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

MAY 24 2004

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Mobile Satellite Ventures Subsidiary LLC )  
)  
Amendment to Application for Authority to Launch )  
and Operate a Replacement MSS Satellite at 101°W )

File No. SAT-AMD-20040209-1

Received

JUN 01 2004

Policy Branch  
International Bureau

**PETITION FOR RECONSIDERATION**

Mobile Satellite Ventures Subsidiary LLC (“MSV”) hereby files this Petition for Reconsideration of the decision of the International Bureau (“Bureau”) dismissing MSV’s above-captioned amendment to its application for a replacement Mobile Satellite Service (“MSS”) satellite for failing to include an interference analysis required for Fixed Satellite Service (“FSS”) satellites.<sup>1</sup> As discussed herein, there are two independent reasons the Bureau should reverse its decision and reinstate MSV’s amendment *nunc pro nunc* as filed on February 9, 2004: (i) MSV’s amendment was “substantially complete” as filed because the interference analysis MSV was allegedly required to provide is in fact not required for the type of satellite (MSS) and type of frequencies (Planned Ku-band) for which MSV has applied and (ii) the Bureau should have required MSV to supplement its application rather than dismissing it.

**Background**

MSV is the successor to Motient Services Inc. (“Motient”), the entity authorized by the Commission in 1989 to construct, launch, and operate a United States MSS system in the L-band.<sup>2</sup> MSV’s current satellite was launched in 1995 and operates at 101°W. In July 1998,

<sup>1</sup> See Letter from Thomas Tycz, FCC, to Lon C. Levin, MSV, File No. SAT-AMD-20040209-00015, DA 04-1095 (April 23, 2004) (“*Bureau Decision*”).

<sup>2</sup> *Order and Authorization*, 4 FCC Rcd 6041 (1989); *remanded by Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991); *Final Decision on Remand*, 7 FCC Rcd 266 (1992); *aff’d*,

MSV filed an application to launch and operate a higher-power, replacement satellite with substantially greater capacity.<sup>3</sup> To accommodate this greater capacity, the application, as amended in December 2000, requested authority to use an additional 250 MHz of Planned Ku-band spectrum<sup>4</sup> for feeder links beyond the 200 MHz for which MSV is already licensed.<sup>5</sup> Specifically, MSV's MSS replacement application requested the following 450 MHz of Planned Ku-band spectrum at 101°W: 10.75-10.95 & 11.2-11.45 GHz (downlink) and 12.75-13.15 & 13.20-13.25 GHz (uplink). The only segment of the Planned Ku-band for which MSV is not currently licensed and did not apply in December 2000 was the following 50 MHz: 10.70-10.75 GHz (downlink) and 13.5-13.20 GHz (uplink). The Bureau placed MSV's amended replacement MSS application on *Public Notice* in March 2001. See Report No. SAT-00066 (March 19, 2001). No party filed a competing application or objected to MSV's request to operate its replacement satellite using additional Planned Ku-band spectrum for feeder links.

On August 27, 2003, EchoStar Satellite LLC ("EchoStar") filed an application for authority to launch and operate a satellite at 101°W using 250 MHz of Planned Ku-band frequencies that MSV had requested in its MSS replacement application as well as the remaining 50 MHz of Planned Ku-band frequencies (*i.e.*, 10.70-10.75 GHz and 13.15-13.20 GHz).<sup>6</sup> Under

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*Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275 (D.C. Cir. 1993); see also *AMSC Subsidiary Corporation, Memorandum Opinion and Order*, 8 FCC Rcd 4040 (1993).

<sup>3</sup> See Application of AMSC, File No. SAT-LOA-19980702-00066 (July 2, 1998).

<sup>4</sup> Throughout this Petition, references to the amount of spectrum refer to its use in both the uplink and downlink direction. Thus, in this case, for example, there are 250 MHz in each direction.

<sup>5</sup> See Application of Motient Services Inc., SAT-AMD-20001214-00171 (December 14, 2000). In March 2001, MSV filed a second amendment in which it requested to operate terrestrial base stations, but did not request additional frequencies beyond those for which it had already applied. See Application of MSV, File No. SAT-ASG-20010302-00017 *et al.* (March 2, 2001).

