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

FEB 10 2005

**Federal Communications Commission
Office of Secretary**

In the Matter of)

ECHOSTAR SATELLITE LLC)
(f/k/a EchoStar Satellite Corporation))

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

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

OPPOSITION TO APPLICATION FOR REVIEW

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Dated: February 10, 2005

Summary

In 2003, the Commission established a new first-come, first-served procedure for licensing satellites. The Commission explained that this new licensing procedure would expedite service to the public by establishing operating rights clearly and quickly. To expedite processing, the Commission instructed the International Bureau to reject any applications that are not "substantially complete" as filed.

Soon after these new procedures were established, EchoStar submitted an application that failed to specify the frequencies it sought to use, including the geographic areas in which it would use certain frequencies, all in violation of specific requirements in the rules. This was one of nine applications that EchoStar filed simultaneously; this particular application proposed a system that required a number of other waivers of the Commission rules and seemed unlikely ever to be built. In response to EchoStar's failure to specify the frequencies it proposed to use (and without addressing various other flaws), the Satellite Division dismissed EchoStar's application as not "substantially complete." After a challenge from EchoStar, the Bureau upheld the Division's decision.

EchoStar here repeats its argument that the admitted flaws in its application are insignificant. As the Bureau has found before, however, EchoStar's failure to properly identify the frequencies it proposes to use is as fundamental as any flaw can be in a satellite application, particularly in a first-come, first-served environment. By making it impossible to know what frequencies EchoStar proposed to use and where they proposed to use them, other potential applications for those frequencies were precluded, which is unfair and counter-productive.

EchoStar argues that the decision to dismiss its application was a deviation from precedent. The cases EchoStar cites, however, are easily distinguished, since they all involve

applications that were incomplete only because of ambiguities in the Commission's own rules. Here, quite to the contrary, the rules—and EchoStar's failure to comply with them—are clear.

Finally, EchoStar makes another new argument, that the decision to dismiss its application was flawed because it failed to distinguish between defects in its original application and defects in a subsequent amendment. This argument ignores the fact that both the application and the subsequent amendment contained at least one of the flaws that was the basis for dismissing EchoStar's application. It also ignores the other flaws in the original EchoStar application (which the Commission has not yet addressed), including at least one that was the basis for dismissal of another EchoStar application filed the same day as the one at issue here. Moreover, this new argument is woefully untimely; the rules prevent EchoStar from raising this issue now.

MSV has relied on the Division's decision in amending its own application and in developing its next-generation system. In designing its system architecture and negotiating with satellite manufacturers, MSV has reasonably assumed that it will have access to all 500 MHz of Planned Ku-band feeder link spectrum. A decision to reinstate EchoStar's application would not only violate Commission rules and policy, it would be prejudicial to MSV's efforts to deploy a next-generation MSS system.

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OPPOSITION TO APPLICATION FOR REVIEW

Mobile Satellite Ventures Subsidiary LLC ("MSV") hereby files this Opposition to the Application for Review filed by EchoStar Satellite L.L.C. ("EchoStar") of the decision of the International Bureau ("Bureau") upholding the Satellite Division's ("Division") dismissal of EchoStar's application to launch and operate a satellite at 101°W.¹ EchoStar provides no basis for reversal of the Bureau's conclusion that the Division appropriately applied the "substantially complete" standard in dismissing EchoStar's application based on its fundamental failure to include relevant, required information regarding the frequencies it proposed to use. As both the Bureau and Division found, these were material errors which prejudiced other applicants and potential applicants, thus warranting dismissal.

Background

First-Come, First-Served Licensing. In April 2003, the Commission decided to eliminate its processing-round approach for considering satellite applications and replaced it with a new

¹ See EchoStar Satellite L.L.C., Application for Review, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (January 26, 2005) ("*EchoStar AFR*").

first-come, first-served licensing policy for geostationary (“GSO”) satellites.² The Commission explained that this policy would serve the public interest by enabling it to act on satellite applications more quickly and efficiently than under the processing-round procedure. *SSLR Order* ¶¶ 4, 7, 74. The Commission explained that this would benefit consumers by ensuring they receive service faster. *Id.* Moreover, the Commission stated that the first-come, first-served approach will lead to more efficient spectrum usage because it will reduce the amount of time spectrum lies fallow. *Id.* The Commission also affirmed that satellite applications must be “substantially complete” as filed. *Id.* ¶ 244. The Commission explained that any lesser standard would encourage speculative applications. *Id.*

MSV’s interest in this proceeding. MSV is the entity authorized by the Commission in 1989 to construct, launch, and operate a United States Mobile Satellite Service (“MSS”) system in the L-band.³ MSV’s current satellite was launched in 1995 and operates at 101°W. In July 1998, MSV filed an application to launch and operate a higher-power, replacement satellite with substantially greater capacity.⁴ To accommodate this greater capacity, MSV subsequently requested authority to use an additional 300 MHz of Planned Ku-band spectrum for feeder links beyond the 200 MHz for which MSV is already licensed.⁵ MSV has first-in-line status for these frequencies.

² *Amendment of the Commission’s Space Station Licensing Rules and Policies, First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-34, FCC 03-102 (rel. May 19, 2003) (“*SSLR Order*”).

³ *Order and Authorization*, 4 FCC Rcd 6041 (1989); *remanded by Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991); *Final Decision on Remand*, 7 FCC Rcd 266 (1992); *aff’d, Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275 (D.C. Cir. 1993); *see also AMSC Subsidiary Corporation, Memorandum Opinion and Order*, 8 FCC Rcd 4040 (1993).

⁴ *See Application of AMSC*, File No. SAT-LOA-19980702-00066 (July 2, 1998).

⁵ *See Application of Motient Services Inc.*, SAT-AMD-20001214-00171 (December 14, 2000). Specifically, MSV’s replacement application requested the following Planned Ku-band

Procedural History of EchoStar Application. On August 27, 2003, EchoStar filed an application for authority to launch and operate a satellite at 101°W using 250 MHz of Planned Ku-band frequencies for which MSV had already applied as well as the remaining 50 MHz of Planned Ku-band frequencies (*i.e.*, 10.70-10.75 GHz and 13.15-13.20 GHz) for which no entity at that point had applied.⁶ EchoStar was thus second-in-line behind MSV with respect to 250 MHz of the 300 MHz it requested and first-in-line with respect to the remaining 50 MHz. This application was one of nine applications EchoStar filed that day.

In its application, EchoStar claimed that its receive terminals would be able to co-exist with terrestrial operators that share the Planned Ku-band downlink “while maintaining an acceptable quality of service.” *EchoStar August 2003 Application* at 20, Exhibit 1 at 19. EchoStar did not address what impact the massive deployment of receive terminals will have on the suitability of the Planned Ku-band downlink for future terrestrial operators. EchoStar’s proposal would have required new terrestrial operators to coordinate with thousands if not millions of EchoStar’s receive terminal, thus rendering the Planned Ku-band downlink unsuitable for terrestrial services. EchoStar also proposed to offer a two-way service which would entail unlimited deployment of transmitting earth stations in the Planned Ku-band uplink. *Id.*, Exhibit 1 at 1, 8, 10. EchoStar never addressed the coordination burden this proposal would place on CARS, BAS, and other licensees sharing the Planned Ku-band uplink.

frequencies at 101°W: 10.75-10.95 & 11.2-11.45 GHz (downlink) and 12.75-13.15 & 13.20-13.25 GHz (uplink). Throughout this Opposition, references to the amount of spectrum refer to its use in both the uplink and downlink direction. On February 9, 2004, MSV filed an amendment to its pending application to request the 50 MHz of Planned Ku-band frequencies at 101°W for which it was not licensed and had not previously requested (10.70-10.75 GHz and 13.15-13.20 GHz). *See* MSV, Amendment, File No. SAT-AMD-20090209-00014 (filed February 9, 2004) (“*MSV February 2004 Amendment*”).

⁶ *See* Application of EchoStar, File No. SAT-LOA-20030827-00179 (filed August 27, 2003) (“*EchoStar August 2003 Application*”).

MSV challenged the EchoStar application on the grounds that, among other things, the application proposed to provide domestic service without requesting a waiver of the rules limiting use of the requested frequencies to international systems.⁷ The Commission has never acted on this Petition.

On November 26, 2003, EchoStar amended its pending application to try to correct the deficiencies identified by MSV.⁸ On February 9, 2004, however, the Division dismissed EchoStar's amended application as incomplete and otherwise not in compliance with the Commission's rules. The Division cited two independent reasons.⁹ First, the Division ruled that EchoStar's application did not comply with Section 25.114(c)(4)(iii) of the rules because it failed to indicate which transponders will be connected to which spot beam in either the uplink or downlink direction, thus making it impossible to tell where EchoStar intended to use various frequencies. *EchoStar Dismissal* at 2. Second, the Division cited EchoStar's failure to clearly identify the downlink frequencies it was requesting. *Id.* at 1-2. Specifically, in one table containing a detailed listing of its frequency plan, EchoStar specified downlink frequencies in the 10.95-11.2 GHz band. *EchoStar November 2003 Amendment*, Attachment A, Section A4, Table A4-1. In two other sections of its amended application, however, EchoStar mentioned downlink frequencies in the 10.70-10.75 GHz band. *See id.*, Attachment A, Section A1, p.1-2 and Section A24, p. 26. In a third part of the document, EchoStar provided a Channel Frequency Plan showing no transponders operating in the 10.70-10.75 GHz band. As a result, the Division ruled

⁷ See Mobile Satellite Ventures Subsidiary LLC, Petition to Deny, File No. SAT-LOA-20030827-00179 (filed November 17, 2003) ("*MSV Petition to Deny*").

⁸ See EchoStar, Amendment, File No. SAT-AMD-20031126-00343 (November 26, 2003) ("*EchoStar November 2003 Amendment*").

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

that it was unable to determine the precise frequencies for which EchoStar was applying.

*EchoStar Dismissal at 2.*¹⁰

EchoStar's initial challenge to the dismissal of its application. On March 10, 2004, EchoStar filed a Petition for Reconsideration of this decision.¹¹ In its Petition, EchoStar did not dispute that its application contained the errors and omissions identified by the Division. Rather, EchoStar argued that these errors and omissions were minor and its application was "substantially complete" taken as a whole. *EchoStar Recon Petition at 2.* MSV opposed this Petition, noting that EchoStar's failure to specify clearly the frequencies it was requesting was material in that it prejudiced other applicants and potential applicants.¹² MSV also explained that EchoStar's failure to indicate which transponders would be connected to which spot beam deprived MSV of information that would have been useful in determining whether EchoStar's coordination proposal is technically feasible. *MSV Opposition to EchoStar Recon Petition at 7.*

The Bureau's rejection of EchoStar's challenge. On December 27, 2004, the Bureau released a decision upholding the Division's dismissal of EchoStar's application.¹³ The Bureau

¹⁰ On February 10, 2004, EchoStar refiled an application for the 300 MHz of Planned Ku-band frequencies it previously requested in its November 2003 Amendment. See Application of EchoStar, File No. SAT-LOA-20040210-00015 (February 10, 2004). This application is second-in-line behind MSV's February 2004 amendment. The Bureau subsequently placed EchoStar's application on *Public Notice*. See Report No. SAT-00203 (March 26, 2004). In its Comments on the application, MSV has explained that the Bureau must defer action on EchoStar's application until after MSV's first-in-line application is processed and granted. See Comments of MSV, File No. SAT-LOA-20040210-00015 (April 26, 2004) ("*MSV Comments*"); Response of MSV, File No. SAT-LOA-20040210-00015 (May 21, 2004) ("*MSV Response*").

