

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

In the matter of Application of)
VISIONSTAR, INCORPORATED,)
Licensee) File Nos. SAT-T/C-20001215-00163
SHANT HOVNANIAN,)
Transferor)
And)
ECHOSTAR VISIONSTAR CORPORATION,)
Transferee)
For Consent to Transfer of Control Over)
Authorization to Construct, Launch and Operate a)
Ka-Band Satellite System in the Fixed-Satellite)
Service at the 113° W.L. Orbital Location)

ORDER AND AUTHORIZATION

Adopted: October 25, 2001

Released: October 30, 2001

By the Chief, International Bureau:

I. INTRODUCTION

1. By this Order, we grant VisionStar Incorporated ("VisionStar") and Shant Hovnanian ("Mr. Hovnanian") authority to transfer control of VisionStar to EchoStar VisionStar Corporation ("EchoStar"). This grant should provide VisionStar with a necessary infusion of capital and will facilitate the rapid deployment of advanced satellite communication services to consumers.

II. BACKGROUND

2. VisionStar, Mr. Hovnanian and EchoStar (collectively, "Applicants") have filed for consent to transfer control over VisionStar's FSS Ka-Band satellite authorization to EchoStar.1 Two parties, Pegasus Development Corporation ("Pegasus") and TRW, Inc. ("TRW," and together with Pegasus, the "Petitioners"), filed petitions to deny this application ("Petitions"). EchoStar and VisionStar filed oppositions to the Petitions ("Oppositions"), and Petitioners filed replies. DirectCom Networks, Inc. ("DirectCom") also filed comments supporting the Petitions and EchoStar filed a Response to DirectCom, to which Pegasus filed a motion to strike.2

1 Application for Consent to Transfer Control, File Nos. SAT-T/C-20001215-00163 and 200-SAT-P/LA-95 ("Application").

2 Pegasus contends that EchoStar was wrong in claiming that the Pegasus Reply introduced impermissible material and contends also that the EchoStar Response included substantive material filed in an untimely manner (continued....)

3. By letter dated May 30, 2001, the Commission requested additional information from the Applicants about the proposed transaction, including a copy of VisionStar's current satellite construction contract.³ The Applicants responded on June 7, 2001, and requested confidential treatment.⁴ Applicants also provided a redacted version of the June 7 response.

4. On June 18, 2001, TRW filed an Opposition to EchoStar/VisionStar's Request for Confidential Treatment and Pegasus filed a Freedom of Information Act (FOIA) request dated July 10. On August 8, 2001, the International Bureau denied the Applicants' request for confidentiality.⁵ The Applicants filed an application for review of that decision on August 10, 2001. In their application for review, the Applicants agreed to disclose information relating to Mr. Hovnanian's investment in VisionStar, VisionStar's Balance Sheet as of December 15, 2000, a Letter Agreement re: Real Property Lease, and a Demand Note, dated November 5, 2000. On August 17, 2001, Pegasus filed an Opposition to Application For Review. On September 21, 2001, the Bureau issued a protective order, making the remaining documents available to Pegasus, TRW and DirectCom.

A. The Applicants

1. VisionStar

5. VisionStar, a New York corporation, holds a license to construct, launch and operate a Ka-band FSS at the 113° W.L. orbital location, and Mr. Hovnanian, President of VisionStar, is an individual resident of New York.

2. EchoStar

6. EchoStar, a Colorado corporation, is a wholly-owned subsidiary of EchoStar Communications Corporation, a Nevada corporation, whose principal business is the provision of telecommunications services, including Direct Broadcast Satellite services. EchoStar's affiliate, EchoStar Satellite Corporation, holds various satellite authorizations. EchoStar and its affiliates operate six DBS satellites, and hold an authorization to construct, launch and operate Ku- and Ka-band FSS satellite systems at the 83° W.L. and 121° W.L. orbital locations.

B. The Transaction

7. According to the Application, on November 7, 2000, the Applicants entered into a two-stage Stock Purchase Agreement (the "Stock Purchase Agreement") under which VisionStar issued stock to EchoStar in an amount sufficient to give EchoStar a 49.9% equity stake in VisionStar, in exchange for a

(...continued from previous page)

and without leave. We deny Pegasus' motion and will consider EchoStar's response to DirectCom as late-filed comments. *See* 47 C.F.R. § 1.45(c).

