessary to *willfully* violate the Communications Act, *intentionally* withhold information and *knowingly* disregard Commission Rules. What is at stake now? Far more than the location of a satellite at an

³⁷ Memorandum Opinion and Order, *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, 16 FCC Rcd. 15070, 15075 (CSB 2001).

³⁸ Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (March 7, 2002).

³⁹ *Id.*

⁴⁰ *Second EchoStar Liability Order*, ¶5.

⁴¹ *Young Broadcasting Order*, ¶1.

unauthorized orbital slot or the carriage of two local stations in two markets. When examined in the context of the proposed Merger, EchoStar has everything to gain by manipulating its *Extension Request*: the creation of a DBS monopoly, its elevation to the largest Multichannel Video Programming Distributor (MVPD) in the country, and its unchallenged status as a Ka-band behemoth.

31. The motives behind EchoStar's *Extension Request* are clearly suspect. EchoStar claims that "Because of adverse financial developments, [EchoStar] was forced to delay certain payments to its satellite contractor, Lockheed Martin Corporation."⁴³ The Commission must determine exactly what EchoStar means by "forced." Who exactly forced EchoStar to do anything? Was it forced to delay payments as a result of contractual obligations? Was it forced to do so because the market dictated it? Or was EchoStar forced to do so because it made good business sense, since launching a Ka-band satellite would debunk its claim that only the Merger will enable American consumers to receive broadband service by satellite?

32. In light of EchoStar's undocumented claim that it was "forced" to delay payments to its satellite contractor, the Commission should conduct a thorough investigation into the merits and validity of EchoStar's *Extension Request*. The Commission has the authority. The Commission's rules permit it to "hold such proceedings as it may deem necessary from time to time in connection with the investigation of *any* matter which it has power to investigate under the law . . . For such purposes it may subpoena witnesses and require the production of

⁴² *Young Broadcasting Order*, ¶12.

⁴³ *Extension Request*, p. 3.

evidence.”⁴⁴ Resolution of these questions is absolutely necessary in light of the high stakes and EchoStar’s past conduct.⁴⁵

33. The Commission also should broaden the scope of its February 4, 2002 Information Request to EchoStar in the Merger proceeding.⁴⁶ Specifically, the Commission should request a broad range of documents related to EchoStar’s Ka-band satellite program -- to include e-mail correspondence, hand-written notes, and informal memorandum -- that bear on why EchoStar was “forced” to miss payments on its satellite. The Commission should obtain the same type of information from EchoStar’s satellite contractor.⁴⁷

34. EchoStar’s past actions before the Commission reveal a licensee that cares little for the Commission’s rules and regulations and even less for its authority. While the Commission strives to serve the public interest through its legal mandate, EchoStar seems to go out of its way to twist, bend and break the rules in order to gain what it wants.

D. Echostar Is Undermining The Ka-Band Industry To Promote Its Proposed Merger With Hughes.

35. When looking at EchoStar’s Merger and Ka-band strategy, it becomes quite clear that EchoStar is simply engaged in a game of regulatory poker.⁴⁸ Take one look at EchoStar’s hand and it becomes quite clear why it is drawn to the table. First, EchoStar has a Government-issued FCC license which it acquired for a mere \$2.8 million dollars. Second, EchoStar has an unprecedented Merger on the line -- with a \$7 billion investment -- in which it has argued that

⁴⁴ 47 C.F.R. § 1.1.

⁴⁵ The list is attached hereto as *Exhibit A*. See also *NRTC Reply*, pp. 4-10

⁴⁶ Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (February 4, 2002).

⁴⁷ See Letter from Jack Richards, National Rural Telecommunications Cooperative, to W. Kenneth Ferree, Chief, Cable Services Bureau, p. 5 (March 13, 2002) (in its correspondence, NRTC requested a broader scope of the Commission’s Information Request, to include e-mail correspondence and informal memorandum).

only the proposed Merger will create the necessary dynamics to allow for satellite broadband deployment.⁴⁹

36. If EchoStar gains approval of its *Extension Request*, it wins the hand: it keeps its Ka-band license; it will not be required to deploy its satellite until May 2005; other Ka-band licensees also will likely seek and receive extensions; and its broadband Merger ‘thesis’ will be advanced. If EchoStar’s *Extension Request* is denied, it still wins the hand: it loses its Ka-band license (a mere \$7.6 million in poker chips); the orbital slot will need to be re-licensed; and broadband service will be delayed. Either way, the Ka-band market will be chilled and EchoStar will be able to argue that broadband deployment is doomed without the Merger. The *Extension Request* is nothing more than a juicy bet with great odds, not to mention a win-win business decision.

