

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

In the Matter of)	
)	
Rainbow DBS Company LLC)	File Nos SAT-LOA-20030827-00172,
)	SAT-LOA-20030827-00248,
)	SAT LOA-20030827-00175
)	SAT LOA-20030827-00249
)	SAT-LOA-20030827-00173
Consent to Withdraw and Unconditionally)	
Release Bonds and Request for)	Call Signs S2485, S2554, S2488, S2555,
Waiver of the Bond Requirement)	S2486

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 2007

Released: March 2, 2007

By the Commission Commissioners Copps and Adelstein dissenting and issuing a joint statement

I INTRODUCTION

1 By this Order, we grant the request of Rainbow DBS Company LLC (Rainbow) to waive the bond requirement, and to withdraw and unconditionally release the bonds submitted by Rainbow to satisfy a condition of its five Ka-band fixed satellite service licenses We also declare Rainbow's authorizations null and void for failure to meet its milestones

II BACKGROUND

2 On November 21, 2003, the International Bureau authorized Rainbow to construct, launch, and operate four Ka-band satellites, one each at the 62° W L , 71° W L , 119° W L and 129° W L orbital locations¹ On January 5, 2004, the Bureau authorized Rainbow to operate a fifth Ka-band satellite at the 87° W L orbital location² Pursuant to each of these authorizations, Rainbow was required to satisfy four separate implementation milestones The license authorization provided that failure to meet the milestone obligations would render the licenses null and void In addition, each authorization required Rainbow to post a \$3 million bond for each satellite, payable to the U S Treasury in the event it did not meet a milestone Rainbow's total bond requirement was \$15 million Rainbow satisfied its first milestone, to execute a binding contract for the construction of each satellite³ As permitted by the

¹ *Public Notice* Policy Branch Information, Report No SAT-00179 (Nov 26, 2003)

² *Public Notice*, Policy Branch Information, 19 FCC Rcd 77 (2004)

³ *Public Notice*, Policy Branch Information, 20 FCC Rcd 7808 (2005)

Commission's rules, Rainbow reduced each bond by 25 percent – to \$2.25 million – upon notification that it had satisfied this first milestone.⁴ Rainbow's next milestone was to complete Critical Design Review before November 21, 2005 for the first four authorizations, and before January 5, 2006 for its fifth satellite. Rainbow acknowledges it did not satisfy this milestone for any of its authorizations and does not intend to proceed with these satellites.⁵ Thus, Rainbow is subject to a forfeiture of \$11.25 million under the bonds.

3 On January 30, 2006, however, Rainbow filed a request for consent to withdraw and unconditionally release the five bonds, and to the extent necessary, for a waiver of the bond requirement.⁶ Rainbow states that consent to withdraw and waive the bond requirement is warranted based on its efforts to build a competitive satellite service. Specifically, Rainbow maintains that it acquired the Ka-band licenses to supplement and complement its VOOM DBS service, provided by its Rainbow 1 satellite at the 61.5° W L orbital location.⁷ Rainbow asserts that to make VOOM viable, it needed to expand beyond Rainbow 1's 11 DBS channels. To that end, it acquired the five Ka-band authorizations and made "significant progress" toward developing and constructing its Ka-band satellites. In addition, it timely posted a bond for each license.

4 Rainbow argues that, despite its best efforts, VOOM did not attract enough subscribers to make the service viable, and in January 2005, it sold the Rainbow 1 satellite and the associated earth stations. Although it made significant attempts to continue VOOM operations, it discontinued the VOOM service in April 2005. As a result, Rainbow was compelled to terminate its satellite construction contract for its Ka-band satellites.⁸

5 Rainbow maintains that under these circumstances, payment of the bond would not serve the underlying purpose of the bond requirement. Rainbow states that its efforts demonstrate that it has not "warehoused" Ka-band spectrum. Further, because other Ka-band orbit locations were unassigned, Rainbow argues that it did not preclude any other party willing and able to construct a Ka-band satellite from doing so.⁹ It also notes that other Ka-band licenses have been returned or revoked, ensuring that interested entities could obtain Ka-band spectrum at many "desirable" locations.¹⁰

⁴ 47 C.F.R. § 25.165(d)

⁵ Letter to Marlene H. Dortch, Secretary, FCC from David A. Deitch, S.V.P. and General Counsel (January 30, 2006) (*Rainbow Letter*)

