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**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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Policy Branch  
International Bureau

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Federal Communications Commission  
Office of Secretary

In the Matter of )

**EchoStar Satellite LLC** )

Application for Authority to Construct, )  
Launch, and Operate a Geostationary )  
Satellite Using the Extended Ku-band )  
Frequencies in the Fixed-Satellite Service )  
at the 101° W.L. Orbital Location )

File No. SAT-LOA-20040210-00015

File No. SAT-AMD-20040428-00085

Call Sign: S2615

To: the International Bureau

**PETITION FOR RECONSIDERATION**

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August 5, 2005

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## I. INTRODUCTION AND SUMMARY

The Bureau has denied the EchoStar Refiled Application on the basis that: (1) Mobile Satellite Ventures Subsidiary LLC ("MSV") had first-in-line status with respect to the additional extended Ku-band spectrum requested by MSV at the 101° W.L. orbital location; and (2) the proposed EchoStar satellite would cause "harmful interference" to the "previously licensed operations" of MSV.<sup>2</sup> The Bureau's decision to deny the EchoStar Refiled Application was not well-grounded in fact and law and should be reconsidered.

*First*, the Bureau's conclusion that MSV has first-in-line status with respect to the Ku-band spectrum requested by MSV is (as the Bureau acknowledges) the subject of two pending Applications for Review which, if either one is granted, would undermine this finding. In sum, the pending Applications for Review point out that the Bureau's actions in dismissing a previously filed EchoStar application (filed on August 27, 2003 before the EchoStar Refiled Application) for the 101° W.L. orbital location, while reinstating an MSV amendment (now granted in the *MSV Order*), are inconsistent with a long line of Commission and court precedent. Specifically, the Bureau has held MSV to a much less exacting standard in determining that its amendment to its application was "substantially complete" while dismissing a previously filed EchoStar application applying a much stricter "letter perfect" standard.

*Second*, the Bureau has failed to provide any support for its critical finding that EchoStar's satellite would cause "harmful interference" to the "previously licensed operations" of MSV. In fact, the opposite is true. Sharing of the overlapping extended Ku-band frequencies between MSV's proposed two feeder links and EchoStar's service links is clearly possible --

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<sup>2</sup> *EchoStar Order* at 2-3. See also *In the Matter of Mobile Satellite Ventures Subsidiary LLC*, DA 05-1492 (rel. May 23, 2005) ("*MSV Order*"). EchoStar has filed a Petition for Clarification and/or Reconsideration of the *MSV Order*. See EchoStar Petition for Clarification and/or Reconsideration, File No. SAT-LOA-19980702-00066 *et al.* (filed June 22, 2005).



something even MSV has recognized in the past. In the *MSV Order*, the Bureau itself acknowledged the prior statements by EchoStar and MSV that sharing was possible and effectively encouraged the parties to enter into sharing discussions.<sup>3</sup> However, just over a month after the *MSV Order*, the Bureau disregarded its own words and dismissed the EchoStar Refiled Application in the *EchoStar Order*. Absent prompt reconsideration of the *EchoStar Order*, the use of the extended Ku-band FSS spectrum at the 101° W.L. orbital location will not be maximized -- a result that is not in the public interest.

The Bureau's denial of the EchoStar Refiled Application is not only inconsistent with its own *MSV Order*, it also flatly contravenes the Commission's policy favoring spectrum efficiency, as well as common sense. The Bureau is denying the EchoStar Refiled Application to use an orbital location for nationwide service because it has licensed another company to use *two* locations in all of the country for feeder link communications with an MSS satellite. Such limited use of an orbital location, however, cannot preclude use of the slot to serve the rest of the country.

The *EchoStar Order* is also at odds with the Commission's prior decisions requiring the sharing of spectrum when satellite operations are only needed for limited feeder link communications. The Commission has consistently allowed co-frequency use of spectrum when a satellite carrier uses that spectrum for a limited number of feeder link sites. For example,

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<sup>3</sup> *MSV Order* at ¶ 16 n. 45 ("EchoStar recently suggested that it may be able to coordinate shared use of this 50 megahertz with MSV. MSV states that it is willing to discuss a sharing arrangement with EchoStar. If the parties reach an agreement, we will entertain a request that involves co-frequency operations.") (citations omitted).

in the Ka-band plan proceeding, the Commission mandated co-frequency sharing of MSS feeder uplinks with LMDS stations and GSO downlinks with FS stations in portions of the band.<sup>4</sup>

In further support of its statements that sharing is possible, EchoStar is submitting an engineering analysis which concludes that "MSV's planned use of the extended Ku-band at 101°W.L. for its MSS feeder links *is compatible* with EchoStar's FSS use of the same frequencies and same orbital location for spot beam DTH services. Sharing of the frequencies would be based on geographic separation of the spot beams in both systems. Such an arrangement would constitute efficient use of the Ku-band FSS spectrum."<sup>5</sup>

The Bureau should reinstate and expeditiously grant the EchoStar Refiled Application, and thereby encourage coordination discussions between the parties. However, to avoid gaming by MSV, successful completion of coordination should not be a condition precedent to licensing the EchoStar satellite. Rather, consistent with normal practice, it should be a condition of EchoStar's license. In this way, there will be every incentive for MSV and EchoStar to maximize the spectral resources at the 101° W.L. orbital location.

## II. BACKGROUND

This proceeding involves one of a number of applications that have been filed by either MSV or EchoStar which includes the use of extended Ku-band frequencies at the 101°W.L. orbital location. On August 27, 2003, EchoStar filed an application ("EchoStar Application") to construct, launch and operate a geostationary satellite to provide Fixed-Satellite

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<sup>4</sup> *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*, 11 FCC Rcd. 19005, 19033-37 (1996).

<sup>5</sup> "MSV-EchoStar Sharing Analysis," prepared by Dr. Richard J. Barnett, Telecomm Strategies Inc., attached hereto as Attachment A (footnote omitted; emphasis added).

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.<sup>6</sup> In November 2003, EchoStar amended its application ("EchoStar Amendment") 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.<sup>7</sup>

On February 9, 2004, the Bureau dismissed the EchoStar Application and the EchoStar Amendment without prejudice to refileing.<sup>8</sup> The only 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 noted elsewhere throughout the EchoStar Application and the EchoStar Amendment; and (2) 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.<sup>9</sup> EchoStar sought timely reconsideration of the EchoStar Dismissal Letter.<sup>10</sup> On December 27, 2004, the Bureau released its Order on Reconsideration denying EchoStar's petition for reconsideration and affirming the

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<sup>6</sup> See *Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd. 10760, at ¶ 244 (2003) ("*Satellite Licensing Order*").

<sup>7</sup> EchoStar Amendment at 1.

<sup>8</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 for Review, "EchoStar Application" refers to SAT-LOA-2003-0827-00179 and "EchoStar Amendment" refers to SAT-AMD-20031126-00343.

<sup>9</sup> Dismissal Letter at 2-3. See 47 C.F.R. §§ 25.112 and 25.114(c)(5).

<sup>10</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).

EchoStar Dismissal Letter. EchoStar filed an Application for Review of this decision on January 26, 2005 that is currently pending before the Commission.

On February 10, 2004, EchoStar also refiled its application and confirmed that it had requested use of all of the extended Ku-band FSS frequencies -- *i.e.*, the EchoStar Refiled Application. However, a day earlier MSV filed an amendment ("the MSV Amendment") to its pending application ("the MSV Application") that included the same extended Ku-band frequencies for MSS feeder links.<sup>11</sup> On April 23, 2004, the Bureau appropriately 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>12</sup> MSV filed a Petition for Reconsideration of the MSV Dismissal Letter on May 24, 2004.<sup>13</sup> EchoStar opposed MSV's Petition for Reconsideration on June 7, 2004,<sup>14</sup> and MSV filed a Reply to the Opposition of EchoStar on June 17, 2004.<sup>15</sup>

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<sup>11</sup> Application of Mobile Satellite Ventures Subsidiary LLC, SAT-AMD-20040209-00014 (February 9, 2004) ("MSV Amendment").

<sup>12</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>13</sup> See Mobile Satellite Ventures Subsidiary LLC, Petition for Reconsideration, File No. SAT-AMD-20040209-00014 (Filed: May 24, 2004).

<sup>14</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>15</sup> See Mobile Satellite Ventures Subsidiary LLC, Reply for Opposition for Reconsideration, File No. SAT-AMD-20040209-00014 (Filed: June 17, 2004).

On September 15, 2004, the Bureau reinstated the MSV Amendment,<sup>16</sup> 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>17</sup> In so doing, the Bureau clearly recognized the significance of such interference analyses to the satellite licensing process by issuing a Public Notice noting that the failure of an applicant to supply such information would result in the dismissal of an application.<sup>18</sup> EchoStar filed an Application for Review of the MSV Reinstatement Order on October 15, 2004, which is currently pending before the Commission.

On May 23, 2005, the Bureau in the *MSV Order* granted the MSV Application, including the reinstated MSV Amendment, allowing MSV to launch and operate a second-generation L-band MSS satellite at the 101° W.L. orbit location ("the MSV Authorization"). The Bureau concluded that MSV was first-in-line for all of its proposed 1000 MHz of feeder link spectrum (500 MHz in each direction), including the frequency bands that EchoStar had previously requested to use "as part of its earlier filed application to construct, launch and operate a satellite at the 101° W.L. orbit location."<sup>19</sup> The Bureau specifically conditioned the MSV Authorization, however, on MSV's operation of at most two extended Ku-band feeder link earth stations in the Continental United States.<sup>20</sup> EchoStar has filed a Petition for Clarification

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<sup>16</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").

<sup>17</sup> MSV Reinstatement Order at 5.

<sup>18</sup> *Id.*

<sup>19</sup> *MSV Order* at ¶16.

<sup>20</sup> *Id.* at ¶ 66.



and/or Reconsideration of the *MSV Order*, arguing that the Bureau should have explicitly recognized and conditioned the MSV Authorization on coordinating its feeder link operations with EchoStar's proposed satellite at the same orbital location.<sup>21</sup>

On July 6, 2005, the Bureau denied the EchoStar Refiled Application on the basis that: (1) "MSV had first-in-line status with respect to the additional Ku-band spectrum requested by MSV at the 101° W.L. orbital location;" and (2) because operation of EchoStar's satellite at the same location using the same Ku-band frequencies "would cause harmful interference to MSV's previously licensed operations."<sup>22</sup> It is these findings that are in error and should be reconsidered by the Bureau.

### **III. MSV SHOULD NOT HAVE FIRST-IN-LINE STATUS FOR THE EXTENDED KU-BAND FREQUENCIES AT THE 101° W.L. ORBITAL LOCATION**

In the *EchoStar Order*, the Bureau found that denial of the EchoStar Refiled Application is appropriate because "MSV ha[s] first-in-line status with respect to the additional Ku-band spectrum requested by MSV at the 101° W.L. orbital location."<sup>23</sup> As set forth above, EchoStar has two pending Applications for Review which, if either one is granted, would undermine this finding by the Bureau.<sup>24</sup>

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<sup>21</sup> See EchoStar Petition for Clarification and/or Reconsideration (filed June 22, 2005).

<sup>22</sup> *EchoStar Order* at 2-3.