37. Even with these favorable odds, however, EchoStar is still trying to stack the deck. The *Extension Request* notes that EchoStar is exploring the possibility of operating its EchoStar IX satellite -- with a May 2005 milestone at the 121° W.L. orbital slot -- from the 113° W.L. slot “on a temporary basis . . . during VisionStar’s extended milestone period.”⁵⁰ In other words, EchoStar is unable to build and launch a satellite into its authorized 113° W.L. orbital slot pursuant to its FCC schedule, but it can build and launch another of its Ka-band satellites into the 121° W.L. slot *a full three years ahead of its milestone schedule*.

38. A few weeks ago, EchoStar’s CEO Charlie Ergen opined that “there are many opportunities for people to get in there and compete with us as long as they are willing to do two

⁴⁸ “I don’t make bets that are not strongly in my favor.” Charlie Ergen, Chairman and CEO, EchoStar; Andrew Ross Sorkin, *Trying To Stack The Deck So Even A Loss Is A Win*, N.Y. Times, October 30, 2001, at C-1 (*NYT Article*).

⁴⁹ *Application*, pp. 43-49.

⁵⁰ *Extension Request*, p. 4.

things: risk their capital and get off their tails.”⁵¹ In this particular instance, EchoStar is willing to do neither. Far from it. Instead of risking capital, it is simply throwing it away -- writing it off as a necessary expenditure on its misguided road to Merger approval. Instead of “getting off [its] tail” to compete, EchoStar is sitting idly by while warehousing its Ka-band license.

39. EchoStar’s disingenuousness knows no bounds. For instance, NRTC has worked hard to make more capital available for the development of rural broadband services through a federal loan guarantee program.⁵² EchoStar, on the other hand, has advised the Rural Utilities Service (RUS) that the federal loan guarantee program is not necessary to bring local television and broadband services to rural America.⁵³ At the same time EchoStar is arguing that the federal loan guarantee program is unnecessary, it is requesting that the FCC extend its Ka-band construction milestones due to the unavailability of funds for Ka-band projects as a result of an alleged downturn in the financial markets. It is time for the Commission to call EchoStar’s bluff.

E. The Commission Should Revoke EchoStar’s License And Award It To A New Licensee Committed To Ka-band Deployment.

40. EchoStar apparently believes that promises are made to be broken. It promised to deploy a DBS satellite to the 175° W.L. orbital slot, only to let the spectrum sit fallow for years until the Commission finally revoked its license.⁵⁴ It promised to provide all local stations in all local markets as a basis for its proposed Merger with Hughes.⁵⁵ Within days of that promise, however, it sought to overturn this requirement and deliver only those signals with “meaningful

⁵¹ Paige Albinak, *EchoStar’s Chances, Slimmer*, Broadcasting & Cable, May 6, 2002.

⁵² See The Launching Our Communities’ Access to Local Television Act of 2000, Pub. L.No.106-553 (2000).

⁵³ *DBS Services Sees No Need For Guarantee*, Satellite Business News, June 14, 2002.

⁵⁴ Memorandum Opinion and Order, *EchoStar Satellite Corporation, Directsat Corporation, Direct Broadcasting Satellite Corporation*, DA 02-1164 (released May 16, 2002).

⁵⁵ Opposition to Petitions to Deny and Reply Comments of General Motors Corporation and Hughes Electronics Corporation and EchoStar Communications Corporation, CS Docket No. 01-348 (filed February 25, 2002); See also Testimony of Charles W. Ergen before the Senate Judiciary Committee, March 6, 2002.

content.”⁵⁶ It promises “national pricing” if the Merger is approved, yet it wants the “flexibility” to respond to local cable promotions.⁵⁷ Now EchoStar is renegeing on yet another promise to the Commission. Despite promising to launch a Ka-band satellite by May 2002, EchoStar now wants to wait until May 2005. The time has come for the Commission to stop accepting EchoStar’s empty promises.