³ Letter from Chief, Satellite and Radiocommunication Division, to Mr. Pantelis Michalopoulos (May 30, 2001).

⁴ Letter from Mr. Pantelis Michalopoulos, Counsel for EchoStar VisionStar Corp., to Mr. Thomas Tycz, Chief, Satellite and Radiocommunication Division, International Bureau, FCC (dated June 7, 2001) (*June 7 Letter*). The Applicant's initial Request for Confidential Treatment covered the *June 7 Letter* and its attachments. On June 18, the Applicants filed a redacted version of the *June 7 Letter*. On June 28, Applicants filed another redacted version of the *June 7 Letter*.

⁵ Letter from Mr. Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, International Bureau, to Mssrs. Pantelis Michalopoulos, Michael Gardner, Bruce Jacobs and Stephen Baruch (dated August 8, 2001) (*August 8 Letter*).

cash payment by EchoStar of \$1,576,209.⁶ Pursuant to the second stage of the Stock Purchase Agreement, after Commission approval, EchoStar will acquire sufficient additional shares to bring its interest to 90% of the issued and outstanding capital stock in VisionStar in exchange for a further cash payment of \$1,266,653. Concurrent with the Stock Purchase Agreement, EchoStar and VisionStar entered into a Credit Agreement (“Credit Agreement”),⁷ pursuant to which EchoStar granted a line of credit of up to \$4,000,000 to VisionStar for the purpose of financing the continued construction of a satellite system in the Ka-band. EchoStar will issue to VisionStar loans,⁸ up to a total of \$4,000,000, to cover various expenses including those related to the Credit Agreement, the Stock Purchase Agreement, the Note, the Pledge and Security Agreement and all loan documents, expenses related to the Application, and payment obligations under a spacecraft construction contract into which VisionStar entered after November 7, 2000.⁹

III. DISCUSSION

A. Framework for Analysis

8. In considering transfer applications, the Commission must determine, pursuant to Section 310(d) of the Communications Act of 1934, as amended (the “Act”), whether the proposed transfers of control will serve the public interest.¹⁰

9. The legal standard that governs our public interest analysis for transfer of control of licenses and authorizations under Sections 310(d) requires that we weigh the potential public interest harms against the potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessity.¹¹ Our analysis considers the likely competitive effects of the proposed transfer of control and whether such transfer raises significant anti-competitive issues.¹² In addition, we consider the efficiencies and other public interest benefits that are likely to result from the proposed transfer of control.¹³

⁶ *Stock Purchase Agreement*, ¶ C and § 1.2; *Application*, Attachment 2. The first stage of the Stock Purchase Agreement has been implemented. *Application*, p. 3.

⁷ The Stock Purchase Agreement was a condition for the Credit Agreement. *Credit Agreement*, p. 1 and § 5, p. 8; *EchoStar Opposition*, Attachment 2.

⁸ *Credit Agreement*, Article I, Definitions, p. 3, and §3.3 Conditions for the Line of Credit, p. 7.

⁹ On November 21, 2000, VisionStar entered into a new satellite construction contract with Lockheed Martin and in December 2000, terminated its satellite construction contract with Orbital Sciences. *Application*, p. 3 and Letter from Mr. Pantelis Michalopoulos, Counsel for EchoStar VisionStar Corp., to Mr. Thomas Tycz, Chief, Satellite and Radiocommunication Division, International Bureau, FCC (dated June 7, 2001) (*June 7 Letter*).

¹⁰ 47 U.S.C. § 310(d).

¹¹ *See e.g.*, Application of VoiceStream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and for Declaratory Ruling Pursuant to Section 310 of the Communications Act, *Memorandum Opinion and Order*, 16 FCC Rcd 9779, 9789 (2001) (*VoiceStream/Deutsche Telekom Order*). *See also* AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications For Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, FCC 99-313, *Memorandum Opinion and Order*, 14 FCC Rcd 19140, 19147 (1999) (*AT&T/BT Order*).

¹² *See e.g.*, *AT&T/BT Order*, 14 FCC Rcd at 19148.

¹³ *See e.g.*, *VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9789.

10. The Petitions raise three issues: 1) whether this transaction constitutes trafficking by sale of a bare license for profit;¹⁴ 2) whether VisionStar has complied with its milestone deadlines;¹⁵ and 3) whether there has been an unauthorized transfer of control.¹⁶ As discussed below, our findings are that the transaction does not constitute trafficking, VisionStar has complied with its milestone deadlines and there has been no unauthorized transfer of control. Moreover, in this Order, we find it in the public interest to grant the transfer application.