<sup>23</sup> *Id.*

<sup>24</sup> See EchoStar Satellite L.L.C., Application for Review, File No. SAT-AMD-20040209-00014 (October 15, 2004) (Attachment B); EchoStar Satellite L.L.C., Application for Review, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (Jan. 26, 2005) (Attachment C). In the *EchoStar Order*, the Bureau acknowledges these Applications for Review and indicates that its decision to deny the EchoStar Refiled Application is "without prejudice" to Commission action on them. *EchoStar Order* at ¶ 1 n.1.



EchoStar will not repeat verbatim the arguments set forth in its pending Applications for Review. The Applications for Review point out that the Bureau's actions in dismissing the EchoStar Application and EchoStar Amendment, while reinstating the MSV Amendment (now granted in the *MSV Order*), are inconsistent with a long line of Commission and court precedent. Specifically, the Bureau has held the MSV Amendment to a much less exacting standard in determining that it was "substantially complete" while dismissing the EchoStar Application and EchoStar Amendment applying a much stricter "letter perfect" standard.

EchoStar's pending Applications for Review argue that the Commission should act to ensure that the processing standards applied by the Bureau for all space station applications are used consistently and in an even handed manner. The errors in the MSV Amendment were no more minor than the errors found by the Bureau in the EchoStar Amendment to be debilitating. Yet the Bureau determined that the EchoStar Amendment and the EchoStar Application should be dismissed while the MSV Amendment should be reinstated, and now granted. The Bureau's actions have unfairly prejudiced EchoStar by subjecting it to intervening applications for use of the same extended Ku-band frequencies, and ultimate denial of its original and refiled applications.<sup>25</sup>

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<sup>25</sup> The EchoStar Petition of the *MSV Order* requests clarification that the grant of MSV's application should not result in dismissal of the EchoStar Refiled Application. The EchoStar Petition reiterates EchoStar's belief that its pending application is not mutually exclusive with MSV's recently granted application because co-frequency extended Ku-band operations are feasible. Further, it states that EchoStar recently initiated formal coordination discussions with MSV and both parties had agreed to an initial meeting. The EchoStar Petition states that if the Bureau were to dismiss the EchoStar Refiled Application on the heels of issuing the *MSV Order*, it would preempt these coordination discussions and would unfairly prejudice EchoStar. In fact, MSV abruptly called off coordination discussions with EchoStar just prior to the Bureau's denial of the EchoStar Refiled Application. See Letter from Bruce M. Jacobs (Counsel to MSV) to Pantelis Michalopoulos and Philip L. Malet (Counsel to EchoStar) (June 27, 2005).

**IV. ECHOSTAR'S PROPOSED SATELLITE AT 101° W.L. WOULD NOT CAUSE HARMFUL INTERFERENCE TO MSV'S MSS FEEDER LINKS**

In denying the EchoStar Refiled Application, the Bureau concluded, without any record support, that operation of EchoStar's proposed satellite "would cause harmful interference to MSV's previously licensed operations."<sup>26</sup> Significantly, the Bureau has failed to cite any evidence supporting this conclusion. Without ample explanation or an adequate record, the courts have routinely set aside agency decisions that fail to explain adequately the bases for such a critical finding of fact. As the Supreme Court has observed, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"<sup>27</sup> For this reason alone, the Bureau should reconsider the *EchoStar Order* and reinstate the EchoStar Refiled Application.

Indeed, the only record "evidence" -- the assertions of EchoStar and MSV -- strongly suggest that both parties believed co-frequency sharing is possible.<sup>28</sup> In the *EchoStar*

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<sup>26</sup> *EchoStar Order* at ¶ 4 (citing 47 C.F.R. § 25.158(b)(3)(ii)).

<sup>27</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The D.C. Court of Appeals has also applied the same standard to cases that involve the Commission. See *Communications and Control, Inc. v. FCC*, 374 F.3d 1329, 1335 (D.C. 2004) (holding that the Commission did not provide an adequate explanation for canceling the applicant's license instead of granting the technical modification it requested); *AT & T Wireless Services, Inc. v. FCC*, 270 F.3d 959, 968 (D.C. 2001) (holding that the Commission did not provide an adequate explanation of its interference threshold when it granted the applicant's waiver despite the evidence in the record that the applicant's actions were causing harmful interference.).

<sup>28</sup> See *EchoStar Petition* at 6-7; see, e.g., *Comments of MSV* at 6 ("MSV agrees with EchoStar that sharing may be possible and is prepared to work with EchoStar to attempt to reach an agreement on sharing"), filed in SAT-LOA-20040210-00015 (April 26, 2004). In more recent correspondence, MSV hardened its position on sharing with EchoStar. See Letter from Jennifer A. Manner, MSV Vice President of Regulatory Affairs to Donald Abelson, Chief of the International Bureau at 1 (June 15, 2005) (claiming that the EchoStar Refiled Application is "mutually exclusive" with the recently granted MSV application); Letter from Bruce D. Jacobs (Counsel to MSV) to Pantelis Michalopoulos and Philip L. Malet (Counsel to EchoStar) at 2 (June 15, 2005) ("Moreover, your proposal for two satellites to share the same frequencies at the

*Order*, the Bureau noted the parties' positions with regard to sharing.<sup>29</sup> Further, in the *MSV Order*, the Bureau acknowledged that EchoStar "may be able to coordinate shared use of" the extended Ku-band frequency bands with MSV.<sup>30</sup> The Bureau further stated that "[i]f the parties reach agreement, we will entertain a request that involves co-frequency operations."<sup>31</sup> Thus, while the Bureau appears to accept the possibility of sharing, and even appeared to encourage the parties to reach a sharing agreement, it never took this possibility into account when it found just over a month later in the *EchoStar Order* that the proposed EchoStar satellite will cause "harmful interference" to MSV's feeder link operations.

The Bureau's denial of the EchoStar Refiled Application is not only inconsistent with its own *MSV Order*, it also flatly contravenes the Commission's policy in favor of spectrum efficiency, as well as common sense. The Bureau is denying the EchoStar Refiled Application to use an orbital location for nationwide service because it has licensed another company to use just *two* locations for feeder link communications with a satellite. Such limited use of an orbital location, however, cannot preclude use of the slot to serve the rest of the country. The Commission should be moving toward *increased* spectrum sharing, not less.

Such a decision by the Bureau also runs counter to the Commission's prior decisions which have allowed co-frequency use of spectrum when a satellite operator uses that spectrum at a limited number of feeder link sites. For example, in the Ka-band plan proceeding,

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same orbital location is novel. Any discussions regarding the feasibility of this untested concept will be highly technical in nature involving considerable engineering and legal resources. MSV finds it highly unlikely that the parties will reach any agreement in just two weeks."). Significantly, MSV did not support any of its latter assertions with empirical data or analysis.

<sup>29</sup> See *EchoStar Order* at ¶ 2 n.7.

<sup>30</sup> *MSV Order* at ¶16 n. 45. See also *EchoStar Order* at ¶ 2 n.7.

<sup>31</sup> *Id.*

the Commission mandated co-frequency sharing of MSS feeder uplinks with LMDS stations, and geostationary satellite FSS downlinks with FS stations, in portions of the band.<sup>32</sup> While such co-frequency sharing involved a satellite and a terrestrial service, the underlying policy is the same - - avoiding an enormous nationwide waste of spectrum just for the sake of operating a handful of feeder link sites. This waste of a valuable resource can be avoided simply by establishing protection zones around MSV's feeder link sites and employing spot beams as indicated in the attached sharing analysis (see Attachment A).

While a full sharing analysis is not possible without MSV's cooperation, EchoStar's preliminary technical analysis (see Attachment A), based upon the disclosed elements of MSV's system, strongly supports EchoStar's (and MSV's prior) claims that co-frequency sharing is possible. The attached analysis prepared by EchoStar's engineering consultant is not intended to set forth the final conditions and interference levels for sharing between EchoStar and MSV. Indeed, EchoStar acknowledges that any final sharing conditions are best established through bilateral discussions between the parties. Rather, the attached sharing analysis is simply intended to demonstrate the feasibility of sharing and sets forth the basic parameters for both satellites to operate co-frequency from the same orbital location.

The attached sharing analysis demonstrates that, taking into account EchoStar's and MSV's particular requirements for use of the extended Ku-band, sharing is possible using co-frequency collocated satellites, without placing undue constraints on either party. Such sharing is feasible because of the use of spot beams by both MSV and EchoStar. Spot beams in the MSV system are likely necessary in order to permit MSV to implement the ATC interference

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<sup>32</sup> *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*, 11 FCC Rcd. 19005, 19033-37 (1996).



cancellation system that it has been licensed to provide. In the EchoStar system, spot beams are an important means for efficiently transmitting its programming to specific geographic areas.

The downlink interference from MSV into EchoStar, and EchoStar into MSV, results in C/I levels of 16.2 dB and 16.8 dB, respectively. Such levels should be acceptable to both parties without severely limiting either's ability to serve its subscribers.<sup>33</sup> Indeed, the calculated interference levels from EchoStar's proposed satellite into MSV's satellite would be *lower* than that caused by the MSV-1 satellite's intra-system interference.<sup>34</sup>

The uplink interference from MSV into EchoStar and EchoStar into MSV, results in C/I levels of 18.3 dB and 21.7 dB, respectively. These levels similarly suggest a compatible sharing environment whether or not the EchoStar uplinks are located outside or inside the United States. In either case, the design and location of MSV's two feeder link stations would not be unduly limited. Indeed, as the attached sharing analysis shows, even if MSV were to use three or four feeder link earth stations in the United States, as it recently suggested it might do,<sup>35</sup> EchoStar and MSV should still be able to share the spectrum.<sup>36</sup>

In sum, the attached sharing analysis demonstrates that the statements of EchoStar and MSV as to the possibility of sharing were not naked assertions. With two parties indicating that sharing is possible, the Bureau should be encouraging coordination of the two systems in

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<sup>33</sup> See Attachment A at 4-6. As set forth in the sharing analysis, these C/I levels are not intended to be the final criteria for downlink interference, but are merely noted to demonstrate the feasibility of sharing between EchoStar and MSV.

<sup>34</sup> See Attachment A at 5 n.7.

<sup>35</sup> As set forth in the attached sharing analysis, EchoStar does not concede that the FCC should permit such a modification by MSV to its authorization. As currently set forth in the *MSV Order*, MSV is limited to the use of just two feeder link stations in the United States. See *MSV Order* at ¶ 66.

<sup>36</sup> See Attachment A at 11.

order to maximize the use of scarce spectral resources. Instead, by denying the EchoStar Refiled Application and granting the MSV Authorization, the Bureau has removed any incentive for MSV to engage in serious coordination discussions, as demonstrated by MSV's abrupt cancellation of the scheduled kick-off meeting for those discussions.<sup>37</sup> Reconsideration of the *EchoStar Order*, and reinstatement of the EchoStar Refiled Application would facilitate those discussions.

The Bureau need not be concerned that reconsideration of the denial of the EchoStar Refiled Application would be inconsistent with the "first come first serve" processing guidelines adopted in the *Satellite Licensing Order*. The *Satellite Licensing Order* and the Commission's Rules allow for the subsequent grant of an application that proposes the use of the same frequencies at the same orbital location of a licensed geostationary satellite. According to the Commission:

... if an application reaches the front of the queue ***that conflicts with*** a previously granted license, we will deny the application rather than keeping the application on file in case the lead applicant does not construct its satellite system.<sup>38</sup>

As set forth above, the EchoStar's Refiled Application does not "conflict" with the MSV Authorization. Indeed, as demonstrated in the attached analysis, EchoStar is confident that co-frequency use of the extended Ku frequency bands is achievable, something even MSV has admitted in the past.