41. Instead of allowing EchoStar to break yet another promise, the Commission should act swiftly, boldly and decisively: revoke EchoStar’s Ka-band license and reassign it to a new licensee that is truly committed to its development.⁵⁸ Using an expedited licensing round, the Commission could ensure that the Ka-band authorization -- with the May 2005 launch date -- is awarded to a deserving licensee.

42. The Commission certainly has the authority to revoke EchoStar’s Ka-band license, which was contingent upon the April and May 2002 milestones.⁵⁹ Both milestones have been missed and as the authorization stipulates, the license may be rendered void.

43. At this point, the public interest would be well served by awarding the license to a more sincere licensee. Despite EchoStar’s absurd claim that “no party has expressed an interest”⁶⁰ in a third round of Ka-band licensing, NRTC believes that there would be multiple qualified applications interested in “risking their capital and getting off their tails” to make Ka-band broadband and local television service a reality.

⁵⁶ *SBCA, et al. v. FCC, et al.*, 275 F.3d 337 (4th Cir. 2001), Petition for A Writ of Certiorari, U.S. March 7, 2002, No. 01-___, n. 2.

⁵⁷ See *NRTC Petition*, p. 37; See also *Ergen Makes His Case*, Satellite Business News, December 21, 2001, at p.1.

⁵⁸ 47 C.F.R. § 25.161 states that “[a] station authorization shall be automatically terminated in whole or in part without further notice to the licensee upon: (a) The expiration of the required date of completion of construction or other required action specified in the authorization, or...if a certification of completion of the required action has not been filed with the Commission unless a request for an extension of time has been filed with the Commission but has not been acted on.”

⁵⁹ *EchoStar/VisionStar Authorization*, ¶30.

⁶⁰ *Extension Request*, p. 13.

F. If EchoStar's Extension Request Is Granted, The Commission Will Be Forced To Issue Extensions To All Ka-band Licensees.

44. In the *Extension Request*, EchoStar describes in considerable detail the financial community's apparent reticence to invest substantial new capital in Ka-band satellite projects.⁶¹ EchoStar even confesses that had it not been for VisionStar's new technical and financial strength as a subsidiary of EchoStar, VisionStar may not have survived the current financial downturn.⁶² Despite its powerful financial backing, however, EchoStar still says it has been "forced" to delay payments to its satellite contractor.⁶³

45. As described above, EchoStar has provided no details regarding the circumstances under which it was forced to delay payments to its satellite contractor. But one thing is certain: of the twenty-four First and Second Round Ka-band licensees, EchoStar is in the *strongest* financial position. The remaining Ka-band licensees -- operating in the same financial environment as EchoStar -- can only dream of having the financial stability and capability of EchoStar. If EchoStar's extension request is granted, the Commission will be forced to grant similar requests by other Ka-band licensees.

46. Attached as *Exhibit B* are two charts, entitled "Ka-Band Licensees With Milestones That May Be Adjusted Through Commission Action," and "Ka-Band Licensees With Milestones That May Be Adjusted Through Commission And ITU Action."⁶⁴ As shown on *Exhibit B*,

⁶¹ *Extension Request*, pp. 2-3, 6-8.

⁶² *Id.*, p. 5.

⁶³ *Id.*, p. 3.

⁶⁴ At a minimum, the Commission appears to face extension requests from the Ka-band Licensees identified on Exhibit A. See Order And Authorization, *PanAmSat Corporation*, 16 FCC Rcd 14367, fn. 49 (released August 03, 2001); Order And Authorization, *Pacific Century Group, Inc.*, 16 FCC Rcd 14356 (released August 03, 2001); Order And Authorization, *Loral CyberStar, Inc.*, 16 FCC Rcd 14346, ¶21, fn. 48 (released August 03, 2001); Order And Authorization, *Lockheed Martin Corporation*, 16 FCC Rcd 14332, ¶31, fn. 58 (released August 03, 2001); Order And Authorization, *Pegasus Development Corporation*, 16 FCC Rcd 14378, fn. 51 (released August 03, 2001); Order And Authorization, *KaStarCom. World Satellite, LLC*, 16 FCC Rcd 14332, ¶23, fn. 48 (released August 03, 2001); Order And Authorization, *Hughes Communications, Inc.*, 16 FCC Rcd 14310, ¶22, fn. 49 (released August 03, 2001); Order And Authorization, *TRW Inc.*, 16 FCC Rcd 14407, ¶25, fn. 55 (released August

EchoStar's milestones precede those of nine other licensees by at least ten months. It is safe to assume that all of these licensees will be submitting Extension Requests to the Commission if the Commission acts favorably on EchoStar's financial hardship plea.

