

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

Received

OCT 19 2004

Policy Branch  
International Bureau

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In the Matter of )  
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Mobile Satellite Ventures )  
Subsidiary LLC )  
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Amendment to Application for )  
Authority to Launch and Operate a )  
Replacement L-band Mobile )  
Satellite Service Satellite at )  
at 101° W )  
\_\_\_\_\_ )

00014  
File No. SAT-AMD-20040209-0014  
Call Sign S2358

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OCT 15 2004

Federal Communications Commission  
Office of Secretary

APPLICATION FOR REVIEW

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October 15, 2004

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**APPLICATION FOR REVIEW**

Pursuant to 47 C.F.R. § 1.115, EchoStar Satellite L.L.C. (“EchoStar”), formerly known as EchoStar Satellite Corporation, hereby requests that the Federal Communications Commission (“Commission”) review the International Bureau’s (“Bureau”) decision to reinstate Mobile Satellite Venture’s (“MSV”) February 9, 2004 Amendment (“MSV Amendment”) seeking to add 50 megahertz of spectrum to its pending application for its next generation Mobile-Satellite Service (“MSS”).<sup>1</sup> Inconsistent with Commission and court precedent, the Bureau has held the MSV Amendment to a much less exacting standard in determining that the amendment was “substantially complete” than the Bureau applied when it dismissed EchoStar’s application and amendment for some of the same spectrum. The Commission should act to

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<sup>1</sup> See Order, In the Matter of Mobile Satellite Ventures Subsidiary LLC Amendment to Application for Authority to Launch and Operate a Replacement L-band Mobile Satellite Service Satellite at 101° W.L., File No. SAT-AMD-20040209-00014, DA 04-2985 (Released: September 15, 2004) (“MSV Reinstatement Order”).

ensure that these satellite licensing applications are treated in a manner consistent with existing Commission and court precedent.

## I. BACKGROUND

On August 27, 2003, EchoStar filed an application to construct, launch and operate a geostationary satellite to provide Fixed-Satellite Service ("FSS") using the allotted extended Ku-band frequencies at the 101° W.L. orbital location under the Commission's new "first-come-first-served" filing procedures ("EchoStar Application").<sup>2</sup> In November 2003, EchoStar amended its application to (1) increase the service area over which uplink transmissions, used primarily for feeder link type earth stations, may be received; and (2) add steerable uplink and fixed downlink spot beams to facilitate any needed coordination with other satellite systems in the allotted extended Ku-band ("EchoStar Amendment").<sup>3</sup> Among other bands, EchoStar requested operating authority for the 10.70-10.75 GHz and 13.15-13.20 GHz bands.

On February 9, 2004, the Bureau dismissed the EchoStar Application and the EchoStar Amendment without prejudice to refileing.<sup>4</sup> The only two reasons given for dismissal were that: (1) Table A.4-1 of Section A.4 of the Technical Annex to the EchoStar Amendment incorrectly referred to frequency bands different from the frequency bands requested elsewhere in the EchoStar Application or the EchoStar Amendment; and (2) the EchoStar Amendment

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<sup>2</sup> See Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 10760, at ¶ 244 (2003) ("Satellite Licensing Order").

<sup>3</sup> EchoStar Amendment at 1.

<sup>4</sup> See Letter to David K. Moskowitz, Senior Vice President and General Counsel, EchoStar Satellite Corporation, from Thomas S. Tycz, DA 04-323 (February 9, 2004) at 1 ("EchoStar Dismissal Letter"). In this application, "EchoStar Application" refers to SAT-LOA-2003-0827-00179 and "EchoStar Amendment" refers to SAT-AMD-20031126-00343.

failed to identify which antenna beams would be connected or switchable to each transponder and tracking, telemetry and control (TT&C) function.<sup>5</sup> On February 10, 2004, EchoStar refiled the EchoStar Application. In addition, EchoStar sought reconsideration of the EchoStar Dismissal Letter.<sup>6</sup>

On February 9, 2004, soon after the EchoStar Application and the EchoStar Amendment were dismissed, MSV filed the MSV Amendment to its pending application for its next generation MSS system.<sup>7</sup> MSV requested an additional 50 Mhz of spectrum in each direction for FSS feeder links including the 10.70-10.75 GHz and 13.15-13.20 GHz bands previously sought by EchoStar. On April 23, 2004, the Bureau also dismissed the MSV Amendment because it failed to include an interference analysis required under Section 25.140(b)(2) of the Commission's rules.<sup>8</sup> MSV filed a Petition for Reconsideration for the MSV Dismissal Letter on May 24, 2004.<sup>9</sup> EchoStar filed an Opposition to MSV's Petition for Reconsideration on June 7, 2004<sup>10</sup> and MSV filed a Reply to the Opposition of EchoStar on June 17, 2004.<sup>11</sup>

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<sup>5</sup> Dismissal Letter at 2-3. *See* 47 C.F.R. §§ 25.112 and 25.114(c)(5).