Unfortunately, after having received its authorization and with the Bureau's denial of EchoStar's Refiled Application, MSV appears to have hardened its position on co-

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<sup>37</sup> See Letter from Bruce M. Jacobs (Counsel to MSV) to Pantelis Michalopoulos and Philip L. Malet (Counsel to EchoStar) (June 27, 2005).

<sup>38</sup> *Satellite Licensing Order* at ¶ 113 (emphasis added).



frequency sharing spectrum in an attempt to parlay the MSV Authorization into something that it was not intended to be. The Bureau appropriately limited the MSV Authorization for feeder link spectrum in the extended Ku-band to transmissions involving a "maximum of *two fixed satellite earth stations* within the continental United States."<sup>39</sup> Such a limited license should not be allowed to foreclose any other use of the spectrum by a co-located satellite. If MSV ends up making this so by its behavior, this would be a blatant case of spectrum hoarding. This was not an intended result of the Commission's new satellite licensing procedures.<sup>40</sup>

The Bureau should reinstate and expeditiously grant the EchoStar Refiled Application, and thereby encourage coordination discussions between the parties. However, to avoid gaming by MSV, successful completion of coordination should not be a condition precedent to licensing the EchoStar satellite. Rather, consistent with normal practice, it should be a condition of EchoStar's license. In this way, there will be every incentive for MSV and EchoStar to maximize the spectral resources at the 101° W.L. orbital location.

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<sup>39</sup> *Id.* at ¶ 66 (emphasis added).

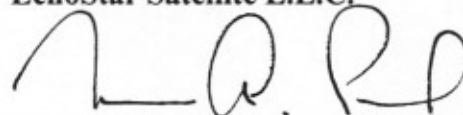
<sup>40</sup> *See Satellite Licensing Order* at ¶ 4 (finding that the new procedures the Commission adopted were intended to "ensure that satellite spectrum and orbital resources will be used efficiently, to the benefit of American consumers").

V. CONCLUSION

For the reasons stated above, the *EchoStar Order* should be reconsidered and the EchoStar Refiled Application reinstated and granted, subject to the successful coordination of the use of the extended Ku-band with MSV.

Respectfully submitted,

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August 5, 2005

## CERTIFICATE OF SERVICE

I, Marc A. Paul, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 5th day of August, 2005, served a true copy of the foregoing "Petition for Reconsideration" by hand delivery (or as otherwise indicated) upon the following:

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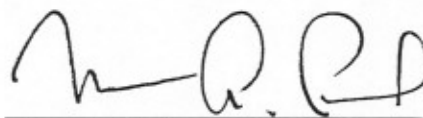
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## ATTACHMENT A

### MSV-EchoStar Sharing Analysis

#### A.1 Introduction

MSV's planned use of the extended Ku-band at 101°W.L. for its MSS feeder links is compatible with EchoStar's FSS use of the same frequencies and same orbital location for spot beam DTH services.<sup>1</sup> Sharing of the frequencies would be based on geographic separation of the spot beams in both systems. Such an arrangement would constitute efficient use of the Ku-band FSS spectrum.

The analysis presented below is intended to demonstrate the feasibility of this sharing arrangement between MSV and EchoStar. It is not intended to derive the final sharing conditions, which are best established through bilateral coordination between the parties.

#### A.2 MSV's Ku-Band Feeder Links

In the November 2003, February 2004 and September 2004 Amendments to its FCC application for a next generation MSS satellite, MSV has provided scant information concerning its Ku-band feeder links.<sup>2</sup> MSV showed an illustrative Ku-band feeder link beam with broad North American coverage, but also stated that "... Ku-band feeder link spot beams may also be formed by the satellite in the event spatial frequency reuse of the available feeder link spectrum

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<sup>1</sup> The Ku-band frequency ranges under consideration here are those in the ITU Appendix 30 B Plan, which are 10.7-10.95 GHz and 11.2-11.45 GHz downlink, and 12.75-13.25 GHz uplink.

<sup>2</sup> See Applications of Mobile Satellite Ventures Subsidiary LLC, File No. SAT-AMD-20031118-00335 (Nov. 18, 2003); File No. SAT-AMD-20040209-00014 (Feb. 9, 2004); File No. SAT-AMD-20040928-00192 (Sept. 28, 2004).

becomes necessary ....”<sup>3</sup>. More recently MSV has stated that it intends to use an ATC self-interference cancellation system in its next generation satellite in order to protect its MSS operations from its own ATC operations.<sup>4</sup> MSV has stated that its interference cancellation scheme will “... require MSV to employ greater re-use of its feeder link frequencies than it would otherwise ... MSV will accomplish this by deploying additional gateway earth stations at a relatively modest additional cost ....”<sup>5</sup>

To date MSV has not clarified the details of its feeder link design, such as the design of the spot beam coverage or the number and location of feeder link earth stations. Its authorization, however, expressly is conditioned on operating up to two feeder link earth stations with its new satellite. Currently MSV is authorized by the FCC to operate only two feeder link earth stations located in Reston, VA and Alexandria, VA. However, these two locations are too close to each other to allow for spatial re-use of the feeder link frequencies using satellite spot beams. Therefore, in the sharing analysis below it is assumed that one of the feeder link spot beams will point towards the Washington DC area (and hence be used with the Reston and/or Alexandria earth stations), and a second spot beam will be pointed towards a distant location, which was arbitrarily selected as being Houston, TX. Candidate spot beam coverage to implement this scheme is shown in Figure 2-1 below.<sup>6</sup>

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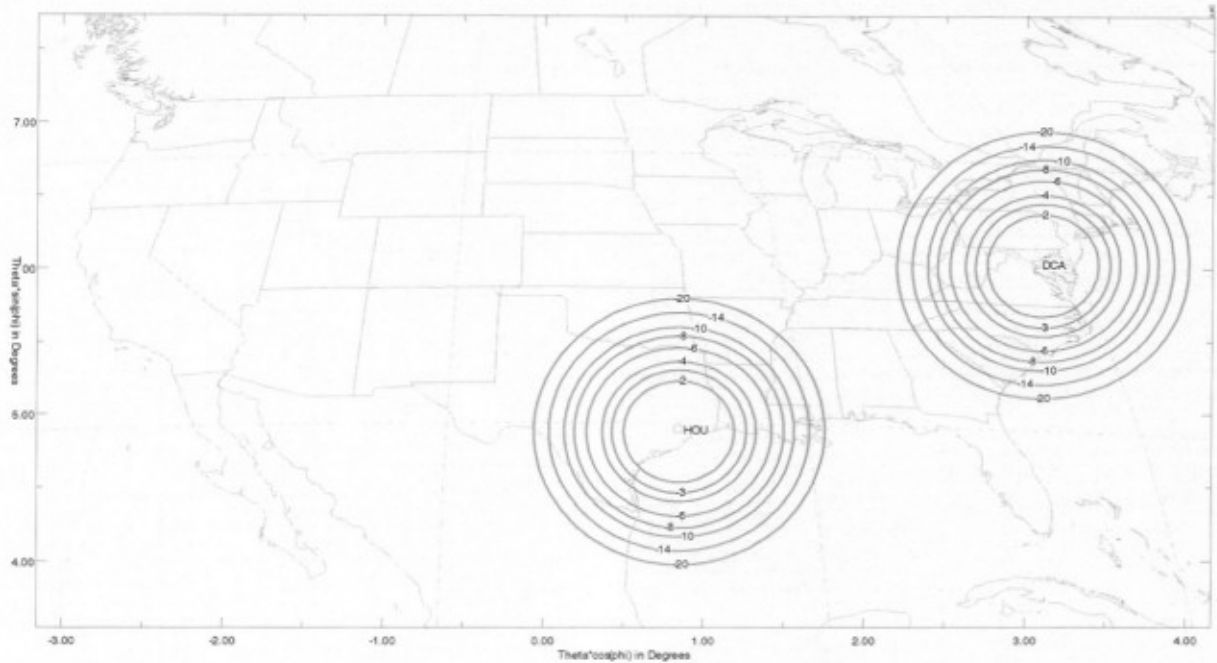
<sup>3</sup> See Applications of Mobile Satellite Ventures Subsidiary LLC, File No. SAT-AMD-20031118-00335 (Nov. 18, 2003); File No. SAT-AMD-20040209-00014 (Feb. 9, 2004).

<sup>4</sup> See Consolidated Opposition to and Comments on Petitions for Reconsideration at 1.C p.7-8 (August 20, 2003); Reply of Mobile Satellite Ventures Subsidiary LLC at technical Appendix 1.2 (September 2, 2003); Applications of Mobile Satellite Ventures Subsidiary LLC, File No. SAT-AMD-20031118-00335 at Technical Appendix p.11 (Nov. 18, 2003); MSV *ex-parte* (January 22, 2004); Response of Mobile Satellite Ventures Subsidiary LLC to Opposition of Inmarsat Ventures Ltd at 17-18 (April 14, 2004).

<sup>5</sup> See Response of Mobile Satellite Ventures Subsidiary LLC to Opposition of Inmarsat Ventures Ltd. at Section II.B.2, April 14, 2004.

<sup>6</sup> Note that the contours shown are -2, -3, -4, -6, -8, -10, -14 and -20 dB relative to beam peak. The -14 dB contour is used in the analysis in later sections of this document.

**Figure 2-1 – Candidate MSV Feeder Link Spot Beam Coverage**



A satellite reflector of 2 meters in diameter is assumed, which results in a peak gain of approximately 45 dBi at the downlink frequencies. This gain is significantly higher than the broad North American beam originally shown in MSV's Amendment, which was 29 dBi, allowing for a reduction in satellite transmit power on the feeder downlink.

There is an inconsistency in the MSV Amendments (common to both the November 2003 and February 2004 Amendments) regarding the actual feeder downlink EIRP and PFD levels. In Table 1-6 of the MSV Amendment, the maximum feeder downlink PFD at the Earth's surface is stated to be in the range -167.3 to -168.7 dBW/m<sup>2</sup>/4kHz, depending on elevation angle, although no back-up analysis is shown to support this. This is inconsistent with the MSV link budget given in Table 1-12 of the MSV Amendment, which shows a feeder downlink EIRP of 20.5 dBW per carrier (50 kHz bandwidth). Such an EIRP level corresponds to a PFD of -152.5 dBW/m<sup>2</sup>/4kHz which is at least 14.8 dB higher than the PFD values stated by MSV in its Table 1-6. This analysis assumes that the MSV link budget is correct and that the proposed feeder downlink EIRP density is 20.5 dBW/50kHz.



Regarding the MSV feeder uplink, Table 1-13 of the MSV Amendment shows a feeder uplink EIRP of 61 dBW per carrier (200 kHz bandwidth). This will be assumed in the sharing analysis below.

### **A.3 EchoStar's Spot Beam Downlinks**

In its FCC Amendment for 101°W, EchoStar proposes downlink spot beams with a peak EIRP of 57 dBW (in 27 MHz). Typically, service could be provided down to EIRP levels of 50 dBW in the dryer rain regions. These parameters will be used in the sharing analysis below.