¹¹ See EchoStar, Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 10, 2004) ("*EchoStar Recon Petition*").

¹² See MSV, Opposition to Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 24, 2004), at 5-7 ("*MSV Opposition to EchoStar Recon Petition*").

¹³ See *EchoStar Satellite LLC, Order on Reconsideration*, DA 04-4056 (International Bureau, December 27, 2004) ("*Bureau Decision*").

rejected EchoStar's contention that the Division applied a "letter-perfect" rather than a "substantially complete" standard in reviewing EchoStar's application. *Bureau Decision* ¶ 9. The Bureau explained that under a "substantially complete" standard, a typographical or similar obvious error would not constitute a sufficient basis for dismissal, as would be the case if the Division applied a "letter perfect" standard. *Id.* ¶ 10. The Bureau explained, however, that EchoStar's errors were not merely typographical nor were they minor. *Id.* First, the Bureau noted that EchoStar failed to disclose which antenna beams are connected or switchable to each transponder and TT&C function, which is mandated by Section 25.114(c)(4)(iii) of the Commission's rules. *Id.* ¶ 11. The Bureau noted that this information allows the Commission, existing 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." *Id.* Second, the Bureau noted that EchoStar's application contained discrepancies in requested frequency assignments. *Id.* ¶ 12. The Bureau explained that frequency information is "one of the essential technical parameters that is used to determine whether an application is mutually-exclusive with a previously filed application." *Id.*

The Bureau also explained that requiring applications to be substantially complete when filed is an important part of the new first-come, first-served satellite licensing procedures. *Bureau Decision* ¶ 13. The goal of this new licensing procedure is to establish operating rights "clearly and quickly, and as a result, allow[] licensees to provide service to the public much sooner than might be possible under [the] previous licensing procedure." *Id.* ¶ 9. The Bureau noted that allowing applicants to cure defects after they are filed "could adversely impact other applicants filing complete applications that are 'second-in-line.'" *Id.* ¶ 13. Moreover, allowing

applicants to correct deficiencies would encourage applicants to file incomplete, internally inconsistent applications, which would delay service to the public. *Id.* Finally, the Bureau explained how dismissal of EchoStar's application was consistent with precedent. *Id.* ¶¶ 14-16.

EchoStar's current challenge. On January 26, 2005, EchoStar filed the instant Application for Review of the Bureau's decision. *See EchoStar AFR.* EchoStar again admits that its application contained the errors and omissions identified by the Bureau but repeats its arguments that its application nonetheless met the "substantially complete" standard. EchoStar also claims that the Bureau has failed to treat similar applications consistently. *Id.* at 13-17. EchoStar contends that on several occasions the Bureau has allowed applicants to correct deficiencies, rather than dismissing them outright. *Id.* at 13-14. For the first time, EchoStar also argues that the Bureau cannot dismiss both its amendment and its underlying application without an explanation as to how this is consistent with precedent. *Id.*

Discussion

I. THE BUREAU PROPERLY APPLIED THE "SUBSTANTIALLY COMPLETE" STANDARD

As the Bureau properly concluded, EchoStar's application failed to clearly identify (i) the manner in which its transponders and spot beams are to be connected and (ii) the downlink frequencies that it is requesting. *Bureau Decision* at 1-2. EchoStar admits that it made these omissions. *EchoStar AFR* at 5, 15. Its only claim is that these omissions were "minor infractions." As the Bureau correctly decided, these omissions were material errors which prejudiced other applicants and potential applicants, thus warranting dismissal. *Bureau Decision* ¶ 11-12.

A. The EchoStar application failed to provide required information that was material

The Bureau acted properly in upholding the dismissal of EchoStar's application because EchoStar violated an unambiguous Commission rule when it failed to identify which transponders will be connected to which spot beam. 47 C.F.R. § 25.114(c)(4)(iii); see *Bureau Decision* ¶ 11. While EchoStar now tries to offer a number of reasons for why this information may not be relevant to its application, EchoStar is not at liberty to disregard a Commission rule because it deems the rule to be inconsequential. *EchoStar AFR* at 11-12. To the extent EchoStar believes Section 25.114(c)(4)(iii) was irrelevant, it should have asked the Commission to eliminate it or, at the very least, request a waiver. See *Bureau Decision* n.8. But EchoStar never made such a request or filed a timely showing, and it is too late to try to do so now.¹⁴

In any event, EchoStar fails to demonstrate that information concerning which transponders will be connected to which spot beams is irrelevant in its case. *EchoStar AFR* at 11-12. As the Bureau properly noted and as MSV explained previously, this information would have been useful in determining which frequencies and locations are impacted by EchoStar's application and whether EchoStar's coordination proposal is technically workable.¹⁵ Thus, given the harm caused to other applicants, EchoStar's failure to demonstrate which transponders will be connected to which spot beam cannot be considered immaterial. As such, EchoStar's

¹⁴ The Bureau has explained that information provided in a Petition for Reconsideration of a decision dismissing an application cannot be used to reinstate an initial application. *PanAmSat Licensee Corp., Order on Reconsideration*, DA 03-3633 (rel. Nov. 13, 2003), at ¶ 7.

¹⁵ See *Bureau Decision* ¶ 11; *MSV Opposition to EchoStar Recon Petition* at 7. EchoStar claims that the precise pointing of its spot beams could only be determined after coordination with MSV. *EchoStar AFR* at 11. Even if this claim was accurate, it does not excuse EchoStar's failure to provide precise pointing of its spot beams for the 50 MHz of Planned Ku-band frequencies for which it was the only applicant prior to the dismissal of its application (*i.e.*, 10.70-10.75 GHz and 13.15-13.20 GHz) and for which co-frequency sharing was not applicable.

application was not “substantially complete” as filed, and the Bureau acted properly in upholding the decision to dismiss it.

B. The EchoStar application was inconsistent as to what frequencies it was proposing to use

The Bureau acted properly in upholding the dismissal of EchoStar’s application because EchoStar’s application was internally inconsistent with respect to its requested frequency assignments. *See Bureau Decision* ¶ 12.¹⁶ Given the inconsistent frequencies listed in EchoStar’s application, it appeared that EchoStar was applying for frequencies in the 10.95-11.2 GHz band, though it was impossible to determine with certainty given the references to both the 10.95-11.2 MHz and the 10.70-10.75 GHz band. Clear and accurate specification of frequencies requested in an application is essential so that potential applicants have unambiguous notice as to which frequencies are available for assignment, thereby avoiding prejudice to other potential applicants.¹⁷ The frequencies EchoStar was requesting could not be “easily resolved” by looking

¹⁶ *See* 47 C.F.R. § 25.114(c)(4) (requiring application to list radio frequencies requested); 47 C.F.R. § 25.112(a)(1) (listing internal inconsistencies as grounds for dismissal of an application).

¹⁷ *Bureau Decision* ¶ 12 (noting that frequency information “is one of the essential technical parameters that is used to determine whether an application is mutually-exclusive with a previously filed application”). EchoStar in its *AFR* also “acknowledges that frequency selection is an important part of all satellite applications.” *EchoStar AFR* at 8.

The Commission has previously recognized that inconsistencies in the precise spectrum requested cannot be considered a mere clerical error because of the potential for prejudice to other applicants. *Mobile Phone of Texas, Inc., Memorandum Opinion and Order*, 5 FCC Rcd 3459 (Chief, Common Carrier Bureau, June 12, 1990). In *Mobile Phone*, in response to a *Public Notice* establishing a 60-day cut-off window for Public Land Mobile Service frequency 152.15 MHz, Mobile Phone filed an application that was internally inconsistent as to whether it was requesting frequency 152.15 MHz or 152.09 MHz. Mobile Phone later filed a letter clarifying that it intended to apply for frequency 152.15 MHz. The Mobile Services Division (“MSD”) deemed this letter to be a major amendment causing Mobile Phone’s application to be filed outside of the 60-day cut-off window. The MSD thus dismissed the application. Mobile Phone filed a Petition for Reconsideration of the MSD’s action seeking reinstatement of its application arguing that its letter was merely intended “to clarify ambiguous information in its timely filed application.” *Id.* ¶ 5. The Common Carrier Bureau rejected Mobile Phone’s Petition because

at the application as a whole, as EchoStar contends. *EchoStar AFR* at 8. While EchoStar now states that it was applying for frequencies in the 10.70-10.75 GHz band and not the 10.95-11.2 MHz band (*id.* at 9-10), there was no way for the Commission or potential applicants to divine EchoStar's intentions given the internal inconsistencies in its application.¹⁸ EchoStar's *post hoc* clarification cannot cure the defects in its application as filed. In this case, due to the ambiguities in EchoStar's application, potential applicants were prejudiced because they were forced to consider whether to expend resources preparing an application for the 10.70-10.75 GHz band that might ultimately obtain only second-in-line status if EchoStar in fact was ultimately deemed to have applied for these frequencies.

reinstating its application would be unfair to other applicants by increasing the number of mutually exclusive applicants and would harm the public interest by delaying service to the public. *Id.* ¶ 8. Moreover, while the Common Carrier Bureau recognized that it had been the practice of the MSD to request corrections regarding minor technical data, it explained that "this practice is not utilized to correct frequency errors." *Id.* n.14.

EchoStar's attempt to distinguish *Mobile Phone* is unavailing. *EchoStar AFR* at 10 n.20. Even if *Mobile Phone*'s application was "replete" with inconsistent frequency references, as EchoStar alleges, nothing in *Mobile Phone* states or implies that it is the number of inconsistent frequency references that renders an application unacceptable for filing. Rather, *Mobile Phone* stands for the basic proposition that an inconsistent frequency reference in an application must be considered more than just a mere clerical error because of the prejudicial impact on other applicants.

Similar to *Mobile Phone*, the Commission has held that an application for a broadcast station will be dismissed if there are internal inconsistencies regarding the coordinates proposed for the transmitter site. *Coachella Valley Wireless Corp., Memorandum Opinion and Order*, 7 FCC Rcd 4252 (July 2, 1992). Among other things, such information is crucial for determining the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license necessary to determinations of mutual exclusivity and compliance with spacing rules. *Ocean Waves Broadcasting, Hearing Designation Order*, 3 FCC Rcd 4637 (Chief, Audio Services Division, August 3, 1988).

¹⁸ As the Bureau noted in upholding the Division's dismissal, it is not the responsibility of the Commission "to select for an applicant the desired frequencies from among differing frequencies provided in an application." *Bureau Decision* ¶ 12.