B. Qualifications

11. As a threshold matter, we must determine whether the applicants are qualified to hold and assign licenses under Section 310(d) of the Act and Commission rules. In making this determination, we do not, as a general rule, re-evaluate the qualifications of the transferors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.¹⁷ No such issues have been raised here that would require us to re-evaluate the basic qualifications of VisionStar or Mr. Hovnanian.

12. Conversely, the analysis of every transfer application requires that we determine whether the proposed transferee is qualified to hold Commission licenses.¹⁸ Section 310(d) of the Act requires that the Commission consider the qualifications of the proposed assignee as if the transferee were applying for the license directly under Section 308 of the Act.¹⁹ In this case, no party has challenged the qualifications of EchoStar as a transferee. Based on our review of the transferee's ownership, we conclude that EchoStar is qualified under our rules to hold the respective licenses and authorizations at issue in this proceeding.

C. Trafficking

13. Section 25.145(d) of the Commission's rules²⁰ prohibits Ka-band satellite licensees from selling "a bare license for profit."²¹ In adopting this rule, the Commission explained that it is intended to discourage speculators and to prevent unjust enrichment of those who do not implement their proposed systems. This provision was not intended to prevent the infusion of capital by either debt or equity financing. Nevertheless, we stated that any such transaction would be monitored to ensure that it does not constitute an evasion of the anti-trafficking provision.²²

14. Section 25.145(d) states that the Commission may require parties seeking authority to transfer a license to submit an affirmative, factual demonstration that no trafficking has occurred, including (i)

¹⁴ *TRW Petition*, pp. 14-21, *Pegasus Petition*, pp. 14-19.

¹⁵ *TRW Petition*, p. 5-14, *Pegasus Petition*, pp. 5-11.

¹⁶ *TRW Petition*, pp. 27-30.

¹⁷ *See, e.g., Voicestream Wireless/Deutsche Telekom Order*, 16 FCC Rcd at 9790.

¹⁸ *See* 47 U.S.C. 308; *see also, AirTouch Communications, Inc.*, 14 FCC Rcd 9430, 9432-34 (Wireless Tel. Bur. 1999).

¹⁹ 47 U.S.C. §308.

²⁰ 47 C.F.R. § 25.145(d).

²¹ *See* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Third Report and Order*, CC Docket No. 92-297, 12 FCC Rcd 22310, 22339-40 (para. 74) (1997) (*Ka-Band Service Rules Order*).

²² *Ka-band Service Rules Order*, 12 FCC Rcd at 22339 (para. 74).

complete details as to the sale of facilities or merger of interests, (ii) an itemized accounting of the consideration involved in the sale or merger, and (iii) a demonstration that the amounts assigned to the facilities represent their fair market value.²³

15. The Applicants note that the Commission, in promulgating the anti-trafficking provision, carefully qualified the rule to allow for the infusion of capital by either debt or equity financing. They maintain that the purpose of their proposed transaction is to raise the capital needed to complete construction and launch of the Ka-band satellite and that Mr. Hovnanian will receive no improper profit as a result of this transaction.²⁴

16. TRW maintains that the Applicants need to demonstrate that VisionStar's investment to date exceeds the contract price of \$3,158,700, fully diluted.²⁵ Similarly, Pegasus maintains that EchoStar is paying \$2.8 million for 90% of VisionStar's stock with an option to purchase the remaining 10% after commencement of operations, and that this amount, along with any other loans or payments, represent the reimbursement to Mr. Hovnanian for his investment in VisionStar.²⁶ We disagree. Our anti-trafficking rule requires an analysis of the licensee's profits. A finding that there is no profit does not require that the licensee's investment exceed the fully diluted contract price, since that price necessarily includes the value of the cash infusion associated with the transaction. Basing the anti-trafficking rule on the value of the firm after the cash infusion would, necessarily, preclude significant cash infusions.

17. Based on review of the record, it appears that Mr. Hovnanian's investment in VisionStar includes a cash equity contribution of \$164,036, and an unspecified amount of uncompensated labor over a period of six years. Mr. Hovnanian loaned VisionStar approximately \$730,000, and was issued a demand note with an interest rate of 7% per annum.²⁷ Because the note carries a market rate of interest, however, the debt and its repayment is not considered in determining whether Mr. Hovnanian is receiving an amount that exceeds his investment.