47. The race to the Commission by financially challenged licensees -- spurred on by the claimed financial difficulties of their market leader -- will hardly soothe the apparently jittery concerns of the financial community. If the Commission acts favorably on the market leader's *Extension Request*, it should be prepared to grant a host of similar requests by less financially secure licensees as their milestone dates approach.

48. EchoStar has placed the Commission in a difficult position. Granting EchoStar's *Extension Request* will delay service from the 113° W.L. orbital slot and require that the Commission grant a blanket waiver to other requesting Ka-band licensees, thereby delaying broadband deployment. Denying the *Extension Request* and revoking the license also will play into EchoStar's plans, by requiring that the slot be re-licensed, thereby achieving the same unfortunate end. On balance, however, it is far preferable for the Commission to assign the license to a new, committed licensee than to allow EchoStar to continue gaming the system.

III. CONCLUSION.

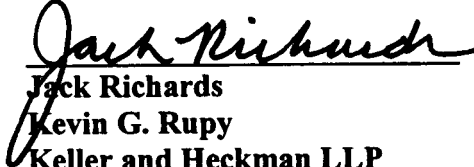
EchoStar's failure to meet its Ka-band milestones is indefensible. While trying to lay the blame at the feet of the financial community, its allocation of funds was the result of its own calculated business decisions. By single-handedly undermining the Ka-band market, EchoStar is attempting to demonstrate that only the proposed Merger will allow for the deployment of broadband satellite services across the country.

03, 2001); Order And Authorization, *Lockheed Martin Corporation*, 16 FCC Rcd 14332, ¶31, fn. 58 (released August 03, 2001).

EchoStar's *Extension Request* is nothing more than its latest gambit to further its Merger prospects. This type of disingenuous behavior has become EchoStar's trademark, and it should not be countenanced further by the Commission. The Commission should revoke EchoStar's Ka-band license and award it to a new licensee.

**Steven T. Berman, Senior Vice President
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June 17, 2002

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In The Matter Of

VisionStar Incorporated

**Application For Modification of
Authority To Construct, Launch
And Operate A Ka-band Satellite
System In The Fixed Satellite
Service**

)
) SAT-MOD-20020430-00075
)
)
)

To: The Commission

AFFIDAVIT OF STEVEN T. BERMAN

Steven T. Berman, having first been duly sworn, does hereby attest and affirm as follows:

1. I am the Senior Vice President, Business Affairs and General Counsel for the National Rural Telecommunications Cooperative (NRTC).
2. I am familiar with the above captioned application for modification of VisionStar Incorporated (VisionStar) to extend its construction and launch and operation milestones.
3. I further declare that NRTC is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity.
4. I have personal knowledge of the assertions of fact presented in the foregoing Petition to Deny of NRTC and declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed on 06/17/02 .

FURTHER AFFIANT SAYETH NOT.



Steven T. Berman
Senior Vice President, Business Affairs
and General Counsel
NATIONAL RURAL TELECOMMUNICATIONS
COOPERATIVE
2121 Cooperative Way, Suite 500
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ECHOSTAR/DIRECTV “FLIP-FLOP” CHART

“We have a track record of doing exactly what we say we’ll do.”⁸

-Charlie Ergen.