C. The Division and the Bureau were not required to provide EchoStar an opportunity to supplement or clarify its application; such an opportunity would undermine the new licensing procedures

As the Bureau properly concluded, EchoStar's assertion that the Bureau should have requested that EchoStar provide the missing information and clarify the ambiguities in its application undermines the intent of the new first-come, first-served policies. *EchoStar AFR at 12; see Bureau Decision ¶ 13*. Under EchoStar's view, an applicant could file an incomplete and ambiguous application and wait for the Bureau to request any missing information and to clarify any ambiguities.¹⁹ If the Bureau were to adopt such a policy, however, the public interest in expedited licensing, service to the public, and use of available spectrum would be disserved while the Bureau takes time to investigate what an applicant intended to request in its application. The Commission adopted first-come, first-served to expedite satellite licensing. This goal would not be served if the Bureau continued past policies of requesting applicants to clarify materially deficient applications.²⁰

D. The decisions of the Division and the Bureau are fully consistent with precedent; in the other cases EchoStar cites, the Bureau permitted supplemental filings only because the rules were ambiguous

EchoStar is wrong when it argues that the Bureau deviated from precedent in dismissing its application while in other cases it has simply requested clarifying information from applicants rather than dismissing the application. *EchoStar AFR at 13-16*. The cases EchoStar cites are

¹⁹ As the Bureau explained, "allowing applicants to 'cure' defects, of the type noted herein, after filing could encourage applicants to file incomplete, internally inconsistent, or otherwise defective applications to receive 'first-in-line' status. This is patently inconsistent with the rationale underlying the 'first-come, first-served' procedure, which is designed to expedite service to the public." *See Bureau Decision ¶ 13* (emphasis in original).

²⁰ *See PanAmSat Licensee Corp., Order on Reconsideration*, DA 03-3633 (rel. Nov. 13, 2003), at ¶ 6 ("PanAmSat's argument that dismissal of its application as incomplete is inconsistent with previous practices is not convincing . . . Finding incomplete applications acceptable for filing is not consistent with the rules and policies adopted by the Commission in the [SSLR] Order and only serves to create uncertainty and inefficiencies in the licensing process.").

inapposite because none involved internally conflicting requests for frequencies or failure to identify which transponders will be connected to which spot beam. Rather, they all involved at most an applicant's failure to comply with an ambiguous rule.²¹ In such an instance, it is normal

²¹ See *Bureau Decision* ¶ 14 (“In those unusual instances where the Commission’s satellite information requirements have not been clearly set forth in a Commission rule, Order or Public Notice, we issue Public Notices to clarify the rules, but do not dismiss applications that do not contain the relevant information if they were filed before the release of the Public Notice.”)

See Letter from Robert Nelson, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary LLC, File No. SAT-AMD-20031118-00335 (April 23, 2004) and Letter from Thomas S. Tycz, Chief, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary LLC, DA 04-1095, File No. SAT-AMD-20040209-00014 (April 23, 2004). In these cases, the Bureau had issued a *Public Notice* in December 2003 clarifying an ambiguity in its rules regarding the need for a two-degree spacing analysis. See *December 2003 Public Notice*. Consistent with this *Public Notice*, the Bureau dismissed an amendment filed by MSV filed after December 2003 without this analysis but asked MSV to file a supplemental analysis in connection with an application that was filed prior to December 2003. Given the ambiguity in the Commission’s requirements, it was appropriate for the Bureau to require MSV to supplement rather than to dismiss the application filed before the issuance of the *Public Notice* clarifying the ambiguity. Conversely, in EchoStar’s case, there is no ambiguity in the requirements it failed to meet.

EchoStar also cites *DirectTV Enterprises LLC, Order and Authorization*, 19 FCC Rcd 7754 (2004). See also Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to David K. Moskowitz, EchoStar Satellite Corp., File Nos. SAT-LOA-20030605-00109, SAT-LOA-20030606-00107, SAT-LOA-20030609-00113 (Feb. 12, 2004). In these cases, the Bureau had issued a *Public Notice* in January 2004 clarifying that, although DBS applicants are not subject to first-come, first-served processing, they are nonetheless subject to the same “substantially complete” standard adopted in the *SSLR Order* for other satellite applicants. See *DBS Public Notice*, 19 FCC Rcd 1346 (2004). The Bureau requested the DBS applicants to supplement applications filed prior to January 2004 with certain information. Given the ambiguity in the Commission’s requirements pertaining to DBS applicants, it was appropriate for the Bureau to require the DBS applicants to supplement rather than to dismiss the applications filed before the issuance of the *Public Notice* clarifying the ambiguity. Conversely, in EchoStar’s case, there is no ambiguity in the requirements it failed to meet.

Finally, EchoStar cites two additional cases, Letter from Thomas S. Tycz, FCC, to Peter Hadinger, Northrop Grumman Space & Mission Systems Corporation, File No. SAT-AMD-20040312-00032 et al, DA 04-1725 (June 16, 2004) and Letter from Thomas S. Tycz, FCC, to David M. Drucker, contactMEO Communications, LLC, File No. SAT-AMD-20040322-00057 et al, DA 04-1722 (June 16, 2004). In these cases, the Bureau had issued two *Public Notices* in June 2004 clarifying ambiguities in its rules regarding (i) the need for a two-degree spacing analysis when there are no satellites using the same frequencies within two degrees of the proposed orbital location, and (ii) the information required for a casualty risk assessment. See

and appropriate for the Bureau to permit the applicant to supplement its application rather than have it dismissed. EchoStar places significant weight on an unchallenged Branch-level decision allowing an applicant to file supplemental information. See *EchoStar AFR* at 14-17 (citing *Loral Skynet*).²² This case, however, is fundamentally different than the case here because the application in that case included all the information required by the Commission's rules. *Bureau Decision* ¶ 16. The Bureau later requested the applicant to simplify the technical information provided and to verify certain assertions made, but it never challenged the completeness of the application.²³ In a case where an applicant complies with the Commission's rules, it is appropriate to request clarifications rather than to dismiss the application.²⁴ Unlike the applicant in that case, however, EchoStar failed to comply with two unambiguous Commission rules when it (i) omitted information regarding the manner in which its transponders and spot beams are to

June 2004 Public Notice; Public Notice, SPB-208, DA 04-1724 (June 2004). Given the ambiguity in the Commission's requirements, it was appropriate for the Bureau to reinstate applications dismissed prior to the release of the *Public Notices* for failing to provide the information as clarified. Conversely, in EchoStar's case, there is no ambiguity in the requirements it failed to meet.

²² See Letter from William Howden, Chief, Systems Analysis Branch, Satellite Division, International Bureau, FCC, to Stan Edinger, Loral Skynet Network Services, Inc., File No. SES-MOD-20030919-01302 (October 16, 2003) ("*Loral Skynet*").

²³ The Bureau acknowledged that it had not defined the showing required for an "effective competitive opportunities" analysis, thus making it appropriate for the Bureau to require the applicant in *Loral Skynet* to provide supplemental information in connection with this analysis rather than dismissing its application. See *Bureau Decision* n.52 (noting that the "Commission's rules do not require the applicant to provide specific documentation to affirm market access").

²⁴ EchoStar places particular emphasis on a footnote in which the Bureau stated that, even if the Systems Analysis Branch erred in failing to dismiss the application in *Loral Skynet*, the Bureau need not repeat the error here. *EchoStar AFR* at 17 (citing *Bureau Decision* ¶ 16 n.45). While accurate, this statement is nonetheless *dicta* and thus has no decisional significance here. Moreover, the Bureau did not state that it made a mistake in *Loral Skynet*. In fact, the Bureau clearly explained why it was proper to request supplemental information in *Loral Skynet* (because the applicant complied with all Commission rules and requirements) and inappropriate in this case (because EchoStar violated two unambiguous Commission rules which resulted in prejudice to the public and potential applicants). *Bureau Decision* ¶ 16.

be connected and (ii) failed to precisely identify the downlink frequencies that it was requesting.²⁵ Moreover, unlike in the present case, there was no evidence in the case EchoStar cites that other applicants or the public were prejudiced by the Bureau's having requested clarifications rather than dismissing the application.²⁶

²⁵ If the Commission were to reinstate EchoStar's application, fundamental fairness would dictate that the Bureau re-evaluate and potentially reinstate the approximately twenty other applications that have been dismissed since the beginning of first-come, first-served processing for failing to provide information mandated by unambiguous Commission rules and policies. In none of these cases did the Bureau afford applicants the opportunity to supplement their applications given the clear requirements of the Commission's rules. *See, e.g.*, Letter from Fern J. Jarmulnek, Deputy Chief, Satellite Division, Int'l. Bur., FCC to Mr. Robert Lewis, SkyTerra Communications Inc., DA 05-274, File Nos. SAT-LOA-20041029-00205, SAT-AMD-20041202-00215 (February 3, 2005) (dismissing application for failing to include downlink link budgets and appropriate antenna contour diagrams); Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to Mr. Brian Park, AfriSpace, Inc., DA 04-1719, File No. SAT-LOA-20040413-00082 (June 16, 2004) (dismissing application for failure to specify sufficient cross-polarization isolation); Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to Mr. Koichiro Matsufuji, Space Communications Corporation, DA 04-730, File No. SAT-PPL-20040120-00006 (April 22, 2004) (dismissing application for failure to provide technical information); Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to Mr. Vicente Rubio Carreton, Hispamar Satellites, S.A., File No. SAT-PPL-20040106-00001 (Feb. 24, 2004) (dismissing application for failure to provide technical information); Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to David K. Moskowitz, EchoStar Satellite Corp. DA 03-3893, File No. SAT-LOA-20030827-00170 (Dec. 8, 2003) (dismissing an application for failing to request a waiver to use proposed frequencies); Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to Kalpak Gude, PanAmSat Licensee Corp., DA 03-3313, File Nos. SAT-LOA-19951012-00165, SAT-AMD-19960202-00016, and SAT-AMD-20030827-00284 (Oct. 22, 2003) (dismissing application and amendment for failing to provide gain contours).

²⁶ *See Bureau Decision* ¶ 12 (stating that information concerning which transponders will be connected to which spot beam "allows the Commission, existing 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"); *see also MSV Opposition to EchoStar Recon Petition* at 7 (noting that EchoStar's failure to identify which transponders will be connected to which spot beam deprived MSV of information that would have been useful in determining whether EchoStar's sharing proposal is technically feasible); *id.* at 5-7 (noting that EchoStar's failure to specify which frequencies it was requesting prejudiced potential applicants by forcing them to consider whether to risk expending resources preparing an application for the 10.70-10.75 GHz band that might ultimately obtain only second-in-line status if EchoStar in fact was ultimately deemed to have applied for these frequencies).