18. In addition, Mr. Hovnanian and EchoStar entered into an Option Agreement, whereby EchoStar can acquire Mr. Hovnanian's 10% interest in VisionStar after the VisionStar satellite system has commenced commercial operations.²⁸ Under this Agreement, EchoStar would pay \$31,587 for each one percent of VisionStar's issued and outstanding capital stock. Mr. Hovnanian has received no other payments from EchoStar and is expected to receive no other future payments. Based on this Option Agreement, the maximum payment that Mr. Hovnanian can receive for his interest in VisionStar is \$315,870, and the value of his interest in VisionStar will be lower if the satellite system does not commence commercial operations or if VisionStar's value does not exceed \$3,158,700 in the first three years after it reaches a gross revenue of \$1,000,000. In addition, since the payment is fixed, there is no

²³ 47 C.F.R. § 25.145(d)(2), (3)(i), (3)(ii), (3)(iii).

²⁴ *EchoStar Opposition*, p. 12.

²⁵ *TRW Petition*, p. 18. The fully diluted value is based on the Applicants' assignment of a value of \$31,587 for each one percent of VisionStar. This value was used to calculate the investment associated with EchoStar's first 49.9% equity stake, its additional investment to bring its equity stake up to 90% and the option value on Mr. Hovnanian's remaining 10% interest. The fully diluted value of the corporation represents the total value of the corporation, based on the contract price, after EchoStar's capital infusion. Following the capital transfusion, EchoStar will hold 90% of the equity, and Mr. Hovnanian will hold 10%. The fully diluted value will be divided between EchoStar and Mr. Hovnanian, and the value of Mr. Hovnanian's share will be \$315,870.

²⁶ *Pegasus Petition*, pp. 15-17. Pegasus also questioned whether EchoStar would be lending Mr. Hovnanian money personally and whether any loans would be forgiven at closing or upon exercise of the Option. These additional issues were resolved by the Applicants' *June 7 letter*.

²⁷ *June 7 Letter*, p. 1 and Attachment H.

²⁸ *Application*, Attachment 2: Option Agreement dated November 7, 2000.

incentive for EchoStar to exercise this option any time before the end of the exercise period, which is three years after the system reaches gross revenue of \$1,000,000. Since, if the option is exercised, there will be a significant delay before Mr. Hovnanian will receive his \$315,870, the present value of this payment is significantly less than \$315,870.²⁹ In determining that Mr. Hovnanian will not make a profit from the sale of a bare license, we consider the possible interest forgone by this significant delay.

19. We conclude that VisionStar and Mr. Hovnanian will not make a profit from the sale of a bare license, and that this finding is sufficient to find that Mr. Hovnanian is not trafficking in a bare license.³⁰ Based largely on the size of Mr. Hovnanian's cash equity contribution, we find that, if EchoStar exercises the option to acquire the remaining VisionStar stock, Mr. Hovnanian will receive no more than an amount equal to his total investment plus reasonable interest.

20. Although TRW notes that trafficking has been defined by the Commission as "selling a bare license for a profit," TRW argues that the absence of profit should not be decisive in determining whether a license is being trafficked, since it would allow transactions that limit the risk associated with speculation.³¹ Instead, they propose an inquiry into whether there is evidence of a *bona fide* effort by the licensee to implement service. In its Reply, TRW suggests that a strict interpretation of our anti-trafficking rule should be applied in this instance since VisionStar has done little to develop its system.³² We do not agree with TRW's interpretation of our rule. We reject their proposed change in our standard inasmuch as our current trafficking standard, strictly applied, is sufficient to discourage speculation.³³

D. Milestones

21. Both Petitioners also maintain that VisionStar did not meet its required milestone deadlines because it did not have a non-contingent construction contract at the time of its first milestone, May 1998. Petitioners maintain that its license is no longer valid and thus cannot be transferred.³⁴

22. VisionStar's authorization to construct, launch and operate a Ka-band satellite at the 113°

²⁹ There will be a significant delay before Mr. Hovnanian would receive this payment, if, in fact, the option is exercised, since: (1) there is a substantial period of time between when the investment is made and when the satellite is likely to be launched, sometime before May 2002; (2) there will be an additional delay before the system reaches a gross revenue of \$1,000,000, and (3) there would likely be an additional three year delay before the option is exercised and Mr. Hovnanian receives his payment of \$315,870. Since there would be at least five years between Mr. Hovnanian's cash investment of \$164,036 and his possible receipt of the option payment, the value of that payment is unlikely to exceed his cash investment plus five to ten years interest forgone on that investment.

