

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of
Digital Broadband Applications Corp.
Consolidated Application for Authority to Operate
U.S. Earth Stations with a U.S.-Licensed Ku-Band
FSS Satellite and Canadian-Licensed Nimiq and
Nimiq 2 Satellites to Offer Integrated Two-Way
Broadband Video and Data Service Throughout
the United States (Call Sign E020010)
File No. SES-LIC-20020109-00023

Order

Adopted: May 6, 2003

Released: May 7, 2003

By the Chief, International Bureau:

I. INTRODUCTION

1. In this Order, we authorize Digital Broadband Applications Corp. (DBAC) to provide two-way broadband data and video service in the United States using two Canadian direct broadcast satellites (DBS) and one U.S.-licensed fixed-satellite service (FSS) satellite.

II. BACKGROUND

A. DISCO II Framework

2. The Commission's DISCO II Order adopted a framework under which the Commission would consider requests for non-U.S. licensed satellite systems to serve the United States.

1 See Digital Broadband Applications Corp., Consolidated Application for Authority to Operate U.S. Earth Stations with a U.S.-Licensed Ku-Band FSS Satellite and Canadian-Licensed Nimiq and Nimiq 2 Satellites to Offer Integrated Two-Way Broadband Video and Data Service Throughout the United States, File No. SES-LIC-20020109-00023 (Jan. 9, 2002) ("DBAC Application").

2 See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and International Service in the United States, Report and Order, IB Docket No. 96-111, 12 FCC Rcd 24094 (1997) ("DISCO II" or "DISCO II Order").

this framework, the Commission, among other things, established a procedure by which a service provider in the United States could request immediate access to a foreign in-orbit satellite that would serve the U.S. market.³ This procedure requires the service provider to apply for an earth station license that would list the foreign satellite as an authorized point of communication.

3. Because the Commission does not issue duplicative U.S. licenses for space stations licensed by another administration,⁴ a U.S. earth station application often represents the Commission's first opportunity to evaluate whether the foreign space station complies with the Commission's technical, legal, and financial qualification requirements. The first earth station application seeking to communicate with a particular foreign satellite must therefore include the same detailed information about the space station and its operations that the Commission requires from U.S. space station applicants.⁵ Financial information is not required if the satellite has already been launched, however, nor is technical information required if the satellite has completed international coordination with the United States.⁶

4. In January 2002, DBAC⁷ filed an application requesting authority to operate a satellite network that would provide integrated two-way subscription broadband video, Internet, and data service to customers in the United States, including those in rural and underserved markets.⁸ The proposed network consists of one hub earth station, located in Arizona, and one million home terminals. The hub and home terminal stations will communicate with the Galaxy XI satellite and a Nimiq satellite, each of which operates or will operate, at the 91° W.L. orbit location.⁹ The home terminals will be equipped with hybrid antennas to enable them to communicate with both the Nimiq and Galaxy satellites. Only one set-top box will be required. DBAC proposes to operate the network as follows: (1) U.S. customers will transmit requests for video and data services to the Galaxy XI satellite in the 14.0-14.5 GHz frequency band, (2) these transmissions will be downlinked from Galaxy XI to the hub earth station in the 11.7-12.2 GHz frequency band, (3) the hub earth station will process the requests and uplink them to a Nimiq satellite in the 17.3-17.8 GHz frequency band, and (4) the Nimiq satellite will provide the requested video and data services to the home terminals in the 12.2-12.7 GHz band. DBAC "seeks only to deliver U.S.

³ See *DISCO II*, 12 FCC Rcd at 24174 (para. 186). For a more detailed summary of the *DISCO II* framework, see Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, *First Order on Reconsideration*, IB Docket No. 96-111, 15 FCC Rcd 7207, 7209-10 (paras. 4-5) (1999) ("*DISCO II First Reconsideration Order*").

⁴ *DISCO II*, 12 FCC Rcd at 24174 (para. 188).

⁵ All earth station applications must be accompanied by an exhibit containing the information required by Section 25.114 of the Commission's rules, 47 C.F.R. § 25.114, with respect to the proposed non-U.S. satellite. *DISCO II*, 12 FCC Rcd at 24175 (para. 189); 47 C.F.R. § 25.137(b). Section 25.137(b) refers to Section 25.114, which sets forth information requirements for U.S. space station operators.

⁶ *DISCO II*, 12 FCC Rcd at 24175-76 (para. 191); 47 C.F.R. § 25.137(b).

⁷ DBAC is "a 100% owned U.S. company." DBAC Consolidated Response and Opposition (filed March 12, 2002) at 9 ("DBAC Response").

⁸ In addition to its application, DBAC filed letters supplementing the record with additional information about its proposed service. See Notice of Oral *Ex Parte* Presentation of Digital Broadband Applications Corp. in File No. SES-LIC-20020109-00023, Letter from Todd M. Stansbury to William F. Caton, Acting Secretary, March 6, 2002; Notice of *Ex Parte* Meeting re: Digital Broadband Applications Corp. File No. SES-LIC-20020109-00023, Letter from Patricia Paoletta to William F. Caton, Acting Secretary, April 19, 2002.

⁹ Nimiq is now operating at 91° W.L. Nimiq 2, launched December 29, 2002, will be located at 91° W.L. The DBAC Application indicates that once the Nimiq 2 satellite is in the 91° W.L. position, the Nimiq satellite will relocate to 82° W.L. The Nimiq satellites are assigned to Canada under the International Telecommunications Union (ITU) 1983 Region 2 Band Plan. Canada requested and received approval from the ITU to modify the Region 2 Band Plan for the 91° W.L. and 82° W.L. orbital locations to expand the Nimiq satellites' coverage areas into the United States.

product and Internet content to U.S. consumers. . .[and] is not proposing to deliver Canadian content or programming in the U.S., or to uplink programming from Canada.”¹⁰ DBAC states that the home terminals may also communicate with the hub using, where available, facilities operating in the terrestrial Local Multipoint Distribution Service (LMDS). DBAC does not, however, request authority to use LMDS spectrum at this time. Consequently, we will not consider its possible use of LMDS spectrum in this order.

