

COPY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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)
at 101° W)
_____)

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

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

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November 16, 2004

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Satellite Service Satellite at)	
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REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115, EchoStar Satellite L.L.C. ("EchoStar") hereby files this Reply to Opposition to Application for Review in the above captioned matter. In its Application for Review,¹ EchoStar demonstrates, that the Bureau held Mobile Satellite Ventures Subsidiary's ("MSV") February 9, 2004 Amendment ("MSV Amendment") to a much less exacting standard in determining that its amendment was "substantially complete"² than the Bureau applied when it dismissed EchoStar's application and amendment for some of the same

¹ See EchoStar Satellite L.L.C., Application for Review, File No. SAT-AMD-20040209-00014 (Filed: October 15, 2004) ("Application for Review").

² See 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., Order, File No. SAT-AMD-20040209-00014, DA 04-2985 (Released: September 15, 2004 ("MSV Reinstatement Order").

spectrum.³ MSV's latest Opposition fails to justify the Bureau's disparate treatment of the two applications.

It is not rational for the Bureau to hold that on the one hand, the omission of an interference analysis by MSV was an excusable minor error in circumstances where past practice had been to require such an analysis, and on the other hand, a minor typographical error by EchoStar in the Technical Annex of an amendment and the omission of certain technical information regarding which transponders are connected to which spot beams in circumstances where this omission would not prejudice other potential spectrum users are major blunders justifying the draconian sanction of dismissal. Thus, the Commission should act to ensure that these satellite licensing applications are treated the same, consistent with existing Commission and court precedent.

I. MSV HAS NOT SHOWN THAT THE SUBSTANTIALLY COMPLETE STANDARD WAS APPLIED CONSISTENTLY TO BOTH APPLICATIONS

Under the Commission's Rules and policies, satellite applications are to be processed if they are "substantially complete" when filed.⁴ 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."⁵ Moreover, as explained by the D.C. Circuit, "the FCC must

³ In this reply, "EchoStar Application" refers to SAT-LOA-20030827-00179 and "EchoStar Amendment" refers to SAT-AMD-20031126-00343.

⁴ 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; Amendment of the Commission's Space Station Licensing Rules and Policies, *Notice of Proposed Rulemaking and First Report and Order*, 17 FCC Rcd. 3847, at ¶ 84; 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 2.

⁵ Processing of FM and TV Broadcast Applications, MM Docket No. 84-750, 50 Fed. Reg. 19936, 19946 (May 13, 1985) ("FM and TV Order").

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.”⁶

MSV contends in its Opposition that the “substantially complete” standard was applied consistently because the interference analysis omitted from its amendment “was in fact not required at the time its application was filed” while the two minor errors in the EchoStar Amendment violated Commission rules and were prejudicial to potential applicants.⁷ MSV fails to demonstrate, however, that the substantially complete standard was applied consistently for both applications.

MSV claims that its omission of an interference analysis was not an error at all because it “was in fact not required at the time its application was filed.”⁸ This claim overstates the impact of the June 16, 2004 Public Notice.⁹ The Bureau did not establish that an interference analysis was in fact never required, instead it essentially excuses the failure to submit such an analysis based on a lack of clarity in the Rules. The MSV Reinstatement Order clearly states that even prior to the June 16, 2004 Public Notice (1) the Bureau had already interpreted the rule to require an interference analysis even where there are no authorized stations within two degrees and (2) applicants had historically submitted this information even prior to the Public Notice

⁶ See *Salzer v. FCC*, 778 F.2d 869, 872 n.7 (D.C. Cir. 1985). (citing *James River* 399 F.2d 581) (“Salzer”).

⁷ See Opposition at 9.

⁸ Opposition at 9.

⁹ See International Bureau Satellite Division Information: Clarification of 47 C.F.R. § 25.140(b)(2) Space Station Application Interference Analysis, DA 04-1708 (June 16, 2004) (“June 16, 2004 Public Notice”).

without need for the clarification.¹⁰ Similarly, the June 16, 2004 Public Notice states that it was clarifying (not establishing) that applicants must submit an interference analysis even when there is no authorized space station within two degrees of the proposed satellite.

The omission of an interference analysis is not the type of minor error in an application that is acceptable since such a “discrepancy [cannot be] resolved, confidently and reliably, drawing on the application as a whole.”¹¹ The rest of MSV’s application would not serve as a reliable guide to other spectrum users about the potential interference impacts presented by MSV’s use of its requested spectrum.¹² Further, it was clear that despite accepting the MSV Amendment, the Bureau did not view the failure to provide an interference analysis as falling in “minor errors or infractions of agency rules” that “may be cured without injury to public or private interest.”¹³ On the contrary, the Bureau issued a Public Notice on June 16, 2004 clarifying that an interference analysis must be provided in circumstances similar to those presented by the MSV Amendment. As set forth in this Public Notice, if the applicant fails to provide such interference analysis, the application will be dismissed.¹⁴ Finally, the Bureau determined that MSV’s failure to provide an interference analysis was “contrary to historical practice” and that similarly situated applicants had submitted the required interference analysis in the past.¹⁵ Because MSV incorrectly claims that its failure to submit an interference analysis was

¹⁰ See MSV Reinstatement Order at 4-5.

