

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

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| In the Matters of |) | |
| |) | |
| EchoStar Corporation |) | File No. SAT-LOA-20030609-00113 |
| |) | File No. SAT-MOD-20081229-00239 |
| Certifications of Milestone Compliance |) | Call Sign S2454 |
| |) | |
| EchoStar Corporation |) | File No. SAT-MOD-20101124-00244 |
| |) | File No. SAT-AMD-20110330-00065 |
| Application to Authorize Operations of the |) | Call Sign S2439 |
| EchoStar 8 Satellite at the 86.5° W.L. Orbital |) | |
| Location |) | |

Memorandum Opinion and Order

Adopted: July 26, 2011

Released: July 26, 2011

By the Chief, International Bureau:

I. INTRODUCTION

1. With this Order, we declare null and void EchoStar Corporation's (EchoStar) authorization to construct a new Direct Broadcast Satellite (DBS) service satellite, EchoStar-86.5W, which was to be located at the 86.5° W.L. orbital location. EchoStar did not meet license conditions requiring it to complete its critical design review two years after grant, and to complete construction of the satellite within four years of grant. Instead, EchoStar decided not to construct the authorized new satellite, but rather seeks to use the eight-year-old, in-orbit EchoStar 8 satellite to meet the milestone deadlines for EchoStar-86.5W. We find it is not in the public interest to permit EchoStar to substitute an older in-orbit satellite for a new state-of-the-art satellite. Consequently, we deny EchoStar's request to use EchoStar 8 to meet EchoStar-86.5W's milestone and to operate at the 86.5° W.L. orbital location. We also deny EchoStar's alternative request for a waiver of the completing construction milestone.

II. BACKGROUND

2. On November 29, 2006, the International Bureau granted EchoStar authority to construct a new DBS satellite to provide service from the 86.5° W.L. orbital location.¹ As a condition of that authorization, EchoStar was required to meet a due diligence milestone schedule that required it to execute a contract for construction of its satellite within one year of the grant (November 29, 2007), complete critical design review (CDR) for the satellite within two years of grant (November 29, 2008),

¹ EchoStar Satellite L.L.C., Application to Construct, Launch, and Operate a Direct Broadcast Satellite at the 86.5° W.L. Orbital Location, *Order and Authorization*, 21 FCC Rcd 14045 (2006) (*EchoStar 86.5 WL Order*). The 86.5° W.L. orbital location is not a planned location under the International Telecommunication Union (ITU) Region 2 broadcasting satellite service Plan, but is instead a location mid-way between two planned locations. ITU Region 2 includes North, Central, and South America and Greenland. See Article 5, Section I of the ITU Radio Regulations. The ITU Region 2 BSS Plan is comprised of the Plan for BSS in the band 12.2-12.7 GHz in ITU Region 2, as contained in Appendix 30 of the ITU Radio Regulations, and the associated Plan for the feeder links in the frequency band 17.3-17.8 GHz for the broadcasting-satellite service in Region 2, as contained in Appendix 30A of the ITU Radio Regulations.

complete construction of the satellite within four years of grant (November 29, 2010), and operate the satellite within six years of grant (November 29, 2012).²

3. On November 29, 2007, to demonstrate that it had met the first milestone, EchoStar filed a copy of its construction contract with Space Systems/Loral. On November 29, 2008, EchoStar filed a certification that it had completed CDR, together with CDR documentation filed subject to a request that it be kept confidential. On December 29, 2008, EchoStar filed an application proposing to modify the antenna coverage pattern and the orbital debris mitigation plan for EchoStar-86.5W.³

4. Now, at its third milestone date -- completing construction -- EchoStar states that it has changed its business plans, and is no longer pursuing the construction of EchoStar-86.5W.⁴ In a modification application filed just five days before the milestone deadline, EchoStar requests authority to operate on the DBS frequencies at the 86.5° W.L. orbital location using its in-orbit EchoStar 8 satellite.⁵ The EchoStar 8 satellite currently operates at the 77° W.L. orbital location as a Mexican-licensed satellite.⁶ EchoStar seeks a ruling that this proposed substitution meets the November 29, 2010 completing construction milestone for the EchoStar-86.5W satellite. Alternatively, EchoStar seeks a waiver of the completing construction milestone.⁷

5. By a letter dated January 13, 2011, the Satellite Division of the International Bureau requested additional information regarding construction of the EchoStar-86.5W satellite, whether construction is continuing, and what payments have been made on the construction contract. In response, EchoStar filed a letter on February 14, 2011, together with a request that the letter be treated in its entirety as confidential.