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
The Availability Of Cable For Rural Consumers	<p>“Millions of potential DBS and/or High Power DBS customers live in areas that do not have access to cable such that, if there is no competition between DIRECTV and EchoStar, there is no competition at all.”</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.⁹</p> <p>“71% of DIRECTV customers live in areas able to receive cable television service.”</p> <p>-<i>DIRECTV 2001 Cable Comments</i>, June 25, 2001, p. 13.¹⁰</p>	<p>“First, nearly every household in America with a television is passed by cable: according to the FCC, 96.6 percent of TV households are passed by cable.”</p> <p>-<i>Willig Declaration</i>, Dec. 3, 2001, p. 24.¹¹</p> <p>“[P]robably almost nobody watching this tonight [via satellite] doesn’t have the opportunity to subscribe to cable if they’d like to.”</p> <p>-Charlie Ergen, <i>Charlie Chat</i>, Nov. 12, 2001.¹²</p>
Carriage Of All Local Stations	<p>“We will comply with must-carry on a single dish and carry all stations in all markets.”</p> <p>-Charlie Ergen, <i>Judiciary Testimony</i>, March 6, 2002.¹³</p>	<p>“However, the merged entity does not intend to carry all channels in every market unless the decision below is upheld.”</p> <p>-<i>SBCA Petition</i>, March 7, 2002.¹⁴</p>

⁸ *Ergen Makes His Case*, Satellite Business News, December 21, 2001, p.10.

⁹ Memorandum of Law In Support of Request for Rule 56(f) Continuance to Respond to DIRECTV Defendants’ Motion For Summary Judgment, *EchoStar Communications Corporation, et al. v. DIRECTV Enterprises, Inc., et al.*, Civ. Action No. 00-K-212, p. 12 (D.Co. filed Nov. 6, 2000) (*EchoStar Memorandum*).

¹⁰ Comments of DIRECTV, submitted August 3, 2001, in response to Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-191 (released June 25, 2001) (*DIRECTV 2001 Cable Comments*).

¹¹ Declaration of Dr. Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, p. 24 (December 3, 2001) (Attachment A to the *Application*) (*Willig Declaration*).

¹² SEC Form 425, filed by EchoStar Communications, Inc., *Transcript of “Charlie Chat,”* November 12, 2001, p.6 (November 16, 2001) (*Charlie Chat*).

¹³ Testimony of Charles W. Ergen before the Senate Judiciary Committee, March 6, 2002 (*Judiciary Testimony*).

¹⁴ *SBCA, et al. v. FCC, et al.*, 275 F.3d 337 (4th Cir. 2001), Petition for A Writ of Certiorari, U.S. March 7, 2002, No. 01-___, n. 2 (*SBCA Petition*).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
The Number of DMAs That Will Be Served	<p>“[With the merger] [w]e would commit to the top hundred markets.”</p> <p>-<i>Ergen House Judiciary Testimony</i>, Dec. 4, 2001.¹⁵</p>	<p>“And as the Applicants announce here for the first time, the merger will bring [DBS services to] <i>every one of the 210 television Designated Market Areas in the United States.</i>”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. ii (emphasis in original).</p>
Competition Between EchoStar And DIRECTV	<p>“DIRECTV and EchoStar react primarily to each other when setting equipment and service prices.”</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p> <p>“EchoStar is DIRECTV’s closest competition.”</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p>	<p>“Executives at EchoStar and DIRECTV indicated that they monitor the pricing of the other firm, but that such pricing plays little (if any) role in their own pricing decisions.”</p> <p>-<i>Application</i>, Dec. 3, 2001, fn. 5.</p> <p>“[T]he data show that the DBS services of the Applicants do not fiercely compete against each other, and the loss of existing competition from the merger is correspondingly limited.</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 41.</p>
DBS Customer Churn	<p>“Many, if not most, consumers who would switch away from EchoStar if it raised its prices relative to all other subscription programming services would turn to DIRECTV.”</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p>	<p>““[T]he objective of each firm is to gain market share by luring customers away from the leading cable providers,’ not the customers of the other DBS firm.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 43.</p>