5. The majority of commenters support grant of the DBAC Application.¹¹ One party, SES Americom, Inc. filed a petition to deny grant, arguing that Canada cannot meet the Commission’s effective competitive opportunities test.¹²

III. DISCUSSION

A. Space Station Analysis

1. General Framework

6. In *DISCO II*, the Commission set forth the public interest analysis applicable in evaluating applications to use non-U.S. licensed space stations to provide satellite service in the United States. This analysis considers the effect on competition in the United States,¹³ spectrum availability,¹⁴ eligibility and operating (*e.g.*, technical) requirements,¹⁵ and national security, law enforcement, foreign policy, and trade concerns.¹⁶ We evaluate DBAC’s request under this framework.

2. Competition Concerns

7. In *DISCO II*, the Commission established a rebuttable presumption in favor of entry by non-U.S. satellites licensed by World Trade Organization (WTO) Members to provide services covered by the U.S. commitments under the WTO Agreement on Basic Telecommunications Services (WTO Basic Telecom Agreement).¹⁷ These commitments include fixed-satellite service, except for direct-to-

¹⁰ DBAC Response at 9.

¹¹ See Comments of United States Hispanic Chamber of Commerce (filed Feb. 25, 2002); Sarnoff Corporation (filed Feb. 25, 2002); Hispanic Information and Telecommunications Network, Inc. (filed Feb. 25, 2002); The California Internet Service Providers Association (filed Feb. 22, 2002). Two parties filing comments, DIRECTV, Inc. and the Motion Picture Association of America (“MPAA”), express no opinion concerning grant or denial of the DBAC Application and instead focus their discussion on other issues. DIRECTV, Inc. urges the Commission to “ensure that there will be no interference with the operations of existing U.S. DBS providers” and asks that DBAC submit for the record more technical details surrounding its proposed service. Comments of DIRECTV, Inc. at 1-2. (filed Feb. 25, 2002). The MPAA believes that the Commission should apply the ECO-Sat test to both components of DBAC’s proposed service, and also recommends that the Commission and Executive Branch enter negotiations with Canada to improve access to Canadian markets for U.S. content providers. Comments of Motion Picture Association of America (filed Feb. 25, 2002). The Commission also received correspondence from various members of Congress, which has been included in the record.

¹² In re Applications of Digital Broadband Applications Corp., For Authority to Operate Earth Stations to Receive from Canadian DBS Satellites, Petition to Deny of SES Americom, Inc., filed Feb. 25, 2002 (“SES Petition”).

¹³ *DISCO II*, 12 FCC Rcd at 24107-56 (paras. 30-145).

¹⁴ *DISCO II*, 12 FCC Rcd at 24157-59 (paras. 146-50).

¹⁵ *DISCO II*, 12 FCC Rcd at 24159-69 (paras. 151-74).

¹⁶ *DISCO II*, 12 FCC Rcd at 24169-72 (paras. 175-82).

¹⁷ *DISCO II*, 12 FCC Rcd at 24112 (para. 39). The WTO came into being on January 1, 1995, pursuant to the Marrakesh Agreement Establishing the World Trade Organization (the Marrakesh Agreement). 33 I.L.M. 1125

home (DTH) service.¹⁸ The United States did not make market access commitments for the DBS service.¹⁹ In *DISCO II*, the Commission indicated that it would apply the effective competitive opportunities test (ECO-Sat) to requests involving provision of non-WTO covered services such as DTH and DBS by non-U.S. satellites to ensure that entry by the foreign satellite does not distort competition in the U.S. market.²⁰ Under this test, we examine effective competitive opportunities for U.S.-licensed satellites to serve the home market of the non-U.S. satellite seeking access to the United States.²¹ We examine in particular *de jure* and *de facto* barriers to entry for the provision of analogous services, and whether any such barriers would cause competitive distortions in the United States.²² We emphasize that application of the ECO-Sat test is one factor in our general public interest analysis framework, as described above.

8. DBAC proposes to provide a hybrid two-way broadband video and data service throughout the continental United States using a combination of Canadian DBS and U.S. FSS satellites.²³ DBAC argues that, according to the *DISCO II Order*, the Commission “established a presumption in favor of granting requests for access to satellites licensed by WTO Member countries,” but exempted from this presumption “applications for ‘one-way satellite transmissions of DTH and DBS television services and digital audio services.’”²⁴ DBAC argues that because Canada is a WTO-member country and DBAC’s planned service offering is two-way, “[b]y its very nature,” the Commission should apply its presumption in favor of grant, and not apply the ECO-Sat test.²⁵ SES Americom argues that a presumption in favor of grant does not apply to the DBAC Application because DBAC intends to offer direct broadcast satellite services, and the United States has “specifically excluded” such services from its

(...continued from previous page)

(1994). The Marrakesh Agreement includes multilateral agreements on trade in goods, services, intellectual property, and dispute settlement. The General Agreement on Trade in Services (GATS) is Annex 1B of the Marrakesh Agreement. 33 I.L.M. 1167 (1994). The WTO Basic Telecom Agreement was incorporated into the GATS by the Fourth Protocol to the GATS (April 11, 1997), 36 I.L.M. 354 (1997) (Fourth Protocol to the GATS). Generally, GATS requires WTO Member Nations to afford most favored nation (MFN) treatment to all other WTO Member Nations. “With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.” GATS Article II, para. 1. Member nations are permitted to take “MFN exemptions,” however, under certain circumstances specified in an annex to GATS. See GATS Annex on Article II Exemptions. The WTO Basic Telecom Agreement also contains specific commitments with respect to market access and national treatment commitments made by WTO members.

¹⁸ *DISCO II*, 12 FCC Rcd at 24104 (para. 25). DTH satellite service is provided in bands internationally allocated to the fixed-satellite service (“FSS”) using FSS satellites. The FSS rules, including those applicable to satellites providing DTH service, are in Part 25 of the rules. DBS operates in the 12.2-12.7 GHz frequency bands (space-to-earth), allocated for the Broadcasting Satellite Service (“BSS”). See Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, 17 FCC Rcd 11331 at para. 3 (2002); see also 47 C.F.R. § 25.202.

¹⁹ The United States made no market access or national treatment commitments for DTH, DBS, and DARS, and took an exception from MFN for these issues. *DISCO II*, 12 FCC Rcd at 24104 (para. 25).

²⁰ *DISCO II*, 12 FCC Rcd at 24136 (para. 98).

²¹ *DISCO II*, 12 FCC Rcd at 24136-7 (para. 98).

²² *DISCO II*, 12 FCC Rcd at 24137 (para. 99); see also 47 C.F.R. § 25.137(a).