### **A.4 EchoStar's Feeder Uplinks**

EchoStar's planned satellite at 101°W will have reconfigurable uplink beam capability, including both fixed and steerable satellite receive beams. The spot beams are steerable such that uplinks can be received from any part of the visible Earth, subject to appropriate regulatory constraints. These spot beams are relatively large (39.5 dBi), but they could be made smaller to further facilitate sharing with MSV. In the sharing analysis below it will be assumed that these beams have 45 dBi peak gain, and operate with an earth station EIRP level of 80.6 dBW (in 27 MHz), as given in the link budgets of the EchoStar 101W° FCC application, as amended.

### **A.5 Downlink Sharing Analysis**

Table 5-1 below shows the analysis of downlink interference from MSV into EchoStar. The MSV downlink EIRP is assumed to be as given in Section A.2 above, and the minimum

EchoStar downlink EIRP as given in Section A.3 above. The results show that a C/I of 16.2 dB is achieved outside of the -14 dB gain contour of the candidate MSV downlink spot beam.<sup>7</sup>

**Table 5-1 – Downlink Interference Analysis (MSV > EchoStar)**

<b>Parameter</b>	<b>Units</b>	<b>Value</b>
MSV downlink EIRP per carrier (per 50 kHz)	20.5	dBW/50kHz
MSV downlink EIRP density (per Hz)	-26.5	dBW/Hz
Min. EchoStar downlink EIRP (per 27 MHz)	50.0	dBW/27MHz
Min. EchoStar downlink EIRP density (per Hz)	-24.3	dBW/Hz
Resulting C/I into EchoStar at MSV beam peak	2.2	dB
Resulting C/I into EchoStar at MSV -14 dB contour	16.2	dB

Table 5-2 below shows the analysis of downlink interference from EchoStar into MSV. The maximum EchoStar downlink EIRP is assumed to be as given in Section A.3 above, and the minimum MSV downlink EIRP as given in Section A.2 above. The results show that a C/I of 16.8 dB is achieved outside of the -26 dB gain contour of the EchoStar downlink spot beam.<sup>8</sup>

**Table 5-2 – Downlink Interference Analysis (EchoStar > MSV)**

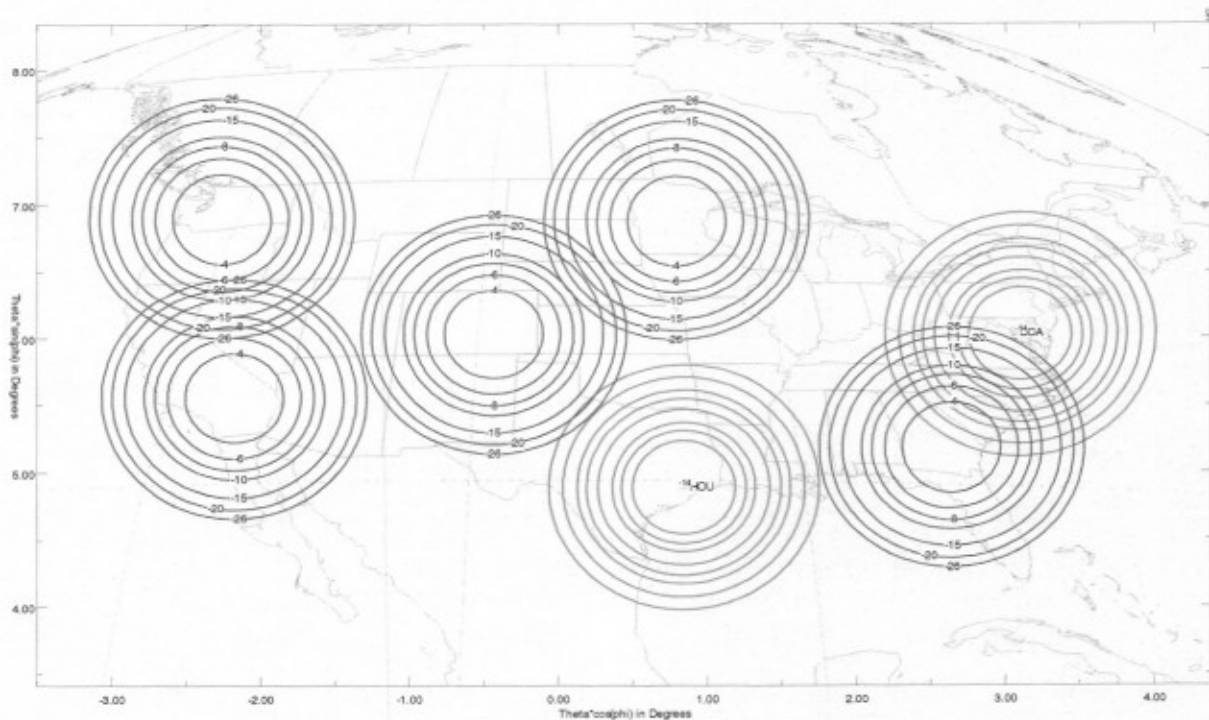
<b>Parameter</b>	<b>Units</b>	<b>Value</b>
Max. EchoStar downlink EIRP (per 27 MHz)	57.0	dBW/27MHz
Max. EchoStar downlink EIRP (per Hz)	-17.3	dBW/Hz
MSV downlink EIRP (per 50 kHz)	20.5	dBW/50kHz
MSV downlink EIRP (per Hz)	-26.5	dBW/Hz
Resulting C/I into MSV at EchoStar beam peak	-9.2	dB
Resulting C/I into MSV at EchoStar -26 dB contour	16.8	dB

<sup>7</sup> EchoStar is not necessarily proposing that 16.2 dB be the criterion for downlink interference from MSV into EchoStar, although operation at this C/I level is clearly a possibility, particularly for newly established EchoStar services.

<sup>8</sup> Similarly, EchoStar is not necessarily proposing that 16.8 dB be the criterion for downlink interference from EchoStar into MSV, although operation at this C/I level is clearly a possibility, particularly for MSV's newly established links on its next generation satellite. It is noted that this level of adjacent satellite interference is lower than the MSV-1 satellite's intra-system interference (C/I of 12.7 dB).

Figure 5-1 below shows some example EchoStar downlink spot beams superimposed on the assumed MSV spot beams. The four EchoStar beams to the center and west of CONUS are all well isolated from the MSV spot beams, showing the significant amounts of territory that can be served by EchoStar that are well removed from the MSV feeder link beams and earth stations. The EchoStar beam to the south-east has deliberately been located relatively close to one of the MSV beams. Note, however, that even in this case the MSV receiving earth station is outside of the -26 dB gain contour of the EchoStar spot beam and so a *C/I* of greater than 16.8 dB would be achieved for the MSV feeder downlink. For this EchoStar spot beam the -14 dB gain contour of the MSV beam intersects approximately one third of the main service area of the EchoStar beam, but useful EchoStar service could be achieved over a significant area of the beam due to the fact that the EchoStar EIRP is well above the assumed minimum of 50 dBW over the main part of the EchoStar beam.

**Figure 5-1 – Example EchoStar Spot Beams and Assumed MSV Spot Beams**



Blue = EchoStar; Red = MSV

## A.6 Uplink Sharing Analysis

Table 6-1 below shows the analysis of uplink interference from MSV into EchoStar. The MSV uplink EIRP is assumed to be as given in Section A.2 above, and the EchoStar uplink EIRP as given in Section A.4 above. The results show that a C/I of greater than 18.3 dB is achieved provided the MSV feeder link earth stations are located outside of the -20 dB gain contour of the EchoStar uplink spot beam.<sup>9</sup>

**Table 6-1 – Uplink Interference Analysis (MSV > EchoStar)**

<b>Parameter</b>	<b>Units</b>	<b>Value</b>
MSV uplink EIRP (per 200 kHz)	61.0	dBW/200kHz
MSV uplink EIRP density (per Hz)	8.0	dBW/Hz
EchoStar uplink EIRP (per 27 MHz)	80.6	dBW/27MHz
EchoStar uplink EIRP density (per Hz)	6.3	dBW/Hz
Resulting C/I into EchoStar if MSV E/S is located at EchoStar beam peak	-1.7	dB
Resulting C/I into EchoStar if MSV E/S is located at EchoStar -20 dB contour	18.3	dB

Table 6-2 below shows the analysis of uplink interference from EchoStar into MSV using the same assumptions as for Table 6-1 above. The results show that a C/I of 21.7 dB is achieved provided the EchoStar feeder link earth stations are located outside of the -20 dB gain contour of the MSV uplink spot beam.<sup>10</sup>

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<sup>9</sup> EchoStar is not necessarily proposing that 18.3 dB be the criterion to be used for uplink interference from MSV into EchoStar, although operation at this C/I level is clearly a possibility, particularly for newly established EchoStar services.

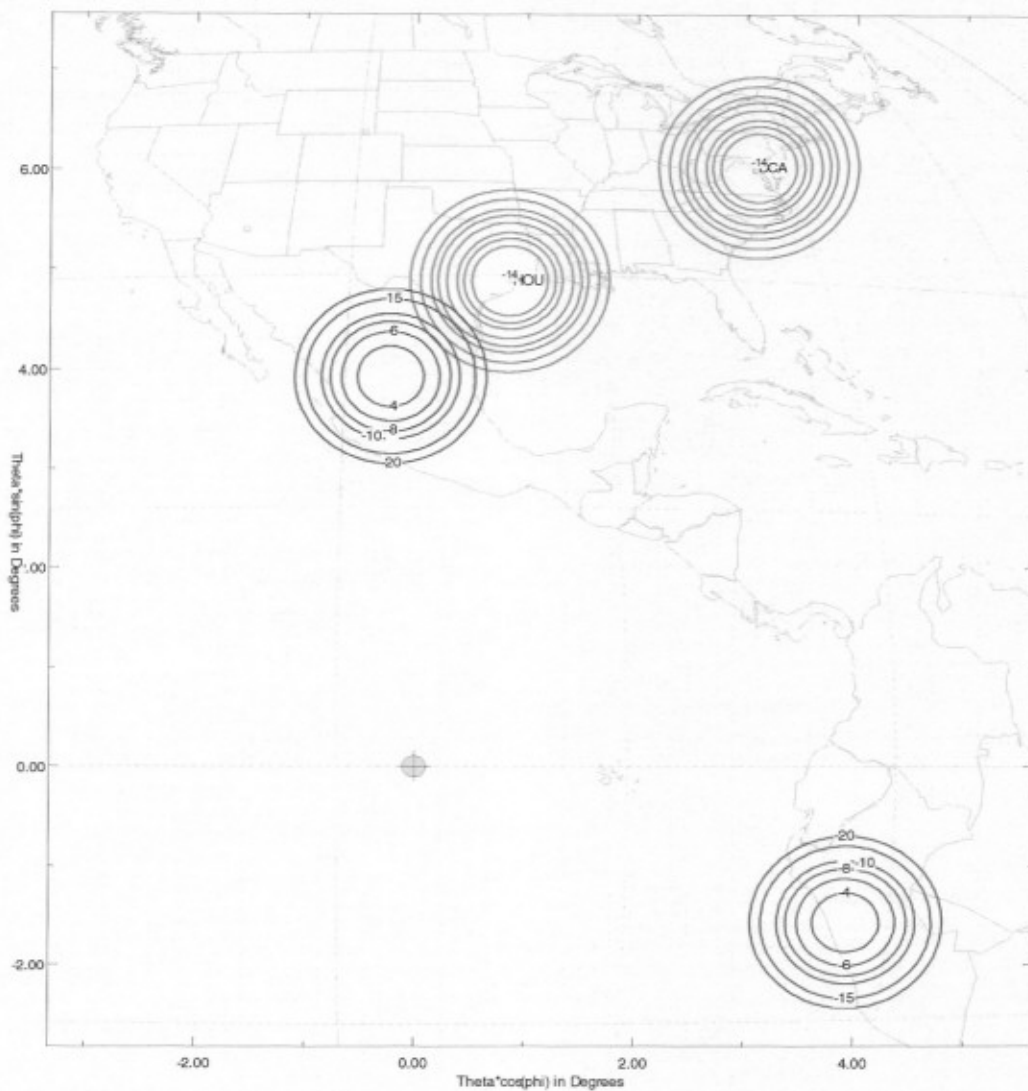
<sup>10</sup> EchoStar is not necessarily proposing that 21.7 dB be the criterion to be used for uplink interference from EchoStar into MSV, although operation at this C/I level is clearly a possibility, particularly for MSV's newly established links on its next generation satellite. It is noted that this level of adjacent satellite interference is lower than the MSV-1 satellite's intra-system interference (C/I of 14.7 dB).