E. The Division and the Bureau properly decided to dismiss both the original application and the subsequent amendment

EchoStar is also wrong when it argues that the Bureau deviated from precedent by dismissing its August 2003 application in addition to its November 2003 amendment. *EchoStar AFR* at 17. This argument ignores the fact that both its original application and its subsequent amendment contained the same failure to identify the connections between the spot beams and transponders. It also ignores the fact that the failure of the original application to seek a waiver of NG104 was the basis for the dismissal of another EchoStar application filed the same day.²⁷ MSV challenged the original application on this ground, among others, and this issue must be addressed before the Commission's gives any consideration to reinstatement of EchoStar's application. Finally, EchoStar never raised this argument before the Bureau in its Petition for Reconsideration, and it is thus barred from raising this issue in its Application for Review. 47 C.F.R. § 1.115(c).²⁸

²⁷ See Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to David K. Moskowitz, EchoStar Satellite Corp., DA 03-3893, File No. SAT-LOA-20030827-00170 (December 8, 2003).

²⁸ The two cases EchoStar cites to support its claim are inapposite. In the MSV case, the Bureau issued a *Public Notice* in December 2003 clarifying an ambiguity in its rules regarding the need for a two-degree spacing analysis. See *December 2003 Public Notice*. Consistent with this *Public Notice*, the Bureau dismissed an MSV amendment that was filed after December 2003 without this analysis but asked MSV to file a supplemental analysis in connection with the underlying application that was filed prior to December 2003. See Letter from Robert Nelson, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary LLC, File No. SAT-AMD-20031118-00335 (April 23, 2004) (requesting supplemental information for application filed prior to December 2003) and Letter from Thomas S. Tycz, Chief, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary LLC, DA 04-1095, File No. SAT-AMD-20040209-00014 (April 23, 2004) (dismissing amendment to same application filed after December 2003). Given the clarification of the ambiguity in the Commission's requirements, it was appropriate and consistent with established policy for the Bureau to keep MSV's underlying application on file while dismissing its amendment. MSV's amendment was subsequently reinstated because the Bureau found that its requirements were ambiguous. See *MSV Reinstatement Order*.

II. COMMISSION REVIEW MUST BE FAIR TO MSV

A. The Commission must consider the deficiencies MSV raised in its 2003 Petition to Deny

Before the Commission permits EchoStar to amend its application to correct its errors, it must also address the deficiencies raised in MSV's 2003 Petition to Deny. *See MSV Petition to Deny*, supra note 7. As discussed above, these include at least one deficiency -- the failure to request a waiver of the prohibition on the use of the frequencies for domestic service -- that has already been the basis for dismissal of another application EchoStar filed simultaneously.²⁹

In the SES case, the applicant included an analog emission designator for the first time in an amendment but failed to provide required technical information for this type of service. *See* Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to Karis A. Hastings, Counsel for SES Americom, Inc., DA 04-1707, File No. SAT-AMD-20040528-00110 (June 10, 2004). The original underlying application, however, was substantially complete as filed and thus was not dismissed.

Moreover, unlike in the MSV and SES cases, the Division found that EchoStar's amendment subsumed its original application. *EchoStar Dismissal* at 1. The Division acted consistently with established precedent in dismissing EchoStar's original application and amendment based on the finding that the amendment subsumed the original underlying application. *See* Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to Kalpak Gude, PanAmSat Licensee Corp., DA 03-3313, File Nos. SAT-LOA-19951012-00165, SAT-AMD-19960202-00016, and SAT-AMD-20030827-00284 (Oct. 22, 2003) (dismissing both application and amendments based on finding that original application was subsumed by subsequent amendments); *see also* Letter from Thomas Tycz, FCC, to Peter Hadinger, Northrop Grumman Space & Mission Systems Corporation, File No. SAT-LOA-19970904-00081 et al (May 18, 2004) (dismissing an underlying application based on a deficient amendment because amendment replaced technical information in underlying application). In the MSV case, the Bureau properly did not make a finding that MSV's February 2004 amendment subsumed its original application. MSV stated that its amendment was filed solely to request an additional 50 MHz of feeder link spectrum. *MSV February 2004 Amendment* at 1. While MSV amended and restated the Technical Appendix from its November 2003 application "for the convenience of Commission staff" (*id.* at 1-2), MSV never stated or implied that this amendment was intended to replace the November 2003 application in its entirety.

²⁹ *See* Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to David K. Moskowitz, EchoStar Satellite Corp., DA 03-3893, File No. SAT-LOA-20030827-00170 (December 8, 2003).

B. The Commission must treat any amendment by EchoStar as a major amendment

EchoStar asked the Bureau to reinstate its application and stated that after reinstatement it would file a further amendment correcting the errors in its application. *EchoStar Recon Petition* at 11. This would require EchoStar to change the frequencies it is requesting in one of the conflicting sections of its application. The Commission's rules, however, specify that any "change" in the frequencies requested in a pending application is a major amendment. 47 C.F.R. § 25.116(b)(2).³⁰ A major amendment to a pending application causes the application to be considered newly filed. *SSLR Order* ¶ 139. Thus, even if the Bureau reinstates EchoStar's application, it must be considered as filed at the time EchoStar files its further major amendment.

C. The Commission should not penalize MSV for relying on the dismissal of EchoStar's application in amending its own application

Even before EchoStar's application was dismissed, MSV was first-in-line relative to EchoStar for 250 MHz. Since the dismissal, and in reliance on it, MSV submitted an amendment requesting the additional 50 MHz, for which it is now also first in line. Moreover, MSV has relied on the availability of these frequencies to design and develop its next-generation system, including negotiations with satellite manufacturers. A decision now to reinstate EchoStar's application thus has the potential to be extremely prejudicial to MSV.

Should the Commission nonetheless reinstate EchoStar's application *nunc pro tunc* as filed on November 26, 2003, the Bureau should ensure at a minimum that EchoStar does not assume first-in-line status with respect to the 250 MHz of Planned Ku-band spectrum for which MSV originally filed in December 2000 (11.2-11.45 GHz band (downlink) and 12.75-13.00 GHz

³⁰ See also *Mobile Phone* (holding that a letter purporting to correct a "clerical error" as to which frequency was requested constitutes a major amendment that caused the application to be considered newly filed).

band (uplink)). In MSV's *February 2004 Amendment*, MSV merely requested the additional 50 MHz of Planned Ku-band spectrum for which it did not previously apply in December 2000 (10.70-10.75 GHz (downlink) and 13.15-13.20 GHz (uplink)). The Bureau's dismissal of EchoStar's application clarified any ambiguity as to whether EchoStar in fact had an application on file for frequencies in the 10.70-10.75 GHz band. Based on this dismissal, MSV was able to amend its application to add these additional frequencies and obtain first-in-line status. To obtain first-in-line status, MSV had no choice but to file this amendment immediately upon dismissal of EchoStar's application before any other potential applicant submitted an application and before a challenge of the Bureau's decision became final.³¹ EchoStar has agreed that MSV should retain first-in-line status for the 250 MHz of Planned Ku-band frequencies for which MSV originally filed in December 2000.³²

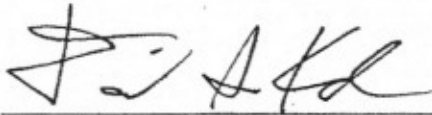
³¹ If MSV had waited until a challenge of the Bureau's decision became final to file this amendment, MSV would have been prevented from obtaining first-in-line status by EchoStar refiling its application at any time while its challenge was pending. Indeed, EchoStar did precisely this by simultaneously challenging the Bureau's decision and refiling a corrected application.

³² See EchoStar, Reply, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (April 5, 2004), at 9 ("EchoStar accepts that upon reinstatement of its application it should not assume first-in-line status for the frequencies originally requested by MSV.").

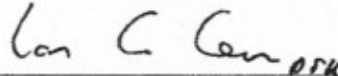
Conclusion

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

Respectfully submitted,



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Dated: February 10, 2005

CERTIFICATE OF SERVICE

I, Sylvia A. Davis, a secretary with the law firm of Shaw Pittman LLP, hereby certify that on this 10th day of February 2005, served a true copy of the foregoing "Opposition to Application for Review" by first class United States mail, postage prepaid, upon the following:

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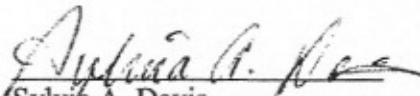
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Before the
Federal Communications Commission
Washington, D.C. 20554

ORIGINAL
Received
AUG 25 2005

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)

) Policy Branch
) International Bureau
) File No. SAT-LOA-20040210-00015
) File No. SAT-AMD-20040428-00085
) Call Sign S2615

RECEIVED

AUG 18 2005

Federal Communications Commission
Office of Secretary

OPPOSITION TO PETITION FOR RECONSIDERATION

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Dated: August 18, 2005

Summary

In adopting its first-come, first-served satellite licensing rules, the Commission explained that it would deny pending mutually-exclusive applications in the satellite queue when the first-in-line application is granted. The Bureau acted consistent with this unambiguous policy when it denied EchoStar's second-in-line application for Planned Ku-band frequencies at 101°W after grant of MSV's first-in-line application. Accordingly, the Bureau's decision should be upheld.

While EchoStar claims that there was not sufficient record evidence for the Bureau to find mutual exclusivity in this case, the fact is that EchoStar as the second-in-line applicant and the proponent of sharing never demonstrated that it could operate using the same frequencies at the same orbital location as MSV without causing harmful interference to MSV. EchoStar's bare assertion that sharing may be possible is not sufficient to eliminate mutual exclusivity. While EchoStar on reconsideration provides information purporting to demonstrate the feasibility of sharing, this comes too late. In any event, the information EchoStar provides does not undermine the Bureau's finding of mutual exclusivity. At bottom, EchoStar is asking the Bureau to restrict MSV's flexibility to operate feeder link earth stations now and in the future. This conflicts with the nationwide license MSV has been granted, which is critical to the operation of MSV's innovative system. EchoStar has cited no Commission policy or precedent that requires a licensee to accommodate a second-in-line applicant by modifying its design and sacrificing its flexibility.

EchoStar's various pending challenges to the Bureau's previous decisions do not undermine MSV's first-in-line status. It is standard Commission practice to act on applications despite the pendency of arguably related challenges. In any event, the issues raised in the challenges EchoStar cites are not impacted by the denial of its application.

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

In the matter of)	
)	
EchoStar Satellite LLC)	File No. SAT-LOA-20040210-00015
)	File No. SAT-AMD-20040428-00085
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)	Call Sign S2615

OPPOSITION TO PETITION FOR RECONSIDERATION

Mobile Satellite Ventures Subsidiary LLC (“MSV”) hereby submits this Opposition to the Petition for Reconsideration filed by EchoStar Satellite L.L.C. (“EchoStar”) of the International Bureau’s (“Bureau”) denial of EchoStar’s above-referenced, mutually exclusive, second-in-line application for Planned Ku-band frequencies at 101°W.¹ The Bureau complied with the Commission’s first-come, first-served satellite processing rules in denying the application. Accordingly, the Bureau’s decision should be upheld.

