

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of:	)	
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<b>DIRECTV ENTERPRISES, LLC</b>	)	File Nos. SAT-LOA-19970605-00049
	)	SAT-AMD-20051118-00226
To Amend its Pending Application for a	)	SAT-AMD-20080114-00015
17/24 GHz BSS Authorization at the	)	SAT-AMD-20080916-00188
Nominal 107° W.L. Orbital Location	)	Call Sign S2242
	)	
	)	
_____	)	

**COMMENTS**

EchoStar Corporation (“EchoStar”) responds to the “Application for Amendment” filed by DIRECTV Enterprises, LLC (“DIRECTV”) on September 16, 2008.<sup>1</sup> The amendment seeks to substitute Pegasus Development DBS Corporation (“Pegasus”) as the applicant for DIRECTV’s pending 17/24 GHz Broadcasting-Satellite Service (“RBW”) application at the 107° W.L. orbital location. The substitution is said to be part of a broader Rationalization Agreement among DIRECTV, Pegasus and Intelsat North America LLC (“Intelsat”).<sup>2</sup>

The stated objective of the Rationalization Agreement is “to maximize the operational capabilities of the proposed systems,” and address the four orbital locations for which more than one applicant have filed to use, resulting in orbital locations split amongst two or more

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<sup>1</sup> DIRECTV Enterprises, LLC, Application for Amendment, File No. SAT-AMD-20080916-00188 (filed Sep. 16, 2008) (“Amendment”).

<sup>2</sup> Amendment at 1.

applicants.<sup>3</sup> EchoStar concurs that U.S. RBW slots are of greater value and competitive significance if a single applicant is able to control all the frequencies at a given location. Specifically, providers would have the ability to defray the substantial costs of constructing a satellite over more transponders and total capacity.

The Rationalization Agreement, however, does not “rationalize” the pending RBW applications in a comprehensive manner. While DIRECTV would gain full control over the 99° W.L. orbital location, and Intelsat would gain full control over the 91° W.L. orbital location, the other two split orbital locations – 107° W.L. (to be split by EchoStar and Pegasus) and 111° W.L. (to be split by EchoStar and DIRECTV) – will remain so under the Agreement. This is regrettable, and could have been avoided by including EchoStar in the three-party negotiations. Yet DIRECTV, Intelsat, and Pegasus failed to reach out to the only other applicant to seek a global solution to the four split RBW orbital locations.

With four split orbital locations and four affected satellite operators, the public interest would be best served with each applicant receiving one of the four split orbital locations. To that end, the Commission should urge all four parties to negotiate a true global and inclusive “Rationalization Agreement.” Absent that, the existing Agreement raises a host of policy and legal issues and should not be sanctioned by the Commission, particularly with respect to the division of the 107° W.L. orbital location between Pegasus and EchoStar. Alternatively, the Commission should grant the amendment only in part and divide the spectrum at 107° W.L. equally between the remaining two applicants, not among the filed applications.

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<sup>3</sup> Letter from Bruce Jacobs to Marlene H. Dortch, File Nos. SAT-LOA-19970605-00049, et al. (Sept. 10, 2008).

## **I. THE RATIONALIZATION AGREEMENT FALLS SHORT OF AN EFFICIENT SPECTRUM REALLOCATION**

There are four applicants in this RBW processing round, and there are four slots that have been requested by more than one applicant. These slots would have to be split under the Commission rules in the absence of a negotiated agreement. The arithmetic is simple, and the optimal negotiated solution suggests itself: each of the four applicants would receive one of the four slots. Unfortunately, the Rationalization Agreement was negotiated among three of the four first-round RBW applicants. The fourth, EchoStar, was not invited to the table. Indeed, EchoStar discovered the existence of this Agreement only by reading an *ex parte* notice of a meeting that the three applicants had arranged with Commission staff. Not surprisingly, this partial agreement falls short of an efficiency-maximizing solution. Its result would be that only two of the four slots would get “rationalized” – the remaining two would remain split.<sup>4</sup> This confers an unfair advantage upon the two applicants (DIRECTV and Intelsat) who end up with one whole slot each, at the expense of EchoStar, whose slots remain split.

It is this lingering split of the spectrum at two slots that raises legal and policy issues with the three-party agreement, and it is for similar reasons that both the Commission and the D.C. Circuit have been skeptical towards exclusionary negotiations among some, but not all, same-round applicants. Indeed, the Commission has already rejected one compromise proposal put forward by EchoStar, DIRECTV and Intelsat, at least in part because Pegasus objected that its pending applications had not been taken into account.<sup>5</sup> The Bureau should show the same

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<sup>4</sup> See Amendment at 4 (“Once that approval [of the amendment] has been secured, (1) Pegasus will withdraw its application at 91° W.L., leaving Intelsat as the sole remaining applicant; (2) Intelsat will withdraw its application at 99° W.L., leaving DIRECTV as the sole remaining applicant; and (3) DIRECTV and Pegasus will consummate the authorized amendment at 107° W.L.”).