⁶ *Rainbow Letter*

⁷ *Rainbow February Letter* at 2. Rainbow also notes that its efforts to expand the VOOM service included participating in Auction 52 for additional DBS frequencies at 166° W L and 175° W L. Auction 52 was subsequently nullified, and Rainbow received a refund of its winning bid. *Id.*

⁸ *Rainbow Letter* at 3

⁹ *Rainbow Letter* at 3

¹⁰ *Rainbow Letter* at 4

III DISCUSSION

6 Under the monetary bond requirement established by the Commission in its *First Space Station Licensing Reform Order*, any entity awarded a license for a geostationary orbit space station must execute, as a condition of the license and within 30 days of the license grant, a bond payable to the U S Treasury¹¹ The bond is payable upon failure to meet any of the implementation milestones included in every license, but the amount of the bond is reduced each time the licensee meets a milestone¹² The Commission established the bond requirement as a “significant component of the package of rules intended to limit license grants to those that are able and willing to build their proposed systems,” for the fundamental purpose of expediting provision of the best possible service to the public, given the lack of available spectrum sought by potential satellite providers¹³ The bond requirement addresses this fundamental purpose in three ways First, it acts as a market-based mechanism to weed out those who lack the financial wherewithal to succeed in establishing service¹⁴ Second, it provides incentives to ensure that the licensee has a good faith intent to apply for the spectrum rights for the purpose of establishing a satellite service¹⁵ Third – and as the other side of the same coin – it discourages behavior like the warehousing and speculative pursuit of spectrum, which will delay service to the public when spectrum is scarce by excluding or delaying others from establishing satellite systems¹⁶

7 Rainbow seeks a waiver of the Commission’s bond requirements in order to obtain consent to withdraw and unconditionally release the performance bonds it submitted to the Commission in obtaining the five Ka-band fixed-satellite service licenses at issue here We are authorized to grant such a waiver under Section 1.3 of the Commission’s rules if the petitioner demonstrates good cause for such action¹⁷ Good cause, in turn, may be found and a waiver granted “where particular facts would make strict compliance inconsistent with the public interest”¹⁸ To make this public interest determination, the

¹¹ Amendment of the Commission’s Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No 02-34, 18 FCC Rcd 10760, 10825-26 (2003) (*First Space Station Licensing Reform Order*), see also Amendment of the Commission’s Space Station Licensing Rules and Policies, *First Order on Reconsideration and Fifth Report and Order* IB Docket No 02-34, 19 FCC Rcd 12637, 12646 (2004) (*Fifth Report and Order*) (stating that the bond requirement is, *inter alia*, a license condition)

¹² *First Space Station Licensing Reform Order*, 18 FCC Rcd at 10826

¹³ *Fifth Report and Order*, 18 FCC Rcd at 12647

¹⁴ *Id* at 12646 (stating that the bond requirement is a “financial qualification requirement” that acts as “a market-based mechanism for ensuring that licensees are able to proceed with constructing their satellites”)

¹⁵ Thus, the Commission has stressed the role of the bond requirement not only in ensuring an applicant/licensee’s financial ability to establish a satellite service, but also its willingness to do so *Id* (stating that the bond requirement is a mechanism for “ensuring that licensees are willing to proceed with constructing their satellites”) To this end, the bond requirement discourages applicants who might pursue the spectrum for speculative purposes or with the intent to warehouse the spectrum See *id* at 12647

¹⁶ *Id* at 12646-47

¹⁷ 47 CFR § 1.3 See also *ICO Global Communications (Holdings) Limited v FCC*, 428 F 3d 264 (2005); *Northeast Cellular Telephone Co v FCC*, 897 F 2d 1164 (D C Cir 1990); *WAIT Radio v FCC*, 418 F 2d 1153 (D C Cir 1969)

waiver cannot undermine the purposes of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule¹⁹

8 In analyzing the facts of this case, we have determined that Rainbow has demonstrated good cause for a waiver of the bond requirements for its five Ka-band authorizations. As discussed in detail below, grant of this waiver will not undermine the three ways in which the bond requirement works to expedite service to the public in an environment of scarce spectrum (*i.e.*, ensuring the licensee's financial ability to establish the licensed service, ensuring its good faith intent to provide the service, and discouraging the warehousing or speculative pursuit of scarce spectrum). Moreover, in light of our conclusion that grant of the waiver will not work at cross-purposes with the fundamental purposes of the bond requirement, we find that the grant will serve the public interest by encouraging the participation in the industry of a full range of potential satellite providers.