Background

In July 1998, MSV filed an application to launch and operate “MSV-1,” a higher-power, replacement Mobile Satellite Service (“MSS”) satellite for its current in-orbit satellite with substantially greater capacity.² In its original application and subsequent amendments, MSV

¹ See, *EchoStar Satellite LLC*, DA 05-1955 (July 6, 2005) (“*EchoStar Denial Order*”).

² See Application of AMSC, File No. SAT-LOA-19980702-00066 (July 2, 1998). The Bureau dismissed a February 2004 amendment to this application because MSV did not include a two-degree spacing analysis. See Letter from Thomas Tycz, FCC, to Lon C. Levin, MSV, File No. SAT-AMD-20040209-00015, DA 04-1095 (April 23, 2004). On reconsideration, the Bureau reinstated the amendment after acknowledging that its rules were ambiguous. See *Order*, File No. SAT-AMD-20040209-00014 (September 15, 2004). EchoStar filed an Application for Review of the Bureau’s reinstatement, which MSV has opposed. See *EchoStar*, Application for

applied to use all 500 MHz of Planned Ku-band frequencies for feeder links at 101°W.

Moreover, MSV applied to use a broad Planned Ku-band feeder link beam which permits MSV to locate its feeder link earth stations anywhere within the United States and to transmit nationwide.³

In February 2004, EchoStar filed a second-in-line application for 300 MHz of Planned Ku-band frequencies at 101°W for which MSV was first-in-line.⁴ EchoStar's application was premised on its belief that it can share the same frequencies licensed to MSV-1 at the same orbital location to cover the same geographic area. EchoStar conceded that its sharing proposal is contingent upon conclusion of a coordination agreement with MSV.⁵

On May 23, 2005, the Bureau granted MSV's application, licensed MSV-1 to use as feeder links the entire 500 MHz of Planned Ku-band frequencies, and approved MSV's request to operate with a global feeder link beam that effectively precludes the operation of any other

Review, File No. SAT-AMD-20040209-00015 (October 15, 2004); MSV, Opposition to Application for Review, File No. SAT-AMD-20040209-00015 (November 1, 2004). MSV's Opposition is Attached as Exhibit A and is incorporated herein by reference. EchoStar's challenge is pending.

³ See AMSC, Application, File No. SAT-LOA-19980702-00066 (July 2, 1998), at Figure 4; MSV, Amendment, File No. SAT-AMD-20040209-00014 (February 9, 2004) ("*MSV February 2004 Amendment*"), at Appendix A, Figure 1-8.

⁴ See Application of EchoStar, File No. SAT-LOA-20040210-00015 (February 10, 2004) ("*EchoStar Application*"). The Bureau dismissed a previous version of this application because it was incomplete and otherwise not in compliance with two unambiguous Commission rules. See Letter from Thomas S. Tycz, FCC, to David K. Moskowitz, EchoStar, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (February 9, 2004). EchoStar filed a Petition for Reconsideration of this decision, which the Bureau denied. See *Order on Reconsideration*, DA 04-4056 (December 27, 2004). EchoStar has filed an Application for Review of the Bureau's decision, which MSV opposed. See EchoStar, Application for Review, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (January 26, 2005); MSV, Opposition to Application for Review, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (February 10, 2005) ("*MSV AFR*"). MSV's Opposition is Attached as Exhibit B and is incorporated herein by reference. EchoStar's challenge is pending.

⁵ See *EchoStar Application* at 7, 24-26.

satellite on those frequencies at that orbital location covering the same geographic area.⁶ The grant of MSV's application was the culmination of a seven-year effort for approval of the next-generation system design. MSV has invested hundreds of millions of dollars developing its system and has raised hundreds of millions more to implement its vision. MSV has posted its required \$3 million bond for the satellite and is now in the process of seeking proposals from satellite vendors.⁷

On July 6, 2005, the Bureau denied EchoStar's pending second-in-line application. *See EchoStar Denial Order*. The Bureau explained that MSV had first-in-line status for all 500 MHz of Planned Ku-band frequencies at 101°W. *See id.* ¶ 4. Given the grant of the first-in-line MSV-1 application, the Bureau explained that the Commission's rules mandated denial of the second-in-line EchoStar application because, if granted, it would cause harmful interference to MSV's licensed operations.⁸ The Bureau further noted its statement in the *MSV-1 Order* that a

⁶ *See Mobile Satellite Ventures Subsidiary LLC, Order and Authorization*, DA 05-1492 (May 23, 2005) ("*MSV-1 Order*"). EchoStar filed a Petition for Clarification and/or Reconsideration of the Bureau's decision, asking the Bureau to clarify that grant of MSV's application will not result in dismissal of EchoStar's application. *See EchoStar, Petition for Clarification and/or Reconsideration*, File Nos. SAT-LOA-19980702-00066 et al (June 22, 2005). MSV opposed EchoStar's Petition, citing the Bureau's subsequent decision to deny EchoStar's mutually exclusive application pursuant to the Commission's first-come, first-served processing rules. *See MSV, Opposition*, File Nos. SAT-LOA-19980702-00066 et al (July 7, 2005) ("*MSV Opposition*"). MSV also filed a Petition for Clarification or Partial Reconsideration of the decision asking the Bureau to clarify that MSV-1 is permitted to operate with a $\pm 0.1^\circ$ East-West station-keeping box. *See MSV, Petition for Clarification and Partial Reconsideration*, File Nos. SAT-LOA-19980702-00066 et al (June 22, 2005).

⁷ *See Letter from Jennifer A. Manner, Vice President, MSV, to Ms. Marlene H. Dortch, FCC*, File No. SAT-LOA-19980702-00066 et al (June 17, 2005); *Press Release, Mobile Satellite Ventures Enters New Phase in the Development of Next Generation Wireless Network* (June 27, 2005) (available at http://www.msvlp.com/pr/news_releases_view.cfm?id=65).

⁸ *See EchoStar Denial Order* ¶ 4 (citing 47 C.F.R. § 25.158(b)(3)(ii) (precluding grant of GSO-like applications if "the proposed satellite will cause harmful interference to any previously licensed operations") and *Amendment of the Commission's Space Station Licensing Rules and Policies, First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No.

coordination agreement between MSV and EchoStar regarding sharing of Planned Ku-band frequencies at 101°W is a prerequisite to the Bureau's consideration of an EchoStar application that proposes co-frequency operations. *See EchoStar Denial Order* n.7 (citing *MSV-1 Order* n. 45). Accordingly, the Bureau explained that it would not keep EchoStar's application on file based on EchoStar's bare assertions that sharing may be possible and that it may reach a coordination agreement with MSV in the future. *Id.*

On August 5, 2005, EchoStar filed a Petition for Reconsideration of the Bureau's decision denying its application.⁹ EchoStar asks the Bureau to reinstate its application and then grant it subject to coordination with MSV. *See EchoStar Petition* at 16.

Discussion

I. THE BUREAU COMPLIED WITH COMMISSION RULES AND POLICIES IN DENYING ECHOSTAR'S MUTUALLY EXCLUSIVE APPLICATION

In denying EchoStar's application, the Bureau appropriately applied unambiguous Commission rules and policies. In adopting its satellite licensing rules in August 2003, the Commission explained that it would deny pending conflicting applications in the satellite queue when the first-in-line application is granted.¹⁰ The Commission explained that this policy would

02-34, 18 FCC Rcd 10760, ¶ 113 (2003) ("*Space Station Reform Order*") ("We decide not to keep subsequently filed applications on file. In other words, 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 application does not construct its satellite system.")).

⁹ *See* EchoStar Satellite LLC, Petition for Reconsideration, File Nos. SAT-LOA-20040210-00015, SAT-AMD-20040428-00085 (August 5, 2005) ("*EchoStar Petition*").

¹⁰ *See* 47 C.F.R. § 25.158(b)(3)(ii); *Space Station Licensing Reform Order* ¶ 113. EchoStar did not request a waiver of this policy in filing its second-in-line application.

result in faster service to the public.¹¹ Because EchoStar's second-in-line application was mutually exclusive with the MSV-1 application, the Commission's policies mandated that the Bureau deny EchoStar's second-in-line application after grant of the MSV-1 application. *See EchoStar Denial Order* ¶ 4.

EchoStar is wrong when it claims that its application was not mutually exclusive with the MSV-1 application. *See EchoStar Petition* at 2. The Commission considers two applications to be mutually exclusive "if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of [the] other application." 47 C.F.R. § 25.155. The Bureau appropriately concluded that EchoStar's proposed operations, if permitted, would cause harmful interference to MSV-1, thus rendering the applications mutually exclusive. *See EchoStar Denial Order* ¶ 4.

While EchoStar claims that the Bureau reached this conclusion without an adequate record,¹² the fact is that EchoStar as the second-in-line applicant and the proponent of sharing never demonstrated that the parties could share without causing harmful interference to MSV. As the Bureau explained in its decision, the only information in the record as to the possibility of sharing was EchoStar's bare assertion that it was possible. *See EchoStar Denial Order* n.7. If a bare assertion that sharing is possible was sufficient to eliminate mutual exclusivity, the Commission's first-come, first-served satellite licensing process would grind to a halt as the Bureau processes speculative applications based on unspecified coordination proposals. This would undermine the goals of certainty, expedited processing, and faster service to the public the

¹¹ *Id.* ("[W]e will deny applications that conflict with previously granted applications because it is more likely to result in faster service to the public, and it will not disadvantage any party that may wish to apply for that orbit location if it becomes available.").

¹² *See EchoStar Petition* at 10-11.

Commission sought to achieve in adopting first-come, first-served licensing.¹³ Moreover, EchoStar has conceded throughout this proceeding that its use of Planned Ku-band frequencies at 101°W would cause harmful interference to MSV unless the parties reached a coordination agreement first.¹⁴ The mere fact that MSV and EchoStar need to enter into a coordination agreement before EchoStar could operate its proposed system in order to avoid harmful interference to MSV-1 demonstrates that its proposal was mutually exclusive with MSV-1.¹⁵

Only in its Petition for Reconsideration does EchoStar now provide information purporting to demonstrate the feasibility of sharing. In addition to being too late to consider now,¹⁶ the information EchoStar provides does nothing to undermine the Bureau's decision to deny the EchoStar application. At bottom, EchoStar is asking the Bureau to restrict MSV's flexibility to operate feeder link earth stations now and in the future. Indeed, under EchoStar's proposal, MSV would be permitted to operate no more than four feeder link earth stations and would not be permitted to relocate those earth stations.¹⁷ Such a request is inappropriate for at least three reasons. First, it ignores the fact that the Bureau has already granted MSV a

¹³ See *Space Station Licensing Reform Order* ¶ 1 (“these procedures will lead to substantial public interest benefits, including faster provision of satellite services to the public, and maintenance of the United States’ position as the leader of the global satellite industry”); *id.* ¶ 45 (“clearly defined initial operating rights reduces regulatory uncertainty, and so encourages investment”).

¹⁴ See *EchoStar Application* at 7, 24-26; *EchoStar Petition* at 12, 16, Attachment A at 1, 12 (“coordination between the parties is necessary”).