<sup>5</sup> See *17/24 GHz Report and Order* at ¶ 69 n.211.

sensitivity to EchoStar's exclusion that it had shown to the omission of Pegasus. As Pegasus noted in March 2007, EchoStar "welcomes the opportunity to discuss [the three-party deal] with them," but has been given no opportunity to do so.<sup>6</sup>

A similar exclusionary agreement among some but not all processing round applicants has been rejected by the D.C. Circuit. In 1987 the Commission tried to resolve mutual exclusivity among Mobile-Satellite Service ("MSS") applicants by letting them form a consortium that would include most, but not all, of the applicants based on a financial qualification rule. The D.C. Circuit in *ARINC I* reversed on the ground that the Commission could not "snuff[] out all minority voices" and thereby "eradicate nonconformity under the pretext of assessing financial qualifications."<sup>7</sup> The D.C. Circuit was particularly concerned that these financial requirements "had the effect of eliminating those applicants whose views concerning the proper form of the consortium were in the minority."<sup>8</sup> Here, by "snuffing out" the views of one of only four parties, the other applicants have effectively precluded the possibility of a comprehensive rationalization of the 17/24 GHz RBW assignments. This does not serve the public interest. The Commission should urge the parties to reach a true global agreement to address all four of the split RBW orbital locations.

## **II. THE APPLICATIONS, AS AMENDED, CANNOT BE GRANTED WITHOUT RULE WAIVERS**

The Rationalization Agreement's failure to remedy all four split RBW orbital locations results in a far more complex transaction, particularly with respect to DIRECTV's exit from the 107° W.L orbital location. As a result, the Commission would have to waive not one, as

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<sup>6</sup> Letter from Bruce Jacobs to Marlene Dortch, IB Docket No. 06-123 (Mar. 26, 2007).

<sup>7</sup> *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 447 (D.C. Cir. 1991) ("*ARINC I*").

<sup>8</sup> *Id.* at 447.

DIRECTV half-concedes, but at least two of its rules to provide Pegasus with two-thirds of the rights to the 107° W.L. orbital location as contemplated by the Agreement. Again, none of these line-drawing issues on slot sharing would need to be addressed if a true global Rationalization Agreement were to be reached.

First of all, Section 25.158(c) of the Commission's rules provides that "[a]n applicant for a GSO-like satellite system license is not allowed to transfer, assign, or otherwise permit any other entity to assume its place in any queue."<sup>9</sup> DIRECTV contends that is "not at all clear whether or how this rule applies to the proposed Amendment."<sup>10</sup> To the contrary, that rule would apply in this instance: the amended application requests precisely the transfer of a place in the queue that is prohibited by that section. Indeed, this is a crucial element of DIRECTV's agreement with Pegasus and Intelsat: "Pegasus needs confirmation that the Commission will treat Pegasus as if it had filed two of the three pending applications for 17/24 GHz BSS band frequencies at 107° W.L. for purposes of division of the available bandwidth at that orbital location."<sup>11</sup>

DIRECTV does request a waiver of Section 25.158(c) to the extent the rule is found to apply.<sup>12</sup> But it does not request another required waiver. Under Section 25.116(b)(1) of the Commission's rules, an amendment to a pending application is deemed to be "major" if it "changes the proposed frequencies ... to be used."<sup>13</sup> The amendment is a major one under this

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<sup>9</sup> See Amendment, Waiver Requests at p.1 (quoting 47 C.F.R. § 25.158(c)).

<sup>10</sup> *Id.*

<sup>11</sup> Amendment at 5.

<sup>12</sup> Amendment, Waiver Request at p.1-2.

<sup>13</sup> 47 C.F.R. § 25.116(b)(1).

rule because it proposes to add 100 MHz to the frequencies requested in DIRECTV's underlying application. DIRECTV's underlying application requested authority to use only 400 MHz of spectrum in the 17.3-17.7 GHz band.<sup>14</sup> The amendment, however, seeks to "conform [DIRECTV's] application to the technical parameters submitted by Pegasus for its proposed system in the same spectrum and at the same nominal location."<sup>15</sup> In turn, Pegasus's application at 107° W.L. describes a satellite that would use 500 MHz of spectrum in the 17.3-17.8 GHz band.<sup>16</sup>

Thus, DIRECTV's underlying application, as amended, must be treated as "newly filed" pursuant to Section 25.116(d).<sup>17</sup> As a result, the application "loses its status" in the queue and should no longer be considered simultaneously filed with EchoStar's or Pegasus's pending applications at 107° W.L. for purposes of division of the available spectrum among mutually exclusive applications.