²³ Industry Canada has licensed the Canadian satellites, Nimiq and Nimiq 2, to Telesat Canada. The holder of the license for the U.S. FSS satellite is PanAmSat Licensee Corp. Canada requested a modification to the ITU Region 2 Band Plan to expand the coverage area of the Nimiq satellites to include coverage of the United States. See n. 9 *supra*.

²⁴ DBAC Application, Exhibit C at 2 (citing *DISCO II*, 12 FCC Rcd at 24136-7).

²⁵ DBAC Application, Exhibit C at 3-4.

WTO commitments.²⁶ SES Americom asserts that the Commission must apply the ECO-Sat test in this situation, and further argues that because Canadian regulation “prohibits the use of U.S.-licensed satellites to offer one-way subscription video programming service to the Canadian public,” Canada cannot meet the ECO-Sat test, thereby preventing grant of the DBAC Application.²⁷

9. We agree with SES Americom that a presumption in favor of grant does not apply to the DBAC Application because DBAC intends to offer direct broadcast satellite services, which are non-WTO covered services.²⁸ Although DBAC proposes to offer a hybrid service, we agree with the Motion Picture Association of America (MPAA) that each component (subscription video and Internet/video and data) requires a separate *DISCO II* analysis.²⁹ In the *DISCO II Order*, the Commission indicated that it would address requests to provide both WTO-covered and non-WTO covered services over a non-U.S. satellite separately, under the rules for each situation.³⁰ Separate analyses are warranted because an individual consumer would likely be capable of using the DBAC service components separately or simultaneously.³¹

10. In the event that the Commission decides that an ECO-Sat analysis is required for the “non-Internet subscription video component,” DBAC requests a waiver of this requirement, which is contained in Section 25.137(a) of the Commission’s rules.³² DBAC makes three arguments in support of a waiver. First, DBAC argues that its service will facilitate broadband deployment, “particularly in rural and other unserved areas;” second, DBAC contends that its service will enhance competition “[i]n light of ever-increasing consolidation in the broadband and subscription video marketplaces;” and finally, DBAC asserts that its intent to use both LMDS and DBS spectrum promotes spectral efficiency.³³ SES Americom argues that DBAC has not met the “heavy burden” required to justify a waiver of the application of the ECO-Sat test.³⁴ In response, DBAC maintains that its service will serve the public interest by promoting “effective competition in the U.S. marketplace for high-power satellite services”³⁵ and by offering innovative broadband services to U.S. consumers.³⁶ DBAC also suggests that due to the scarcity of high-power satellites at full-CONUS orbital positions, use of the Nimiq satellites “might be the

²⁶ SES Petition at 3.

²⁷ SES Petition at 4-6.

²⁸ SES Petition at 3.

²⁹ MPAA comments at 2.

³⁰ *DISCO II*, 12 FCC Rcd at 24137-8 (para. 101).

³¹ DBAC notes that its service has a “non-Internet subscription video component.” Ex. C at 7. In an *ex parte* statement, DBAC notes that despite the integrated nature of its proposed service offering, “the choice of service offering ultimately would be the customer’s.” DBAC April 19, 2002 *ex parte* at 2. See also SES Americom Response at 3 (“[t]he fact the DBAC will be offering a bundled service does not prohibit consumers from choosing only one of many service offerings. . .”).

³² DBAC Application, Exhibit C at 7. Section 25.137(a) provides that earth station applicants seeking authority to operate with a non-U.S. licensed space station must demonstrate “that U.S.-licensed satellite systems have effective competitive opportunities to provide analogous services in: (1) The country in which the non-U.S. licensed space station is licensed; and (2) All countries in which communications with the U.S. earth station will originate or terminate.” See 47 C.F.R. § 25.137(a).

³³ DBAC Application, Exhibit C at 8-12.

³⁴ SES Petition at 7-9.

³⁵ DBAC Response at 3-6.

³⁶ DBAC Response at 10-13.

only means of offering a competitive alternative” to current U.S. video and broadband offerings.³⁷ SES Americom responds that to the contrary, domestic U.S. Ku-band FSS providers also have excess capacity that could be used to provide the service that DBAC proposes.³⁸

11. Commission rules may be waived if there is “good cause” to do so.³⁹ Waiver is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than would strict adherence to the general rule.⁴⁰ Circumstances that would justify a waiver include “considerations of hardship, equity, or more effective implementation of overall policy.”⁴¹ Generally, the Commission may grant a waiver of its rules in a particular case only if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.⁴² Applying the standard set forth above, DBAC’s application does not provide a sufficient basis for waiver of the ECO-Sat requirement in Section 25.137(a). Rather, DBAC’s reasons in support of a waiver do not distinguish it from any other entity seeking to offer a competitive service.⁴³ Furthermore, DBAC’s argument that its plan is spectrally efficient is merely speculative since it has not yet applied for the use of any terrestrial LMDS spectrum nor has it provided any information concerning its intent to use or otherwise obtain spectrum of currently licensed LMDS entities. Regardless, even if DBAC’s spectral efficiency argument were not speculative, we would find it inapposite to our evaluation of the waiver request. The purpose of Section 25.137(a) is to prevent competitive distortions that could result in the United States as a result of a foreign operator offering service in the United States that a U.S. operator cannot offer in the foreign operator’s home country. Whether a proposal is spectrally efficient does not ordinarily affect our analysis of competitive distortions. Because DBAC does not allege any special circumstances that necessitate a waiver of the general rule, we deny its request for waiver of Section 25.137(a). Nevertheless, as indicated in more detail below, our denial of this waiver request does not prevent grant of the DBAC application.

12. We next conduct a *DISCO II* analysis for each component of DBAC’s proposed service. With regard to the fixed-satellite service Internet/video and data component of DBAC’s proposal, we find that the presumption in favor of entry is applicable because this is a WTO-covered service and Canada is both a WTO member and a signatory to the WTO Basic Telecom Agreement.⁴⁴ No comments suggest that allowing Nimiq and Nimiq 2 to enter the U.S. market to provide fixed-satellite services would raise

³⁷ DBAC Response at 6.

³⁸ SES Americom Response at 6. We note that SES Americom does not propose to provide DBS service using orbital locations assigned to the United States under the ITU Region 2 Band Plan. See SES Americom, Petition for Declaratory Ruling, filed April 25, 2002.

³⁹ See Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3. See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (“*WAIT Radio*”); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

⁴⁰ *Northeast Cellular*, 897 F.2d at 1166.