**Table 6-2 – Uplink Interference Analysis (EchoStar > MSV)**

<b>Parameter</b>	<b>Units</b>	<b>Value</b>
EchoStar uplink EIRP (per 27 MHz)	80.6	dBW/27MHz
EchoStar uplink EIRP density (per Hz)	6.3	dBW/Hz
MSV uplink EIRP (per 200 kHz)	61.0	dBW/200kHz
MSV uplink EIRP density (per Hz)	8.0	dBW/Hz
Resulting C/I into EchoStar if MSV E/S is located at EchoStar beam peak	1.7	dB
Resulting C/I into EchoStar if MSV E/S is located at EchoStar -20 dB contour	21.7	dB

Two uplink sharing scenarios are addressed below in terms of the location of the EchoStar uplinks. The first is shown in Figure 6-1 where the EchoStar uplinks are located outside of the USA, as illustrated in the EchoStar 101W FCC application, as amended. In this case there is ample geographic separation of the beams between MSV and EchoStar to meet the levels computed in Tables 6-1 and 6-2 above. In fact the isolation is likely to be much greater than 30 dB, rather than the 20 dB assumed in these tables, resulting in C/I levels of the order of 30 dB. Note also that the -20 dB contour of the EchoStar beam only enters a very small area of CONUS in southern Texas along the Mexican border, thereby placing negligible constraints on the possible location of the MSV feeder link earth stations.

**Figure 6-1 – Scenario of EchoStar Uplinks Outside of the USA**



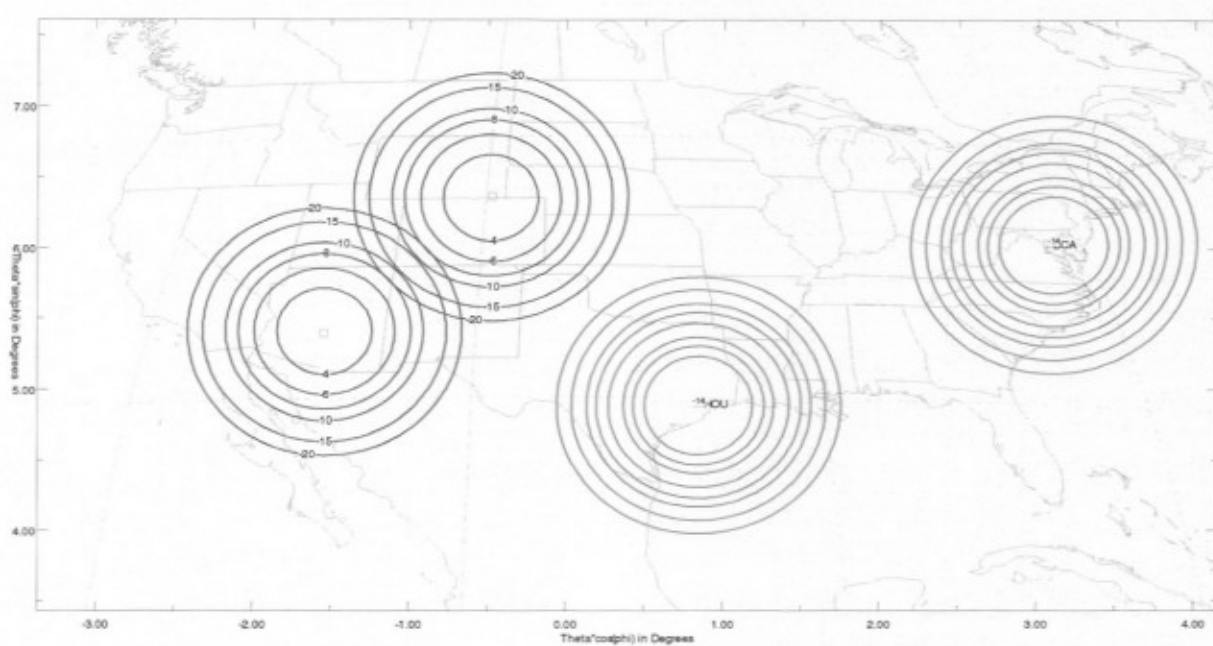
The second scenario is shown in Figure 6-2 where the EchoStar uplinks are located inside the USA at Cheyenne, WY and Gilbert, AZ.<sup>11</sup> In this case there is also more than sufficient geographic separation of the beams between MSV and EchoStar and likely isolation and hence C/I levels would be in the region of 30 dB or more. Note that with this scenario there would be considerable flexibility for MSV to locate its 2<sup>nd</sup> feeder link earth station anywhere within large

<sup>11</sup> These two sites are already established EchoStar uplink sites used with other EchoStar satellites.



parts of CONUS provided it maintains a certain geographic distance from Cheyenne, WY and Gilbert, AZ.

**Figure 6-2 – Scenario of EchoStar Uplinks in the USA**



#### **A.7 Possible Use of Additional MSV Feeder Link Earth Stations**

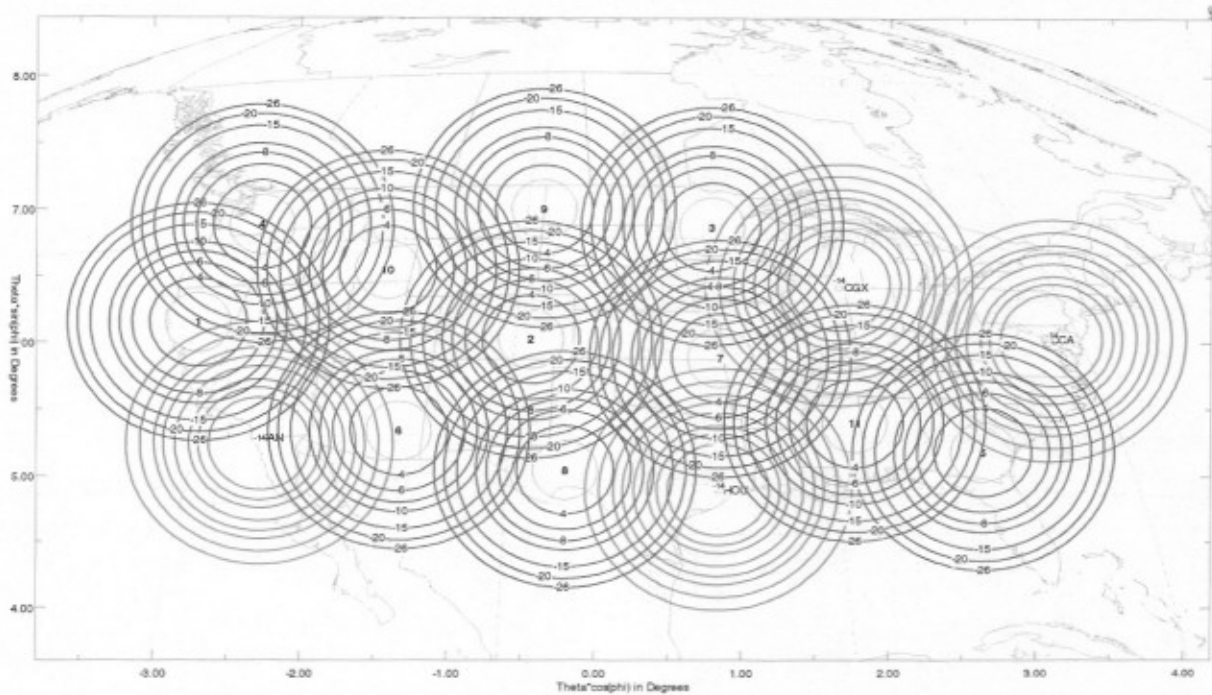
MSV has indicated that it might choose to use up to three or four additional feeder link earth station sites in order to obtain higher levels of frequency re-use.<sup>12</sup> Although this would restrict the flexibility for EchoStar's use of the band, sharing would still be viable as demonstrated in Figures 7-1 below, which shows the downlink situation (similar results apply in the case of the uplink). Two additional feeder link sites have been arbitrarily located at Chicago

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<sup>12</sup> See MSV Opposition to Petition for Clarification and/or Reconsideration at 4-5 (July 7, 2005). EchoStar does not concede that the FCC should modify the two feeder link condition in the MSV authorization; without possible restrictions on the future location of additional earth stations. Similar restrictions were placed on MSS feeder links in the 29 GHz band to accommodate LMDS stations. *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*, 11 FCC Rcd. 19005, 19033 (1996).

and San Diego, which ensure adequate isolation from the other two assumed MSV feeder link sites at Washington DC and Houston. Many example EchoStar beams are shown in Figure 7-1, all of which achieve the 26 dB isolation from the MSV feeder link earth station sites. This illustrates well that EchoStar and MSV would be able to share the band even with a higher level of frequency reuse in the MSV system.

**Figure 7-1 – Downlink Example with Four MSV Feeder Link Earth Stations**



Blue = EchoStar; Red = MSV

## A.8 Conclusions

In this sharing analysis it has been demonstrated that, with EchoStar and MSV's particular requirements for use of the Appendix 30B Ku-band, sharing is possible using co-frequency collocated satellites, without placing undue constraints on either party. Such sharing is feasible because of the use of spot beams by both MSV and EchoStar. Spot beams in the MSV system apparently are necessary in order to permit MSV to implement the ATC interference

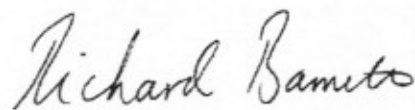
cancellation system that it intends to deploy. In the EchoStar system spot beams are an important means for efficiently transmitting its programming to restricted geographic areas.

Although the analysis presented here clearly shows the feasibility of sharing, coordination between the parties is necessary to arrive at the optimum arrangements for both parties.

**CERTIFICATION OF PERSON RESPONSIBLE**

**FOR PREPARING ENGINEERING INFORMATION**

I hereby certify that I am the technically qualified person responsible for preparation of the engineering information contained in this pleading, that I am familiar with Part 25 of the Commission's Rules, that I have either prepared or reviewed the engineering information submitted in this pleading, and that it is complete and accurate to the best of my knowledge and belief.