³⁰ See *NetSat 28 Application for Authority to Transfer Control, Order and Authorization*, DA 01-1761 (para. 15) (Int'l Bur. 2001); *KaStar 73 Acquisition, LLC, and KaStar 109.2 Acquisition, LLC, Applications for Consent to Transfer of Control, Memorandum Opinion and Order*, 15 FCC Rcd 1615, 1619 (para. 12) (Int'l Bur. 1999).

³¹ *TRW Petition*, p. 18.

³² *TRW Consolidated Reply*, pp. 17-19.

³³ In determining whether Mr. Hovnanian will receive payments in excess of his investment, we calculated the maximum payment that Mr. Hovnanian might receive. This payment would be received only if EchoStar exercised its option, and if the payment is made, Mr. Hovnanian will not receive the payment until at least three years after the system is operating and generating substantial revenues. If, at the point, the enterprise is worth less than \$3,158,700, EchoStar might not exercise the option, and Mr. Hovnanian will receive less than the option payment. Since we based the profit analysis on the maximum payment Mr. Hovnanian might receive, we can be assured that, in no event will Mr. Hovnanian profit from the sale of a bare license. This assurance that, at best, there is no profit from the sale of a bare license is sufficient to deter speculation.

³⁴ *TRW Petition*, pp. 5-9, *Pegasus Petition*, pp. 5-11. Petitioners also claim that VisionStar did not file its progress reports with the Commission. (*TRW Petition*, p. 12, *Pegasus Petition*, p. 10.) VisionStar provided a copy of its June 26, 2000 report to the Commission in its Opposition. (*VisionStar Opposition*, Exhibit C).

W.L. orbital location is conditioned on VisionStar beginning construction of its satellite by May 1998, completing construction by April 2002, and launching its satellite by May 2002.³⁵ To satisfy the construction commencement milestone, a licensee must show that it has executed a non-contingent satellite construction contract.³⁶ As explained in its response to our request for further information, on May 26, 1998, VisionStar entered into a satellite construction contract with Orbital Sciences. On November 21, 2000, VisionStar entered into a further construction contract with Lockheed Martin Corporation and in December 2000, VisionStar cancelled its construction contract with Orbital Sciences.³⁷

23. Based on our review of the documents submitted by the Applicants, we find that VisionStar has a current Satellite Construction Contract with Lockheed Martin. In addition, we find that VisionStar had a non-contingent contract with Orbital by May 1998 and that its contract with Orbital was not terminated until the Lockheed Martin contract was executed and thus VisionStar has met its commencement of construction milestone.³⁸ VisionStar was in compliance with its construction milestone as of May 1998 and has remained in compliance with that requirement. Further review of the VisionStar/Lockheed Martin contract indicates that if all contract deadlines are met, the satellite will be constructed and ready for launch in compliance with the second and third milestone deadlines.³⁹ The contract with Lockheed Martin will allow VisionStar is expected to meet its complete construction and its launch milestones. Moreover, there has been no interval in which VisionStar was out of compliance with its commencement of construction milestone. Thus, VisionStar's license remains valid. We will, however, given the tight schedule of contract deadlines relative to the milestones in VisionStar's license, condition this authorization for transfer. We will require VisionStar to notify the Commission of any changes in the status of the VisionStar/Lockheed Martin contract and any changes in the contract milestones or the milestone payment schedule. Moreover, VisionStar must notify the Commission if the Lockheed Martin does not achieve any of the milestones set out in the VisionStar/Lockheed Martin contract. We believe these conditions are necessary to ensure that the spectrum covered by this transferred license is put to use expeditiously.

