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SEP 13 2004 Policy Branch
International Bureau
Federal Communications Commission
Office of Secretary

September 13, 2004

Int'l Bureau

Via HAND DELIVERY

SEP 15 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Front Office

Re: In the Matter of contactMEO Communications, LLC Application for Authority to Launch and Operate a Geostationary and Non-Geostationary Orbit Fixed Satellite System in the Ka-Band. File No.: SAT-LOA-19971222-00222, as amended.

Dear Ms. Dortch:

On behalf of EchoStar Satellite LLC ("EchoStar"), enclosed please find an original and four copies of a Petition to Deny of the Applications and Amendments described above. This Petition to Deny is being provided in response to the Amendments filed in the above-mentioned proceedings on July 19, 2004. Please do not hesitate to contact the undersigned should you have any questions with respect to this filing.

Respectfully submitted,



Pantelis Michalopoulos
Philip L. Malet
Lee C. Milstein

Attorneys for EchoStar Satellite L.L.C.

Enclosures

cc: Thomas S. Tycz
David M. Drucker, contactMEO
David Kane, Consulting Engineer

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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SEP 13 2004

Federal Communications Commission
Office of Secretary

In the Matter of)

contactMEO Communications, LLC)

Application for Authority to Launch)
and Operate a Geostationary and Non-)
Geostationary Orbit Fixed Satellite)
System in the Ka-Band.)
_____)

SAT-LOA-19971222-00222

SAT-AMD-20040322-00057

SAT-AMD-20040719-00141

To: International Bureau

PETITION TO DENY OF EHOSTAR SATELLITE LLC

EchoStar Satellite LLC ("EchoStar") hereby files this Opposition to the above-captioned applications, as amended, of contactMEO Communications LLC ("@contact") to operate geostationary orbit ("GSO") and non-geostationary orbit ("NGSO") Fixed Satellite Service ("FSS") satellites in the primary NGSO portions of the Ka-band. EchoStar's interest in this matter is acute; its applications for four similar (4) GSO FSS satellites that would operate in the same segments of the Ka-band and at some of the same orbital locations as @contact's proposed satellites were summarily denied by the Commission and are subject of pending petitions for reconsideration.¹ EchoStar, therefore, is a party in interest in this proceeding both

¹ *In the Matter of EchoStar Satellite LLC Application for Authority to Construct, Launch And Operate Geostationary Satellites in the Fixed-Satellite Service Using the Ka and/or Extended Ku-bands at the 83° W.L., 105° W.L., 113° W.L., and 121° W.L. Orbital Locations, Petition for Reconsideration, filed Jun. 1, 2004 ("EchoStar Petition for Reconsideration").* The orbital locations applied for by EchoStar for two of its proposed satellites are identical to two of

because it has an interest in any proposal for spectrum use that is inconsistent with the policies that were applied to its prior applications, and because a grant of authority to @contact would conflict with EchoStar's petition for reconsideration for these mutually exclusive applications.

The applications of @contact for GSO satellites operating in NGSO spectrum and for NGSO use of the GSO FSS spectrum by @contact's NGSO system must be denied if the Bureau refuses to reinstate EchoStar's pending Ka-band GSO applications because the asserted deficiencies in EchoStar's applications were also present in @contact's GSO applications at the time they were accepted for filing. Of course, if the Bureau were to reinstate EchoStar's applications on reconsideration, then it should process both sets of applications in accordance with their priority in the FCC's FCFS Queue. In any event, the Commission should institute a rulemaking proceeding as proposed by EchoStar over a year ago,² regarding the operation of GSO FSS satellites in the primary NGSO FSS frequency bands and possibly the operation of NGSO satellites in the primary GSO FSS bands. Regardless, the Bureau cannot grant @contact's GSO FSS applications at this time.³

@contact's Ka-band GSO satellites (121 W.L. and 83 W.L.), and therefore the two sets of applications are mutually exclusive. See *In the Matter of Amendment of the Commission's Space Station Licensing Rules and Policies, Mitigation of Orbital Debris*, First Report and Order and Further Notice of Proposed Rulemaking in IB Docket No. 02-34, and First Report and Order in IB Docket No. 02-54, FCC 03-102, ¶ 139 (rel. May 19, 2003) ("*FCFS Order*")

² *In the Matter of Petition for Rulemaking To Redesignate The 28.6-29.1 GHz (Earth-to-Space) and 18.8-19.3 GHz (space-to-Earth) Bands to Allow Geostationary Fixed-Satellite Service Operations On A Co-Primary Basis*, filed Aug. 27, 2003 ("*Petition for Rulemaking*").