¹⁵ Despite acknowledging the need for prior coordination, EchoStar never once approached MSV to discuss coordination for over eighteen months after filings its application. It was not until after MSV's first-in-line application was granted that EchoStar sought to discuss sharing with MSV.

¹⁶ The Bureau has explained that information provided in a Petition for Reconsideration of a decision dismissing an application cannot be used to reinstate an initial application. *PanAmSat Licensee Corp., Order on Reconsideration*, DA 03-3633 (rel. Nov. 13, 2003), at ¶ 7.

¹⁷ See *EchoStar Petition*, Attachment A.

nationwide and exclusive license to use Planned Ku-band spectrum.¹⁸ Second, it refuses to acknowledge that a nationwide and exclusive license is critical to the development of MSV's system because it provides flexibility with respect to the operation of additional feeder link earth stations as well as the location and potential relocation of those feeder link earth stations. EchoStar has cited no Commission policy or precedent that requires a licensee to accommodate a second-in-line applicant by modifying its system design and sacrificing its flexibility. Third, it ignores the fact that the Commission's first-come, first-served licensing policy for geostationary satellites "was designed to give applicants filing first the sole license to operate on the proposed frequencies."¹⁹ EchoStar's claim that MSV should receive only a limited authorization is thus directly contrary to first-come, first-served licensing.

EchoStar also raises a number of extraneous issues that fail to undermine the Bureau's decision. While EchoStar argues that MSV will not use spectrum efficiently,²⁰ MSV's proposed use of the Planned Ku-band represents the most efficient use of the band possible. MSV's use of Planned Ku-band feeder link spectrum is an essential element of its next-generation MSS system, which represents a critical advancement in MSS technology. This system will provide voice and broadband services to rural and remote areas as well as dense urban centers using small, handheld wireless devices that are virtually identical to current cellular phones in terms of aesthetics, cost, form factor, and functionality. Moreover, as MSV has explained previously, it may propose to modify the present design of MSV-1 to intensify the use of its feeder link

¹⁸ The Bureau granted MSV's request for a broad feeder link beam which permits MSV to locate its feeder link earth stations anywhere within the United States and to transmit nationwide. *See MSV February 2004 Amendment*, Appendix A at 5 and Figure 1-8; *see also* AMSC, Application, File No. SAT-LOA-19980702-00066 (July 2, 1998), at Figure 4.

¹⁹ *MSV-1 Order* ¶ 16.

²⁰ *See EchoStar Petition* at 3, 11.

spectrum by deploying spot beams and as many as three or four additional earth stations.²¹ Such a modification would be consistent with the Commission's policies to encourage licensees to achieve greater spectrum efficiency in the use of their licensed spectrum without harming other operators. Regardless of the amount of reuse MSV proposes, MSV's use of the Planned Ku-band represents a far more efficient use than EchoStar's proposal, which involves the operation of consumer units which will be vulnerable to interference from terrestrial operators and, to the extent the EchoStar units provided two-way service, could cause interference to those terrestrial operations.²²

While EchoStar argues that denial of the application preempts coordination discussions between MSV and EchoStar, this is not the case. See *EchoStar Petition* at 13-14. EchoStar does not need to have a mutually exclusive, second-in-line application pending in order to discuss coordination with MSV or any other satellite operator. Rather, the appropriate course of action would be for EchoStar to first reach a private agreement with a satellite operator setting forth the technical parameters for sharing and then seek Commission approval for a satellite system that complies with those parameters.²³ Such an approach is consistent with Commission policies that

²¹ See *MSV February 2004 Amendment*, Appendix A at 5; *MSV Opposition* at 4-5.

²² See *EchoStar Application, Technical Annex* at 1, 12 n.3; see also *EchoStar, Application*, File No. SAT-LOA-20030827-00179 (filed August 27, 2003), Exhibit 1 at 1, 3, 8, 9, 10, 18, 19.

²³ Of course, EchoStar could avoid the need for coordination entirely by applying to use Planned Ku-band frequencies at an orbital location where the frequencies are not already licensed. While 101°W is the orbital location assigned to the United States under the Appendix 30B plan, EchoStar could pursue a Planned Ku-band license at another orbital location assigned to another administration by proposing an amendment to the Appendix 30B plan. See *Mobile Satellite Ventures Subsidiary LLC, Order and Authorization*, DA 05-50 (January 10, 2005) (granting license to use Planned Ku-band frequencies at 63.5°W pursuant to amendment to Appendix 30B plan); *Boeing, Order and Authorization*, DA 03-2073 (Chief, Int'l Bur. and Chief, OET, June 24, 2003) (granting license to use Planned Ku-band frequencies at 120°W pursuant to amendment to Appendix 30B plan; Boeing has since relinquished its license, thereby making these frequencies

encourage licensees to enter into private arrangements for sharing of licensed frequencies with third parties.²⁴

Despite EchoStar's claim,²⁵ the Bureau's "normal practice" is to deny applications that are premised on potential sharing, rather than granting the application conditioned on unspecified future coordination. Indeed, the Commission's satellite processing rules mandate denial of satellite applications premised on sharing before the Commission has established sharing rules. *See Space Station Licensing Reform Order* ¶ 58. Consistent with this rule, the Bureau denied four separate EchoStar applications for geostationary satellites proposing to share frequencies allocated for primary non-geostationary use before sharing rules had been established.²⁶

available for licensing). At such orbital locations, EchoStar would be first-in-line, thus avoiding the need to coordinate with other operators.

²⁴ *See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004); *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003); *In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licenses, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-148, 11 FCC Rcd 21831 (1996).

²⁵ *See EchoStar Petition* at 4.

²⁶ *See EchoStar LLC, Memorandum Opinion and Order*, DA 04-1167 (April 29, 2004). The Bureau dealt with similar facts in addressing an application filed by Globalstar to operate a geostationary satellite at 101°W using already licensed Ku-band frequencies, including the same frequencies at issue in this proceeding. *See Globalstar, Amendment, File No. SAT-AMD-20001103-00154* (November 3, 2000). Like EchoStar, Globalstar asked the Bureau to condition grant of its application upon successful coordination with other operators. *Id.* at 9 ("Globalstar will coordinate with any other satellite network that is authorized to operate in the same frequency band."). Instead, the Bureau denied the application because Globalstar failed to provide evidence sufficient to support its proposal. *See Application of Globalstar, L.P. for Authority to Launch and Operate a Mobile-Satellite Service System in the 2 GHz Band, Order and Authorization*, 16 FCC Rcd 13739, DA 01-1634 (Chief, Int'l Bur. and Acting Chief, OET; July 17, 2001), at ¶¶ 27-28.

While EchoStar argues that the decision in this case is at odds with prior Commission decisions to promote sharing,²⁷ EchoStar has cited no Commission precedent permitting co-frequency operation of collocated satellites. The only case EchoStar cites to support its claim pertains to co-frequency sharing between satellite and terrestrial operators, a sharing environment which already exists in the Planned Ku-band.²⁸ EchoStar's plan to locate a second Planned Ku-band satellite at 101°W only complicates the existing sharing environment between satellite and terrestrial operators in the Planned Ku-band.

II. ECHOSTAR'S PENDING CHALLENGES DO NOT UNDERMINE MSV'S FIRST-IN-LINE STATUS

There is no merit to EchoStar's claim that its various pending challenges to the Bureau's previous decisions undermine MSV's first-in-line status. *See EchoStar Petition* at 8-9. The Bureau has explained that its decision to deny EchoStar's application is without prejudice to these challenges. *See EchoStar Denial Order* n.3. Indeed, it is standard Commission practice to act on applications despite the pendency of arguably related challenges.²⁹ Moreover, the Bureau

²⁷ *See EchoStar Petition* at 11-12.

²⁸ *See id.* (citing *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules, First Report and Order*, 11 FCC Rcd 19005 (1996)). Indeed, the Planned Ku-band is heavily used by terrestrial operators. Use of both the Planned Ku-band uplink and downlink frequencies by GSO satellites is subject to footnote NG104, which stipulates that only "international systems (*i.e.*, other than domestic systems)" may use these frequencies. 47 C.F.R. § 2.106, footnote NG104. By restricting GSO use of the Planned Ku-band to only international systems, the Commission intended to limit the number of earth stations operating in these bands. *See Report and Order*, 39 FCC 2d 959, ¶¶ 37-38 (February 23, 1973); *Report and Order*, 70 FCC 2d 1193, ¶ 189 (Dec, 28, 1978). The Commission has explained that permitting only a limited number of earth stations would minimize interference to terrestrial operators and would avoid impeding the growth of terrestrial operations with burdensome coordination requirements. *See Boeing, Order and Authorization*, DA 03-2073 (Chief, Int'l Bur. and Chief, OET, June 24, 2003), at ¶ 15 ("The Commission adopted the NG104 restriction for the purpose of limiting the number of earth stations with which terrestrial Fixed Service applicants would have to coordinate in order to obtain licenses for operation in the 10.7-11.7 GHz and 12.75-13.25 GHz bands.").

²⁹ *See, e.g., General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, Memorandum Opinion and Order*, 19 FCC Rcd 473,

acted properly in dismissing EchoStar's November 2003 application and reinstating MSV's November 2004 application, and its decisions should be affirmed by the full Commission.³⁰

In any event, the issues raised in the challenges EchoStar cites are not impacted by the denial of its application. In the unlikely event EchoStar's Application for Review of the Bureau's dismissal of its November 2003 application is successful, then the most that EchoStar can expect is to have its application reinstated as filed on November 2003.³¹ In the unlikely event that EchoStar's challenge to the Bureau's reinstatement of MSV's February 2004 application is successful, then the most that EchoStar can expect is for the 50 MHz for which MSV applied in this application to become available on a first-come, first-served basis to all interested parties. The Commission has never stated that it would keep second-in-line applications such as EchoStar's on file pending the outcome of a challenge to the grant of the first-in-line application. Rather, according to the satellite licensing policies, if a license is

¶ 25 (2004) ("holding this proceeding in abeyance on the grounds advocated by EchoStar would only create uncertainty, delay, and expense that would disserve the public interest."); *Black Crow Wireless, L.P., Order*, 16 FCC Rcd 15643, ¶ 6 (Wireless Bureau, August 21, 2001).

³⁰ While EchoStar states that the Bureau should ensure that its processing standards are "used consistently and in an even handed manner" (*EchoStar Petition* at 9), that is exactly what the Bureau did in dismissing EchoStar's November 2003 application while reinstating MSV's November 2004 application. In EchoStar's case, it failed to provide information required by unambiguous Commission rules; in such a case, dismissal is appropriate. See *MSV AFR* (attached hereto as Exhibit B) at 11-14. In MSV's case, it did not include information required by a rule that the Bureau explained was ambiguous; in such an instance, it is normal and appropriate for the Bureau to permit the applicant to supplement its application rather than dismiss the application. *Id.*

³¹ As MSV has noted in its Opposition to EchoStar's Application for Review, even if EchoStar's application is reinstated, it must be considered as filed at the time EchoStar files its further major amendment specifying the frequencies it is requesting. See *MSV AFR* (attached hereto as Exhibit B) at 17.

revoked, the frequencies would be available to all interested parties, not solely to the entity that filed second-in-line.³²

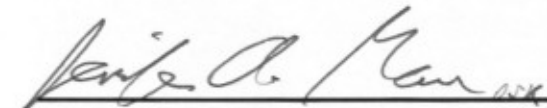
Conclusion

For the foregoing reasons, the Bureau's decision denying EchoStar's application should be upheld.

