

ORIGINAL
RECEIVED

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

JUN 17 2004

JUN 21 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Policy Branch)
International Bureau)
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-20040209-00014

Int'l Bureau

JUN 17 2004

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Mobile Satellite Ventures Subsidiary LLC ("MSV") hereby files this Reply to the Opposition of EchoStar Satellite LLC ("EchoStar") to MSV's Petition for Reconsideration of the decision of the International Bureau ("Bureau") dismissing MSV's above-captioned amendment for failing to include a two-degree spacing analysis. As an initial matter, the Bureau just yesterday confirmed that the Commission's rules and policies were ambiguous as to whether a two-degree spacing analysis is required for a satellite such as the one proposed by MSV when there are no authorized satellites using the same frequencies within two degrees of the proposed satellite. Given this ambiguity, the Bureau reinstated two applications that had been previously dismissed for failing to include such an analysis under these circumstances. The Bureau must afford MSV the same treatment and reinstate its amendment *nunc pro nunc* as filed on February 9, 2004.

While EchoStar's Opposition has been rendered moot by the Bureau's recent acknowledgment of the ambiguity in the Commission's rules and policies, MSV nonetheless demonstrates below that EchoStar has failed to refute MSV's showing that (i) the interference analysis MSV was allegedly required to provide is in fact not required for Planned Ku-band frequencies or Mobile Satellite Service ("MSS") satellites and (ii) even assuming such an

analysis was required, the Bureau should have asked MSV to supplement its application rather than dismissing it.

Background

On December 3, 2003, the Bureau released a *Public Notice* clarifying the interference analysis an applicant for a Fixed Satellite Service (“FSS”) satellite must provide to demonstrate compliance with two-degree orbital spacing.¹ 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, MSV filed an amendment to its pending application for a replacement MSS satellite at 101°W to request 50 MHz of Planned Ku-band frequencies for feeder links which it was not licensed and had not previously applied (10.70-10.75 GHz and 13.15-13.20 GHz).² On April 23, 2004, the Bureau dismissed this amendment for failing to include the two-degree spacing analysis required for FSS satellites as clarified by the *December Public Notice*.³ As a result of this dismissal, MSV lost its status as first-in-line for these frequencies. EchoStar, which filed an application for these same frequencies on February 10,

¹ See *Public Notice, Clarification of Space Station Application Interference Analysis*, SPB-195, DA 03-3863 (December 3, 2003) (“*December Public Notice*”).

² MSV, Amendment, File No. SAT-AMD-20040209-00014 (filed February 9, 2004) (“*MSV Amendment*”). A thorough discussion of the background regarding this proceeding is discussed in MSV’s Petition for Reconsideration. See *MSV Petition* at 1-5.

³ 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*”).

2004,⁴ is now first-in-line for these frequencies.⁵ Should the Bureau reinstate MSV's amendment, it will return to first-in-line status.

On May 24, 2004, MSV filed a Petition for Reconsideration of the Bureau's dismissal of its February 2004 amendment.⁶ MSV explained that the Bureau erred in dismissing its amendment for three independent reasons: (i) a two-degree spacing analysis is not required when there is no authorized satellite using the same frequencies within two degrees of the proposed satellite; (ii) a two-degree spacing analysis is irrelevant with respect to Planned Ku-band frequencies; and (iii) the *December Public Notice* did not pertain to the type of satellite (MSS) for which MSV applied. *MSV Petition* at 1.

With respect to the first reason, MSV explained that the interference analysis required by the *December Public Notice* is limited to applications for FSS satellites proposed to be operated within two degrees of adjacent satellites authorized to use the same frequencies. *MSV Petition* at 7. MSV explained that such an analysis is unnecessary for its proposed satellite because there is no satellite that is authorized to operate in the Planned Ku-band within two degrees of 101°W. *Id.* at 7. MSV explained that "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." *Id.*

⁴ Application of EchoStar, File No. SAT-LOA-20040210-00015 (February 10, 2004).

⁵ 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. Comments of MSV, File No. SAT-LOA-20040210-00015 (April 26, 2004) ("*MSV Comments*"), at 5-6; Response of MSV, File No. SAT-LOA-20040210-00015 (May 21, 2004) ("*MSV Response*"), at 9-10.

⁶ Mobile Satellite Ventures Subsidiary LLC, Petition for Reconsideration, File No. SAT-AMD-20040209-00014 (May 24, 2004) ("*MSV Petition*").