³ There are similar regulatory infirmities in the proposed use of the primary GSO FSS Ka-band by @contact's NGSO satellites since there are no FCC rules in place for sharing this spectrum.

I. Background

In relevant part, @contact has applied for authority to operate GSO FSS satellites on a secondary basis using spectrum designated for NGSO FSS use.⁴ It has also applied for its NGSO satellites to now use the primary GSO FSS Ka-band spectrum.⁵ Under the Commission's rules, all of the requested NGSO spectrum is allocated solely for NGSO satellites.⁶ and the requested downlinks in the GSO spectrum are allocated solely for GSO FSS use.⁷ In part because the Bureau was not convinced that @contact had adequately addressed the NGSO/GSO sharing issues, the Bureau dismissed @contact's applications.⁸ However, on the Bureau's own motion, its dismissal was reversed and @contact was given another opportunity to supplement its filings with additional technical information.⁹ In its most recent submissions, @contact has supplemented its sharing analysis and included additional technical information relating to GSO/NGSO sharing.¹⁰

⁴ SAT-AMD-20040322-00057, Amendment narrative at 2, 7.

⁵ *Id.*

⁶ See 47 C.F.R. 2.106; *In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, Report and Order, IB Docket No. 98-172, FCC 00-212, at ¶¶ 10, 28 (rel. Jun. 22, 2000).

⁷ *Id.*

⁸ Letter from Thomas S. Tycz, FCC, to David M. Drucker, @contact, DA 04-1386, May 18, 2004 (“@contact Dismissal Letter”).

⁹ Letter from Thomas S. Tycz, FCC, to David M. Drucker, @contact, DA 04-1722, Jun. 16, 2004 (“@contact Reversal Letter”).

¹⁰ See SAT-AMD-20040719-00141, Annex 3.

EchoStar similarly filed applications for authority to operate GSO FSS satellites in the primary NGSO FSS Ka-band; however the Bureau on April 29, 2004, denied these applications without providing EchoStar with any opportunity to supplement its technical showing.¹¹ EchoStar has petitioned the Bureau for reconsideration of the *EchoStar Denial Order*,¹² but to date the Bureau has taken no action on the *Petition for Reconsideration*.

II. The Bureau Must Deny the GSO FSS Applications of @contact

The Bureau's recent dismissal of EchoStar's applications to operate GSO satellites using spectrum designated for NGSO FSS in the Ka-band,¹³ absent reconsideration and reinstatement *nunc pro tunc*, requires that it also deny @contact's GSO applications, since EchoStar and @contact are similarly-situated parties. As EchoStar explained in its applications, no harmful interference would occur from the operation of its proposed GSO satellites in the NGSO Ka-bands because it would adhere to internationally recognized power limits,¹⁴ and because it would cease operations in the NGSO spectrum upon notification of the likelihood of harmful interference.¹⁵ @contact had made nearly identical representations in its applications

¹¹ *In the Matter of EchoStar Satellite LLC Application for Authority to Construct, Launch And Operate Geostationary Satellites in the Fixed-Satellite Service Using the Ka and/or Extended Ku-bands at the 83° W.L., 105° W.L., 113° W.L., and 121° W.L. Orbital Locations*, Memorandum Opinion and Order, DA 04-1167 (rel. Apr. 29, 2004) ("*EchoStar Denial Order*").

¹² *EchoStar Petition for Reconsideration*.

¹³ *EchoStar Denial Order*.

¹⁴ *In the Matter of EchoStar Satellite Corporation Applications for Authority to Construct, Launch And Operate Nine Geostationary Satellites in the Fixed-Satellite Service Using the Ka and/or Extended Ku-bands at the 81° W.L., 83° W.L., 101° W.L., 105° W.L., 109° W.L., 113° W.L., 119° W.L., 121° W.L., and 123° W.L. Orbital Locations*, Applications, Technical Annex, Attachment A at 17-19 (filed Aug. 27, 2003).