¹⁵ See *Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market, Oversight Hearing Before the House Committee on the Judiciary*, 107th Congress, Serial No. 50, p. 66 (December 4, 2001) (statement of Charles Ergen, President and CEO, EchoStar Communications Corporation) (*Ergen House Judiciary Testimony*).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
Customers Abandoning the DBS Platform	<p>“Absent a merger, there is a profound risk that DBS will devolve from its current position in the MVPD market as a quality and innovations leader to a lesser alternative that will cause its customers to abandon the DBS platform.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 38.</p>	<p>“DIRECTV in the U.S. expects to have a stellar year, by bringing over a million new subscribers.”</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.¹⁶</p> <p>“Based on the quarter-to-date performance of DIRECTV U.S., we expect to significantly exceed our guidance for net new subscriber additions in the first quarter [of 2002] . . .”</p> <p>-Jack Shaw, <i>Hughes Press Release</i>, March 21, 2002.¹⁷</p> <p>“Total revenue for the quarter was 1.15 billion, an increase of 13% over last quarter, and 43% better than the same period a year ago. Revenue for the year was 4 billion, an increase of 47% over 2000. Continued subscriber growth and higher revenue per subscriber were the key drivers behind this increase. We currently expect 2002 revenue to be approximately 20 to 25% higher than 2001 revenue.”</p> <p>-Michael McDonnell, CFO, EchoStar, <i>EchoStar Investor Call</i>, March 4, 2002.</p>
Competition Against Cable	<p>“In the unlikely event that the merger does not receive regulatory approval, I am absolutely convinced that HUGHES will be a very strong company, with many new strategic options available to increase value.”</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>“[T]he two firms must merge to stay competitive with . . . cable operators.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 47.</p>

¹⁶ SEC Form 425, filed by Hughes Electronics Corporation, *Transcript Of The Fourth-Quarter And Year-End Earnings Call* (January 15, 2002) (*Hughes Investment Call*).

¹⁷ “DIRECTV U.S. to Substantially Exceed First Quarter 2002 Expectations With Over 325,000 Net New Customers,” Press Release of Hughes Electronics Corporation, March 21, 2002 (*Hughes Press Release*).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
The Meaning of National Pricing	<p>“We offer nationwide pricing today and we’re willing to commit to this going forward so that rural areas will get the advantages of competitive prices occurring in urban areas.”</p> <p><i>-Ergen House Judiciary Testimony, Dec. 4, 2001 p. 13.</i></p>	<p>“The ability to offer local promotions for installation and equipment will not undermine the effectiveness of national pricing as a constraint.”</p> <p><i>-Opposition, Feb. 25, 2002, p. 69.</i></p>
Vertical Integration	<p>“Unlike most large cable operators, [EchoStar] has no ownership stake in any programming producer, and the Applicants do not intend to pursue a strategy of vertical integration with programmers post-Merger.”</p> <p><i>-Application, Dec. 3, 2001, p. 6.</i></p>	<p>“The Applicants hereby advise the Commission that on December 14, 2001, [EchoStar Communications Corporation] signed definitive agreements relating to a transaction with Vivendi Universal, S.A . . . Under the Agreement, Vivendi will make a \$1.5 billion investment in [EchoStar Communications Corporation] . . . As part of the transaction [EchoStar Communications Corporation] has also agreed to carry 5 new Vivendi channels.”</p> <p><i>-Vivendi Letter, Dec. 18, 2001.¹⁸</i></p> <p>“We’re not opposed to taking a minority interest in a content provider on certain occasions.”</p> <p><i>-Charlie Ergen, EchoStar Investment Call, March 4, 2002.</i></p>
Favorable Programming Deals	<p>“Because of their relatively small market shares, EchoStar and DIRECTV have not enjoyed the market position necessary to obtain favorable programming deals available to cable.”</p> <p><i>-Opposition, Feb. 25, 2002, p. 125.</i></p>	<p>“[W]e have I think historically always been able to reach agreement with the particular programmers to something we think is fair for our consumers, and at a price that we think is fair.”</p> <p><i>-Charlie Ergen, EchoStar Investment Call, March 4, 2002.</i></p>
Entry Barriers to the DBS Market	<p>“There are significant entry barriers to the DBS and/or High Power DBS market.”</p> <p><i>-EchoStar Memorandum, Nov. 6, 2000, p. 12.</i></p>	<p>“[O]ther [satellite] companies have ample opportunity to use satellite spectrum and orbital locations . . . to introduce additional competition in the MVPD market.”</p> <p><i>-Opposition, Feb. 25, 2002, p. 49.</i></p>