<sup>6</sup> Application of EchoStar, File No. SAT-LOA-20030827-00179 (filed August 27, 2003).

the new first-come, first-served licensing policies for geostationary (“GSO”) satellites,<sup>7</sup> EchoStar was second-in-line behind MSV at 101°W with respect to 250 MHz of the 300 MHz it requested and first-in-line with respect to the 50 MHz for which MSV is not licensed and did not apply in December 2000. On November 18, 2003, MSV filed a minor amendment to its pending MSS replacement application to revise the technical parameters of its proposed satellite, but did not request additional frequencies beyond those for which it had already applied.<sup>8</sup> On November 26, 2003, EchoStar amended its pending application to correct deficiencies noted by MSV.<sup>9</sup>

On December 3, 2003, the Bureau released a *Public Notice* clarifying the interference analysis an applicant for an FSS satellite must provide to demonstrate compliance with two-degree orbital spacing.<sup>10</sup> The Bureau stated that an FSS space station application filed after December 3, 2003 that does not contain this analysis would be dismissed but an application filed before December 3, 2003 that did not contain this analysis would have to be supplemented but would not be dismissed. *December Public Notice* at 2.

On February 9, 2004, the Bureau dismissed EchoStar’s application as incomplete and otherwise not in compliance with the Commission’s rules for, among other things, failing to specify the frequencies for which it was applying.<sup>11</sup> EchoStar has filed a Petition for

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<sup>7</sup> *First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-34, FCC 03-102 (rel. May 19, 2003) (“*Space Station Licensing Reform Order*”); *Notice of Proposed Rulemaking*, 17 FCC Rcd 3847 (2002) (“*Space Station Licensing Reform NPRM*”).

<sup>8</sup> See MSV, Minor Amendment, File No. SAT-AMD-20031118-00335 (November 18, 2003).

<sup>9</sup> EchoStar, Amendment, File No. SAT-AMD-20031126-00343 (November 26, 2003); see also MSV, Petition to Deny, File No. SAT-LOA-20030827-00179 (filed November 17, 2003).

<sup>10</sup> See *Public Notice, Clarification of Space Station Application Interference Analysis*, SPB-195, DA 03-3863 (December 3, 2003) (“*December Public Notice*”).

<sup>11</sup> See Letter from Thomas S. Tycz, FCC, to David K. Moskowitz, EchoStar, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (February 9, 2004).

Reconsideration of this decision, which is pending.<sup>12</sup> On February 9, 2004, upon dismissal of EchoStar's application, MSV filed the above-captioned amendment to its pending application for a replacement MSS satellite to request the 50 MHz of Planned Ku-band frequencies for which it was not licensed and had not previously requested (10.70-10.75 GHz and 13.15-13.20 GHz).<sup>13</sup>

On February 10, 2004, one day after MSV filed its amendment, EchoStar refiled an application for 300 MHz of Planned Ku-band frequencies at 101°W: 10.70-10.75 GHz and 11.2-11.45 GHz (downlink) and 12.75-13.0 GHz & 13.15-13.2 GHz (uplink).<sup>14</sup> In its application, EchoStar conceded that MSV is first-in-line for these frequencies. *See id.*, Technical Annex at 25. At the same time, EchoStar stated its view that MSV and EchoStar can share these frequencies at 101°W over the same geographic area. *See id.* EchoStar contemplates entering into an agreement with MSV that would detail the conditions for sharing. *See id.*, Technical Annex at 1, 7, 12 n.3, 22, 25, 26. On March 26, 2004, the Bureau placed EchoStar's application on *Public Notice*. *See* Report No. SAT-00203 (March 26, 2004).<sup>15</sup>

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<sup>12</sup> *See* EchoStar, Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 10, 2004) ("*EchoStar Recon Petition*").

<sup>13</sup> MSV, Amendment, File No. SAT-AMD-20090209-00014 (filed February 9, 2004) ("*MSV Amendment*"). EchoStar has asked the Bureau to reinstate its November 26, 2003 application *nunc pro tunc*. *EchoStar Recon Petition*. In its Reply to MSV's Opposition to its Petition for Reconsideration, EchoStar accepts that if its application is reinstated *nunc pro tunc* as filed on November 26, 2003, it will not assume first-in-line status for the 250 MHz of Planned Ku-band frequencies for which MSV originally filed in December 2000 (11.2-11.45 GHz band (downlink) and 12.75-13.00 GHz band (uplink)). *See* EchoStar, Reply, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (April 5, 2004), at 9.

<sup>14</sup> Application of EchoStar, File No. SAT-LOA-20040210-00015 (February 10, 2004).

<sup>15</sup> In its Comments on the application, MSV has explained that the Bureau must defer action on EchoStar's application until after MSV's first-in-line application is processed and granted. Comments of MSV, File No. SAT-LOA-20040210-00015 (April 26, 2004) ("*MSV Comments*"); Response of MSV, File No. SAT-LOA-20040210-00015 (May 21, 2004) ("*MSV Response*").