¹⁵ *Id.*, at 15.

and had not made any additional technical showings or interference analyses prior to the reinstatement of its applications by the Bureau.¹⁶ Nevertheless, whereas the Commission stated that EchoStar “has not demonstrated that its proposed satellites will not cause interference to other systems in those frequency bands, nor that a waiver of [Commission] rules is justified,”¹⁷ and thereby denied the Applications without accepting them for filing and placing them on public notice, @contact has now been permitted to supplement its applications. Given a similar opportunity, EchoStar would be able to make the same type of technical showing and analysis that @contact includes in its most recent filings.¹⁸

Indeed, the only notable difference between the proposed GSO satellites in EchoStar’s applications and those of @contact is that @contact’s proposal purports to coordinate the operations of its GSO satellites with its NGSO constellation of satellites, while EchoStar’s proposed GSO satellites would operate on a stand-alone basis. This distinction, though, is immaterial for purposes of determining the acceptability of both sets of applications for filing and placing them on public notice.¹⁹ Whereas @contact proposes that its GSO satellites could cease operations and switch their traffic to its NGSO satellites during in line events and potential

¹⁶ SAT-AMD-20040322-00057, Amendment narrative at 6-9. Despite reference to the contrary, @contact has not included any additional technical analysis beyond what is included in the narrative. *Id.* at fn 5.

¹⁷ *EchoStar Denial Order*, at 1.

¹⁸ See SAT-AMD-20040719-00141, Annex 3.

¹⁹ @contact makes the absurd argument that its GSO satellites are really NGSO-like satellites because it proposed to use them in conjunction with its NGSO constellation. Regardless as to how they are used, these proposed satellites would operate at a geosynchronous location in the GSO orbit and would preclude other GSO satellites from operating on the same frequencies at the same orbital locations. While one can call a duck by some other name, if it looks like a duck, walks like a duck and quacks like a duck, it is still a duck.

harmful interference from another NGSO system, EchoStar could similarly cease operations in the NGSO band and move its traffic to the GSO FSS band during in line events. Thus, @contact and EchoStar are similarly-situated parties and should be treated in the same manner.

While EchoStar believes that it may indeed be proper for the Bureau to request additional information regarding GSO/NGSO sharing, as it did for @contact, rather than deny its GSO applications outright, the Bureau may not properly change its practice regarding the processing of applications without prior notice of such a change in policy or practice.²⁰ “It is a basic premise of administrative law that the Commission must treat similarly situated parties alike, absent a legally sustainable reason to the contrary.”²¹ Such varying treatment is arbitrary and capricious.²² Therefore, in order to ensure regulatory parity in this case, the Bureau should have sustained its denial of @contact’s GSO applications rather than accept them for filing so long as EchoStar’s GSO applications remain subject to the *EchoStar Denial Order*.

²⁰ See *Salzer v. FCC*, 778 F.2d 869, 873 (D.C. Cir. 1985). See, also, *Motor Vehicle Mfr. ’s Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970) (per Judge Leventhal: “An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”).

²¹ See, *EchoStar Denial Order*, at ¶8, citing *Petition to Deny or Dismiss of Hughes Electronics Corporation and Hughes Network Systems, Inc.*, filed Oct. 24, 2003, at 7 (Hughes Petition) (citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)), and *Northrop Grumman Space Technology and Mission Systems Corporation, Consolidated Petition to Dismiss*, filed Oct. 24, 2003, at 5 (Northrop Grumman Petition).

²² See, e.g., *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. Of Trade*, 412 U.S. 800 (1973); *Melody Music*, 345 F.2d 730.

III. **Alternatively, The Bureau Could Reinstate EchoStar's Applications and Then Process Each Set of GSO Applications According to the FCFS Queue**

Rather than dismissing or denying once again @contact's GSO applications, the Bureau has the option of granting EchoStar's reconsideration request, reinstating EchoStar's GSO applications *nunc pro tunc*, and processing both sets of applications according to the FCFS Queue. As stated above, similarly-situated applicants must be treated alike. Any action by the Bureau other than denial of @contact's applications would thus violate this principle unless the Bureau were also to reconsider its treatment of EchoStar's GSO applications. This is especially important because @contact has now applied for two of the same orbital locations that were included in EchoStar's GSO applications. Therefore, a lack of regulatory parity would be extremely prejudicial to EchoStar.

In accordance with the Commission's Rules, @contact's GSO applications are mutually exclusive with EchoStar's GSO applications with respect to Ka-band frequencies requested at 83° W.L. and 121° W.L. Applications are 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 one or more other applications."²³ Because it is not technically possible to have two GSO satellites licensed for the same frequencies at the same orbital location, the applications as submitted are mutually exclusive.

If EchoStar's applications were reinstated *nunc pro tunc*, there is no doubt that they would be considered first-in-time under the Commission's First-Come, First-Served ("FCFS") order,²⁴ because @contact's March 22, 2004 submission constitutes a "major"

²³ 47 C.F.R. § 25.155(a).