III. DISCUSSION

6. *Milestone Compliance.* The Commission's DBS due diligence rules are designed to ensure that valuable spectrum is not held to the exclusion of others by licensees unable or unwilling to proceed with their plans,⁸ and that service is timely deployed for the benefit of the public.⁹ To this end, the Commission places certain conditions on DBS authorizations, referred to as due diligence milestones. These milestones track the three-to-five year period needed to construct and launch a new satellite. The

² *EchoStar 86.5 WL Order*, 21 FCC Rcd at 14058, ¶ 25 and 14060, ¶ 30.

³ File No. SAT-MOD-20081229-00239.

⁴ EchoStar Corporation Application for Modification, IBFS File No. SAT-MOD-20101124-00244 at 3 (EchoStar Modification Application).

⁵ EchoStar filed an amendment to this application to update the uplink command frequencies for EchoStar 8. IBFS File No. SAT-AMD-20110330-00065.

⁶ On September 17, 2010, the Satellite Division consented to the transfer of control of the EchoStar 8 space station from EchoStar Corporation to QuetzSat, S. de R.L. de C.V., operating under authorization from the Secretaría de Comunicaciones y Transportes and the Comisión Federal de Telecomunicaciones of Mexico. Consent to this transfer became effective on September 22, 2010, at which time EchoStar's FCC authorization for EchoStar 8 was terminated.

⁷ EchoStar Modification Application at 9-11.

⁸ Joint Application for Review of Constellation Holdings, Inc., Mobile Communications Holdings, Inc., and ICO Global Communications (Holdings) Limited, *Memorandum Opinion and Order*, 19 FCC Rcd 11631, 11632, ¶ 2 (2004).

⁹ 47 C.F.R. § 25.148(b); Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, 17 FCC Rcd 11331, 11352, ¶ 42 (2002).

Commission closely scrutinizes all milestone filings to determine whether diligent progress is made toward operation of the authorized DBS satellite.¹⁰

7. We have reviewed the information provided by EchoStar, and find that EchoStar did not meet the CDR milestone for the EchoStar-86.5W satellite.¹¹ CDR is “the stage in the spacecraft implementation process at which the design and development phase ends and the manufacturing phase starts.”¹² Although the Commission has not prescribed a particular method for demonstrating that the CDR milestone has been met, evidence of compliance may include: (1) evidence of significant expenditures, as required by most construction contracts at the time of the spacecraft CDR; (2) affidavits from independent manufacturers; and (3) evidence that the licensee has ordered all the long lead items needed to begin physical construction of the spacecraft.¹³ We find that the CDR package submitted by EchoStar falls far short of what is required to demonstrate compliance with the CDR milestone. The technical data EchoStar submitted in its CDR data package shows that the major components of a satellite have been identified, but it does not show how the components have been integrated into a functional electrical and mechanical design specific to the EchoStar-86.5W satellite.¹⁴ This is because the design and development phase for this satellite has not ended. Statements in the CDR data package EchoStar submitted show that significant design work remains to be performed.¹⁵ Consequently, the design and development phase has not ended and, by definition, CDR has not occurred. In addition, there is no evidence of significant expenditures at CDR that was due under the terms of the construction contract.¹⁶ In fact, EchoStar made no payments at all on this contract after an initial payment at execution, and that initial payment amounts to only a small fraction of one percent of the contract price.¹⁷

8. With respect to the completing construction milestone, EchoStar acknowledges that construction has not been completed.¹⁸ Indeed, EchoStar has supplied no evidence to suggest that

¹⁰ Advanced Communications Corporation Application for Extension of Time to Construct, Launch, and Operate A Direct Broadcast Satellite System, *Memorandum Opinion and Order*, 11 FCC Rcd 3399, 3411, ¶ 28, 3414, ¶ 37 (1995) (*Advanced Application for Review*).

¹¹ The information provided by EchoStar also raises a substantial question as to whether EchoStar met the milestone for a binding construction contract. We need not decide this issue, however, given our findings regarding the CDR and completing construction milestones.

¹² *EchoStar 86.5 WL Order*, 21 FCC Rcd at 14058, ¶ 25 (citing Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 10760, 10826, ¶ 170 (2003)).

¹³ *EchoStar 86.5 WL Order*, 21 FCC Rcd at 14058.

¹⁴ Since several DBS satellites similar to the EchoStar 86.5 W satellite have been built for both EchoStar and DIRECTV, and the satellite is based on a Space Systems/Loral model that has been used for other types of satellites as well, many of the major components of the satellite are “heritage” components. Thus, selection of these components does not demonstrate that EchoStar completed design work specific to EchoStar-86.5W.

¹⁵ For example, EchoStar states that some of the critical analyses “will be developed,” and that the results of certain analyses “will be provided at CDR,” and the results of other analyses are “to be presented at CDR.” However, completed analyses are not presented anywhere in EchoStar’s CDR package.

¹⁶ Contract between EchoStar Orbital Corporation II and Space Systems/Loral, Inc. at Payment Plan in Attachment A (confidentiality requested).