On April 23, 2004, the Bureau dismissed MSV's February 9, 2004 amendment to its MSS replacement application for failing to include the interference analysis required for FSS applications as clarified by the *December Public Notice*. See *Bureau Decision*. The Bureau explained that the "analysis must include the r.f. characteristics of both interfering and interfered with carriers, as well as the resulting interference potential, such that the Commission or other applicants in the future course of consideration of this application can complete the analysis." *Id.* at 2. In compliance with the policy stated in the *December 2003 Public Notice*, the Bureau requested MSV to supplement its November 2003 amendment with the interference analysis but did not dismiss the amendment because it was filed prior to the date of the *Public Notice*.<sup>16</sup> As a result of the Bureau's dismissal of MSV's February 2004 amendment, MSV has lost its status as first-in-line for the following 50 MHz of Planned Ku-band frequencies: 10.70-10.75 GHz (downlink) and 13.15-13.20 GHz (uplink). EchoStar is now first-in-line for these frequencies.<sup>17</sup> Should the Bureau reinstate MSV's amendment, it will return to first-in-line status.

#### Discussion

##### **I. MSV's Amendment Is "Substantially Complete" As Filed and Should Be Reinstated *Nunc Pro Tunc* Because There Is No Requirement that MSV Provide the Interference Analysis Cited by the Bureau**

The Commission's rules provide that satellite applications will be processed if they are "substantially complete" when they are filed.<sup>18</sup> The Bureau dismissed MSV's amendment as not

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<sup>16</sup> See Letter from Robert G. Nelson, FCC, to Lon C. Levin, MSV, File No. SAT-AMD-20031118-00335 (April 23, 2004). On this date, MSV has supplemented its November 2003 and February 2004 amendments with the interference analysis. This in no way should be construed to imply that MSV believes that this interference analysis is required for its proposed satellite.

<sup>17</sup> MSV has asked the Bureau to defer grant of EchoStar's application for this 50 MHz until after MSV's amendment is reinstated as result of this Petition and then granted. *MSV Comments* at 5-6; *MSV Response* at 9-10.

<sup>18</sup> See *Space Station Licensing Reform Order* ¶ 244; *Space Station Licensing Reform NPRM* ¶ 84; *Bureau Decision* at 1; see also 47 C.F.R. § 25.112.

“substantially complete” for failing to include the interference analysis clarified in the *December Public Notice. Bureau Decision* at 2. In fact, MSV’s amendment is substantially complete as filed because the interference analysis MSV allegedly failed to provide is not required for the type of satellite (MSS) and type of frequencies (Planned Ku-band) for which MSV has applied.

The *December Public Notice* applies to applications for FSS satellites, not MSS satellites. MSV has applied for an MSS satellite and thus there is no requirement that MSV provide the interference analysis it allegedly failed to provide. The *December Public Notice* clarifies the type of interference analysis required by Section 25.140(b)(2) of the rules, which applies only to applications for FSS satellites.<sup>19</sup> The *December Public Notice* itself states that the interference analysis required pertains to applications for FSS satellites no less than eight times, but never refers to applications for MSS satellites or to feeder links for MSS satellites. Even the Bureau’s letter dismissing MSV’s amendment states that the interference analysis allegedly required applies to “proposed FSS satellite system[s].” *Bureau Decision* at 2. To be sure, feeder links for MSS satellites at times may be considered as FSS frequencies, but this is by no means clear and was not clarified in the *December Public Notice*. For example, the Commission’s rules state that the “Fixed-satellite Service” and “Mobile Satellite Service” both “*may* include feeder links.”<sup>20</sup> Moreover, Section 25.210(j) of the Commission’s rules provides that FSS satellites must comply with a certain longitudinal station keeping requirement. 47 C.F.R. § 25.210(j). In a pending rulemaking, the Commission has sought comment on whether “the longitudinal tolerance applicable to the fixed satellite service should be applied to space stations in other services, such

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<sup>19</sup> 47 C.F.R. § 25.140(b)(2) (“Each applicant for a space station authorization in the *fixed-satellite service* must demonstrate . . .”) (emphasis added).