Respectfully submitted,



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Dated: August 18, 2005

³² *Space Station Licensing Reform Order* ¶ 113.

Exhibit A

MSV, Opposition to Application for Review
File No. SAT-AMD-20040209-00015 (November 1, 2004)

DUPLICATE
RECEIVED

NOV - 1 2004

Federal Communications Commission
Office of Secretary

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

In the Matter of)
)
Mobile Satellite Ventures Subsidiary LLC) File No. SAT-AMD-20040209-00014;
) Call Sign S2358
Amendment to Application for Authority to Launch)
and Operate a Replacement MSS Satellite at 101°W)

OPPOSITION TO APPLICATION FOR REVIEW

Mobile Satellite Ventures Subsidiary LLC ("MSV") hereby files this Opposition to the Application for Review filed by EchoStar Satellite L.L.C. ("EchoStar") of the decision of the International Bureau ("Bureau") to reinstate MSV's above-captioned amendment to its application for a replacement Mobile Satellite Service ("MSS") satellite.¹ EchoStar provides no basis for reversal of the Bureau's decision to reinstate MSV's application. The Bureau applied the "substantially complete" standard consistently in reinstating MSV's application while dismissing EchoStar's application for the same frequencies. Unlike MSV's omission of a two-degree spacing analysis which was not clearly required at the time its application was filed, EchoStar's failure to precisely specify the frequencies for which it was applying was a material error which prejudiced other applicants and potential applicants.

Background

Procedural History of EchoStar Application. On August 27, 2003, EchoStar filed an application for authority to launch and operate a satellite at 101°W using 250 MHz of Planned Ku-band frequencies for which MSV had already applied as well as the remaining 50 MHz of Planned Ku-band frequencies (*i.e.*, 10.70-10.75 GHz and 13.15-13.20 GHz) for which no entity

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

had applied.² Under the new first-come, first-served licensing policies for geostationary (“GSO”) satellites,³ EchoStar was second-in-line behind MSV with respect to 250 MHz of the 300 MHz it requested and first-in-line with respect to the remaining 50 MHz.

On November 26, 2003, EchoStar amended its pending application to correct certain deficiencies.⁴ On February 9, 2004, the Bureau dismissed EchoStar’s amended application as incomplete and otherwise not in compliance with the Commission’s rules for two independent reasons.⁵ First, the Bureau cited EchoStar’s failure to clearly identify the downlink frequencies it was requesting. *EchoStar Dismissal* at 1-2. As a result, the Bureau found that it was unable to determine the precise frequencies for which EchoStar was applying. *Id.* at 2. Second, the Bureau ruled that EchoStar’s application did not comply with Section 25.114(c)(5) of the rules because it failed to indicate which transponders will be connected to which spot beam in either the uplink or downlink direction. *Id.* EchoStar filed a Petition for Reconsideration of this decision, which is pending.⁶ In its Petition, EchoStar did not dispute that its application contained the errors and omissions identified by the Bureau. Rather, EchoStar argued that these errors and omissions were minor and its application was “substantially complete” taken as a whole. *EchoStar Recon Petition* at 2. MSV has opposed this Petition, noting that EchoStar’s

² Application of EchoStar, File No. SAT-LOA-20030827-00179 (filed August 27, 2003). Throughout this Opposition, references to the amount of spectrum refer to its use in both the uplink and downlink direction.

³ *First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-34, FCC 03-102 (rel. May 19, 2003) (“*Space Station Licensing Reform Order*”).

⁴ See EchoStar, Amendment, File No. SAT-AMD-20031126-00343 (November 26, 2003) (“*EchoStar November 2003 Amendment*”).

⁵ See Letter from Thomas S. Tycz, FCC, to David K. Moskowitz, EchoStar, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (February 9, 2004) (“*EchoStar Dismissal*”).

⁶ See EchoStar, Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 10, 2004) (“*EchoStar Recon Petition*”).

failure to specify clearly the frequencies it was requesting was material in that it prejudiced other applicants and potential applicants.⁷ MSV also explained that EchoStar's failure to indicate which transponders would be connected to which spot beam deprived MSV of information that would have been useful in determining whether EchoStar's sharing proposal is technically feasible. *MSV Opposition to EchoStar Recon Petition* at 7.

On February 10, 2004, EchoStar refiled an application for the 300 MHz of Planned Ku-band frequencies it previously requested in its November 2003 Amendment.⁸ The Bureau subsequently placed this application on *Public Notice*. See Report No. SAT-00203 (March 26, 2004).⁹

Procedural History of MSV Replacement Application. MSV is the successor to Motient Services Inc. ("Motient"), the entity authorized by the Commission in 1989 to construct, launch, and operate a United States MSS system in the L-band.¹⁰ MSV's current satellite was launched in 1995 and operates at 101°W. In July 1998, MSV filed an application to launch and operate a higher-power, replacement satellite with substantially greater capacity.¹¹ To accommodate this greater capacity, the application, as amended in December 2000, requested authority to use an

⁷ See MSV, *Opposition to Petition for Reconsideration*, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 24, 2004), at 5-7 ("*MSV Opposition to EchoStar Recon Petition*").

⁸ See Application of EchoStar, File No. SAT-LOA-20040210-00015 (February 10, 2004).

⁹ In its Comments on the application, MSV has explained that the Bureau must defer action on EchoStar's application until after MSV's first-in-line application is processed and granted. See Comments of MSV, File No. SAT-LOA-20040210-00015 (April 26, 2004) ("*MSV Comments*"); Response of MSV, File No. SAT-LOA-20040210-00015 (May 21, 2004) ("*MSV Response*").

¹⁰ *Order and Authorization*, 4 FCC Rcd 6041 (1989); *remanded by Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991); *Final Decision on Remand*, 7 FCC Rcd 266 (1992); *aff'd*, *Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275 (D.C. Cir. 1993); see also *AMSC Subsidiary Corporation, Memorandum Opinion and Order*, 8 FCC Rcd 4040 (1993).

¹¹ See Application of AMSC, File No. SAT-LOA-19980702-00066 (July 2, 1998).

additional 250 MHz of Planned Ku-band spectrum for feeder links beyond the 200 MHz for which MSV is already licensed.¹² Specifically, MSV's replacement application requested the following 450 MHz of Planned Ku-band spectrum at 101°W: 10.75-10.95 & 11.2-11.45 GHz (downlink) and 12.75-13.15 & 13.20-13.25 GHz (uplink). The only segment of the Planned Ku-band for which MSV is not currently licensed and did not apply in December 2000 was the following 50 MHz: 10.70-10.75 GHz (downlink) and 13.5-13.20 GHz (uplink). The Bureau placed MSV's amended application on *Public Notice* in March 2001. See Report No. SAT-00066 (March 19, 2001).

On November 18, 2003, MSV filed a minor amendment to its pending replacement application to revise the technical parameters of its proposed satellite, but did not request additional frequencies beyond those for which it had already applied.¹³

On December 3, 2003, the Bureau released a *Public Notice* clarifying the interference analysis that must be provided with a satellite application to demonstrate compliance with two-degree orbital spacing.¹⁴ The Bureau stated that an application filed after December 3, 2003 that does not contain this analysis would be dismissed, but an application filed before this date that did not contain this analysis would have to be supplemented but would not be dismissed.

On February 9, 2004, upon dismissal of EchoStar's November 2003 Amendment, MSV filed the above-captioned amendment to its pending application to request the 50 MHz of

¹² See Application of Motient Services Inc., SAT-AMD-20001214-00171 (December 14, 2000). In March 2001, MSV filed a second amendment in which it requested to operate terrestrial base stations, but did not request additional frequencies beyond those for which it had already applied. See Application of MSV, File No. SAT-ASG-20010302-00017 *et al.* (March 2, 2001).

¹³ See MSV, Minor Amendment, File No. SAT-AMD-20031118-00335 (November 18, 2003) ("*MSV November 2003 Amendment*").

¹⁴ See *Public Notice, Clarification of Space Station Application Interference Analysis*, SPB-195, DA 03-3863 (December 3, 2003) ("*December 2003 Public Notice*").

Planned Ku-band frequencies at 101°W for which it was not licensed and had not previously requested (10.70-10.75 GHz and 13.15-13.20 GHz).¹⁵ As a result, MSV gained first-in-line status for these frequencies. MSV explained in its amendment that there are no satellites authorized to operate using Planned Ku-band frequencies within two degrees of its proposed satellite at 101°W. *See MSV Amendment*, Appendix A at 4.

On April 23, 2004, the Bureau dismissed MSV's February 2004 Amendment for omitting a two-degree spacing analysis.¹⁶ As a result, EchoStar became first-in-line for the following 50 MHz of Planned Ku-band frequencies: 10.70-10.75 GHz (downlink) and 13.15-13.20 GHz (uplink).¹⁷ In compliance with the policy stated in the *December 2003 Public Notice*, the Bureau requested MSV to supplement its November 2003 Amendment with a two-degree spacing analysis but did not dismiss the amendment because it was filed prior to the *December 2003 Public Notice*.¹⁸

On May 24, 2004, MSV filed a Petition for Reconsideration of the Bureau's dismissal of its February 2004 Amendment, explaining that the Bureau erred in dismissing the application

¹⁵ *See MSV, Amendment*, File No. SAT-AMD-20090209-00014 (filed February 9, 2004) ("*MSV February 2004 Amendment*"). EchoStar has asked the Bureau to reinstate its November 2003 Amendment *nunc pro tunc*. *EchoStar Recon Petition*. In its Reply to MSV's Opposition to its Petition for Reconsideration, EchoStar accepts that if its application is reinstated *nunc pro tunc* as filed on November 26, 2003, it will not assume first-in-line status for the 250 MHz of Planned Ku-band frequencies for which MSV originally filed in December 2000 (11.2-11.45 GHz band (downlink) and 12.75-13.00 GHz band (uplink)). *See EchoStar, Reply*, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (April 5, 2004), at 9.

¹⁶ *See Letter from Thomas Tycz, FCC, to Lon C. Levin, MSV*, File No. SAT-AMD-20040209-00015, DA 04-1095 (April 23, 2004) ("*Bureau Decision*").