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Dated: August 5, 2005

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

Received  
OCT 19 2004  
Policy Branch  
International Bureau

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-20040209-0014  
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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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

	)	
In the Matter of	)	
	)	
<b>Mobile Satellite Ventures</b>	)	
<b>Subsidiary LLC</b>	)	File No. SAT-AMD-20040209-0014
	)	Call Sign S2358
Amendment to Application for	)	
Authority to Launch and Operate a	)	
Replacement L-band Mobile	)	
Satellite Service Satellite at	)	
at 101° W )	)	

**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 refile.<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 similar to the MSV Amendment and that the failure of an applicant to supply the interference analysis would result in 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.

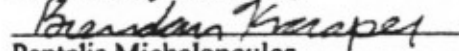
<sup>26</sup> In addition, allowing EchoStar to correct its omission without dismissing its EchoStar Application and EchoStar Amendment would not harm the public interest. The processing of this application, as amended, could have waited for EchoStar to supplement its filing with the requested information. 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.

David K. Moskowitz  
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October 15, 2004



**CERTIFICATE OF SERVICE**

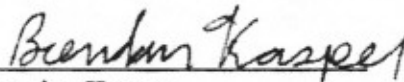
I, Brendan Kasper, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 15<sup>th</sup> day of October, 2004, served a true copy of the foregoing "Application for Review" by first class United States mail, postage prepaid, upon the following:

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\* By hand delivery

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

**RECEIVED**

JAN 26 2005

Federal Communications Commission  
Office of Secretary

In the Matter of )

**ECHOSTAR SATELLITE L.L.C.** )  
(f/k/a EchoStar Satellite Corporation) )

Application for Authority to Construct, )  
Launch and Operate a Geostationary )  
Satellite in the Fixed Satellite Service )  
Using the Allotted Extended Ku-band )  
Frequencies at the 101° W Orbital Location )

File Nos. SAT-LOA-20030827-00179  
SAT-AMD-20031126-00343  
Call Sign S2492

**APPLICATION FOR REVIEW**

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January 26, 2005

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of ) ) ) <b>ECHOSTAR SATELLITE L.L.C.</b> ) (f/k/a EchoStar Satellite Corporation) ) ) Application for Authority to Construct, ) Launch and Operate a Geostationary ) Satellite in the Fixed Satellite Service ) Using the Allotted Extended Ku-band ) Frequencies at the 101° W Orbital Location )	File Nos.     SAT-LOA-20030827-00179 SAT-AMD-20031126-00343 Call Sign S2492
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**APPLICATION FOR REVIEW**

Pursuant to 47 C.F.R. § 1.115, EchoStar Satellite L.L.C. ("EchoStar") hereby requests that the Federal Communications Commission ("Commission") review the International Bureau's ("Bureau") Order on Reconsideration ("Order") released on December 27, 2004.<sup>1</sup> In that Order, the Bureau wrongly dismissed EchoStar's Application and related Amendment for an allotted extended Ku-band satellite at 101° W.L.<sup>2</sup> on the basis that they were not "substantially complete."<sup>3</sup>

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<sup>1</sup> *In the Matter of EchoStar Satellite L.L.C. (f/k/a EchoStar Satellite Corporation), Order on Reconsideration*, DA 04-4056 (rel. Dec. 27, 2004) ("Order").

<sup>2</sup> In this Application for Review, "Application" refers to SAT-LOA-20030827-00179 and "Amendment" refers to SAT-AMD-20031126-00343.

<sup>3</sup> *Order* at ¶ 16 ("EchoStar's application did not contain all of the information required by the Commission's rules and thus was not substantially complete when filed.").

## I. INTRODUCTION AND SUMMARY

The Bureau based its dismissal of EchoStar's Application and Amendment on two minor defects: (1) one of the tables in the Technical Annex to the Amendment incorrectly referred to frequency bands different from the frequency bands actually applied for and specifically noted in the Application and Amendment; and (2) the Amendment failed to identify which transponders would be connected to which spot beam in either the uplink or downlink directions.<sup>4</sup> EchoStar seeks review of the Order on the grounds that the Bureau misapplied the substantially complete standard by ignoring applicable Commission and court precedent regarding that standard. What is worse, the Bureau appears to have significantly tightened the "substantially complete" standard despite the Commission's express disavowal of a "letter-perfect" standard for satellite applications. While the Bureau protests that it did not apply a "letter-perfect" standard in dismissing EchoStar's Application and Amendment, no other conclusion can be drawn in light of the triviality of the errors at issue.

*First*, Commission precedent on the "substantially complete" standard is clear that discrepancies in an application will not render it unacceptable for filing if the discrepancy can be resolved, "confidently and reliably, drawing on the application as a whole." Only those discrepancies that are not resolvable by looking at the application *as a whole* justify dismissal. The incorrect frequency reference in Table A.4-1 of the Technical Annex to the Amendment is precisely this kind of resolvable discrepancy. The correct downlink frequencies in the allotted extended Ku-bands (10.7-10.75 GHz and 11.2-11.45 GHz) are mentioned no fewer than ten times throughout the Application and Amendment, including in the FCC Form 312 submitted

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<sup>4</sup> Order at ¶¶ 11-12; Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to David K. Moskowitz, Senior Vice President and General Counsel, EchoStar Satellite Corporation, DA 04-323 (Feb. 9, 2004) at 2-3 ("EchoStar Dismissal Letter"). See 47 C.F.R. §§ 25.112 and 25.114(c)(5).



with the Amendment. Moreover, the fact that EchoStar intended to apply for frequencies in the allotted portion of the extended Ku-band is patently clear from the inclusion of "Appendix 30B" technical information, which is only required for these frequency bands. The infirmity of the Bureau's Order is evidenced by the lone counter example it cites to illustrate the kind of mistake that would *not* justify dismissal -- an example involving a discrepancy that in fact is no different than the one at issue here.

*Second*, court precedent is likewise clear that, under a "substantially complete" standard, applications must be accepted "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." The missing information regarding which transponders are connected with which spot beams is just such a curable defect. Contrary to the Bureau's view, the missing technical information was not necessary for EchoStar's or any other user's interference analysis for the proposed satellite. Instead, based on EchoStar's proposed use of the satellite for direct-to-home services, other users of the band will correctly assume that there will be simultaneous uplink and downlink frequency overlaps and the beams could be pointed anywhere within the service areas.

*Finally*, in dismissing EchoStar's Application and Amendment, the Bureau exhibited a disturbing failure to treat similar applications consistently. On several occasions, the Bureau has permitted applicants to correct much more egregious defects in their first-come, first-serve applications, such as failures to include two-degree spacing analysis or "effective competitive opportunities" analysis. In defense of its action, the Bureau first attempts to draw a distinction between "insufficient" and "non-existent." However, such a distinction is not borne out by the facts, and even if it were, a test based on such unfathomably fine differences would be a license for arbitrariness. The Bureau then makes the remarkable admission that if it made a

mistake in its past treatment of another applicant, it should not repeat its mistake here. While it may be true that an agency is not required to repeat an error, unsupported claims of prior error cannot excuse an agency's failure to act in a consistent fashion.

In sum, the Bureau's Order misapplied the "substantially complete" standard to EchoStar's Application and Amendment and is inconsistent with Commission and court precedent. The Order cannot be upheld, because to do so would essentially give the Bureau free rein to apply any standard it wanted to judge the adequacy of applications, and excuse any differences in treatment by reasoning that if it made a mistake the last time, it can simply ignore that precedent. This would be a particularly prejudicial result as it would undermine the Commission's first-come, first-served processing guidelines. Under that system, "substantially complete" filings are to receive priority processing rights based on the frequencies sought and the time of application, measured to the thousandth of a second. It would mock the precision of that mechanism if completeness were to be judged in an ever shifting, standardless manner. The Commission should, therefore, reverse the Order and reinstate the Application and Amendment into its proper place in the space station application processing queue.

## **II. QUESTION PRESENTED**

The questions presented in this application for review are:

- Whether the Bureau acted in conflict with Commission and court precedent in applying its "substantially complete" standard for accepting satellite applications, or otherwise misapplied that standard or in fact applied a letter-perfect standard, when it dismissed EchoStar's Application and Amendment; and
- Whether the Bureau committed prejudicial error by failing to treat like applications similarly.

### III. 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. Throughout the Application, EchoStar made it clear that it was requesting operating authority for the 10.70-10.75 GHz and 11.20-11.45 GHz (downlink) and the 12.75-13.00 GHz and 13.15-13.20 GHz (uplink) frequencies, which are part of the allotted extended Ku-band governed by Appendix 30B of the International Telecommunication Union ("ITU") Radio Regulations. Indeed, EchoStar submitted ITU Appendix 30B information with its Application, which is only necessary for requests to use frequencies in this band.

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.<sup>5</sup> EchoStar did not request a change in frequency bands and, in all but one table, referred always to the allotted Appendix 30B Ku-band frequencies throughout the Amendment.

On February 9, 2004, the Bureau issued a letter dismissing EchoStar's Application and Amendment without prejudice to re-filing.<sup>6</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 Application and Amendment; and (2) the Amendment failed to

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<sup>5</sup> *Amendment* at 1.

<sup>6</sup> EchoStar Dismissal Letter at 1.

identify which transponders would be connected to which spot beam in either the uplink or downlink directions.<sup>7</sup> On February 10, 2004, EchoStar refiled a corrected application, but discovered that Mobile Satellite Ventures Subsidiary, LLC ("MSV") had already filed an amendment to its pending application to request all of the same frequencies on February 9, 2004.<sup>8</sup> On March 10, 2004, EchoStar sought reconsideration of the EchoStar Dismissal Letter.<sup>9</sup>

On December 27, 2004, the Bureau released its Order on Reconsideration denying EchoStar's petition for reconsideration and affirming the EchoStar Dismissal Letter. On reconsideration, the Bureau relied again on the discrepancy in the frequency table and the missing information as to which transponders would be connected to which spot beam to reach its conclusion that the Application and Amendment were not "substantially complete."

#### **IV. THE BUREAU WRONGFULLY IGNORED COMMISSION AND COURT PRECEDENT ON THE "SUBSTANTIALLY COMPLETE" STANDARD WHEN IT DISMISSED THE ECHOSTAR APPLICATION AND AMENDMENT**

A substantially complete standard for accepting satellite applications does not mean that applications must be "letter-perfect," and indeed the Bureau disclaims reliance on a "letter-perfect" standard.<sup>10</sup> However, as explained below, while purporting to apply the substantially complete standard, the Bureau has ignored important Commission and court precedent on the meaning of that standard and has failed to act in a manner consistent with such precedent.

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<sup>7</sup> EchoStar Dismissal Letter at 2-3. See 47 C.F.R. §§ 25.112 and 25.114(c)(5).

<sup>8</sup> See SAT-AMD-20040209-00014.

<sup>9</sup> See EchoStar Petition.

<sup>10</sup> See Order at ¶ 9.

**A. Under The Substantially Complete Standard, Applications That Contain Discrepancies That Can Be Resolved “Confidently And Reliably, Drawing On the Application As A Whole” Must be Accepted For Filing**

When it affirmed the continued use of a substantially complete standard for accepting satellite applications in the *First Space Station Licensing Reform Order*,<sup>11</sup> the Commission explained that this standard is “comparable to the ‘hard look’ policy the Commission included as part its broadcast license first-come, first-served approach.”<sup>12</sup> Indeed, the Commission specifically cited the *FM and TV Order*, in which the Commission set out detailed guidelines on when an application would be “substantially complete” and acceptable for filing under its broadcast licensing rules.<sup>13</sup> The Commission’s prior decisions on the application of the substantially complete standard in the broadcast context are therefore directly relevant here.