E. Improper Transfer of Control

24. TRW also alleges that through certain conditions in the Stock Purchase Agreement, EchoStar may have already assumed effective control of the VisionStar license, and that additional information regarding the details and terms of the Shareholders Agreement entered into by and among EchoStar, VisionStar and Mr. Hovnanian, dated November 7, 2000 ("Shareholders Agreement") must be disclosed to determine whether EchoStar might already control the VisionStar Board of Directors. TRW raises

³⁵ On May 9, 1997, as part of the first Ka-band processing round, the International Bureau authorized VisionStar to launch and operate a geostationary-orbit (GSO) satellite to provide fixed satellite service in the Ka-band. See *In the Matter of VisionStar, Inc., Application for Authority to Construct, Launch and Operate a Ka-band Satellite System in the Fixed-Satellite Service*, 13 FCC Rcd. 1428, 1438 (para. 31) (Int'l Bureau 1997) ("*VisionStar Authorization Order*"). VisionStar requested an extension of its milestones and on May 25, 2001, the Bureau denied VisionStar's request to toll milestone requirements applicable to its license was denied. See *In the Matter of VisionStar, Inc., Request for Extension of Milestones*, DA-01-1285 (Intl Bureau 2001).

³⁶ *Norris Satellite Communications, Inc.*, 12 FCC Rcd 22299, 22303-04 (para. 9)(1997); *AMSC Subsidiary Corp.*, 8 FCC Rcd 404, 4042 (para. 14) n. 27 (1993); *National Exchange Satellite, Inc.*, 7 FCC Rcd 1990, 1991 (para. 5) n. 13 (CCB 1992), aff'd, 8 FCC Rcd 636 (1993).

³⁷ *June 7 Letter*, pp. 3-5.

³⁸ *June 7 Letter*, pp. 3-5.

³⁹ *June 7 Letter*, Attachment 1. ["*VisionStar/Lockheed Martin Spacecraft Contract*"] This attachment was made available to the parties under a protective order issued on September 21, 2001.

issues with respect to control of the VisionStar Board of Directors,⁴⁰ limitations on VisionStar's operations,⁴¹ and supermajority voting requirements.⁴²

25. In its Opposition, EchoStar provided copies of the relevant contracts, including the Shareholders Agreement, as requested by TRW. The Shareholders Agreement allows a shareholder with the majority of outstanding voting shares to designate a majority of members to the Board.⁴³ Therefore, EchoStar may not designate a majority of members to the Board until after it obtains a majority of outstanding voting shares. EchoStar also clarified certain provisions of the Stock Purchase Agreement, explaining that some limitations in the Shareholders Agreement were only effective for a relatively short period of time and that that time period has already expired.⁴⁴ Although EchoStar did not address the supermajority voting requirements, the Shareholders Agreement listed the actions that were subject to supermajority voting.⁴⁵ The scope of the actions that require supermajority voting is not sufficiently broad as to confer control to the minority shareholder.

26. Based on our analysis of this information, we conclude that there has been no improper transfer of control of the VisionStar license. With a majority of the outstanding voting shares under the current structure and before the proposed transfer, Mr. Hovnanian maintains the right to appoint a majority of members of the Board. The limitations on VisionStar's spending were limited in time or scope and were consistent with reasonable protections for a minority investor. The more restrictive limitations related to maintaining the assets described in VisionStar's October 26 balance sheet through the closing of the initial transaction. A review of the actions requiring supermajority voting indicates that each of the actions subject to the supermajority voting provision relates directly to the possible dilution of current shareholders' interests or the creation of obligations that would negatively affect the value of EchoStar's investment. A requirement of prior written consent if VisionStar is to enter into or be party to any contract obligating or potentially obligating VisionStar in an amount in excess of \$25,000, absent justification, might involve an unauthorized transfer of control.⁴⁶ However, in this instance, we find that the provision is not, by itself, sufficient to provide evidence of a premature transfer of control. Premature

⁴⁰ TRW cites § 6.6 of the Stock Purchase Agreement in which at least one position on the Board of Directors remains vacant until filled by a director designated by EchoStar. The Stock Purchase Agreement does not indicate whether EchoStar had a role in the selection of the third director. *TRW Petition*, p. 28.

⁴¹ TRW in its Petition cites § 2.8(x) of the Stock Purchase Agreement, which places limitations on aggregate capital expenditures and commitments in excess of \$500 for additions to property, plant equipment or tangible assets. *TRW Petition*, p. 29.

⁴² TRW notes § 2.1 of the Stock Purchase Agreement, where it is noted that there is a requirement that VisionStar "may not take or fail to take certain specified actions without super majority Board and/or shareholder approval." *TRW Petition*, p. 29. Under the Shareholders Agreement, certain actions require at least 54.9% of the voting shares. Since EchoStar obtained a 49.9% interest in VisionStar on November 7, 2000, under this Agreement, these actions could not be taken without EchoStar approval. If the listed actions are sufficiently broad, the requirement that EchoStar approve of these actions might constitute an unauthorized transfer of control.