Regardless, DIRECTV has failed to make a good cause showing required to support its waiver requests. DIRECTV is effectively trying to compensate Pegasus for relinquishing rights at the 99° W.L. orbital location with rights at the 107° W.L. orbital location that would fairly

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<sup>14</sup> See DIRECTV Enterprises, LLC, Amendment at 5 ("the satellite transmit spectrum used will be restricted to 17.3-17.7 GHz"), *filed in* File No. SAT-AMD-20080114-00015 (filed Jan. 14, 2008).

<sup>15</sup> Amendment at 1 (requesting amendment "to conform this application to the technical parameters submitted by Pegasus for its proposed system in the same spectrum and at the same nominal location, for purposes of division of the available bandwidth.").

<sup>16</sup> See Pegasus DBS Development Corp., Amendment at Frequency Bands Exhibit, *filed in* File No. SAT-AMD-20080114-00024 (filed Jan. 24, 2008).

<sup>17</sup> 47 C.F.R. § 25.116(d) ("Any application for a GSO-like satellite license within the meaning of §25.158 will be considered to be a newly filed application if it is amended by a major amendment (as defined by paragraph (b) of this section), and will cause the application to lose its status relative to later-filed applications in the "queue" as described in § 25.158.").

belong, in part, to EchoStar. This may be in DIRECTV's interest, but it is not in the public's interest.

### **III. RBW SPECTRUM AT 107° W.L. SHOULD BE DIVIDED EQUALLY BETWEEN THE REMAINING APPLICANTS**

DIRECTV requests “confirmation that the Commission will treat Pegasus as if it had filed two of the three pending applications for 17/24 GHz BSS band frequencies at 107° W.L. for purposes of division of the available bandwidth at that orbital location.”<sup>18</sup> The avowed purpose of this clarification is to ensure that Pegasus would receive two-thirds of the 17/24 GHz BSS spectrum at 107° W.L., leaving one-third for EchoStar.<sup>19</sup> To this end, DIRECTV urges the Commission to “count the number of *filed applications* at 107° W.L. (Pegasus controlling two of three), rather than the number of *remaining applicants* at 107° W.L. (Pegasus being one of two).”<sup>20</sup>

This misreads the Commission's rules and orders on how mutual exclusivity is to be resolved in the case of simultaneously filed GSO-like applications. Section 25.158(d)(4) of the Commission's rules makes it clear that, in such situations, “the available bandwidth at the orbital location or locations in question will be divided equally *among those licensees*.”<sup>21</sup> The Commission confirmed this in the *17/24 GHz BSS Report and Order* when it held that, “where two or more applications are mutually exclusive, we will divide the available spectrum equally

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<sup>18</sup> Amendment at 5.

<sup>19</sup> *Id.* at 5-6.

<sup>20</sup> *Id.* at 5.

<sup>21</sup> 47 C.F.R. § 25.158(d)(4). *See also First Space Station Licensing Reform Order* at ¶ 135 (“We also adopt our proposed second-tier selection mechanism of dividing the spectrum at a particular orbit location *evenly among the applicants* in cases where two or more applicants file mutually exclusive applications at the same thousandth of a second.”) (emphasis added).

*among the applicants ....*<sup>22</sup> The Commission reiterated the rule again in the *17/24 GHz BSS Order on Reconsideration*: “In the event two or more applicants requested authority to operate at the same orbital location, we directed the Bureau to consider the applications concurrently and, *if the applicants were qualified, to license them to operate in an equal portion of the spectrum.*”<sup>23</sup> In other words, the spectrum is to be divided by the *number of applicants or licensees*, and not the number of filed applications as DIRECTV contends.


#### IV. CONCLUSION

The Commission should encourage all four applicants to negotiate a global settlement to address the four split RBW orbital locations. Alternatively, the Commission should grant the application only in part and divide the spectrum at 107° W.L. evenly between EchoStar and Pegasus by simple operation of its existing rules.

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Respectfully submitted,

  
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<sup>22</sup> *17/24 GHz BSS Report and Order* at ¶ 143 (emphasis added).

<sup>23</sup> *17/24 GHz BSS Order on Reconsideration* at ¶ 33 (emphasis added).




**CERTIFICATE OF SERVICE**

I, Chung Hsiang Mah, hereby certify that on October 27, 2008, I caused true and correct copies of the foregoing to be served on the following by first-class mail:

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