<sup>6</sup> *See* EchoStar Satellite L.L.C., Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179 and SAT-AMD-20031126-0343 (Filed: March 10, 2004).

<sup>7</sup> Application of Mobile Satellite Ventures Subsidiary LLC, SAT-AMD-20040209-00014 (February 9, 2004) ("MSV Amendment").

<sup>8</sup> *See* Letter to Lon C. Levin, Senior Vice President, Mobile Satellite Ventures Subsidiary LLC, from Thomas S. Tycz, DA 04-1095 (April 23, 2004) at 2 ("MSV Dismissal Letter").

<sup>9</sup> *See* Mobile Satellite Ventures Subsidiary LLC, Petition for Reconsideration, File No. SAT-AMD-20040209-00014 (Filed: May 24, 2004).

<sup>10</sup> *See* EchoStar Satellite L.L.C., Opposition to MSV's Petition for Reconsideration, File No. SAT-AMD-20040209-00014 (Filed: June 7, 2004).

<sup>11</sup> *See* Mobile Satellite Ventures Subsidiary LLC, Reply to Opposition for Reconsideration, File No. SAT-AMD-20040209-00014 (Filed: June 17, 2004).

On September 15, 2004, the Bureau issued the MSV Reinstatement Order that reinstated the MSV Amendment. The Bureau decided to reinstate the MSV Amendment despite the fact that it determined that “Section 25.140(b)(2) of the Commission’s rules require an interference analysis for feeder links in the FSS bands regardless of the classification of the service provided to end users.”<sup>12</sup> In addition, the Bureau clearly indicated that it believed the interference analysis was an important part of the satellite licensing application because it issued a Public Notice clarifying that an interference analysis was required in situations to similar to the MSV Amendment and that the failure of an applicant to supply the interference analysis would result the dismissal of the application.<sup>13</sup>

**II. THE BUREAU IN THE MSV REINSTATEMENT ORDER HOLDS MSV TO A MUCH LESS EXACTING STANDARD FOR DETERMINING THAT AN APPLICATION IS “SUBSTANTIALLY COMPLETE” THAN IT APPLIED IN THE ECHOSTAR DISMISSAL LETTER**

Under the Commission’s Rules and policies, satellite applications are to be processed if they are “substantially complete” when filed.<sup>14</sup> Under Commission interpretations of the “substantially complete” standard, minor errors in an application are acceptable so long as the “the discrepancy [can be] resolved, confidently and reliably, drawing on the application as a whole.”<sup>15</sup> Moreover, as explained by the D.C. Circuit, “the FCC must accept applications that

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<sup>12</sup> MSV Reinstatement Order at 5.

<sup>13</sup> MSV Reinstatement Order at 5.

<sup>14</sup> See *Satellite Licensing Order* at ¶ 244; *Satellite Licensing NPRM* at ¶ 84; EchoStar Dismissal Letter at 2.

<sup>15</sup> *Processing of FM and TV Broadcast Applications*, MM Docket No. 84-750, 50 Fed. Reg. 19936, 19946 (May 13, 1985) (“*FM and TV Order*”).

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.”<sup>16</sup>

The Bureau has not applied the “substantially complete” standard consistently in evaluating the MSV Amendment and the EchoStar Amendment.<sup>17</sup> The errors in the MSV Amendment are not minor errors or violations of Commission rules that can be resolved based on the contents of the rest of the application or which could be cured without causing injury to a private or public interest. In contrast, the errors in the EchoStar Amendment are minor errors or violations of Commission rules. Yet the Bureau has determined that the EchoStar Amendment and the EchoStar Application should be dismissed while it has determined that the MSV Amendment should be reinstated. The Commission should act to ensure that the substantially complete standard is applied consistently to the MSV Amendment and the EchoStar Amendment.