With respect to the second reason, MSV explained that, because the Planned Ku-band is a planned band, meaning the 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, any modification would require further international process. *MSV Petition* at 7-8. Thus, in MSV's case, the interference analysis required by the *December Public Notice* would be irrelevant. *Id.* at 8.

With respect to the third reason, MSV explained that the *December Public Notice* pertains to applications for FSS satellites, not MSS satellites. *MSV Petition* at 6-7. While MSV recognized that feeder links for MSS satellites often use FSS frequencies, MSV explained that there is no Commission rule or policy specifying that an MSS satellite is always considered to be an FSS satellite if it uses FSS frequencies for feeder links. *Id.* Given that the *December Public Notice* did not specify whether it intended to apply to MSS satellites that use feeder links in FSS bands, MSV explained that its amendment should not have been dismissed for failing to include the interference analysis required by the notice. *Id.* at 6.

Even assuming MSV was required to provide the interference analysis, MSV explained that its alleged failure to include it can only be considered minor and can be cured by simply supplementing the application without injury to any public or private interest. *MSV Petition* at 9-10.

On June 7, 2004, EchoStar filed an Opposition to MSV's Petition.⁷ EchoStar contends that the *December Public Notice* applies to MSV's application because MSV proposes use of

⁷ EchoStar Satellite LLC, Opposition to Petition for Reconsideration, File No. SAT-AMD-20040209-00014 (June 7, 2004) ("*EchoStar Opposition*").

FSS frequencies for feeder links. *EchoStar Opposition* at 2. EchoStar does not mention MSV's showing that the two-degree spacing analysis required by the *December Public Notice* is inapplicable to satellites proposing (i) to be operated greater than two degrees from any authorized satellite using the same frequencies or (ii) to use Planned Ku-band frequencies. EchoStar argues that the Bureau should not apply a more lenient standard in evaluating MSV's application than the standard it applied in determining that EchoStar's November 2003 application for Planned Ku-band frequencies at 101°W was not "substantially complete" because it failed to specify the frequencies requested. *Id.* 3-4.⁸ EchoStar asserts without explanation that MSV's failure to include the interference analysis allegedly required is a "more grave deficiency" than EchoStar's failure to specify the frequencies it was requesting. *Id.* at 4.

Yesterday, the Bureau issued a *Public Notice* confirming that the rules and its *December Public Notice* were ambiguous as to whether a two-degree spacing analysis is required when there are no authorized satellites using the same frequencies within two degrees of the proposed satellite.⁹ The Bureau explained that the rules are "subject to conflicting, but reasonable, interpretations" and that "one reasonable interpretation of the rule is that if there are no authorized space stations [within 2 degrees], then no interference analysis is required."¹⁰ While the Bureau clarified that such an analysis is required under these circumstances, it also reinstated

⁸ 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).

⁹ See *Public Notice, Clarification of 47 C.F.R. § 25.140(b)(2): Space Station Application Interference Analysis*, SPB-207, DA 04-1708 (June 16, 2004) ("*June Public Notice*").

¹⁰ See Letter from Thomas S. Tycz, FCC, to Peter Hadinger, Northrop Grumman Space & Mission Systems Corporation, File No. SAT-AMD-20040312-00032 et al, DA 04-1725 (June 16, 2004), 2-3 ("*Northrop Grumman Decision*"); see also Letter from Thomas S. Tycz, FCC, to David M. Drucker, contactMEO Communications, LLC, File No. SAT-AMD-20040322-00057 et al, DA 04-1722 (June 16, 2004), at 2 ("*contactMEO Decision*").

two applications that had been previously dismissed for failing to include a two-degree spacing analysis under these circumstances given the ambiguity in the Commission's rules and policies.¹¹

Discussion

In its Petition for Reconsideration, MSV provided three independent reasons for why the Bureau erred in dismissing its amendment. With respect to the first reason, the Bureau yesterday confirmed that the rules and its *December Public Notice* were ambiguous as to whether a two-degree spacing analysis is required when there are no authorized satellites using the same frequencies within two degrees of the proposed satellite. Given this ambiguity, the Bureau reinstated two applications that had been previously dismissed for failing to include a two-degree spacing analysis under these circumstances. *See Northrop Grumman Decision; contactMEO Decision*. As MSV explained in its February 2004 Amendment and again in its Petition, there are no satellites authorized to operate using Planned Ku-band frequencies within two degrees of its proposed satellite at 101°W. *See MSV Amendment*, Appendix A at 4; *MSV Petition* at 7. Accordingly, MSV was not in error and its February 2004 Amendment was “substantially complete” as filed despite not including a two-degree spacing analysis. Accordingly, the Bureau must reinstate MSV's February 2004 Amendment, as it has done with two similar applications.¹²