⁴¹ *WAIT Radio*, 418 F.2d at 1159.

⁴² *WAIT Radio*, 418 F.2d at 1157.

⁴³ SES Americom also argues that a waiver of the ECO-Sat test would impair the ability of the U.S. to obtain concessions from Canada and other trading partners in ongoing WTO negotiations. SES Petition at 8. We do not find this argument relevant to determining whether to grant or deny an ECO-Sat waiver, and moreover, the U.S. Trade Representative opted not to comment on the DBAC Application.

⁴⁴ See <www.wto.org/wto/services/tel01.htm> at n.2 for a list of all signatories to the WTO Basic Telecom Agreement. See <www.wto.org/wto/about/organsn6.htm> for a list of all WTO Members. Industry Canada permits non-Canadian, WTO-member licensed FSS space stations to serve Canadians. See Annex D, Policy Framework for the Provision of Fixed Satellite Service, Industry Canada, RP-008, December 1998.

competition concerns of the kind discussed in *DISCO II*.⁴⁵ In addition, we have already allowed other Canadian satellites to access the U.S. market for the provision of FSS.⁴⁶ Thus, we find that granting Nimiq and Nimiq 2 entry to the U.S. market to provide FSS for delivery of Internet/video and data services to consumers will enhance competition in the United States.

13. As noted above, the United States made market access commitments for fixed-satellite services under the WTO Basic Telecom Agreement, but did not make market access commitments for DTH or DBS service. DBAC's subscription video service offering constitutes DBS, which we have described as the use of satellites to deliver video programming directly to subscribers using relatively small receiving antennas.⁴⁷ Since the presumption that entry of the Nimiq satellites to the United States will further competition in the United States does not apply, we must perform an ECO-Sat analysis for the "non-Internet subscription video component"⁴⁸ of DBAC's proposed service. This requires us to examine effective competitive opportunities for U.S.-licensed satellites to provide service in Canada that is analogous to DBAC's proposed service.⁴⁹ We examine in particular *de jure* and *de facto* barriers to entry, and whether any such barriers would cause competitive distortions in the United States.⁵⁰

14. The record indicates that Canada limits the access of U.S. programmers and U.S. content to Canada's subscription video market.⁵¹ MPAA notes that "Canadian distribution undertakings [including DTH] must carry a majority of Canadian signals and services," and are also subject to programming content quotas.⁵² SES Americom cites Annex C of Industry Canada's Policy Framework for the Provision of Fixed Satellite Services ("Annex C") as proof that Canada "prohibits the use of U.S.-licensed satellites to offer one-way subscription video programming service to the Canadian public."⁵³ According to Annex C, an entity "should make use of Canadian satellite facilities to carry all Canadian programming services. . ." and "under no circumstances should an undertaking use exclusively foreign satellites for the distribution of its services to Canadians."⁵⁴ Under this framework, Industry Canada

⁴⁵ The "competition concerns" contemplated by the Commission include market concentration, discrimination, below average variable cost pricing, or market power. *DISCO II*, 12 FCC Rcd at 24113 (para. 41). See also SES Petition at n. 17 (agreeing with DBAC that U.S.-licensed satellites can be used to provide Internet access to Canadians).

⁴⁶ The Bureau has previously determined that Telesat is legally qualified to provide satellite services in the United States. Telesat Canada, Request for Declaratory Ruling or Petition for Waiver on Earth Stations' Use of Anik E1 and Anik E2 Satellite Capacity to Provide Basic Telecommunications Service in the United States, *Order*, 15 FCC Rcd 3649, 3653 (para. 13) (Int'l Bur. 1999) ("*Anik E2 Order*"); Telesat Canada, Petition for Declaratory Ruling For Inclusion of Anik F1 on the Permitted Space Station List, *Order*, 15 FCC Rcd 24828, 24831 (para. 10) (Int'l Bur. 2002) ("*Anik F1 Order*").

⁴⁷ See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 02-145, *Notice of Inquiry*, 17 FCC Rcd 11579 at n. 31 (2002). DBS operates in the 12.2-12.7 GHz frequency bands (space-to-earth), allocated for the Broadcasting Satellite Service ("BSS"). See Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, 17 FCC Rcd 11331 at para. 3 (2002); see also 47 C.F.R. § 25.202.

⁴⁸ DBAC Application Ex. C at 7.

⁴⁹ See 47 C.F.R. § 25.137(a).

⁵⁰ *DISCO II*, 12 FCC Rcd at 24137 (para. 99).

⁵¹ See, e.g., MPAA comments at 3; SES Petition at 5.

⁵² MPAA comments at 3-4.

⁵³ SES Petition at 5.

⁵⁴ *Id.*; see also Annex C, Policy Framework for the Provision of Fixed Satellite Service, Industry Canada, RP-008, December 1998.

likely would deny access to a U.S. satellite proposing entry to Canada⁵⁵ in a manner analogous to that proposed by DBAC for Nimiq and Nimiq 2 (*i.e.*, examining only the subscription video component). In other words, a Canadian entity proposing to use a U.S. satellite to deliver Canadian video programming to Canadians only would be denied access. Thus, a *de jure* barrier exists in Canada for any U.S. satellite seeking to offer a DBAC-analogous service.

15. Despite the existence of this barrier, we do not believe that the Nimiq satellites should be denied access to the U.S. market for DBAC's proposed service offering. In describing how the proposed and subsequently adopted ECO-Sat test would be applied in reviewing applications for earth stations to communicate with non-U.S. satellites, the Commission stated that it would "consider whether any additional countervailing public interest factors weigh in favor of a result different from the one we would reach under the ECO-Sat analysis alone."⁵⁶ When the Commission proposed using the ECO-Sat test, it noted that if a law or regulation prohibited U.S. satellites from providing service in a foreign country, the Commission "would prohibit a satellite system licensed by that country from serving the U.S. market, *unless there is a compelling public interest reason to do otherwise.*"⁵⁷ Among the factors that the Commission considers is the effect that the foreign entry will have on competition *in* the United States.⁵⁸

16. In this case, we believe that permitting DBAC to offer its service will enhance, rather than distort or harm, competition in the United States for broadband video and data services. Competitive distortions in the U.S. market would only be likely to result if a number of conditions were satisfied. Among those conditions would be that: (1) through use of the Canadian satellites, DBAC would have access to cost savings, subsidies or quality-enhancing assets not available to other U.S. service providers; (2) those cost savings, subsidies, or quality-enhancing assets would be sufficiently large to enable DBAC to offer prices and quality of service that would cause some or all of the incumbent U.S. DTH/DBS providers to exit the market; (3) following exit of some or all of the domestic DTH/DBS providers, DBAC would be able to raise the price of service to U.S. customers; and (4) entry barriers exist such that neither the incumbent U.S. DTH/DBS providers nor new U.S. DTH/DBS providers could enter the market, thereby defeating the price increase.⁵⁹ With regard to the second and third conditions, competitive distortions related to predatory pricing are a rare phenomenon, in part because there is a very

⁵⁵ Just as Canada obtained approval from the ITU to modify the ITU Region 2 Band Plan to expand its coverage area (*see n. 9 supra*), the United States also would have to obtain approval to modify the ITU Region 2 Band Plan in order for a U.S. satellite to provide service in Canada.