¹¹ *TV and FM Order* at 19946.

¹² *Application for Review* at 6.

¹³ *Salzer*, 778 F.2d at 872.

¹⁴ MSV Reinstatement Order at 5 and June 16, 2004 Public Notice.

¹⁵ See MSV Reinstatement Order at 4-5. See also June 16, 2004 Public Notice at 1 (“Historically, applicants have submitted interference analyses based on other authorized or proposed systems or based on the technical data of the applicant’s own satellite in cases where

permissible, it does not address the factors the Commission and courts have used when analyzing whether an application should be considered "substantially complete."

Similarly, MSV incorrectly claims that the EchoStar Amendment failed to clearly state what frequencies it was applying for and thereby violated Commission rules and prejudiced potential applicants.¹⁶ Perhaps most telling in regard to its claim of prejudice is what MSV does not say in its Opposition. MSV does not, and obviously cannot, assert that it was somehow misled or confused by the typographical error in the Technical Annex about the frequencies requested by EchoStar, even though it seems to have the most direct interest of any other third party in the requested frequencies.

Despite this clear weakness in its claim, MSV cites the Common Carrier Bureau's *Mobile Phone* decision for the proposition that internal inconsistencies with regard to requested frequencies prejudice other potential applicants and are fatal to an application.¹⁷ However, the EchoStar Amendment is readily distinguishable from that case. In the EchoStar Amendment, the only inconsistency was easily resolvable by reviewing the rest of the application and amendment while the numerous inconsistencies present in *Mobile Phone* were not. While both the cover letter and accompanying FCC Form 401 in *Mobile Phone* made reference to certain frequencies, these references conflicted with those specified in the body of the application. Additionally, there were other inconsistencies within the engineering statements themselves. This inextricable

there are no licensed or proposed satellites within two degrees of the applicant's proposed orbital location.")

¹⁶ See Opposition at 9.

¹⁷ See Opposition at fn 28. (Citing *In re Application of Mobile Phone of Texas, Inc.*, Memorandum Opinion and Order, 5 FCC Rec. 3459 (Common Carrier Bur., June 12, 1990) ("Mobile Phone").

web of conflicting information provided reasonable doubt as to which frequency bands were being requested by the applicant.

By contrast, in the EchoStar Amendment, EchoStar's request for frequencies and all relevant textual information within the EchoStar Application and EchoStar Amendment, with the exception of one instance in one table in the Technical Annex, refers to the correct frequency bands. Thus, it would be wrong to classify the correction of one typographical error as an amendment to change the frequencies requested in the pending application. This type of correction is not the type of "major amendment" envisioned by 47 C.F.R. § 25.116(b)(1), and only was classified as such in the case of *Mobile Phone* because of the repeated inconsistencies and genuine question as to the applicable frequency bands being requested by the applicant.

The decision in *Mobile Phone* is also distinguishable because in that case the amendment submitted to correct the numerous inconsistencies "created a new conflict with [a mutually exclusive] application that was not apparent at the time Mobile Phone filed its application."¹⁸ By contrast, the single inconsistency in the EchoStar Amendment prejudiced no one. Thus, MSV's reliance on *Mobile Phone* is misguided. The typographical error in this case can easily be "resolved, confidently and reliably, drawing on the application a whole."¹⁹

MSV also claims that it was prejudiced because EchoStar's failure to specify which transponder would be connected to which spot beam deprived MSV of information that might have been useful in determining whether EchoStar's sharing proposal is possible.²⁰ However, it is unclear how MSV would be prejudiced in this case. As EchoStar explained in its Application for Review, because the spot beams are all steerable and repointable, only through

¹⁸ Mobile Phone at ¶ 8.

¹⁹ FM and TV Order.

²⁰ Opposition at fn 27.

coordination with other licensees, as foreseen and specifically mentioned in the EchoStar Application, would knowing the pointing directions and channel allocations of each beam be useful in resolving any interference issues.²¹ Thus coordination would be necessary to allow interference free spectrum sharing irrespective of the spot beam and transponder connections, and MSV cannot convincingly claim prejudice in that or any other regard.

Thus, MSV has not demonstrate that the two minor errors in the EchoStar Amendment failed to render the amendment “substantially complete” under existing Commission and court precedent. These minor errors easily could be “resolved, confidently and reliably, drawing on the application as a whole”²² or could be corrected “without injury to public or private interest.”²³

²¹ See Application for Review at 8 and fn 25.

²² TV and FM Order at 19946.

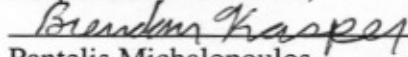
²³ See Salzer 778 F.2d at 872.

II. CONCLUSION

The Bureau has impermissibly treated the MSV Amendment as “substantially complete” while rejecting the EchoStar Amendment as requiring the dismissal of its application. MSV has not shown that this disparate treatment is justified under the “substantially complete” standard. Thus, 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 to both the MSV Amendment and the EchoStar Amendment.

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CERTIFICATE OF SERVICE

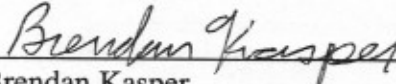
I, Brendan Kasper, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 16th day of November, 2004, served a true copy of the foregoing "Application for Review" by first class United States mail, postage prepaid, upon the following:

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