⁴³ *Shareholders Agreement*, § IV(a)(ii); *EchoStar Opposition*, Attachment 2.

⁴⁴ *EchoStar Opposition*, p. 24. The restriction on capital expenditures or commitments for additions to property, plant, equipment or intangible capital assets in excess of \$500 was effective for the period from the time VisionStar submitted its balance sheet, October 26, 2000, until the closing of the initial transaction. TRW admits that these provisions are "common in agreements anticipating a transfer of control." *TRW Petition*, p. 29.

⁴⁵ Twenty-two types of actions require prior written consent of at least 54.9% of the voting shares. This includes entering into or being party to any contract obligating, or potentially obligating, VisionStar in an amount in excess of \$25,000, other than the Credit Agreement and the Spacecraft Contract. Other listed actions relate directly to maintenance of the structure of VisionStar and maintenance of its assets. *Shareholders Agreement*, pp. 5-7; *EchoStar Opposition*, Attachment 3.

⁴⁶ Roy M. Speer, 11 FCC Rcd 18393 (1996) at 18434.

transfer of control requires actions on the part of the transferee in addition to the contractual rights granted here.⁴⁷ We do not find that there has been an assumption of control by EchoStar and thus, the rights granted to EchoStar in the Shareholders' Agreement when taken together with the lack of interference in VisionStar's business by EchoStar does not indicate an unauthorized transfer of control.

F. Public Interest

27. We find that grant of the transfer application is in the public interest. The Applicants cite several reasons why the proposed transfer is in the public interest. Several of those reasons, such as the ability to provide broadband service to EchoStar customers to allow EchoStar to better compete with other broadband providers and the ability to bring broadband services to rural communities, are not specific to the proposed transaction and thus are not considered in determining whether this transfer is in the public interest.⁴⁸

28. Inasmuch as the Commission recently licensed 11 applicants to launch and operate FSS systems using Ka-band frequencies at a total of 34 orbital locations and that these systems have the potential to provide a wide variety of broadband interactive, direct-to-home, and digital services to all areas of the United States,⁴⁹ we find that the proposed transfer does not lessen competition in any market in which EchoStar is likely to participate. We find, however, that the proposed transfer will allow an infusion of capital in VisionStar, which will facilitate the expeditious deployment of its Ka-Band satellite service. We find this sufficient to meet the public interest test since we find no potential harms. Thus, the Applicants' demonstration of potential benefits need not be as great.⁵⁰

IV. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED that Consent to Transfer of Control Over Authorization to Construct, Launch and Operate a Ka-Band Satellite System in the Fixed-Satellite Service at 113° W.L., [File Nos. SAT-T/C-20001215-00163 and 200-SAT-P/LA-95], filed by VisionStar, Incorporated and Shant Hovnanian IS GRANTED, subject to the condition stated below.

30. IT IS FURTHER ORDERED that this grant is conditioned on EchoStar VisionStar meeting the following milestone conditions:

- 1) EchoStar VisionStar must maintain of compliance with the Commencement of Construction Milestone;
- 2) EchoStar VisionStar must complete Satellite Construction by April 2002, and Launch by May 2002.

⁴⁷ *Id.*, at ¶¶ 53-55.

⁴⁸ *See*, for example, *DOJ/FTC Horizontal Merger Guidelines*, §4: "The Agency will consider only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies."

⁴⁹ *Second Round Assignment of Geostationary Satellite Orbital Locations to Fixed Satellite Service Space Stations in the Ka-Band*, DA 01-1693 (Int'l Bureau, August 3, 2001) (*Second Round Assignment Order*) The Appendix to the *Second Round Order* lists all first- and second-round Ka-band GSO orbit location assignments.

⁵⁰ The Commission noted in the Bell Atlantic/NYNEX Order, "[a]s the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest, convenience, and necessity." *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

- 3) EchoStar VisionStar must inform the Commission of any change in the status of its Spacecraft Contract.

Failure to meet this condition will render this authorization null and void.

31. IT IS FURTHER ORDERED that Pegasus's Motion to Strike is denied.

32. This Order is issued pursuant to Section 0.261 of the Commission's rules on delegated authority, 47 C.F.R. § 0.261, and is 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, 1.115, may be filed within 30 days of the date of the release of this Order. *See* 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief, International Bureau