

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

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<i>Application of</i>)	
)	
DIRECTV ENTERPRISES, LLC)	File No. SAT-AMD-20080916-00188
)	Call Sign S2242
To Amend its Pending Application for a)	
17/24 GHz BSS Authorization at the)	
Nominal 107° W.L. Orbital Location)	
_____)	

RESPONSE OF DIRECTV ENTERPRISES, LLC

In this proceeding, DIRECTV Enterprises, LLC (“DIRECTV”) seeks an authorization that is a key component of a plan that will simplify the 17/24 GHz Broadcast Satellite Service (“BSS”) applications currently pending before the Commission and consolidate the assets of three applicants at three orbital locations. While recognizing the benefits of such consolidation and simplification, EchoStar Corporation (“EchoStar”) has raised certain concerns about this application’s potential impact on licensing in the 17/24 GHz BSS band.¹

None of these concerns should delay the Commission in granting DIRECTV’s application. As a policy matter, EchoStar suggests that the Rationalization Agreement does not go far enough, and proposes its own alternative. This argument ignores the fact that the Commission itself urged applicants to resolve situations of mutual exclusivity in whole *or in part*. In addition, the Rationalization Agreement is a private arrangement concluded among parties who each believe it is fair, while EchoStar’s alternative

¹ Comments of EchoStar Corporation (filed Oct. 27, 2008) (“EchoStar Comments”).

obviously disadvantages DIRECTV. EchoStar has always been, and still is, welcome to negotiate these issues with the other 17/24 GHz BSS applicants. But EchoStar's dissatisfaction provides no legal basis for the *Commission* to reject the Rationalization Agreement.

A. EchoStar Admits the Benefits of the Rationalization Agreement and Offers No Realistic Alternative.

EchoStar begins its Comments by conceding that consolidation of 17/24 GHz BSS assets – the stated objective of the Orbital Location Rationalization Agreement (“Rationalization Agreement”) among DIRECTV, Pegasus Development DBS Corporation (“Pegasus”), and Intelsat North America LLC (“Intelsat”) – would serve the public interest, since such slots “are of greater value and competitive significance if a single applicant is able to control all the frequencies at a given location” and because “providers would have the ability to defray the substantial costs of constructing a satellite over more transponders and total capacity.”² Thus, EchoStar does not deny that benefits will arise from implementing the Rationalization Agreement.

Instead, EchoStar faults the parties for not attempting to extend those benefits further. Specifically, EchoStar laments the fact that it was not included in the arrangement and that not all 17/24 GHz BSS locations that are currently the subject of multiple applications would be rationalized to just one applicant. EchoStar appears to urge that the Commission should not to approve a transaction that resolves much but not all of the overlapping applications pending in this band. EchoStar's attempt to make the perfect the enemy of the good fails for several reasons.

² *Id.* at 2.

First, the Commission should reject the unprecedented standard EchoStar espouses. The Commission has encouraged 17/24 GHz BSS applicants to “reach a compromise regarding their orbital assignment requests and minimize, or avoid, mutually exclusive situations.”³ The Rationalization Agreement will certainly “minimize” such situations, even if does not avoid them entirely. And there is no rule that prevents private parties from entering into commercial arrangements that do not include all other applicants.

Second, EchoStar presents no legal basis on which the Commission could reject the instant Application. EchoStar’s claim that both the Commission and the D.C. circuit have rejected “similar exclusionary agreements” is clearly erroneous. In the only judicial decision cited, *ARINC I*,⁴ the Commission adopted a rule mandating that a group of applicants form a single consortium for licensing, rather than having their individual licenses considered. In that context, “the Commission’s adoption of the consortium requirement in [that] case precluded applicants from prosecuting their individual applications at all.”⁵ Here, by contrast, the Rationalization Agreement is a private arrangement rather than a Commission mandate, and all applications not involved in that arrangement are unaffected by it and can be prosecuted fully. With respect to EchoStar,

³ See *Establishment of Policies and Service Rules for the Broadcasting Satellite Service at the 17.3-17.7 GHz Frequency Band and at the 17.7-17.8 GHz Frequency Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-directionally in the 17.3-17.8 GHz Frequency Band*, 22 FCC Rcd. 8842, ¶ 146 (2007) (“BSS R&O”).

⁴ *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991) (“*ARINC I*”) (cited in EchoStar Comments at 4).

⁵ *ARINC I*, 928 F.2d at 451. It is also worth noting that *ARINC I* involved the Commission’s efforts to devise a way to resolve mutual exclusivity in the context of a processing round. This case, by contrast, does not involve a processing round, and the Commission has already established the method for resolving mutual exclusivity – by dividing the spectrum evenly among competing applicants. *BSS R&O*, ¶ 143.

that means that its pending application at 107° W.L. will not be “snuffed out” as were the non-conforming applications in *ARINC I*;⁶ rather, that application remains pending and EchoStar is still in line to get exactly the same authorization as it would be eligible for in the absence of the Rationalization Agreement.

Similarly inapposite is EchoStar’s reference to the Commission’s decision not to adopt a rule implementing a proposed orbital spacing regime for 17/24 GHz BSS slots submitted jointly by DIRECTV, EchoStar, and Intelsat.⁷ There again, the proposal was made in the context of a proceeding to adopt rules of general applicability, rather than a private arrangement that would affect only those who are parties to it. And although the Commission noted in a footnote that one applicant did not concur in the joint proposal because it had not been involved in the proposal’s formulation, that fact was not cited as a basis for deciding to adopt a different orbital spacing regime which the Commission deemed to be the best combination of feasibility and flexibility.⁸

Third, EchoStar’s proposal would patently disadvantage DIRECTV. EchoStar notes that there are four orbital locations with more than one 17/24 GHz BSS application pending, and four operators with co-equal status who have filed applications at those slots, and concludes that a “true global and inclusive” Rationalization Agreement would allocate one slot to each operator.⁹ Yet this approach overlooks an important variable – the fact that there are nine applications at the four split orbital locations, not eight. Under

⁶ *ARINC I*, 928 F.2d at 447-48.