¹⁸ Ex Parte Notice, Submitted by Counsel for General Motors Corporation and Hughes Electronics Corporation and Counsel for EchoStar Communications Corporation, Docket No. 01-348, p. 2 (December 18, 2001) (*Vivendi Letter*).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
Analog Cable Versus DBS	<p>“Old, analog, rotting miles of cable . . . Once you’ve experienced digital satellite, you’re not rushing out to get cable.”</p> <p>-Charlie Ergen, <i>Denver Post Interview</i>, Oct. 5, 1997.¹⁹</p>	<p>“Even analog cable operators historically have had tremendous advantages over DBS operators . . .”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 36.</p>
C-Band As Competition To DBS	<p>“Indeed, the size and cost of these dish antennas have rendered C-band technology largely obsolete.”</p> <p>-<i>EchoStar Amended Complaint</i>, April 5, 2001, p. 10.²⁰</p>	<p>“[C-band] products remain very attractive, particularly in areas where dish size is not important.”</p> <p>-<i>Application</i>, Dec. 3, 2001, p. 40.</p>
The Cable Industry’s Rollout of Digital Cable	<p>“Where [the cable industry] has come out in general [with digital cable], as they have done, and advertised in a market, they really raised the awareness about digital television in the marketplace. We have seen strong customer growth, and an increase in the total market. It increases for us.”</p> <p>-Roxanne Austin, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>“If EchoStar and DIRECTV are to continue to succeed, they must match . . . the dire competitive threat posed by the [digital] upgrade of these incumbents’ systems.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 38.</p>
The Cable Industry’s Bounty Programs	<p>“[D]igital cable is profoundly threatening to DBS. Among other things, digital cable: . . . has led the large cable multiple system operators to target DBS much more aggressively than in the past, including with . . . “dish bounties,” and other satellite specific promotions.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 37.</p>	<p>“The [bounty program] is a very poor economic model for them . . . I think it’s a very poor financial model for them. We will probably watch that, and if we see somebody doing something stupid, we’ll take advantage of it . . .”</p> <p>-Charlie Ergen, <i>EchoStar Investment Call</i>, March 4, 2002.</p>
The Product Market	<p>“DBS is in a separate product market from alternative sources of programming, including cable television.”</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p>	<p>“EchoStar and DIRECTV compete in the market for Multichannel Video Program Distribution (MVPD).”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 33.</p>

¹⁹ *Ergen On The Edge*, Denver Post, October 5, 1997, J-1 (*Denver Post Interview*).

²⁰ Amended Complaint, *EchoStar Communications Corporation, et al. v. DIRECTV Enterprises, Inc., et al.*, Civ. Action No. 00-K-212, p. 12 (D.Co. filed April 5, 2001) (*EchoStar Amended Complaint*).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
Competitive Broadband Offerings	<p>“[F]rom the Hughes standpoint, we truly believe that broadband is here. And we have competitive offerings, if you just go to the satellite-based offering that we have, a competitive offering.”</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>“[T]he merger of EchoStar and Hughes will <i>create</i> for the first time a truly competitive broadband alternative to DSL and cable modem service . . . consumers today located in areas served by DSL or cable modems lack access to effective satellite broadband competition.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 80 (emphasis in original).</p>
Consumer Broadband Services	<p>“[U]sing Ka-band satellite systems, will satisfy growing consumer demand for broadband services, and will be a significant step towards bridging the digital divide between urban and rural areas.”</p> <p>-<i>EchoStar/VisionStar Application</i>, Dec. 15, 2000, p. 9.²¹</p>	<p>“Nor could [EchoStar or DIRECTV] standing alone deploy on a timely basis an advanced residential broadband service of mass scale and appeal at an affordable price.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, pp. 80-81.</p>
The Critical Mass For Broadband Deployment	<p>“The combination of EchoStar and VisionStar will help create the critical mass, scale efficiencies and realistic chances of commercial success that will help both companies to deploy Ka-band satellites as expeditiously as possible.”</p> <p>-<i>EchoStar/VisionStar Application</i>, Dec. 15, 2000, p. 5.</p>	<p>“EchoStar currently does not have access to sufficient spectrum, orbital locations or capital resources to achieve (our) targets. All of these limitations, however, can be overcome by combining the resources of [Hughes and EchoStar] once the merger is approved.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 101 (discussing EchoStar’s limited Ka-band development).</p>
The Use of Theoretical Analysis	<p>“[P]roper competition analysis is limited to alternatives that are ‘practical in the business situation faced by the merging firms’ and should not rely on alternatives that are ‘merely theoretical.’”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 8.</p>	<p>“The Commission has reported that it is technically feasible for a new terrestrial service, which the Commission has dubbed Multichannel Video Distribution and Data Service (MVDDS) to share spectrum allocated to DBS in the 12.2 – 12.7 GHz band.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 53.</p>