⁵⁶ *See* Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and International Service in the United States, *Notice of Proposed Rulemaking*, IB Docket No. 96-111, 11 FCC Rcd 18178, 18185 (para. 12) (1996) ("*DISCO II NPRM*"). *See also DISCO II Order*, 12 FCC Rcd at 24098, 24106 (paras. 7, 29). *See also* Market Entry and Regulation of Foreign-affiliated Entities, IB Docket No. 95-22, *Report and Order*, 11 FCC Rcd 3873, 3896-7 (1995) (describing the ECO test that was the precedent for the similar ECO-Sat test).

⁵⁷ *DISCO II NPRM*, 11 FCC Rcd at 18192 (emphasis added).

⁵⁸ *DISCO II*, 12 FCC Rcd at 24098 (para. 7).

⁵⁹ The latter two conditions are often indicative of a predatory pricing scheme. On the conditions necessary to engage in such a scheme and for it to be successful, *see*, for example: DENNIS W. CARLTON AND JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 384-394 (2d ed. 1994) and RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 123-124 (1972). *See also*: Comsat Corporation, Policies and Rules for Alternative Incentive Based Regulation of Comsat Corporation, IB Docket No. 98-60, *Report and Order*, 14 FCC Rcd 3065, paras. 32-34 (1999) and PanAmSat Corporation, Complainant, v. Comsat Corporation-Comsat World Systems, Defendant, File No. E-96-21, *Memorandum Opinion and Order*, 12 FCC Rcd 6952, paras. 16-20 (1997).

high risk that such behavior will be unsuccessful.⁶⁰ While competitive distortions might also arise from cost savings or subsidies that could afford a firm providing DBS service using non-U.S. satellites with the ability to price below the marginal cost of other DBS providers, in this instance, competitive distortions related to cost savings or subsidies are extremely unlikely. Moreover, the record does not contain any discussion of such cost savings or their ability to create competitive distortions.

17. We find that the above conditions do not exist, and that competitive distortion in the U.S. market would not occur if DBAC is authorized to provide the service it proposes. DBAC does not propose to provide service from the United States into Canada.⁶¹ However, even if DBAC, using a Canadian satellite, were to have access to the Canadian market that is denied to other U.S. providers, such access would not, in fact, provide DBAC with a significant cost advantage in the U.S. market. DBAC, in serving Canadian DBS customers, would be subject to Canadian programming content quotas. As long as the majority of content provided to Canadian DBS customers is required by Canadian regulations to consist of Canadian signals and services, DBAC would be able to offer its Canadian customers only a portion of the content that would be available to U.S. consumers. If DBAC provides no Canadian content, it would not be able to serve the Canadian market. If DBAC provides some Canadian content, it could provide Canadian customers with that content plus the same amount of non-Canadian content. Unless the Canadian content were to comprise half of their U.S. offerings, DBAC would not be able to provide the full U.S. package of programs to the Canadian market. Since DBAC would be unlikely to provide an attractive package in Canada, and since Canada is a significantly smaller market than the United States,⁶² any scale economies that might result from access to Canadian customers would be relatively small and would not afford DBAC with cost-savings relative to other U.S. DBS providers that would be sufficiently large as to create a competitive distortion. Further, DBAC is not a dominant incumbent in U.S. DBS services. To the contrary, DBAC does not yet have any subscribers since it has not yet entered the market for DBS or multichannel video programming distribution (MVPD) services. Allegations of competitive distortions related to predatory pricing, cost savings or subsidies almost always involve a dominant incumbent. To create a competitive distortion in DBS services, DBAC would need to overcome all the advantages that are available to the incumbents with large installed bases.

18. Most importantly, rather than creating a competitive distortion, entry by DBAC into the U.S. market can increase competition in DBS services and in MVPD service generally. The markets for

⁶⁰ See, e.g., Ronald L. Koller, *The Myth of Predatory Pricing*, ANTITRUST LAW AND ECONOMICS REVIEW 3: 105-23, (1971); John E. Kwoka, Jr. et al., ed., *The Antitrust Revolution* 151 (HarperCollins College Publishers, N.Y., 1994). As the Supreme Court explained in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*:

[T]he success of such [predatory] schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in excess profits. The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predators' losses and to harvest some additional gain...For this reason, there is consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.

Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (citing Robert Bork, *The Antitrust Paradox*, 149-155 (1978)).

⁶¹ DBAC Response at 9 ("DBAC. . . seeks only to deliver U.S. product and internet conduct to U.S. consumers.").

⁶² According to U.S. and Canadian census data, in 2002, the U.S. had a population of approximately of 288.4 million, while Canada had a population of approximately 31.4 million. See <<http://eire.census.gov/popest/data/states/tables/ST-EST2002-01.php>> and <<http://www.statcan.ca/english/Pgdb/demo02.htm>> (visited on Feb. 3, 2003).

delivery of video programming to households are highly concentrated.⁶³ In the vast majority of local markets, the primary providers of MVPD services are two DBS providers, EchoStar and DirecTV, and cable operators, and for the vast majority of those markets where cable service is available, there is a single, franchised cable provider.⁶⁴ Future provision of DBS services in these markets as proposed by DBAC, with Canadian satellites, will not create a competitive distortion, and could increase competition in MVPD services.