9 With respect to the financial qualifications function of the bond, we observe that Rainbow and its affiliated companies invested approximately \$1 billion over a six-year period to launch a state-of-the-art DBS satellite, develop consumer equipment, construct uplink facilities, and create and acquire innovative, high definition programming.²⁰ These investments were part of Rainbow's efforts to establish its VOOB enterprise, a comprehensive, high definition television programming service, which its proposed Ka-band satellites were to supplement and complement. Hence, in this situation, it is clear that using the bond requirement to weed out an entity with Rainbow's financial resources would not serve the purposes of the rule with respect to financial qualifications.

10 Similarly, we conclude that demanding strict compliance with the bond requirement in this case is not necessary to preserve its function as a mechanism to ensure good faith. Given Rainbow's progress and investment in establishing the Ka-band component of its overall system, along with the reasons for Rainbow's failure, it cannot be said that Rainbow was entering into this venture merely for the sake of speculation, without a *bona fide* intent to provide a full-fledged satellite service to the public. Specifically, in addition to the \$1 billion mentioned above, Rainbow made "significant progress" by "satisfying its first milestone," by executing a construction contract for all five satellites.²¹ Further, Rainbow states that it invested "more than \$13 million directly to develop and construct" the five Ka-band satellites.²² This amount includes \$12 million paid under the construction contract for the satellites. The facts of this case thus support our conclusion that Rainbow's ultimate inability to proceed with its system was not caused by insufficient good faith efforts to succeed, but rather because of a lack of

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¹⁸ *Northeast Cellular*, 89 F.2d at 1166, *ICO Global Communications*, 428 F.3d at 269 (quoting *Northeast Cellular*), *see also* *WAIT Radio*, 418 F.2d at 1157-59.

¹⁹ *See e.g.* *WAIT Radio*, 418 F.2d at 1157 (stating that even though the overall objectives of a general rule have been adjudged to be in the public interest, it is possible that application of the rule to a specific case may not serve the public interest if an applicant's proposal does not undermine the public interest policy served by the rule), *Northeast Cellular*, 89 F.2d at 1166 (stating that in granting a waiver, an agency must explain why deviation from the general rule better serves the public interest than would strict adherence to the rule).

²⁰ *Rainbow Letter* at 1.

²¹ *Rainbow Letter* at 2.

²² *Rainbow Letter* at 2.

subscribers to sustain the enterprise over the long term²³

11 Our conclusion that a waiver here will not undermine the purpose of the bond requirement is premised not only on Rainbow's manifest financial resources and good faith approach toward establishing a satellite system, but also on the fact that sufficient spectrum comparable to Rainbow's holdings has been available for other potential providers of satellite service. In this particular instance, Rainbow's licensing did not preclude other parties from applying for comparable available Ka-band licenses at the time Rainbow submitted its applications.²⁴ From the time Rainbow applied for its five Ka-band orbital locations, there have been at least ten other vacant Ka-band orbital locations for which U.S. providers could have applied.²⁵ We acknowledge that each of these alternative locations have unique characteristics – as do each of the locations licensed to Rainbow. Indeed, we have recognized that orbital locations are generally not fungible, and we do not lightly equate satellite spectrum licensed to one operator with that which is licensed to another. Nevertheless, in this case all the available authorizations (both Rainbow's five authorizations and the ten vacant locations referenced above) occupy the same band and are classified as full-CONUS slots. Moreover, since each one exhibits a unique but similarly challenging set of drawbacks that a potential operator must work to overcome (such as international encumbrances and portions of coverage that are less than optimal), we conclude that none of them have decided advantages over the others, and that at least a subset of them offers a feasible alternative to the one for which an applicant has ultimately applied. In addition, the fact that one party (EchoStar) filed almost simultaneously with Rainbow for one of the licenses here does not dissuade us from our conclusion about the sufficiency of the alternatives to the five Rainbow orbital slots, given that EchoStar has gone on to obtain alternative spectrum. (We also observe Rainbow's other four authorizations were not subject to any competing interest.) Nor does it concern us that some of the available orbital locations we have identified have remained unoccupied over the relevant period, given the myriad of possible causes that are consistent with our conclusions about availability (e.g., high costs of establishing a satellite system, discouraging market opportunities, insufficient number of interested applicants). In sum, we believe that the fifteen orbital locations offered sufficiently similar opportunities to conclude that Rainbow's application for five of these locations was not speculative, and that the award of the licenses to Rainbow did not have warehousing effects. The conclusion that other Ka-band orbital locations were reasonably available is reinforced by the additional factor that other Ka-band orbital locations become