<sup>20</sup> 47 C.F.R. §§ 2.1, 25.201 (stating that FSS “*may* also include feeder links of other space radiocommunication services”) (emphasis added); 47 C.F.R. §§ 2.1, 25.201 (sating that MSS “*may* also include feeder links necessary for its operation”) (emphasis added).

as the mobile satellite service.”<sup>21</sup> If feeder links for MSS satellites are always considered FSS, the rule pertaining to longitudinal tolerance would already apply to MSS satellites that use feeder links and thus there would be no need for the Commission to seek comment on this issue. In addition, Section 25.158(a) of the Commission’s rules explains that “GSO-like satellites” include “FSS, and MSS feeder links which use GSO satellites.” 47 C.F.R. § 25.158(a). If feeder links for GSO MSS satellites are always considered as FSS, there would be no need for this rule to make such a distinction between FSS and MSS feeder links. In short, there simply is no definitive rule or policy that states that feeder links for an MSS satellite will always be considered as FSS. The *December Public Notice* failed to specify whether it pertains to feeder links for an MSS satellite. Thus, MSV’s amendment to its MSS application must be considered “substantially complete” despite not including an interference analysis required for FSS.

The interference analysis as clarified by the *December Public Notice* is also inapplicable to the Planned Ku-band frequencies for which MSV has applied. The interference analysis is intended to demonstrate how MSV can operate at 101°W within two degrees of adjacent Planned Ku-band satellites. But, as MSV explained in its application, there is no satellite that operates in the Planned Ku-band within two degrees of 101°W. *MSV Amendment*, Appendix A at 4. The only satellite operating in the Planned Ku-band within even ten degrees of 101°W is MSAT-1 at 106.5°W, licensed by Industry Canada to Mobile Satellite Ventures (Canada) Inc. Neither Section 25.140(b)(2) nor the *December Public Notice* states that an applicant is required to provide a two-degree spacing analysis based on the assumption that a hypothetical satellite may operate within two degrees from the proposed satellite.

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<sup>21</sup> *Orbital Debris, Notice of Proposed Rulemaking*, FCC 02-80 (March 18, 2002), ¶ 47.

As the name implies, the Planned Ku-band is a planned band, meaning technical parameters and required orbital spacing that allow satellites to operate without causing harmful interference to or receiving harmful interference from adjacent Planned Ku-band satellites have already been determined in an extensive ITU-based process that, to modify, would require further international process. For example, the Bureau has explained that two-degree spacing does not apply to DBS satellites because DBS is a planned band and the required spacing between satellites has already been determined by the ITU.<sup>22</sup> In the Appendix 30B plan, the nearest planned satellites to 101°W are at 104°W (Ecuador) and 98.2°W (Aruba). To the extent an application is filed in the future for a satellite to be located within two degrees of MSV's proposed satellite at 101°W that deviates from the Appendix 30B plan, that applicant will have the burden of demonstrating in an international process that harmful interference will not be caused to MSV's or any other nearby satellite. This analysis is performed by using the ITU MSPACEg software and its associated database of parameters including the parameters listed in Appendix 30B of the ITU Radio Regulations for the 101°W orbital location.<sup>23</sup> The interference analysis required by the *December Public Notice* would amount to extraneous information for such a hypothetical future applicant.

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<sup>22</sup> *Pegasus Development Corporation, Order*, DA 04-909 (March 31, 2004), at n.73 (“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 is based on satellite spacings of nine degrees for co-frequency, co-coverage operation.”).

<sup>23</sup> The Bureau is currently considering how to process short-spaced applications in the DBS band, which like the Planned Ku-band is a planned band. *See* Report No. SPB-196, DA 03-3093 (December 16, 2003). The Bureau has requested comment as to whether a rulemaking proceeding is a necessary prerequisite for the provision of DBS services using short-spaced DBS satellites. *Id.* Moreover, as some commenters noted, because DBS is an internationally planned band, reduced orbital spacing can only occur upon agreement in international forums such as the ITU. *See, e.g.*, Reply Comments of Telesat, SPB-196 (Feb. 13, 2004). As the case of DBS demonstrates, simply filing an application that demonstrates compliance with the Commission’s two-degree spacing policy is neither necessary nor sufficient to operate at reduced orbital spacing in an internationally planned band.



## II. The Bureau Should Have Required MSV to Supplement Its Amendment Rather Than Dismissing It

Under a “substantially complete” standard, minor errors in an application do not warrant dismissal of that application.<sup>24</sup> For example, in *James River Broadcasting Corporation v. FCC*, the D.C. Circuit reversed a Commission decision that dismissed a broadcast application under a substantially complete standard. *See James River Broadcasting Corporation v. FCC*, 399 F.2d 581 (1968). The court held that even though the application was patently not in accordance with the Commission’s rules, it was nonetheless substantially complete when filed. *Id.* at 583. As the court later reiterated in *Salzer v. FCC*, “[u]nder the *James River* standard, the FCC must accept applications that are substantially complete when filed even if they contain minor errors or infractions of agency rules, so long as any such defects may be cured without injury to public or private interest.” *See Salzer v. FCC*, 778 F.2d 869, 872 n. 7 (D.C. Cir. 1985).