The *FM and TV Order* includes guidelines on how applications containing visibly incorrect or inconsistent information should be treated under the substantially complete standard:

If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. *If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender.*<sup>14</sup>

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<sup>11</sup> *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 ¶ 244 (2003) (“*First Space Station Licensing Reform Order*”).

<sup>12</sup> *Amendment of the Commission’s Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking, 17 FCC Rcd 3847 at ¶ 93 n. 123 (2002) (“*Space Station Licensing NPRM*”), cited in *First Space Station Licensing Reform Order* at ¶ 244.

<sup>13</sup> See *Processing of FM and TV Broadcast Applications*, MM Docket No. 84-750, 50 Fed. Reg. 19936 (1985) (“*FM and TV Order*”), cited in *First Space Station Licensing Reform Order* at ¶ 244 n. 578 and *Space Station Licensing NPRM* at ¶ 93 n.123.

<sup>14</sup> See *FM and TV Order* at Appendix D (1985) (“*FM and TV Order*”) (emphasis added).



The Bureau simply ignores this precedent, reasoning instead that “frequency information is required to be filed because . . . it is one of the essential technical parameters that is used to determine whether an application is mutually-exclusive with a previously filed application”<sup>15</sup> and that it is not the responsibility of the agency “to select for an applicant the desired frequencies among differing frequencies provided in an application.”<sup>16</sup>

EchoStar acknowledges that frequency selection is an important part of all satellite applications. However, under a substantially complete standard, even the selection of frequencies need not be “letter-perfect.” Indeed, the Bureau accepts that some incorrect frequency references, such as putting the decimal point in the wrong place (*e.g.*, specifying 5.925-6.425 MHz rather than 5925-6425 MHz or 5.925-6.425 GHz), “would be recognized immediately as a typographical error.”<sup>17</sup> But the only reason that such an error would be “recognized immediately” as typographical presumably is because the Commission staff can “confidently and reliably” ascertain the correct frequencies from the application as a whole, *i.e.*, it is clear from the rest of the application that the applicant intended to select the C-band frequencies.

The incorrect frequency reference in Table A.4-1 of the Technical Annex to the Amendment is precisely the kind of discrepancy that can be easily resolved. The correct downlink frequencies in the allotted extended Ku-bands (10.7-10.75 GHz and 11.2-11.45 GHz) are mentioned no fewer than ten times throughout the Application and Amendment,<sup>18</sup> whereas

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<sup>15</sup> Order at ¶ 12.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at ¶ 10.

<sup>18</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-

the incorrect reference to non-allotted extended Ku-band frequencies (10.95-11.2 GHz) appears only once in a table attached to the Amendment. Moreover, the fact that EchoStar intended to apply for frequencies in the allotted portion of the extended Ku-band is patently clear from the inclusion of otherwise unnecessary "Appendix 30B" technical information.

Inexplicably, the Bureau points to all these other references to the correct allotted extended Ku-band frequencies in the Application and Amendment as sources of confusion,<sup>19</sup> when in fact they make clear exactly which frequencies EchoStar intended to apply for in its Application and Amendment. Using the Bureau's own example, a reference to 5.925-6.425 MHz is obviously a typographical error because it must be clear from the application "as a whole" that the request is for C-band frequencies. On that basis, EchoStar's reference to frequencies in the 10.95-11.2 GHz band must similarly be viewed as a typographical error

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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>19</sup> Order at ¶¶ 4-5 (reciting the many references to the allotted extended Ku-band frequencies (10.7-10.75 GHz) and the single inconsistent reference in Table A.4-1 of Section A.4 of the Attachment to the Amendment, and concluding "Given these inconsistencies, the Division was unable to determine precisely which frequency assignments EchoStar was seeking.").

because it is clear from the EchoStar Application and Amendment “as a whole” that EchoStar always intended to apply for the allotted extended Ku-band frequencies.<sup>20</sup>

Thus, under the applicable precedent on the treatment of inconsistent information under the “substantially complete” standard, the incorrect frequency reference in Table A.4-1 of the Technical Annex to the Amendment is no basis for dismissing the Application and Amendment. Moreover, this typographical error should not be conflated with the question of the transponder connections. The error can easily be resolved on the face of the Application and Amendment as a whole, and once resolved, it is no longer a source of confusion, nor is it an indication that together with additional concerns, the Application should be dismissed.

**B. Under The Substantially Complete Standard, Applications Must Be Accepted “Even If They Contain Minor Errors Or Infractions Of Agency Rules, So Long As Any Defects May Be Cured Without Injury To Public Or Private Interest”**

As noted above, a substantially complete standard does not mean a “letter-perfect” standard. In fact, the D.C. Circuit has explained that, under a substantially complete standard, applications must be accepted “even if they contain minor errors or infractions of agency rules, so long as any defects may be cured without injury to public or private interest.”<sup>21</sup> The Bureau appears to have ignored this precedent by insisting that “substantially complete” means “providing the information which is required by the Commission’s rules”<sup>22</sup> and by

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<sup>20</sup> The isolated frequency discrepancy in this case is quite different from the scenario where an application is replete with inconsistent frequency references such that the Commission staff cannot readily ascertain which frequencies were intended to be selected. In the latter scenario, the application would not be acceptable for filing. *Application of Mobile Phone of Texas, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd. 3459 (C.C.B., June 12, 1990) (Mobile Phone’s cover letter, the accompanying FCC Form 401, application, and engineering statements all contained differing and conflicting frequency requests).

<sup>21</sup> *Salzer v. FCC*, 778 F.2d 869, 872 n.7 (D.C. Cir. 1985) (citing *James River Broad. Corp. v. FCC*, 399 F.2d 581 (DC Cir. 1968)).

<sup>22</sup> Order at ¶ 9.

concluding that "EchoStar's application did not contain all of the information required by the Commission's rules and thus was not substantially complete when filed."<sup>23</sup> A requirement to provide "all information required by the Commission's rules" is consonant with the "letter-perfect" standard rejected by the Commission, but is not consistent with a substantially complete standard, which by definition must tolerate some "infractions of agency rules."<sup>24</sup>

The missing information regarding which transponders are connected or switchable to which spot beams, though required by the Commission's rules, is just the kind of minor "infraction" that can be cured without prejudice to anyone. The Bureau claims that the missing information would "allow[] the Commission, operators and potential applicants to identify which frequencies and locations are impacted by the pending application, which ones are available and the extent to which the proposed frequency uses and locations require coordination."<sup>25</sup> In fact, the absence or presence of the missing technical information would not affect EchoStar's or any other user's interference analysis for the proposed satellite or the orbital locations that it might impact.<sup>26</sup> Given EchoStar's proposed use of the satellite for direct-to-home services, other users of the band must assume, correctly, that there will be simultaneous uplink and downlink frequency overlaps and that the beams could be pointed towards any part of the service area. In fact, the Amendment clearly explains in Section A5.2 of the Technical Annex that the precise pointing directions of the spot beams, and hence the channels to be assigned to each spot beam, can only be determined after coordination with the proposed MSV satellite. Therefore, by maintaining flexibility in the connectivity arrangements, coordination

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<sup>23</sup> *Id.* at ¶ 16.

<sup>24</sup> *Salzer*, 778 F.2d at 872 n.7 (citing *James River*, 399 F.2d 581).

<sup>25</sup> Order at ¶ 11.

<sup>26</sup> See Attachment A -- Declaration of Richard Barnett (Jan. 26, 2004).



with other satellites is *facilitated*, contrary to the Bureau's claims that the lack of specificity would *impede* frequency sharing arrangements with other satellites. Any more specific information as to which transponder is connected or switchable would make no practical difference, except in the context of a coordination with a particular operator at which point the specific connectivity would have to be determined to facilitate coordination. Clearly, the changes to the proposed satellite introduced by the Amendment were intended to provide flexibility in coordination. Thus, allowing EchoStar to cure this omission would make no practical difference to any public or private interest.

The Bureau expresses concern that "[a]llowing applicants to cure applications after they are filed could adversely impact other applicants filing complete applications that are 'second-in-line' to the first application."<sup>27</sup> This cannot be the kind of public or private interest injury that the courts or the Commission imagined would justify dismissal under a substantially complete standard, as this kind of injury would be present in every case involving an application with a defect, no matter how minor. Taken to its logical conclusion, the Bureau's approach would result in *every* defective application being dismissed because failure to do so could impact second-in-line applicants. This would be an impermissible shift from a "substantially complete" standard to a "letter-perfect" standard.

In addition, the public interest would not be harmed by allowing EchoStar to correct its omission without dismissing its Application and Amendment. 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 re-file its application with the requested information,

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<sup>27</sup> *Id.* at ¶ 13.



the Bureau presumably will continue to process essentially the same application. In fact, the overzealous dismissal of applications with inconsequential errors is likely to be a greater source of delay than any request to cure such applications.

Thus, under applicable court precedent, the omission of technical information identifying which transponders are connected or switchable to which spot beam also cannot be the basis for dismissing EchoStar's application.

#### V. THE BUREAU HAS FAILED TO TREAT LIKE APPLICATIONS SIMILARLY

In dismissing the Application and Amendment, the Bureau has demonstrated a disturbing failure to treat like applications similarly.<sup>28</sup> While it is true that the Bureau has dismissed quite a number of applications since the *First Space Station Licensing Reform Order*, it has also permitted on several occasions applicants to correct defects in their applications.<sup>29</sup>

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<sup>28</sup> See, e.g., *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (“[An agency] ‘cannot act arbitrarily nor can it treat similar situations in dissimilar ways,’ [] and we [have] remanded litigation to the agency when it did not take pains to reconcile an apparent difference in the treatment accorded litigants circumstanced alike.” (quoting *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 780 (D.C. Cir. 1969)); *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996) (“[A]dministrative agencies must apply the same basic rules to all similarly situated supplicants. An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.”).

<sup>29</sup> See, e.g., Letter from William Howden, Chief, Satellite Division, FCC, to Stan Edinger, Loral Skynet Network Services, Inc., SES-MOD-20030919-01302 (Oct. 16, 2003) (“*Loral Skynet Oct. 16 Letter*”); Letter from Robert G. Nelson, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary, LLC, SAT-AMD-20031118-00335 (Apr. 23, 2004) (“*MSV Information Request Letter*”); See *In the Matter of DirecTV Enterprises, LLC Application for Authority to Launch and Operate DirecTV 7S*, Order and Authorization, 19 FCC Rcd. 7754, ¶ 6 (2004) (“On November 17, 2003, the Satellite Division sent a letter to DIRECTV, requesting additional information required by Section 25.114 of the Commission's rules, including a Form 312 and certain technical information required by Sections 25.114(c) of the Commission's rules.”); Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to David K. Moskowitz, EchoStar Satellite Corp., SAT-LOA-20030605-00109, SAT-LOA-20030606-00107, SAT-LOA-20030609-00113 (Feb. 12, 2004); Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to Peter Hadinger, Northrop Grumman Space & Mission Sys. Corp., DA 04-1725, Jun. 16, 2004; Letter from Thomas S. Tycz, FCC to David M. Drucker,

Many of the defects that the Bureau has allowed applicants to correct have been much more egregious than the minor discrepancy and omission found in EchoStar's Application and Amendment, including the absence of any two-degree spacing analysis in satellite applications and the absence of information on "effective competitive opportunities" in applications seeking authority to communicate with a foreign-licensed satellite.