²³ We realize that we stated in the *Fifth Report and Order* that we would not modify the bond requirement to accommodate businesses that procure their licenses in good faith but are later forced to abandon them because of economic changes in the marketplace. See 19 FCC Rcd at 12652. Nevertheless, we find this is a unique situation given the substantial outlays made by Rainbow and its affiliates.

²⁴ Cf. *AfriSpace, Inc., Order and Authorization*, DA 06-4 ¶¶ 26-29 (Int'l Bur. rel. January 3, 2006) (good cause shown for waiver of bond requirement where (1) warehousing was not a concern because the orbital location and frequencies to be used by the applicant's satellite were already being used by the applicant's existing satellite (which the new satellite would replace) and (2) speculation was not a concern because, for technical reasons, no one else would be able to operate on the applicant's frequency bands in the intended area of operation).

²⁵ Rainbow DBS submitted its application on the day the Commission lifted the freeze on new satellite applications imposed by the *First Space Station Licensing Reform Order*. According to Rainbow, as of two months before imposition of the freeze, there were approximately 37 Ka-band orbital locations available. *Rainbow Letter* at 3. At that time, the number of orbital locations reasonably available to U.S. providers for service to the United States, based upon ITU reservations, was approximately 15: 113° W L, 131° W L, 129° W L, 127° W L, 123° W L, 119° W L, 111° W L, 91° W L, 87° W L, 81° W L, 79° W L, 77° W L, 75° W L, 71° W L, and 62° W L.

available both before and after Rainbow applied because of license cancellations²⁶ Finally, the Commission's first-come, first-serve procedure for processing satellite applications adopted in the *First Space Station Licensing Reform Order* ensures that potential entrants are able to obtain Ka-band spectrum at many of these locations in a minimal amount of time

12 We also find that the waiver grant will better serve the public interest by encouraging the participation in the industry of a full range of potential satellite providers As explained above, Rainbow is unique in that it undertook a substantial effort, both in terms of finances and good faith, to establish a satellite system during a period of time when comparable spectrum was available for use by other potential operators Enforcing the bond requirement against this backdrop could have the effect of discouraging industry participation in the future by similarly qualified and motivated applicants There is a strong public interest in affirmatively encouraging this kind of participation, not possibly discouraging it by the pro forma application of the bond requirement in circumstances where we have already determined that the three functions served by the requirement will not be undermined by the waiver grant

13 Because Rainbow, by its own admission, failed to comply with its second milestone, to complete Critical Design Review, Rainbow's Ka-band authorizations are null and void Accordingly, the five orbital locations previously assigned to Rainbow, 62° W L , 71° W L , 87° W L , 119° W L and 129° W L , are now available for reassignment

IV CONCLUSION AND ORDERING CLAUSE

14 Based on the foregoing, we find that Rainbow had demonstrated good cause for the Commission to waive its satellite bond requirement As a result, Rainbow is released from its bond obligations

²⁶ *PanAmSat Licensee Corp* , MO&O, 16 FCC Rcd 11534 (2001), *Motorola Inc and Teledesic*, MO&O, 17 FCC Rcd 16543 (2002); *CAI Data Systems*, MO&O, 18 FCC Rcd 22332 (2003), *Pegasus Dev Corp* , MO&O, 18 FCC Rcd 26672 (2003), *VisionStar Inc* , MO&O, 19 FCC Rcd 14820 (2004), *NetSat 28 Company, L L C* , MO&O, 19 FCC Rcd 17722 (2004), *CyberStar Licensee L L C* , Order 20 FCC Rcd 15263 (2005) The foregoing license cancellations reflect the fluid nature of the Ka-band satellite market over time While it would have been much better if all of the systems had succeeded, from a spectrum availability viewpoint, these developments nonetheless resulted in the unanticipated availability of Ka-band orbital locations during the time periods involved