¹⁷ See *Advanced Application for Review*, 11 FCC Rcd at 3418, ¶ 50 (declaring DBS license null and void for failure to meet the second prong of the then-applicable DBS due diligence milestones, as Advanced had paid less than 1% of the contract price).

¹⁸ The Commission has declared other DBS satellite licenses null and void when construction was not continuing. See, e.g., *Advanced Application for Review*, 11 FCC Rcd at 3420-21, ¶ 56 (Advanced appeared to abandon its DBS

(continued....)

construction had even begun. EchoStar states that it has changed its business plans, and is no longer pursuing the construction of EchoStar-86.5W.¹⁹ Instead, EchoStar requests authority to use EchoStar 8, a satellite that is now well into its expected mission life, to satisfy EchoStar-86.5W's due diligence milestones.²⁰ We deny that request. Recently, we denied a similar request by Star One, S.A. to use an in-orbit space station in lieu of a newly-constructed satellite.²¹ In denying Star One's request, we found that allowing an older space station as a substitute for constructing a new space station is inconsistent with the policy goal that satellite providers remain committed and able to timely implement new, state-of-the-art space stations as described in their applications, to the benefit of U.S. consumers.²² EchoStar attempts to distinguish *Star One* by asserting that its proposed substitute space station is just eight years old, in contrast to the 15-year-old satellite at issue in *Star One*. We are not persuaded that some additional quantum of useful life in the EchoStar 8 satellite should lead to a different result. Furthermore, EchoStar 8 is not capable of meeting the state-of-the-art technical specifications of the proposed EchoStar-86.5W satellite. We therefore find that EchoStar did not meet the completing construction milestone for the EchoStar-86.5W satellite.

9. *Waiver Request.* EchoStar alternatively seeks a waiver of the completing construction milestone.²³ Section 1.3 of the Commission's rules provides that waiver of a rule may be granted upon "good cause shown."²⁴ Waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.²⁵ Generally, the Commission may grant a waiver of its rules in a particular case only if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.²⁶

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business, progress toward actual implementation was not steady and consistent with the schedule established in the construction contract); *see also* Final Analysis Communication Services, Inc. Authorization to Construct, Launch and Operate a Non-Voice, Non-Geostationary Mobile Satellite System in the 148-150.5 MHz, 400.15-401 MHz, and 137-138 MHz Bands, *Memorandum Opinion and Order*, 19 FCC Rcd 4768, 4774, ¶ 18 (Int'l Bur. 2004) (construction completely halted).

¹⁹ EchoStar Modification Application at 3. The Commission previously denied a request by EchoStar for a milestone extension based on its business decisions, stating: "EchoStar's business decision to use its new satellites to carry additional broadcast stations from CONUS locations is not a justification for failure to meet its milestone obligations at other orbit locations." EchoStar Satellite Corporation, Directsat Corporation, Direct Broadcasting Satellite Corporation, Consolidated Request For Additional Time To Commence Operation, *Memorandum Opinion and Order*, 17 FCC Rcd 8831, 8835, ¶ 10 (Int'l Bur. Sat. Div. 2002).

²⁰ It is unclear when, or whether, EchoStar 8 will become available to be moved to the 86.5° W.L. orbital location. EchoStar 8's availability is contingent upon the launch of QuetzSat 1, which is to replace EchoStar 8 at the 77° W.L. orbital location. Further, EchoStar 8 recently suffered a disruption in service and is scheduled for additional testing to determine its health. *See* IBFS File No. SAT-STA-20110225-00036. In any case, we would not allow EchoStar 8 to be used to satisfy EchoStar-86.5W's milestones, even if EchoStar 8 were available immediately.

²¹ Star One, S.A. Petition for Declaratory Ruling to be Added to the Permitted List, *Order*, 25 FCC Rcd 14338 (Int'l Bur. 2010) (*Star One*).

²² *Id.* at 14342, ¶ 8 and 14345, ¶ 14.

²³ EchoStar has not requested a waiver of the CDR milestone. As we found above in ¶ 7, EchoStar did not meet the CDR milestone. Therefore, EchoStar's license is null and void for that reason alone. Nevertheless, we address here its request for a waiver of the subsequent completing construction milestone.

²⁴ Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3. *See also* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio*); Northeast Cellular Telephone Co., 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).

²⁵ *Northeast Cellular*, 897 F.2d at 1166.

²⁶ *WAIT Radio*, 418 F.2d at 1157.