**A. The MSV Amendment Was Treated As Being Substantially Complete Despite the Omission of an Important Interference Analysis**

The error that originally led the Bureau to dismiss the MSV Amendment was that MSV failed to submit an interference analysis where the applicant was required to demonstrate the compatibility of their proposed systems within two-degrees from the any authorized space

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<sup>16</sup> See *Salzer v. FCC*, 778 F.2d 869, 872 n.7 (D.C. Cir. 1985). (citing *James River* 399 F.2d 581).

<sup>17</sup> The EchoStar Petition For Reconsideration of the EchoStar Dismissal Letter is still pending. The MSV Reinstatement Decision notes that “[b]ecause EchoStar’s petition for reconsideration is still pending, MSV’s status with respect to the 10.70-10.75 GHz and 13.15-13.20 GHz frequencies is subject to our decision on EchoStar’s petition for reconsideration of the EchoStar Dismissal Letter.” MSV Reinstatement Decision at 6. Thus, it is possible that the Bureau will also determine that EchoStar Amendment is also substantially complete and reinstate the EchoStar Amendment and EchoStar Application. However, in order to protect its rights, EchoStar had to file this application for review of the MSV Reinstatement Order.

stations.<sup>18</sup> Even while reinstating the MSV Amendment, the Bureau stated that “Section 25.140(b)(2) of the Commission’s rules require an interference analysis for feeder links in the FSS bands regardless of the classification of the service provided to end users.”<sup>19</sup> Under the MSV Amendment, MSV requested feeder links in the FSS band including the 10.70-10.75 GHz and 13.15-13.20 GHz bands and it should therefore have submitted an interference analysis. This omission is not the type of minor error in an application that is acceptable so long as the “the discrepancy [can be] resolved, confidently and reliably, drawing on the application as a whole.”<sup>20</sup> The rest of the application would not serve as a reliable guide to other spectrum users about the potential interference problems presented by MSV’s use of its requested spectrum.

**B. The EchoStar Amendment Was Treated As Not Being Substantially Complete Based on Two Minor Errors**

In contrast to the substantive omission that the Bureau allowed when it treated the MSV Amendment as “substantially complete” in the MSV Reinstatement Order, the Bureau treated the EchoStar Amendment as not “substantially complete” based on two minor errors. The first minor error was that the requested frequency bands were not correctly identified in Table A.4-1 of the Technical Annex filed with the EchoStar Amendment due to a typographical error.<sup>21</sup> As the Commission has previously stated, an application that contains a minor error or discrepancy that can be “confidently and reliably”<sup>22</sup> resolved by looking at the application as a

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<sup>18</sup> See MSV Reinstatement Order at 4.

<sup>19</sup> MSV Reinstatement Order at 5.

<sup>20</sup> *TV and FM Order* at 19946.

<sup>21</sup> Compare, e.g., 47 C.F.R. § 25.116(c)(3) (permitting NGSO applicants to make even major amendments to their application after the processing round cut-off date if it is to “correct[] typographical, transcription, or similar clerical errors which are clearly demonstrated to be mistakes by reference to other parts of the application . . .”).

<sup>22</sup> *TV and FM Order* at 19946.



whole would still meet the “substantially complete” standard. The EchoStar Application and EchoStar Amendment as a whole clearly establish that EchoStar did not change its requested frequency assignments with the filing of the Amendment, and was always proposing to use frequencies in the allotted extended Ku-band –namely 10.70-10.75 GHz and 11.20-11.45 GHz on the downlink, and 12.75-13.00 GHz and 13.15-13.20 GHz on the uplink.<sup>23</sup> Consequently, the typographical error in the frequency table included with the Amendment did not render the Application or Amendment unacceptable under the substantially complete standard.

The second minor error cited in the EchoStar Dismissal Letter was that the EchoStar Amendment failed to identify which antenna beams would be connected or switchable to each transponder and tracking, telemetry and control (TT&C) function. This is precisely the type of error that “may be cured without injury to public or private interest.”<sup>24</sup> In contrast to the interference analysis that was omitted in the MSV Amendment where the Bureau felt that the