19. Although we determine that granting DBAC authority to access the Canadian satellites will not distort, and would likely increase, competition in the United States, we still find it necessary to condition DBAC's access to ensure that in the future competitive distortions do not result. Specifically, we will limit the scope of this authorization to the service as proposed in the DBAC Application in this regard: we will not permit DBAC to provide DBS programming to U.S. customers that it obtains through exclusive agreements entered into with Canadian space station operators, program suppliers, and/or program distributors.⁶⁵ The Commission prohibits exclusive service arrangements made by both U.S. and non-U.S. satellite operators providing any services in the United States.⁶⁶ In the *DISCO II Order*, the Commission explained that prohibiting exclusive arrangements "is consistent with our national treatment and MFN obligations under the GATS because we will be treating non-U.S. satellites the same as U.S. satellites, and will treat all non-U.S. satellites similarly."⁶⁷ As noted above, a competitive distortion might exist if, because of its use of a Canadian satellite, DBAC had access to quality-enhancing assets not available to other U.S. DTH/DBS providers, enabling DBAC to provide a higher quality product for any given price than might be possible absent such an exclusive license. If DBAC were to have access to Canadian content not available to other DTH/DBS providers, exclusive access to that content might provide DBAC with an advantage that could create a competitive distortion, *i.e.*, if that content proves so popular that it places other DTH/DBS providers at a significant competitive disadvantage. While such a competitive distortion is unlikely, by imposing on DBAC a prohibition against exclusive agreements, we eliminate the possibility that DBAC will have access to a cost-saving or quality-enhancing opportunity that is not also available to U.S. providers using U.S. satellites only.

3. Spectrum Availability

20. In *DISCO II*, the Commission determined that, given the scarcity of orbit and spectrum resources, it would consider spectrum availability as a factor in determining whether to allow a foreign satellite to serve the United States.⁶⁸ This is consistent with the Chairman's Note to the WTO Basic Telecom Agreement, which states that WTO Members may exercise their domestic spectrum/frequency management policies when considering foreign entry.

21. DirecTV suggests that DBAC's operations could interfere with its existing DBS operations and states that the Commission must ensure that the Nimiq satellites do not interfere with the

⁶³ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Ninth Annual Report*, FCC 02-338, rel. December 31, 2002 (paras. 113-117).

⁶⁴ Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation (transferors) and EchoStar Communications Corporation (transferee), *Hearing Designation Order*, 17 FCC Rcd 20559 at para. 127 (2002).

⁶⁵ DBAC states that it "is not proposing to deliver Canadian content or programming in the U.S., or to uplink programming from Canada." (DBAC Response at 9.)

⁶⁶ *DISCO II*, 12 FCC Rcd at 24166 (paras. 161-167).

⁶⁷ *DISCO II*, 12 FCC Rcd at 24166 (para. 167).

⁶⁸ *DISCO II*, 12 FCC Rcd at 24159 (para. 150).

operations of existing U.S. DBS providers.⁶⁹ We conclude that the Nimiq satellites will not interfere with U.S. DBS operations provided that their operating parameters do not exceed those filed with the ITU for the Nimiq and Nimiq 2 satellites. Operations on both Nimiq satellites now fall within the parameters defined by the ITU in Appendices 30 and 30A of the International Radio Regulations as not affecting U.S. DBS satellites.⁷⁰ In this context, “not affecting” is equivalent to not interfering unacceptably. Consequently, the Nimiq and Nimiq 2 satellites do not present any unacceptable increased interference potential to U.S. DBS satellites and the Canadian administrator need not seek our agreement prior to operating these satellites or seeking notification and entry in the master register at the ITU. We therefore find that allowing Nimiq and Nimiq 2 to serve the U.S. market from 82° W.L. and 91° W.L. in a manner consistent with Appendices 30 and 30A of the International Radio Regulations will neither affect the operations of any U.S.-licensed DBS satellites nor contravene the Commission’s spectrum/frequency management policies.

4. Eligibility Requirements

a. Legal Qualifications

22. The Commission's *DISCO II Order* requires that space station operators not licensed by the Commission meet the same legal, financial, and technical qualifications required of U.S.-licensed space station operators. DBAC indicates in its application that Canada has granted licenses to Telesat Canada to operate Nimiq and Nimiq 2.⁷¹ We have previously reviewed letters of intent from Telesat Canada for other fixed-satellite facilities and have found that Telesat Canada is legally qualified to provide satellite services in the United States.⁷² Furthermore, nothing in the record raises concerns about Telesat’s legal qualifications to provide satellite services in the United States. Thus, we find that Telesat Canada is legally qualified to provide satellite service (both DBS and FSS) in the United States.

b. Financial Qualifications

23. In the *DISCO II Order*, the Commission exempted in-orbit, non-U.S. space station systems from financial qualification requirements, reasoning that “where the foreign satellite is already in-orbit, there is no concern about whether the prospective entrant is financially capable of building and launching its system.”⁷³ DBAC indicates that Nimiq has been launched and is currently operating in the 91° W.L. orbital position.⁷⁴ Consequently, we need not examine Telesat Canada’s financial qualifications with regard to the Nimiq satellite.

24. At the time DBAC filed its application, the Nimiq 2 satellite was not operational, and was scheduled for launch in the first quarter of 2003.⁷⁵ Thus, ordinarily, DBAC would need to supply the financial information required by our rules. Although DBAC provided Telesat Canada’s 2000 Annual Report and Third Quarter 2001 Financial Statement, it seeks a waiver of Sections 25.137(b), 24.114(c)(17), and 25.140 should the Commission determine that the information supplied does not

⁶⁹ DirecTV comments at 1.

⁷⁰ See International Radio Regulations, Appendices 30 and 30A.

⁷¹ DBAC Application, Exhibit C at 3.

⁷² See n. 46, *supra*.

⁷³ *DISCO II Order*, 12 FCC Rcd at 24176 (para. 191). Section 25.137(b) exempts applicants from providing financial information only if “the non-U.S. licensed space station is in orbit and operating.” 47 C.F.R. § 25.137(b).

⁷⁴ DBAC Application, Exhibit C at 14.

