

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

FILED/ACCEPTED

JAN 16 2007

Federal Communications Commission  
Office of the Secretary

In the Matter of	)		
	)		
<b>ECHOSTAR SATELLITE L.L.C.</b>	)	File No.	SAT-LOA-20030609-00113
	)		
Application to Construct, Launch and	)		
Operate a Direct Broadcast Satellite at the	)	Call Sign:	S2454
86.5° W.L. Orbital Location	)		
	)		

**OPPOSITION TO APPLICATION FOR REVIEW**

Pursuant to 47 C.F.R. § 1.115(d), EchoStar Satellite L.L.C. (“EchoStar”)<sup>1</sup> hereby responds to the application for review filed by Telesat Canada (“Telesat”) on December 29, 2006.<sup>2</sup> Telesat’s application for review seeks to overturn a November 29, 2006 order of the International Bureau (“Bureau”) granting EchoStar authority to construct a “tweener” Direct Broadcast Satellite (“DBS”) to be located at 86.5° W.L. – a location 4.5 degrees from two Canadian DBS slots.<sup>3</sup> In a companion order issued the same day, the Bureau granted Spectrum Five, LLC, authority to provide DBS service to the United States from two foreign-licensed

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<sup>1</sup> On November 18, 2005, EchoStar sought to substitute EchoStar Satellite Operating Corporation, a wholly owned subsidiary of EchoStar, as the applicant for the EchoStar-86.5W license. See Letter from Pantelis Michalopoulos, Counsel for EchoStar to Marlene H. Dortch, Secretary, FCC, filed in SAT-LOA-20020328-00051, SAT-LOA-20020328-00051, SAT-LOA-20020328-00052, SAT-LOA-20030609-00113, SES-LFS-20040831-01253, SES-LFS-20050701-00852, SES-LIC-20050621-00799, SES-AFS-20050624-00813 (filed Nov. 18, 2005). However, the Bureau’s grant does not appear to reflect this change.

<sup>2</sup> Application for Review of Telesat Canada, filed in File No. SAT-LOA-20030609-00113, Call Sign S2454 (filed Dec. 29, 2006) (“Telesat Application”).

<sup>3</sup> EchoStar Satellite L.L.C., DA 06-2440, Order and Authorization, File No. SAT-LOA-20030609-00113, Call Sign S2454 (rel. Nov. 29, 2006) (“EchoStar Order”).

“tweener” satellites at 114.5° W.L. – a location 4.5 degrees away from two U.S. DBS slots.<sup>4</sup>

Both EchoStar and DIRECTV have filed applications for review of the *Spectrum Five Order*.<sup>5</sup>

The *EchoStar Order* and *Spectrum Five Order* raise overlapping substantive issues regarding the technical feasibility of reduced orbital spacing for DBS satellites serving the United States and the procedural propriety of authorizing such operations at this time – issues that are presently the subject of an open Commission rulemaking (the “*DBS NPRM*”).<sup>6</sup> For this reason, the procedural issues raised in the applications for review of the two Bureau orders granting “tweener” satellite slots should be resolved in the same manner. It is a hallmark of administrative law that similarly situated parties should be treated similarly.<sup>7</sup>

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<sup>4</sup> *Spectrum Five, LLC*, DA 06-2439, Order and Authorization, File Nos. SAT-LOI-20050312-00062, SAT-LOI-20050312-00063, Call Signs S2667, S2668 (rel. Nov. 29, 2006) (“*Spectrum Five Order*”).

<sup>5</sup> Application for Review of EchoStar Satellite L.L.C., *filed in* File Nos. SAT-LOI-20050312-00062, SAT-LOI-20050312-00063 (filed Dec. 29, 2006); Application for Review of DIRECTV Enterprises, LLC, *filed in* File Nos. SAT-LOI-20050312-00062, SAT-LOI-20050312-00063 (filed Dec. 29, 2006).

<sup>6</sup> See *Amendment of the Commission’s Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service; Feasibility of Reduced Orbital Spacing for Provision of Direct Broadcast Satellite Service in the United States*, FCC 06-120, Notice of Proposed Rulemaking, 21 FCC Rcd 9443 (2006) (“*DBS NPRM*”).

<sup>7</sup> See, e.g., *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (“[An agency] ‘cannot act arbitrarily nor can it treat similar situations in dissimilar ways,’ and we [have] remanded litigation to the agency when it did not take pains to reconcile an apparent difference in the treatment accorded litigants circumstanced alike.” (quoting *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 780 (D.C. Cir. 1969)); *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996) (“[A]dministrative agencies must apply the same basic rules to all similarly situated supplicants. An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.”).