²¹ Application for Consent to Transfer of Control Over Authorization, File No. 200-SAT-P/LA-95 (filed December 15, 2000) (EchoStar/VisionStar Application).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
Regulation vs. Competition	<p>“Regulation as a tool for facilitating broadband deployment . . . has historically led to market inefficiencies.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 115.</p>	<p>“New EchoStar will commit to a [regulated] nationwide pricing policy for basic broadband services that will translate effective competition in urban areas into benefits to all households for broadband service, just as it will for MVPD services.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 118.</p>
A Monopoly’s Willingness To Provide Innovative Services	<p>“[T]he proposed merger offers the possibility of substantial efficiency improvements . . . which would directly benefit DBS consumers by providing an expanded array of services.”</p> <p>-<i>Willig Declaration</i>, Dec. 3, 2001, p. 12.</p>	<p>“As is well documented in the literature of economics, monopolists do not invest the full amounts required for economic efficiency when they are provided with monopoly returns on their investments.”</p> <p>-<i>Willig Letter</i>, Dec. 11, 2001.²²</p>

Ka-Band Licensees With Milestones

EXHIBIT B

That May Be Adjusted Through Commission Action

COMPANY	ORBITAL SLOT	COMMENCE CONSTRUCTION	COMPLETE CONSTRUCTION	LAUNCH AND OPERATE (FCC)	ITU 'BRING INTO USE DATE'
NetSat 28	95° W.L.	--	August 2003	September 2003	November 2004
VisionStar	113° W.L.		April 2002	May 2002	May 2005
Loral Space & Communications	89° W.L.	May 1998	April 2002	May 2002	November 2004
	81° W.L.	May 1998	April 2002	May 2002	November 2004
	47° W.L.	May 1998	April 2002	May 2002	November 2004
	78° E.L.	May 1998	April 2002	May 2002	November 2004

Ka-Band Licensees With Milestones

That May Be Adjusted Through Commission and ITU Action

COMPANY ⁶⁵	ORBITAL SLOT	COMMENCE CONSTRUCTION	COMPLETE CONSTRUCTION	LAUNCH AND OPERATE (FCC/ITU)	POSSIBLE EXTENDED ITU 'BRING INTO USE DATE'
Hughes Communications, Inc.	131° W.L.	August 2002	--	March 9, 2003*	March 2005
KaStarCom. World Satellite, LLC	111° W.L.	August 2002	--	March 9, 2003*	March 2005
Lockheed Martin Corporation	129° W.L.	August 2002	--	March 9, 2003*	March 2005
	51° W.L.	August 2003	--	March 9, 2003*	March 2005
Loral CyberStar, Inc.	147° W.L.	August 2002	--	March 9, 2003*	March 2005
PanAmSat Corporation	133° W.L.	August 2002	--	March 9, 2003*	March 2005
Pacific Century Group, Inc.	71° W.L.	August 2003	--	March 9, 2003*	March 2005
Pegasus Development Corporation	107° W.L.	August 2002	--	March 9, 2003*	March 2005
TRW, Inc.	15° E.L.	August 2002	--	March 9, 2003*	March 2005

*The Licensee may apply to the International Telecommunication Union (ITU) -- through the FCC -- for an extension of this date. In order to receive an extension, the Licensee must make a showing of various due diligence requirements. The ITU may extend the Bring Into Use date by two years under the conditions specified in ITU Radio Regulations Articles S11.44B through S11.44I.

⁶⁵ A "--" symbol is inserted in those instances where the FCC has not established a milestone date.

Certificate of Service

I HEREBY CERTIFY that on this 17th day of June, 2002, a true and correct copy of the foregoing Petition to Deny of the National Rural Telecommunications Cooperative in the Matter of Application of VisionStar Incorporated (SAT-MOD-20020430-00075), was submitted via hand delivery to the Federal Communications Commission and served via courier, electronic mail or First Class Mail upon the following:

Served via courier:

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The Honorable Kathleen Q. Abernathy
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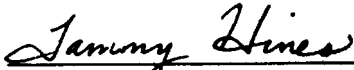
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