In this case, even assuming MSV were required to provide the interference analysis, MSV’s failure to include it can only be considered minor and can be cured by supplementing the application without injury to any public or private interest. The Bureau has taken such an approach in recently requesting Iridium and Boeing to supplement their applications, both of which were filed under first-come, first-served processing after the effective date of the new processing rules.<sup>25</sup> Rather than dismissing these applications, the Bureau merely requested the

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<sup>24</sup> The *Space Station Licensing Reform Order* did not change the standard for assessing whether an application is substantially complete. *See Satellite Licensing Reform Order* ¶ 244 (“[W]e find that continuing to require substantially complete satellite applications will also continue to provide some additional protection against speculative satellite applications.”); *see also Space Station Licensing Reform NPRM* ¶ 84 n.104 (“We emphasize that we are not proposing any changes to the ‘substantially complete’ standard we currently use for satellite license review.”).

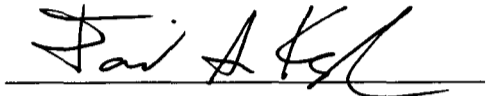
<sup>25</sup> Iridium, Application for Modification, File No. SAT-MOD-20030828-00286 (August 28, 2003); Boeing, Amendment, File No. SAT-AMD-20030827-00241 (August 27, 2003).

applicants to file supplements.<sup>26</sup> The Bureau should have taken the same approach with MSV, especially considering that the *December Public Notice* did not state that it applied to MSS applications, the interference analysis requested has no relevance to Planned Ku-band frequencies, and MSV has been prejudiced because it has lost priority to 50 MHz as a result of the Bureau's decision to dismiss the application rather than requesting a supplement.<sup>27</sup>

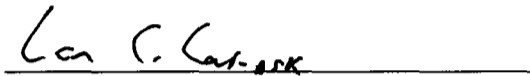
### Conclusion

MSV requests that the Commission act consistently with the views expressed herein.

Respectfully submitted,



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<sup>26</sup> See Letter from Thomas Tycz, International Bureau, FCC, to Peter D. Shields, Counsel for Iridium, File No. SAT-MOD-20030828-00286 (October 22, 2003) (requesting Iridium to supplement its application with ownership information); Letter from Letter from Thomas Tycz, International Bureau, FCC, to Joseph R. Markoski, Counsel for Boeing, File No. SAT-MOD-20030827-00241 (February 11, 2004) (requesting Boeing to supplement its application with information pertaining to orbital debris mitigation and longitudinal station keeping).

<sup>27</sup> This case is far different from the Bureau's recent decision to dismiss EchoStar's November 2003 amendment for failing to specify the frequencies for which it was applying. See Letter from Thomas Tycz, FCC, to David K. Moskowitz, EchoStar, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (February 9, 2004). In that case, EchoStar's failure to clearly state the frequencies for which it was applying prejudiced potential applicants under first-come, first-served licensing. See MSV, Opposition to Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 24, 2004), at 6-8. EchoStar's failure created uncertainty for potential applicants, resulting in delay in license grants, service to the public, and use of spectrum, thus undermining the goals of the first-come, first-served regime. *Id.* In MSV's case, failure to include an interference analysis that has no relevance to the Planned Ku-band frequencies for which MSV has applied has not prejudiced any applicant or potential applicant for these frequencies.

**CERTIFICATION**

I, Richard O. Evans, Senior Engineer of Mobile Satellite Ventures Subsidiary LLC ("MSV"), certify under penalty of perjury that:

I am the technically qualified person with overall responsibility for preparation of the information contained in the foregoing. I am familiar with the requirements of the Commission's rules, and the information contained therein is true and correct.

Executed on May 24, 2004



Richard O. Evans  
Senior Engineer

## CERTIFICATE OF SERVICE

I, Sylvia A. Davis, a secretary with the law firm of Shaw Pittman LLP, hereby certify that on this 24th day of May 2004, served a true copy of the foregoing "Petition for Reconsideration" by first class United States mail, postage prepaid, upon the following:

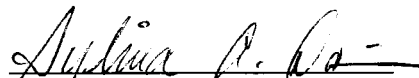
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