In its Petition, MSV also demonstrated that the two-degree spacing analysis required by the *December Public Notice* does not apply to an application such as MSV's for Planned Ku-band frequencies. *MSV Petition* at 7-8. EchoStar's Opposition is notably silent on this point. Not surprisingly, EchoStar does not even attempt to offer an explanation as to why a two-degree spacing analysis would be required in MSV's case given that the technical parameters and

¹¹ *Northrop Grumman Decision; contactMEO Decision*.

¹² The Commission must treat similarly situated entities the same. *See McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993).

required orbital spacing for satellites in the Planned Ku-band have already been established by the ITU.

With respect to the third reason, EchoStar does not refute that the *December Public Notice* applies only to applications for FSS satellites. EchoStar is wrong, however, when it claims that an MSS satellite is always treated as an FSS satellite if it uses frequencies allocated to FSS for feeder links. *EchoStar Opposition* at 2-3. EchoStar does not explain the numerous instances cited by MSV in which the Commission carefully distinguishes between FSS satellites and MSS satellites that use feeder links in the FSS. *MSV Petition* at 6-7. EchoStar fails to cite any Commission rule or policy that definitively establishes that an MSS satellite will always be considered as an FSS satellite if it uses FSS frequencies for feeder links. Given that the *December Public Notice* failed to specify whether it pertains to an MSS satellite that uses feeder links in the FSS, MSV's amendment to its MSS application must be considered "substantially complete" despite not including the two-degree spacing analysis.

Finally, MSV agrees with EchoStar that the Bureau should apply the same standard to both MSV and EchoStar in assessing whether their applications for Planned Ku-band frequencies at 101°W are "substantially complete" as filed. *EchoStar Opposition* at 3-4. In applying that standard, however, the Bureau must come to two different conclusions. In EchoStar's case, its November 2003 amendment failed to specify the frequencies for which it was applying.¹³ EchoStar's failure to clearly state the frequencies for which it was applying prejudiced potential applicants under first-come, first-served licensing.¹⁴ EchoStar's failure created uncertainty for

¹³ See Letter from Thomas Tycz, FCC, to David K. Moskowitz, EchoStar, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (February 9, 2004).

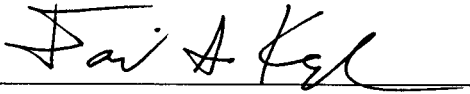
¹⁴ See MSV, Opposition to Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 24, 2004), at 6-8.

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.¹⁵ Under such circumstances, the Bureau's decision to dismiss EchoStar's application was appropriate. In MSV's case, its failure to include an interference analysis that has no relevance to the frequencies for which it applied did not result in any prejudice to any applicant or potential applicant for these frequencies. EchoStar has not made any claim to the contrary. Under such circumstances, the Bureau's decision to dismiss MSV's application was inappropriate. Even assuming the interference analysis was required, this deficiency could be cured simply by supplementing the application without injury to any public or private interest

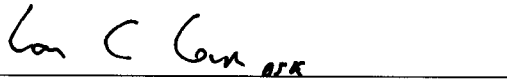
Conclusion

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

Respectfully submitted,



Bruce D. Jacobs
David S. Konczal
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000



Lon C. Levin
Vice President
**MOBILE SATELLITE VENTURES
SUBSIDIARY LLC**
10802 Park Ridge Boulevard
Reston, Virginia 20191
(703) 390-2700

Dated: June 17, 2004

¹⁵ *Id.*

CERTIFICATE OF SERVICE

I, Sylvia A. Davis, a secretary with the law firm of Shaw Pittman LLP, hereby certify that on this 17th day of June 2004, served a true copy of the foregoing "Reply to Opposition to Petition for Reconsideration" by first class United States mail, postage prepaid, upon the following:

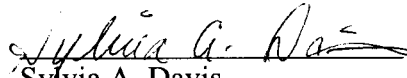
Thomas S. Tycz*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Andrea Kelly*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Robert Nelson*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Pantelis Michalopoulos
Steptoe & Johnson LLP
1330 Connecticut Avenue N.W.
Washington, D.C. 20036

Counsel for EchoStar Satellite LLC


Sylvia A. Davis

*By hand delivery