⁷ EchoStar Comments at 3-4.

⁸ *Compare BSS R&O*, ¶ 69 n.211 (noting Pegasus’s non-concurrence) and ¶ 70 (finding that a four-degree orbital spacing plan “is feasible, and that it best affords all applicants the flexibility to design and deploy systems consistent with their stated plans”).

⁹ EchoStar Comments at 2.

the existing Rationalization Agreement, three operators will give up one application at a split location in order to consolidate its holdings at another. Moving from this agreement to the one EchoStar appears to posit as preferable would involve (1) DIRECTV relinquishing its application at the 111° W.L. location in favor of EchoStar, and (2) EchoStar and DIRECTV relinquishing their applications at the 107° W.L. orbital location in favor of Pegasus. While this would benefit both EchoStar and Pegasus, it would not benefit DIRECTV – which would nonetheless be asked to be the only pending applicant to give up a second pending application.

EchoStar has not explained why this would be equitable (much less preferable), or whether it would be willing to contribute additional assets of its own to make it so. Although EchoStar has known about the Rationalization Agreement for over a month, to DIRECTV's knowledge, EchoStar has made no proposal to resolve the split-slot situations at 107° W.L. and 111° W.L. EchoStar is, of course, welcome to make such a proposal, and DIRECTV would certainly entertain it. However, unless it has a solution to offer that benefits all parties involved, EchoStar is just part of the problem and would have the Commission either perpetuate the split-slot situation as it currently stands or mandate EchoStar's unilateral approach that is *less* fair than the Rationalization Agreement. Neither of these alternatives would serve the public interest.

B. EchoStar's Procedural Arguments Are Erroneous.

EchoStar contends that DIRECTV's Application runs afoul of two Commission rules: (1) Section 25.158(c), which prohibits transferring an applicant's place in a processing queue; and (2) Section 25.116(b)(1), which defines an amendment as "major"

if it involves changes in the proposed frequencies to be used.¹⁰ DIRECTV has previously explained why Section 25.158(c) should not apply in this case, but has also justified a waiver in the event that the Commission concludes that it does.¹¹ As for Section 25.116(b)(1), EchoStar has misapplied the rules based on its misapprehension of DIRECTV's application. DIRECTV has asked the Commission to conform its existing Application at 107° W.L. to the technical parameters of Pegasus's proposed system "*in the same spectrum* and at the same nominal location."¹² Or, as explained later in the Application, the request is to "conform [DIRECTV's] application to Pegasus's proposed operational parameters *in the relevant bandwidth*"¹³ – *i.e.*, the bandwidth requested by DIRECTV. In other words, Pegasus would receive no more than DIRECTV has to offer – an application covering 400 MHz of 17/24 GHz BSS spectrum that both Pegasus and DIRECTV have requested.¹⁴

EchoStar characterizes the Rationalization Agreement as allowing Pegasus to compensate DIRECTV for relinquishing rights "that would fairly belong, in part, to EchoStar."¹⁵ This is simply not true. As explained above, by stepping into DIRECTV's shoes, Pegasus would gain no claim to spectrum at 107° W.L. beyond what DIRECTV would already have. Moreover, because the Commission eliminated its anti-trafficking

¹⁰ EchoStar Comments at 5-6.

¹¹ See Application, Waiver Requests at 1-2.

¹² Application at 1 (emphasis added).

¹³ *Id.* at 4 (emphasis added). In an abundance of caution, DIRECTV made a contingent request for waiver of Section 25.116 should the Commission find it applicable. See *id.*, Waiver Requests at 3.

¹⁴ Accordingly, once the Application is granted, Pegasus would have a $\frac{2}{3}$ interest in 400 MHz of 17/24 GHz BSS spectrum at 107° W.L. and a $\frac{1}{2}$ interest in the remaining 100 MHz to be used for services outside the United States.

¹⁵ EchoStar Comments at 6-7.

rules in 2003,¹⁶ DIRECTV, Intelsat, and Pegasus would be able to swap their interests at 107° W.L., 99° W.L., and 91° W.L. once they have been licensed – with the same effect on EchoStar as the current proposal. There is no reason to require the Commission to go through the steps of issuing those licenses and then processing the resulting assignment applications in order to achieve the same ends the parties will effectuate with the grant of this single application.

* * *

For the foregoing reasons, DIRECTV respectfully submits that the Comments filed by EchoStar should not delay the Commission in granting the pending Amendment.

Respectfully submitted,

DIRECTV ENTERPRISES, LLC

By: 

William M. Wiltshire
Michael Nilsson

Susan Eid
Vice President, Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, INC.
444 North Capitol Street, N.W.
Suite 728
Washington, DC 20001
(202) 715-2330

HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
202-730-1300

Counsel for DIRECTV Enterprises, LLC

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¹⁶ See *Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd. 10760, ¶ 215 (2003).

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of November, 2008, a copy of the foregoing Response of DIRECTV Enterprises, LLC was served by first class mail, postage prepaid, upon:

Pantelis Michalopoulos
Chung Hsiang Mah
Step toe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
Counsel for EchoStar Corporation

Tony Lin
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037
Counsel for Pegasus Development DBS Corporation

Susan Crandall
Intelsat North America LLC
3400 International Drive, N.W.
Washington, DC 20008
Counsel for Intelsat North America LLC



Alex Reynolds