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

¹⁸ *See Letter from Robert G. Nelson, FCC, to Lon C. Levin, MSV*, File No. SAT-AMD-20031118-00335 (April 23, 2004).

because a two-degree spacing analysis is not required when there is no authorized satellite using the same frequencies within two degrees of the proposed satellite.¹⁹

On June 16, 2004, the Bureau issued a *Public Notice* confirming that the rules and its *December 2003 Public Notice* were ambiguous as to whether a two-degree spacing analysis is required when there are no authorized satellites using the same frequencies within two degrees of the proposed satellite.²⁰ The Bureau explained that the rules are “subject to conflicting, but reasonable, interpretations” and that “one reasonable interpretation of the rule is that if there are no authorized space stations [within 2 degrees], then no interference analysis is required.”²¹ While the Bureau clarified that such an analysis is required under these circumstances, it also reinstated two applications that had been previously dismissed for failing to include a two-degree spacing analysis under these circumstances given this ambiguity. *See Northrop Grumman Decision; contactMEO Decision.*

On September 15, 2004, the Bureau issued a decision reinstating MSV’s February 2004 Amendment.²² Consistent with its *June 2004 Public Notice*, the Bureau explained that one reasonable interpretation of its rules and policies is that if there are no authorized satellites within two degrees of a satellite proposed in an application using the same frequencies, then a two-

¹⁹ *See* MSV, Petition for Reconsideration, File No. SAT-AMD-20040209-00014 (May 24, 2004) (“*MSV Petition*”), at 7. EchoStar has opposed this Petition. *See* EchoStar Satellite LLC, Opposition to Petition for Reconsideration, File No. SAT-AMD-20040209-00014 (June 7, 2004) (“*EchoStar Opposition*”).

²⁰ *See Public Notice, Clarification of 47 C.F.R. § 25.140(b)(2): Space Station Application Interference Analysis*, SPB-207, DA 04-1708 (June 16, 2004) (“*June 2004 Public Notice*”).

²¹ *See* Letter from Thomas S. Tycz, FCC, to Peter Hadinger, Northrop Grumman Space & Mission Systems Corporation, File No. SAT-AMD-20040312-00032 et al, DA 04-1725 (June 16, 2004), 2-3 (“*Northrop Grumman Decision*”); *see also* Letter from Thomas S. Tycz, FCC, to David M. Drucker, contactMEO Communications, LLC, File No. SAT-AMD-20040322-00057 et al, DA 04-1722 (June 16, 2004), at 2 (“*contactMEO Decision*”).

²² *See Mobile Satellite Ventures Subsidiary LLC, Order*, File No. SAT-AMD-20040209-00014 (Satellite Division, International Bureau, September 15, 2004) (“*MSV Reinstatement Order*”).

degree spacing analysis is not required. *MSV Reinstatement Order* ¶ 11. The Bureau accordingly reinstated MSV's February 2004 Amendment. The Bureau noted that its action was consistent with its reinstatement of two similar applications. *Id.* (citing *Northrop Grumman Decision* and *contactMEO Decision*). In its decision, the Bureau required MSV to supplement its application with a two-degree spacing analysis by September 28, 2004. *Id.* ¶ 12. MSV timely filed this analysis,²³ and the Bureau subsequently placed MSV's amended application on *Public Notice* in October 2004. *See* Report No. SAT-00248 (October 8, 2004).

On October 15, 2004, EchoStar filed an Application for Review of the Bureau's decision to reinstate MSV's February 2004 Amendment. *See EchoStar Application for Review*. EchoStar does not dispute that at the time MSV filed its February 2004 Amendment the Commission's rules and policies were ambiguous as to whether a two-degree spacing analysis was required when there are no authorized satellites using the same frequencies within two degrees of the proposed satellite. Nor does EchoStar dispute that reinstatement of MSV's application was consistent with the Bureau's decision in the *Northrop Grumman Decision* and *contactMEO Decision*. Rather, EchoStar mostly repeats the arguments it has already made in its pending Petition for Reconsideration of the Bureau's decision dismissing its November 2003 Amendment. *EchoStar Recon Petition*. EchoStar argues that the Bureau held MSV to a "much less exacting standard" in determining that MSV's application was "substantially complete" while dismissing EchoStar's application. *EchoStar Application for Review* at 1, 5. EchoStar characterizes MSV's omission of a two-degree spacing analysis to be a material error which warranted dismissal whereas its own failures to clearly specify the frequencies it was requesting and to indicate which transponders would be connected to which spot beam were minor errors

²³ *See* MSV, Amendment, File No. SAT-AMD-20040928-00192 (September 28, 2004).

which did not warrant dismissal. *Id.* at 6-8. EchoStar asks the Commission to ensure that the “substantially complete” standard is applied consistently. *Id.* at 9.

Discussion

I. The Bureau Acted Properly In Reinstating MSV’s February 2004 Amendment

The Bureau reinstated MSV’s February 2004 Amendment because the Commission’s rules as well as the *December 2003 Public Notice* were ambiguous as to whether a two-degree spacing analysis is required when there are no authorized satellites using the same frequencies within two degrees of the satellite proposed in an application. There are no satellites authorized to operate using Planned Ku-band frequencies within two degrees of MSV’s proposed replacement satellite at 101°W. EchoStar does not contest this point nor does it contend that when MSV filed its February 2004 Amendment the Commission’s rules and policies clearly required MSV to submit a two-degree spacing analysis. Accordingly, EchoStar has offered no basis for reversal of the Bureau’s decision to reinstate MSV’s February 2004 Amendment.²⁴

II. The Bureau Has Applied the “Substantially Complete” Standard Consistently in Reinstating MSV’s Application While Dismissing EchoStar’s Application

The Commission’s rules provide that satellite applications will be processed if they are “substantially complete” when they are filed.²⁵ Under a “substantially complete” standard, minor errors in an application do not warrant dismissal of the application. While EchoStar

²⁴ EchoStar claims that MSV was required to submit a two-degree spacing analysis because MSS feeder links are considered to be a Fixed Satellite Service (“FSS”), and the Commission’s rules clearly require a two-degree spacing analysis to be submitted with an application for FSS frequencies. *EchoStar Application for Review* at 6. This is irrelevant. The Bureau reinstated MSV’s application because the Commission’s rules and policies were ambiguous as to whether a two-degree spacing analysis is required when there are no authorized satellites using the same frequencies within two degrees of the proposed satellite. Regardless of whether the frequencies for which MSV applied were FSS frequencies, the Bureau found that MSV acted reasonably in omitting a two-degree spacing analysis given this ambiguity.

²⁵ *Space Station Licensing Reform Order* ¶ 244.

claims that the Bureau applied this standard inconsistently in reinstating MSV's application while dismissing EchoStar's, there is a fundamental difference between the two applications that justified the Bureau's action. Unlike MSV's omission of a two-degree spacing analysis that was in fact not required at the time its application was filed, EchoStar's failure to clearly state the frequencies for which it was applying violated the Commission's rules²⁶ and prejudiced potential applicants under first-come, first-served licensing.²⁷ Clear and accurate specification of the frequencies requested in an application is essential so that potential applicants have unambiguous notice as to which frequencies are available for assignment, thereby avoiding prejudice to other potential applicants.²⁸ The internal inconsistencies in EchoStar's application created uncertainty

²⁶ See 47 C.F.R. § 25.114(c)(4) (requiring application to list radio frequencies requested); 47 C.F.R. § 25.112(a)(1) (listing internal inconsistencies as grounds for dismissal of an application).

²⁷ See *MSV Opposition to EchoStar Recon Petition* at 6-8. Moreover, EchoStar's failure to indicate which transponders will be connected to which spot beam deprived MSV of information that would have been useful in determining whether EchoStar's sharing proposal is technically feasible. *Id.* at 7.

²⁸ The Commission has recognized that inconsistencies in the frequency requested in an application cannot be considered a mere clerical error because of the potential for prejudice to other applicants. *Mobile Phone of Texas, Inc., Memorandum Opinion and Order*, 5 FCC Rcd 3459 (Chief, Common Carrier Bureau, June 12, 1990). In *Mobile Phone*, in response to a *Public Notice* establishing a 60-day cut-off window for Public Land Mobile Service frequency 152.15 MHz, Mobile Phone filed an application that was internally inconsistent as to whether it was requesting frequency 152.15 MHz or 152.09 MHz. Mobile Phone later filed a letter clarifying that it intended to apply for frequency 152.15 MHz. The Mobile Services Division ("MSD") deemed this letter to be a major amendment causing Mobile Phone's application to be filed outside of the 60-day cut-off window. The MSD thus dismissed the application. Mobile Phone filed a Petition for Reconsideration of the MSD's action seeking reinstatement of its application arguing that its letter was merely intended "to clarify ambiguous information in its timely filed application." *Id.* ¶ 5. The Common Carrier Bureau rejected Mobile Phone's Petition because reinstating its application would be unfair to other applicants by increasing the number of mutually exclusive applicants and would harm the public interest by delaying service to the public. *Id.* ¶ 8. Moreover, while the Common Carrier Bureau recognized that it had been the practice of the MSD to request corrections regarding minor technical data, it explained that "this practice is not utilized to correct frequency errors." *Id.* n.14.

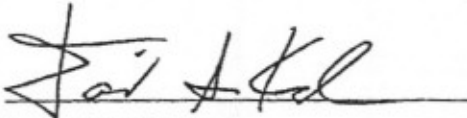
Similarly, the Commission has held that an application for a broadcast station will be dismissed if there are internal inconsistencies regarding the coordinates proposed for the

for potential applicants, resulting in delay in license grants, service to the public, and use of spectrum, thus undermining the goals of the first-come, first-served regime. *MSV Opposition to EchoStar Recon Petition* at 7. Whereas EchoStar's errors were major and thus justified dismissal, MSV's omission of a two-degree spacing analysis was not an error at all. As the Bureau has recognized (and EchoStar has not refuted), MSV reasonably interpreted the Commission's rules and policies to not require a two-degree spacing analysis when there are no authorized satellites using the same frequencies within two degrees of the proposed satellite. *MSV Reinstatement Order* ¶ 11. Under these circumstances, the Bureau acted consistently in reinstating the MSV application and dismissing the EchoStar application.

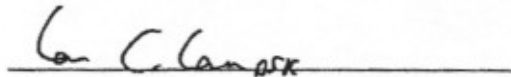
Conclusion

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

Respectfully submitted,



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transmitter site. *Coachella Valley Wireless Corp., Memorandum Opinion and Order*, 7 FCC Rcd 4252 (July 2, 1992). Among other things, such information is crucial for determining the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license necessary to determinations of mutual exclusivity and compliance with spacing rules. *Ocean Waves Broadcasting, Hearing Designation Order*, 3 FCC Rcd 4637 (Chief, Audio Services Division, August 3, 1988).

CERTIFICATE OF SERVICE

I, Sylvia A. Davis, a secretary with the law firm of Shaw Pittman LLP, hereby certify that on this 1st day of November 2004, served a true copy of the foregoing "Opposition to Application for Review" by first class United States mail, postage prepaid, upon the following:

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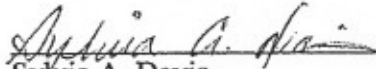
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Exhibit B

MSV, Opposition to Application for Review

File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (February 10, 2005)