⁷⁵ DBAC Application, Exhibit C at 14.

satisfy the requirements of these sections.⁷⁶ DBAC argues that “rigid application” of these rules would serve no purpose, since there is little likelihood of spectrum warehousing because Canada has exclusive rights to the DBS frequencies at issue (*i.e.*, “there would be no preclusive effect on the ability of new entrants to enter” the United States).⁷⁷

25. While our research shows that Nimiq 2 was successfully launched from Kazakhstan on December 29, 2002, the location and operational status of this satellite remains uncertain.⁷⁸ Thus, absent grant of a waiver, DBAC must supply the financial information required by our rules, and we find that DBAC’s submission does not satisfy these requirements. However, Commission rules may be waived if there is “good cause” to do so and such waiver does not undermine the intent of the rule.⁷⁹ We conclude that there is good cause to grant DBAC a waiver of the financial qualification requirements in this case with respect to the Nimiq 2 satellite. Since all steps to secure Canadian licensing have been concluded and Telesat has successfully launched the Nimiq 2 satellite, there are no concerns about spectrum warehousing or whether DBAC “is financially capable of building and launching its system.”⁸⁰ Consequently, granting a waiver of our financial demonstration requirements in this case satisfies our policy objectives and serves the public interest.

c. Technical Qualifications

26. In *DISCO II*, the Commission stated it would require non-U.S.-licensed space stations to meet the same technical requirements that apply to U.S. space stations.⁸¹ For DBS satellites, such as Nimiq and Nimiq 2, the most significant requirement is that the satellites’ DBS operations must be in accordance with the sharing criteria and technical characteristics contained in Appendices 30 and 30A of the International Radio Regulations.⁸² To enable the Commission to determine whether the non-U.S. satellite complies with U.S. technical requirements, it requires earth station applicants to provide the same technical information concerning the non-U.S. satellite as it requires U.S. space station applicants to provide concerning the proposed U.S. space station.⁸³ The Commission has carved out an exception to this information requirement in cases where the international coordination process has been completed for the non-U.S. space station.⁸⁴ DBAC states that the international coordination process has been completed for both the Nimiq and Nimiq 2 satellites.⁸⁵

⁷⁶ DBAC Application, Exhibit C at 15.

⁷⁷ DBAC Application, Exhibit C at 15.

⁷⁸ See Press Releases, Telesat Launches New Direct Broadcast Satellite, Dec. 30, 2002, <<http://www.telesat.ca/eng/02-14.htm>>; Nimiq 2 Satellite Anomaly, Feb. 20, 2003, <<http://www.telesat.ca/eng/03-04.htm>>; Telesat Clears Nimiq 2 Satellite for Long-Term Service, April 11, 2003, <<http://www.telesat.ca/eng/03-07.htm>>.

⁷⁹ See 47 C.F.R. § 1.3 (2001). See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (“*WAIT Radio*”); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”). See *supra* discussion of the Commission’s waiver standard at para. 11.

⁸⁰ *DISCO II Order*, 12 FCC Rcd at 24176 (para. 191).

⁸¹ *DISCO II Order*, 12 FCC Rcd at 24161-2 (para. 156).

⁸² See 47 C.F.R. § 25.148(f). The Commission’s two-degree orbital spacing requirements do not apply to DBS satellites since the assignment plan of Appendices 30 and 30A of the ITU International Radio Regulations are based on satellite spacings of nine degrees for co-frequency, co-coverage operation.

⁸³ 47 C.F.R. § 25.137(b).

⁸⁴ *Id.*

⁸⁵ DBAC Application at Exhibit C, p.13.

27. As noted, operations on Nimiq and Nimiq 2 fall within the parameters defined by the ITU as not affecting U.S. DBS satellites. Consequently, coordination has, in effect, been completed between the Nimiq satellites and potentially affected U.S. satellites. Thus, DBAC need not submit technical information concerning these satellites in its application. Based on information published and/or received by the ITU,⁸⁶ we find that the Nimiq and Nimiq 2 satellites meet all applicable ITU requirements and would comply with the Commission's requirements if they were to be licensed by the United States.

5. Other Issues

28. As described above, under *DISCO II*, national security, law enforcement, foreign policy, and trade concerns are included in the public interest analysis. With one exception, nothing in the record before us raises any such concerns. The MPAA advocates that the United States Government should enter negotiations with Canada for a bilateral agreement to improve Canadian access for U.S. service and content providers.⁸⁷ Though this argument may have merit for future consideration in a different context, the U.S. Trade Representative elected not to comment in this proceeding, and in any event this issue is beyond the scope of our review of DBAC's application.

B. Earth Station Application

29. We now turn to the DBAC earth station application. DBAC seeks to operate a new very small aperture terminal (VSAT) network, which includes one transmit-and-receive fixed hub earth station in Wickenburg, Arizona, using a 7.2-meter antenna to communicate with the Nimiq and Nimiq 2 satellites and the Galaxy XI satellite. DBAC plans to carry Internet traffic and subscription video programming to consumer earth stations located throughout the United States. These home terminals will consist of a 0.75 meter hybrid antenna.

1. The Hub Earth Station

30. DBAC's proposed hub earth station complies with all the requirements of Part 25, and so we grant DBAC authority to access the Nimiq, Nimiq 2, and Galaxy XI satellites in the bands specified in this Order.

2. The Home Earth Stations

a. Radiation Hazard

31. The home terminal consists of an elliptical aperture reflector, a one-piece offset prime focus feed assembly, and a custom-made single arm feed support to hold the outdoor unit. The outdoor unit is connected to the indoor unit via coaxial cables. The indoor unit contains the modem and data conversion electronics.

32. High frequency energy originates at the feed assembly and is directed to the satellite by the elliptical reflector. DBAC submitted a radiation hazard study that showed the maximum radiation power density of the outdoor unit, between the feed assembly and the reflector, does not meet the required uncontrolled exposure limit contained in Section 1.1310.⁸⁸ This means that radiation exposure could occur if a person accidentally placed his or her head or body between the feed horn and the reflector.

⁸⁶ *CAN-BSSI 82°*, ITU Weekly Circular 2409, Special Section APS30/E/126 (Dec. 21, 1999); *CAN-BSS2 91°*, ITU Weekly Circular 2409, Special Section APS30/E/127 (December 21, 1999).

⁸⁷ MPAA comments at 6.

⁸⁸ 47 C.F.R. § 1.1310.

33. DBAC states, however, that if an object is placed between the feed horn and the reflector, it will block the hub's transmission from being received by the indoor unit. In this case, the indoor unit will disable the transmitter in a maximum of three seconds. This is below the allowable limit of 14.1 seconds over a thirty-minute period based on the maximum radiation power density level at the feed.