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<sup>23</sup> See, e.g., Application at 2 (“Specifically, EchoStar requests authority to launch and operate the following GSO FSS satellites: ... a satellite at 101° W.L. that would operate in a portion of the allotted extended Ku-band – 10.70-10.75 GHz and 11.20-11.45 GHz from space-to-Earth, and 12.75-13.00 GHz and 13.15-13.20 GHz from Earth-to-space.”); *id.* at 5 (“The payload in the allotted portion of the extended Ku-band at 101° W.L. will consist of 18 transponders each of 27 MHz usable bandwidth covering 300 MHz in each direction (10.70-10.75 GHz and 11.20-11.45 GHz from space-to-Earth, and 12.75-13.00 GHz, 13.15-13.20 GHz from Earth-to-space.”); *id.* at Exhibit 1 - A.1 (“The satellite will use the 11.2-11.45 GHz band and a portion of the 10.7-10.75 GHz band for downlink transmissions and the 12.75-13.0 GHz band and a portion of the 13.15-13.2 GHz band for uplink transmissions.”); *id.* at Exhibit 1 - A.23 (listing the correct allotted extended Ku-band frequencies for the Sharing Analysis with Other Services and Allocations); *id.* at Exhibit 2 (listing the correct allotted extended Ku-band frequencies). See also, e.g., Amendment at 4 (“The use of the bands 10.7-11.7 GHz (space-to-Earth) and 12.75-13.25 GHz (Earth-to-space) by the fixed-satellite service in the geostationary-satellite orbit”); *id.* at Attachment A - A.1 (“The satellite will use the 11.2-11.45 GHz band and a portion of the 10.7-10.75 GHz band for downlink transmissions and the 12.75-13.0 GHz band and a portion of the 13.15-13.2 GHz band for uplink transmissions (portions of spectrum of the ITU Appendix 30B FSS allotment band.”); *id.* at Attachment A - A.23 (referring to MSV’s pending application to use the allotted extended Ku-band frequencies at the same location); *id.* at Attachment A - A.24 (referring to the correct allotted extended Ku-band frequencies).

<sup>24</sup> See *Salzer*, 778 F.2d, at 872. (citing *James River* 399 F.2d 581).

missing interference analysis was important enough to issue a Public Notice clarifying that the analysis must be provided and failure to do so will result in the application being dismissed, the missing information in the EchoStar Amendment does not make a practical difference as to whether EchoStar's proposed satellite would potentially interfere with nearby satellites or other authorized services in the allotted extended Ku-band. In fact, the absence or presence of the missing technical information identified by the Bureau would not affect EchoStar's or any other user's interference analysis for the proposed satellite.<sup>25</sup> Other authorized users of the band will rightly assume that there will be simultaneous uplink and downlink frequency overlaps in assessing the potential for interference.<sup>26</sup>

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<sup>25</sup> It is important to note that the uplink and downlink spot beams in the proposed EchoStar-101W satellite are all steerable or repointable, as clearly explained in the EchoStar Application, and this means that, from an interference perspective, they must be assumed to point to anywhere on the visible Earth. Only through coordination with other licensees, as foreseen and specifically mentioned in the EchoStar Application, would the benefits of knowing the pointing directions and the channel allocations of each beam be useful in resolving any interference issues.

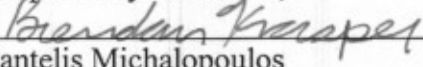
<sup>26</sup> In addition, allowing EchoStar to correct its omission without dismissing its EchoStar Application and EchoStar Amendment would not harm the public interest. The processing of this application, as amended, could have waited for EchoStar to supplement its filing with the requested information. No harm to the public would have resulted from any such minimal delays. Indeed, by allowing EchoStar to refile its application with the requested information, the Bureau presumably will continue to process essentially the same application. Again in contrast to the omission in the EchoStar Amendment, the fact that the Bureau felt that it was important enough to issue a Public Notice addressing the interference analysis omitted from the MSV Amendment suggests that the failure to include this information would harm the public interest.

### III. CONCLUSION

For the reasons stated above, EchoStar respectfully requests that the Commission act to ensure that the "substantially complete" standard for determining when an application is accepted for filing is applied consistently and in accordance with Commission and court precedent in both the MSV Amendment and the EchoStar Amendment.

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October 15, 2004

## CERTIFICATE OF SERVICE

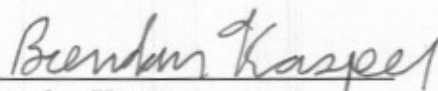
I, Brendan Kasper, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 15<sup>th</sup> day of October, 2004, served a true copy of the foregoing "Application for Review" by first class United States mail, postage prepaid, upon the following:

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