10. EchoStar states that the Commission granted a similar waiver in *Dominion Video*.²⁷ In that case, the licensee failed to complete construction, and sought to rely on use of a satellite already in orbit to meet due diligence requirements.²⁸ The facts that supported the waiver in that case, however, are not present in this case. *Dominion Video* was authorized to operate on only eight of 32 available channels at the 61.5° W.L. orbital location.²⁹ The other 24 channels were authorized for use by other licensees, including EchoStar, which was already operating a satellite at that location. The International Bureau granted *Dominion* a waiver of the due diligence requirements to allow *Dominion* to use the in-orbit EchoStar 3 satellite to provide service over *Dominion*'s authorized channels. In doing so, the Bureau recognized that, since the initial grant of eight channels to *Dominion* in 1982, the Commission had approved cooperative ventures if existing channel assignments proved insufficient to avoid the enormous expense and delay involved in constructing and launching a separate satellite at the same orbital location to provide just a small number of channels.³⁰ Furthermore, the Bureau noted that authorizing *Dominion* to begin service would expand programming choices for DBS subscribers.³¹ In contrast, EchoStar-86.5W was authorized to operate on all 32 channels available at the 86.5° W.L. orbital location, and a new competitor will not result from grant of a waiver here. The only party involved is EchoStar, which made a business decision to allocate resources to launch two other new satellites to other orbital locations, while not moving forward with construction of the new satellite authorized at the 86.5° W.L. orbital location.³² Under these circumstances, we cannot conclude that grant of a waiver would serve the public interest.

11. Consequently, we will not allow EchoStar 8 to serve as a substitute for EchoStar-86.5W. Because EchoStar did not meet either the CDR or completing construction milestones, we declare the license for EchoStar-86.5W null and void. We therefore dismiss as moot EchoStar's 2008 application to modify the EchoStar 86.5W authorization to revise the antenna coverage pattern and the orbital debris mitigation plan.³³ Further, to the extent that the application to move EchoStar 8 into the 86.5° W.L. orbital location could be viewed as a stand-alone application, it is subject to the current freeze on new DBS service applications.³⁴

²⁷ *Dominion Video Satellite Inc. Application for Minor Modification of Authority to Construct and Launch and to Continue Construction and Launch of Planned Satellite at 61.5° W.L., Order and Authorization*, 14 FCC Rcd. 8182 (Int'l Bur. 1999) (*Dominion Video*).

²⁸ *Dominion* sought authority to use the EchoStar 3 satellite, which was just two years old, instead of constructing and launching its own satellite. The Bureau found that *Dominion Video* did not meet its construction milestone, stating that nothing in the Commission's rules suggests that leasing capacity on another space station licensed to another DBS operator was sufficient to meet a construction milestone. *Dominion Video*, 14 FCC Rcd at 8185, ¶ 7. Similarly, we decline here to find milestone compliance based on a space station constructed and launched pursuant to a separate authorization.

²⁹ *Dominion Video*, 14 FCC Rcd at 8183, ¶ 2. The DBS licensing procedures in place at that time assigned as few as three channels to licensees at individual orbital locations, based on the applicants' requests. See Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service, *Notice of Proposed Rulemaking*, IB Docket No. 06-160, 21 FCC Rcd 9443, 9447, ¶ 7 (2006).

³⁰ *Dominion Video*, 14 FCC Rcd. at 8186-7, ¶¶ 11-12.

³¹ *Id.* at ¶ 10.

³² EchoStar Modification Application at 3.

³³ File No. SAT-MOD-20081229-00239.

³⁴ See Direct Broadcast Satellite (DBS) Service Auction Nullified: Commission Sets Forth Refund Procedures For Auction No. 52 Winning Bidders and Adopts a Freeze On All New DBS Service Applications, *Public Notice*, FCC 05-213, 20 FCC Rcd 20618 (2005).

IV. ORDERING CLAUSES

12. Accordingly, it is ORDERED, pursuant to Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, that the authorization for EchoStar Corporation to operate on 32 Direct Broadcast Satellite channels at the 86.5° W.L. orbital location, File No. SAT-LOA-20030609-00113 (Call Sign S2454) IS DECLARED NULL AND VOID.

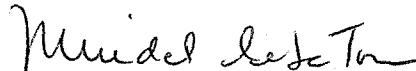
13. IT IS FURTHER ORDERED that EchoStar Corporation's application, as amended, to modify its authorization at the 86.5° W.L. orbital location by substituting the EchoStar 8 satellite for new construction, File Nos. SAT-MOD-20101124-00244 and SAT-AMD-20110330-00065, IS DENIED.

14. IT IS FURTHER ORDERED that EchoStar Corporation's request for a waiver of the completing construction milestone IS DENIED.

15. IT IS FURTHER ORDERED that EchoStar Corporation's application to modify the authorization at the 86.5° W.L. orbital location, File No. SAT-MOD-20081229-00239, IS DISMISSED.

16. IT IS FURTHER ORDERED that this Order is effective upon release. Petitions for reconsideration under 47 C.F.R. § 1.106 or applications for review under 47 C.F.R. § 1.115 may be filed within thirty days of the release date. See 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION



Mindel De La Torre
Chief, International Bureau