34. DBAC further states that in order to further prevent the possibility of harmful radiation exposure, it will ensure that the home terminal is installed by technically trained professionals. These installers will place antennas only at locations that are not readily accessible. DBAC also states it will include radiation hazard warning labels on the terminal indicating the area of potential exposure. During antenna maintenance the transmitter will be turned off.

35. We grant DBAC authority to use the 0.75 meter home terminals, provided that DBAC meets several conditions. Specifically, DBAC must ensure that the antenna does not create the potential for exposure of persons who may be within its immediate vicinity to radiofrequency radiation in excess of FCC safety guidelines defined in 47 C.F.R. §§ 1.1307(b)(1) and 1.1310. DBAC must take precautions to ensure compliance with FCC guidelines for exposure to RF radiation, including use of a warning label on the transmitting antennas, and a radome or an automatic shut off system. Only technically trained professionals shall install the antennas, which they shall place only at locations that are not readily accessible.

b. Compliance with Other Technical Requirements

36. Last, we must evaluate the home earth terminals to assess whether they comply with the other technical requirements contained in Part 25 of the Commission's rules. We find that the antenna gain patterns exceed the level specified in Section 25.209(a) of the Commission's rules.⁸⁹ This higher power density from the home terminals to the Galaxy XI satellite, together with the possibility of pointing error, creates the potential for harmful interference into satellites as far as six degrees away from Galaxy XI. Nevertheless, the Commission's rules, in Section 25.209(f), allow us to license an antenna that does not meet the specified gain pattern envelope upon a showing that the antenna will not create unacceptable levels of interference to other satellite systems.⁹⁰ DBAC completed frequency coordination with all potentially affected satellite operators and provided affidavits demonstrating that these operators acknowledge DBAC's operation of non-conforming antennas and do not object to the use of DBAC's higher power density. Specifically, DBAC indicates that the only affected adjacent satellites are Telstar 4 at 89° W.L. and Telstar 6 at 93° W.L., both operated by Loral Skynet, and that PanAmSat (the Galaxy XI licensee) has fully completed the coordination with Loral for the operation of DBAC's 0.75-meter terminals.⁹¹ Based on this information provided by DBAC, we are satisfied that DBAC's antennas will not create unacceptable levels of interference to other satellite systems.

37. Further, DBAC proposes to operate the home terminals using a slotted Aloha network access scheme. This protocol presents the possibility that the terminals may operate with powers that exceed the effective isotropically radiated power (EIRP) levels contained in Section 25.134(a) of the Commission's rules.⁹² To ensure that the home terminals do not cause harmful interference into other satellite networks, we will require the terminals to operate with EIRPs no higher than those permitted by

⁸⁹ 47 C.F.R. § 25.209(a). Specifically, the main lobe of the transmitting gain pattern exceeds the specified envelope by approximately 5 dB at 1 degree.

⁹⁰ 47 C.F.R. § 25.209(f).

⁹¹ See FCC File No. SES-LIC-20020109-00023, Letter from Patricia Paoletta to Marlene H. Dortch, Secretary, March 25, 2003 (containing PanAmSat Corporation's engineering certification and technical analysis and demonstrating that coordination has been completed).

⁹² 47 C.F.R. § 25.134(a).

the Commission's rules. We also note that the slotted Aloha protocol is the subject of an ongoing Commission rulemaking and that we will require DBAC to adhere to all rules that the Commission may adopt in that proceeding.⁹³

IV. CONCLUSION

38. We have performed a *DISCO II* analysis in this Order, and have determined that DBAC's communications with the Nimiq and Nimiq 2 satellites will be consistent with the Commission's policies regarding U.S. access to space stations licensed by foreign administrations. We therefore grant DBAC's earth station application subject to the conditions set forth in this Order, finding such grant to be in the public interest.

V. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED that, pursuant to Sections 303(r), 308, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 303(r), 308, 309, 310, and Sections 25.121(a) and 25.137(c) of the Commission's rules, 47 C.F.R. §§ 25.121(a), 25.137(c), the Application for Earth Station Authorizations, File No. SES-LIC-20020109-00023, IS GRANTED and DBAC's VSAT network IS GRANTED authority to provide Fixed-Satellite Services, including Direct Broadcast Satellite service, to, from, or within the United States, by accessing the Nimiq satellite to be located at the 82° W.L. orbital location, the Nimiq 2 satellite to be located at the 91° W.L. orbital location, and the PanAmSat Galaxy XI satellite located at the 91° W.L. orbital location, subject to the conditions set forth in each earth station license and the following conditions:

- a. DBAC is not authorized to provide programming to U.S. customers that it obtains through exclusive agreements entered into with Canadian space station operators, program suppliers, and/or program distributors.
- b. DBAC shall ensure that the antenna does not create the potential for exposure of persons who may be within the immediate vicinity to radiofrequency radiation in excess of FCC safety guidelines defined in 47 C.F.R. §§ 1.1307(b)(1) and 1.1310. DBAC shall take precautions to ensure compliance with FCC guidelines for exposure to RF radiation. This will include a warning label on the transmitting antennas, and a radome or an automatic shut off system. Only technically trained professionals shall install the antennas. These installers shall place the antennas only at locations that are not readily accessible.
- c. DBAC must not exceed the limits set forth in 47 C.F.R. § 25.134(a). Further, this authorization is subject to the final outcome of Commission action in Petition for Rulemaking Filed by Spacenet, Inc., RM-9864, *Public Notice*, Report No. SPB-156 (rel. April 28, 2000).
- d. Communications between earth stations and the Nimiq and Nimiq 2 DBS satellites shall be in compliance with the satellite coordination agreements reached between Canada and other administrations and in a

⁹³ See Petition for Rulemaking Filed by Spacenet, Inc., RM-9864, *Public Notice*, Report No. SPB-156 (rel. April 28, 2000).

manner consistent with Appendices 30 and 30A of the International Radio Regulations.

- e. Communications between 0.75-meter earth stations and the PanAmSat Galaxy XI satellite shall be in compliance with the satellite coordination agreements reached between PanAmSat and Loral Skynet.
- f. DBAC's DBS and DTH operations must comply with all rules applicable to other Commission DBS/DTH licensees (*e.g.*, the public interest obligations of 47 C.F.R. § 25.701).

40. IT IS FURTHER ORDERED that this Order is issued pursuant to Section 0.261 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.261. This Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules, 47 C.F.R. §§ 1.106 and 1.115, may be filed within 30 days of the date of the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief, International Bureau