Telesat's other claims are either inaccurate or more appropriately addressed in other fora.<sup>8</sup> With respect to specific coordination concerns raised by Telesat, they are best addressed in operator-to-operator negotiations.<sup>9</sup> Nevertheless, the prospects of successful coordination between EchoStar's proposed DBS satellite at 86.5° W.L. and Telesat's DBS satellites at 82° and 91° W.L. are good because of the different primary coverage areas of the respective satellites – a characteristic notably absent from the Spectrum Five proposal. Specifically, and notwithstanding Telesat's claims, the proposed EchoStar satellite and Telesat's satellites are only nominally co-coverage: current and future coverage of the U.S. from the Canadian slots surrounding 86.5° W.L. is very limited, facilitating sharing by geographic separation.<sup>10</sup> In these

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<sup>8</sup> In a footnote, Telesat raises a challenge to the *EchoStar Order* not related to the feasibility of tweener DBS satellites – namely that EchoStar's application was not substantially complete “because EchoStar failed to submit the orbital debris mitigation plan required under the Commission's rules.” *Telesat Application* at 7 n.23. EchoStar did submit an orbital debris mitigation plan, however. *EchoStar Order* at ¶ 21. In that submission, EchoStar explained that many of the details had not been settled because the satellite was still in the design process. The Commission has acknowledged in the past that the applicant need not supply all of these details at such an early point. *See, e.g., contactMEO Communications, LLC*, 21 FCC Rcd 4035, at ¶ 47 (2006). In any event, the information that EchoStar submitted is all that is needed to avoid dismissal under the Commission's “substantially complete” standard. *See, e.g., Letter from William Howden, Chief, Satellite Division, FCC, to Stan Edinger, Loral Skynet Network Services, Inc., SES-MOD-20030919-01302* (Oct. 16, 2003). Moreover, the Commission has taken the appropriate steps to address this issue, namely to withhold launch and operating authority until full details of EchoStar's orbital debris mitigation plan have been supplied. *See EchoStar Order* at ¶ 21; *contactMEO, supra*.

<sup>9</sup> *See, e.g., Comments of EchoStar Satellite L.L.C., filed in IB Docket No. 06-160*, at 11 n.18 (filed Dec. 12, 2006).

<sup>10</sup> EchoStar's proposed satellite will primarily serve the United States. In contrast, under its Canadian licenses, Telesat is required to use the Nimiq 1 and 2 satellites at 82° and 91° W.L. to provide service to “all regions of Canada,” which means that the amount of capacity it could devote to U.S. service is necessarily limited. *See, e.g., Letter from Michael Binder, Assistant Deputy Minister, Industry Canada to L.J. Boisvert, President and CEO, Telesat Canada, at Attachment, condition 5* (Mar. 18, 1999) (Nimiq 1 License) (“You must provide DBS satellite service to all regions of Canada.”). In addition, Telesat has said that it has “sold all capacity on the Nimiq 1 and Nimiq 2 satellites to Bell ExpressVu, a Canadian DTH service provider, and that Bell ExpressVu ‘needs all capacity available at the 82° and 91° W.L.’ orbital locations.”

circumstances, EchoStar is optimistic that it will be able to successfully coordinate the operation of its proposed satellite at 86.5° W.L., using techniques such as beam shaping, power roll-offs near the Canadian border, and/or the addition of spot beams to the EchoStar satellite.<sup>11</sup> Thus, unlike the procedural irregularities raised in all three applications for review, the interference issues are fact-specific and can be resolved independently.

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*Pegasus Development Corp.*, 19 FCC Rcd 6080, at ¶ 27 (2004) (“*Pegasus Order*”). To the best of EchoStar’s knowledge, Bell ExpressVu is using this capacity to provide DTH services in Canada, not the United States. This leaves very little (if any) capacity for the provision of DBS service to the United States from 82° and 91° W.L. Indeed, Telesat does not appear to be providing any DBS service to the U.S. today from the Nimiq satellites at those locations, despite previous grants of Commission authority to provide such service. Digital Broadband Applications Corp. (“DBAC”), the only entity cited by Telesat as being licensed to provide service to the United States using the Nimiq satellites, has in fact modified its authority to remove those satellites as points of communications because of the lack of available capacity on those satellites. *Telesat Application* at 3 n.8 (citing *Digital Broadband Applications Corp.*, 18 FCC Rcd 9455 (2003)); see *EchoStar Order* at ¶ 16 n.79 (citing Public Notice, Report No. SES-00663). See also *Digital Broadband Applications Corp.*, File No. SES-MOD-20040506-00656, exhibit 1 (filed May 6, 2004) (“DBAC is not currently able to access adequate Nimiq capacity, as it intended to offer its interactive broadband video and data service.”). Telesat also fails to note that, in May 2006, Canada filed with the ITU modifications to its Region 2 plan entries at 82° and 91° W.L. (CAN-BSS1X and CAN-BSS2X) to provide for Canadian service areas only, *i.e.* no U.S. coverage.

<sup>11</sup> See *EchoStar Application* at 5 (“[T]hrough the proper design of the proposed satellite, including beam shaping and power roll-off, harmful interference to other nearby planned BSS systems can be avoided.”), filed in File No. SAT-LOA-20030609-00113 (filed Jun. 9, 2003); *Consolidated Reply* at 2 (“EchoStar believes that these concerns can be addressed by a coordination condition so long as the plans of Telesat and Express Vu do not implicate use of ‘triple-feed’ antennas.”); see also *Comments of EchoStar Satellite L.L.C.*, filed in IB Docket No. 06-160, at 11 n.18 (filed Dec. 12, 2006).

For the reasons stated above, EchoStar urges the Commission to resolve the procedural issues raised in Telesat's application for review of the *EchoStar Order* in the same manner as EchoStar's and DIRECTV's applications for review of the *Spectrum Five Order*.

Respectfully submitted,

  
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January 16, 2006

## CERTIFICATE OF SERVICE

I, Chung Hsiang Mah, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 29th day of December, 2006, I served a true copy of the foregoing "Opposition to Application for Review," by hand delivery and electronic mail upon the following:

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