²⁴ *FCFS Order*.

amendment under the Rules and would lose date priority. Despite @contact's claims to the contrary, a request for a different orbital location is a major amendment under the Commission's Rules.²⁵ The Commission has also made clear that, "We will treat major amendments to GSO-like satellite license applications as newly filed applications. Major amendments will cause the license application to be moved to the end of the queue." *FCFS Order* at ¶ 139.²⁶ EchoStar's GSO applications were filed in August 2003. To avoid unjustly providing @contact's GSO applications with date priority over EchoStar's GSO applications, the Bureau must rule on EchoStar's *Petition for Reconsideration* before acting on @contact's pending applications.

IV. The Commission Should Also Initiate a Rulemaking Proceeding

Regardless of the approach the Bureau takes with respect to the pending GSO applications, the Commission should initiate a rulemaking proceeding to consider redesignating the 18.8-19.3 GHz (space-to-Earth) bands for secondary GSO FSS operations (the 28.6-29.1 GHz uplink band already has such a designation) and develop sharing criteria. EchoStar submitted a petition for such a rulemaking over a year ago. In that Petition, EchoStar demonstrated why NGSO/GSO sharing in these bands would be beneficial and feasible.²⁷ EchoStar is not the only party that would be interested in the institution of this rulemaking

²⁵ While @contact claims that its amendment is not a major one because it has not asked for additional frequency bands or orbital resources, @contact *Amendment*, at 9, the Commission's Rules make clear that an amendment is deemed major whenever there is a change in the orbital location requested, not as a result of an expansion of the number of orbital locations requested. 47 C.F.R. § 25.116(b) ("An amendment will be deemed to be a major amendment ... [i]f the amendment ... increases the potential for interference, or changes the proposed frequencies or orbital locations to be used.").

²⁶ 47 C.F.R. § 25.116(d) ("Any application for a GSO-like satellite license ... will be considered to be a newly filed application if it is amended by a major amendment ..., and will cause the application to lose its status relative to later-filed applications in the 'queue.'").

²⁷ *Petition for Rulemaking*.

proceeding. Indeed, as evidenced by the recent filings of @contact and Northrop Grumman Space & Mission Systems Corp., several satellite companies are interested in the use of NGSO FSS spectrum for GSO FSS satellites. Moreover, both @contact and Northrop Grumman seek authority for use of the GSO spectrum by NGSO satellites. This request covers precisely the same issues as EchoStar's request -- among other things, the downlink GSO spectrum has no designation, even secondary, for NGSO use.

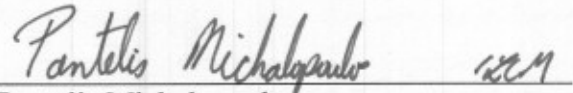
Indeed, the Commission has also recently noted the benefits of band sharing, including greater spectrum efficiency and technology neutrality.²⁸ In order to promote the public interest, effectively manage available spectrum, and avoid disputes involving similar applications, the Commission should promptly institute the requested rulemaking to consider NGSO/GSO sharing issues in the Ka-band.

V. Conclusion

For all of the above reasons as well as those set forth in EchoStar's related *Petition for Reconsideration* and *Petition for Rulemaking*, EchoStar respectfully requests that the Bureau treat EchoStar and @contact as similarly-situated parties by either denying @contact's GSO applications or reinstating EchoStar's GSO applications *nunc pro tunc* and processing both sets of applications according to the FCFS Queue. In any event, the Commission should institute a rulemaking proceeding to govern future sharing of NGSO-designated Ka-band spectrum by GSO satellites and GSO-designated spectrum by NGSO satellites.

²⁸ See *In the Matter of Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Report And Order, Fourth Report And Order And Further Notice Of Proposed Rulemaking, FCC 04-134, at ¶¶ 44-50 (rel. Jul. 16, 2004) (“[W]e believe that promoting efficient spectrum use through sharing spectrum is consistent with our overall spectrum policy.”).

Respectfully submitted,

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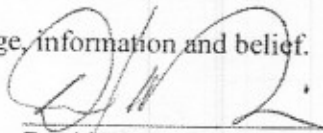
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Date: September 13, 2004

DECLARATION

I, David W. Bair, hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.



David W. Bair
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Dated: 9/13/04

CERTIFICATE OF SERVICE

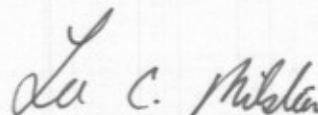
I, Lee C. Milstein, hereby declare that copies of the foregoing Petition to Deny of contactMEO's Application and Amendments for authority to launch and operate a geostationary and non-geostationary orbit fixed satellite system in the Ka-band were sent on this 13th day of September, 2004 by hand delivery or United States Postal Service (indicated by *) to the following:

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