For example, in *Loral Skynet*, the Bureau gave the applicant an opportunity to correct its application to communicate with a foreign-licensed satellite by requesting "additional technical information and information that was missing from the original application."<sup>30</sup> The missing information apparently included information necessary for the Bureau to conduct an "effective competitive opportunities" analysis under the Commission's *DISCO II* order. The Bureau ultimately dismissed the application, but only after the applicant failed to respond to the Bureau's request for information.

The Bureau has attempted to distinguish *Loral Skynet* from the present case on the grounds that the missing *DISCO II* information was not missing after all, but was merely "insufficient for [the Bureau] to make a determination."<sup>31</sup> Apparently, the applicant had made a bare assertion that the satellite market of the foreign country in question was open to U.S.

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contactMEO Communications LLC, DA 04-1722, Jun. 16, 2004 (same) ("*@contact Reversal Letter*").

<sup>30</sup> Letter from William Howden, Satellite Division, FCC to Stan Edinger, Loral Skynet Network Services, Inc., DA 03-3904, SES-MOD-20030919-01302, at 1 (Dec. 11, 2003) (dismissing Loral Skynet's application for failure to provide the information requested by the *Loral Skynet Oct. 16 Letter*, *supra* note 29).

<sup>31</sup> *Loral Skynet Oct. 16 Letter* at 2. See also Order at ¶ 16 n.52 ("The December 11 Letter incorrectly referred to Loral's failure to supply 'missing' information required by the Commission's *DISCO II Order*.").

satellite operators.<sup>32</sup> This is no distinction at all. In the case under review, EchoStar also provided some of the technical information regarding which antenna beams are connected or switchable to which transponders, as required by 47 C.F.R. 25.114(c)(4)(iii), albeit not all of the requested information. As the Bureau's careful review of the Application and Amendment would have revealed, EchoStar's proposed satellite could operate in two different modes – one involving one of two large downlink beams, and the other involving nine smaller spot beams.<sup>33</sup> When the satellite is transmitting on one of two large downlink beams, the Amendment states that "all transponders may be switched as a block between one or the other of the two beams."<sup>34</sup> In addition, in the Appendix 30B information submitted with the original Application, there is both (a) a note indicating that either large downlink beam can be used with any downlink frequency assignment, and (b) a strapping table showing which uplink frequencies are associated with which downlink frequencies. Only the information regarding which spot beams are connected with which transponder is missing for when the satellite is operating in the other mode. Thus, the Application and Amendment is not any more deficient, and is significantly more complete than, the information supplied by the applicant in *Loral Skynet*. The Bureau cannot dismiss the Application and Amendment in this case, while giving the similarly situated applicant in *Loral Skynet* the opportunity to supplement or correct its application, without

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<sup>32</sup> See SES-MOD-20030919-01302, Appendix A, at A-40 ("The Kingdom of Tonga is awaiting admission to the WTO and currently enjoys "Observer" status at the WTO. China is a WTO member nation. Tongasat has confirmed that earth stations in Tonga have been authorized to communicate with U.S. licensed satellites."); Order at ¶ 16 n. 52 ("To this end, Loral attached an exhibit to its application stating that Tonga's satellite market is open to U.S. satellite operators. . . . [T]he staff requested additional information pursuant to 47 C.F.R. § 25.111(a) because it was not clear whether Loral had adequately shown that Tonga's satellite market is open to U.S. satellite operators.").

<sup>33</sup> See Amendment, Technical Annex, at 1.

<sup>34</sup> Amendment, Technical Annex, at 5.

reasoned explanation.<sup>35</sup> As demonstrated, the Bureau's explanation of the differences between the two cases simply does not withstand scrutiny.

The Bureau tries to hedge its conclusion by suggesting that "[i]n any event, if the Division failed to dismiss an incomplete application, it is a well-settled principle of administrative law that the fact that an agency made an error in one instance does not require the agency to repeat the error."<sup>36</sup> This is hardly a justification for the inconsistent treatment of similarly situated applicants under the "substantially complete" standard. While it may be true that an agency is not required to repeat an error, unsupported claims of prior error cannot excuse a failure by an agency to act in a consistent fashion.<sup>37</sup> It is far from clear that the Bureau was wrong in *Loral Skynet* and correct in this case. Indeed, the Bureau does not admit that it decided *Loral Skynet* incorrectly. If anything, the Bureau's suggestion that it *might* have been wrong in

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<sup>35</sup> See *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("An agency changing its course must supply a reasoned analysis."); *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977) ("This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965) ("We think the Commission's refusal at least to explain its differential treatment of appellant and NBC were in error. . . . [W]e think the differences are not so 'obvious' as to remove the need for explanation."); *Communications Control, Inc. v. FCC*, 374 F.3d 1329, (D.C. Cir. 2004) ("The Commission's *ipse dixit* that CCI's typographical error rendered its license void ab initio does not [support its decision], especially in light of the Commission's practice of correcting, without much ado, typographical errors such as this one. The Commission's departure from this practice, with no explanation, renders its . . . rationale arbitrary and capricious.").

<sup>36</sup> Order at ¶ 16 n. 45. Curiously, the Bureau cites *Southeast Telephone, Inc. v. FCC*, 1999 WL 1215855 (D.C. Cir.) in support of its "well-settled" principle, an unpublished opinion that has no precedential value under the rules of the D.C. Circuit. See D.C. CIRCUIT RULE 36(c)(2) ("A panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.").

<sup>37</sup> *Chem-Haulers, Inc. v. ICC*, 565 F.2d 728, 730 (D.C. Cir. 1977) ("If it were clear that the instances cited were simply inadvertent departures from a generally uniform course of decision, we would deplore them without permitting them to derange the outcome of other cases. . . . Still, we have before us neither the Commission's statement that it earlier strayed nor the records adverted to, and we cannot rest on its counsel unadorned assertion [that the prior decisions were in error].") (emphasis added).



earlier cases only demonstrates the arbitrary and capricious manner in which the Bureau has been applying the substantially complete standard established by the Commission. The adverse consequences of the Bureau's doctrinal incoherence should not be borne by EchoStar.

Moreover, the Bureau's discriminatory treatment of EchoStar is underscored by its dismissal of both the Application and the Amendment for defects found in the latter, while only dismissing the defective amendments filed by others and allowing their applications to remain on file. On a number of occasions, the Bureau has dismissed an amendment it found not to be substantially complete while retaining the underlying application. For instance, when MSV filed an amendment to its application to request the same allotted extended Ku-band frequencies as EchoStar at 101° W.L., the Bureau initially dismissed only the amendment for incompleteness.<sup>38</sup> MSV's underlying application was not dismissed. Similarly, when SES Americom, Inc. ("SES") filed a defective amendment to its application to operate AMC-15 at 105° W.L., the Bureau dismissed only the defective amendment, and not the underlying application.<sup>39</sup> Yet in this case, the Bureau decided to dismiss both the Application and Amendment. The Bureau cannot simply treat EchoStar's Application and Amendment differently from the manner in which it treated the applications and amendments filed by MSV and SES, and moreover, do so without any explanation at all.

## VI. CONCLUSION

For the reasons stated above, the Bureau's dismissal of EchoStar's Application and Amendment was inconsistent with precedent and failed to treat like applications similarly.

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<sup>38</sup> See Letter from Thomas S. Tycz, Chief, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary LLC, DA 04-1095, SAT-AMD-20040209-00014 (Apr. 23, 2004). The Bureau later reinstated MSV's amendment. *In the Matter of Mobile Satellite Ventures LLC*, DA 04-2985, Order, SAT-AMD-20040209-00014 (rel. Sept. 15, 2004).

<sup>39</sup> See Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to Karis A. Hastings, Counsel for SES Americom, Inc., DA 04-1707, SAT-AMD-20040528-00110 (Jun. 14, 2004).



The dismissal should therefore be reversed and EchoStar's Application and Amendment should be reinstated into their proper place in the satellite application processing queue.

Respectfully submitted,

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January 26, 2005

**ATTACHMENT A**

**DECLARATION OF RICHARD BARNETT**

### DECLARATION OF RICHARD BARNETT

I, Richard Barnett, declare under penalty of perjury under the laws of the United States that the following is true to the best of my knowledge, information and belief:

1. I am an engineer with a BSc(Hons) degree in Electronic Engineering and a PhD degree in the field of Communications Engineering. I have been involved in satellite engineering projects for the past 25 years and have extensive domestic US and international satellite regulatory experience.
2. At EchoStar Satellite L.L.C.'s ("EchoStar") request, I prepared the amendment filed by EchoStar Satellite L.L.C. on November 26, 2003 (SAT-AMD-20031126-00343) ("Amendment").
3. I understand that on February 9, 2004, the International Bureau dismissed the Amendment, along with EchoStar's underlying satellite application (SAT-LOA-20030827-00179) ("Application"), because (a) certain frequencies mentioned in Table A.4-1 of the Amendment was different from the frequencies requested everywhere else in the Application and Amendment; and (b) the Amendment did not identify which transponders would be connected with which spot beam.
4. With respect to the omitted information regarding which transponders would be connected with which spot beam, it is my professional opinion that the absence or presence of such information would not affect EchoStar's or any other user's interference analysis for the proposed satellite or the locations that it might impact, for the following reasons:
  - (a) 2 degree compliance for the proposed EchoStar satellite is demonstrated in the Amendment. Therefore, other satellites spaced 2 degrees or further from 101°W do not represent an interference issue. The main interference issue is with respect to the proposed collocated MSV satellite at 101°W.
  - (b) The Amendment clearly states that all the transponders are switchable to either of the large area coverage beams, and this would represent the worst-case interference situation with respect to the co-frequency, collocated MSV satellite, which proposes to use a limited number of narrow spot beams for its feeder links, with as-yet undefined pointing directions.
  - (c) When the EchoStar transponders are switched from the large area coverage beams to any of the small downlink spot beams, the interference situation with respect to the collocated MSV satellite is improved, because EchoStar has committed, in the Amendment, to coordinate the pointing directions of the spot beams, and the channels used in each spot beam, with MSV.
  - (d) The inherent flexibility in the design of the proposed EchoStar satellite, in terms of its precise spot beam coverage and connectivity, is a deliberate feature to facilitate coordination with the proposed collocated MSV

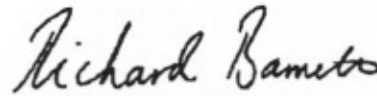
satellite, which has undefined spot beam locations. It is not an impediment to frequency sharing with affected satellites.

5. Given EchoStar's proposed use of the satellite for direct-to-home services, and EchoStar's stated ability to connect all the transponders to the large area coverage beams, other users of the band will rightly assume that there could be simultaneous uplink and downlink frequency overlap over the entire service area of the EchoStar satellite.

6. Moreover, because the uplink beams will be steerable and the precise pointing directions of the downlink beams have not yet been fixed, other users of the band must also assume that the beams could point towards any part of the service areas.

7. The more specific information as to which transponder is connected or switchable to which spot beam would make no practical difference, except in the context of a coordination with a particular operator at which the point the specific connectivity would be determined to facilitate coordination.

Executed: January 26, 2005



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Richard Barnett  
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6404 Highland Drive,  
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## CERTIFICATE OF SERVICE

I, Chung Hsiang Mah, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 26th day of January, 2005, served a true copy of the foregoing "Application for Review," and accompanying Declaration of Richard Barnett, by first class United States mail, postage prepaid, upon the following:

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