15 Accordingly, the Rainbow DBS Company LLC's request for a waiver of the Commission's bond requirement, and for consent to withdraw and unconditionally release the bond is GRANTED, and Rainbow's Ka-band authorizations are DECLARED NULL AND VOID

FEDERAL COMMUNICATIONS COMMISSION

Marlene H Dortch
Secretary

**JOINT STATEMENT OF
COMMISSIONERS MICHAEL J COPPS AND JONATHAN S ADELSTEIN
DISSENTING**

Re Rainbow DBS Company LLC, Consent to Withdraw and Unconditionally Release Bonds and Request for Waiver of the Bond Requirement, File Nos SAT-LOA-20030827-00172 et al, Call Signs S2485, S2554, S2488, S2555, S2486

While this is a case with difficult facts, we do not believe the public interest is served by granting Rainbow DBS Company LLC ("Rainbow") relief from its \$11.25 million bond obligation. Given the clear Commission direction on the impact of changed economic circumstances on satellite licensees, it is unclear to us why the majority, without public comment, would substantially weaken the bond requirement and our relatively new satellite licensing rules for the benefit of one company.

We are sympathetic to the expenses incurred by Rainbow in attempting to develop its DBS service. The Commission actually took specific steps to promote the Rainbow service on several occasions.²⁷ But with regards to our bond requirements, the Commission has been clear that "to the extent petitioners are asserting that satellite entrepreneurs should be free to apply for and obtain satellite licenses and later abandon their licenses because of economic changes in the marketplace, we believe that such practices are inconsistent with the public interest."²⁸

Indeed, all satellite licensees will incur costs in the development of their systems. But the bond requirement should not rise or fall on how many dollars a licensee incurs in development or whether similarly situated spectrum may or may not be available.²⁹ The Commission created the bond requirement in the first place to avoid these very questions. The theory behind the bond requirement is that the Commission does not have to be put in the position of having to look behind the original intent of the licensee. Instead, the applicant's willingness to forfeit capital as a bond itself testifies to the applicant's qualifications to secure the slot. "Thus, financial qualifications will become a market-driven rather than a regulatory determination."³⁰ How the slot ultimately is used, though, is in the sole discretion of the licensee.

In this case, Rainbow, and its parent company Cablevision, were well aware of the bond

²⁷ See e.g. *Rainbow DBS Co LLC Applications for Special Temporary Authority to Operate a Direct Broadcast Satellite Over Channels 23 and 24 at the 61.5° W L Orbital Local Order and Authorization*, 18 FCC Rcd 19825 (2003).

²⁸ Amendment of the Commission's Space Station Licensing Rules and Policies, *First Order on Reconsideration and Fifth Report and Order*, IB Docket No. 02-34, 19 FCC Rcd 12637, 12652 (2004) (*Fifth Report and Order*) (underline added).

²⁹ As the item notes, EchoStar filed almost simultaneously with Rainbow for one of the Ka-band slots, but was denied access to that license because it was awarded to Rainbow under our first-come, first-served licensing regime.

³⁰ Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-34, 18 FCC Rcd 10760, 10825 (2003).

requirements at the time of receiving their five Ka-band licenses. In fact, the company initially submitted bonds in the amount of \$25 million (based on a \$5 million bond per satellite) before posting a reduced \$3 million per satellite as a result of changes to the Commission's rules. After the company met the first milestone to execute a binding contract, the total bond amount was reduced from \$15 million to \$11.25 million, where it currently stands.

While we believe the legal position set forth by the Commission in adopting the bond requirement counsels against a grant of the \$11.25 million bond waiver, we also are troubled by the lack of accountability in reaching this decision. It is difficult to understand how the Commission can part with \$11.25 million meant for the U.S. Treasury without seeking public comment or developing a record beyond Rainbow's initial three and half page filing. Where are the financial affidavits detailing the \$13 million purportedly spent on developing and constructing the five (5) Ka-band satellites? Is the \$2.6 million a typical amount that a licensee would expend to hit its first milestone? What is the financial impact of this decision with respect to current licensees with bond requirements?

The Commission has spoken definitively on the issue of satellite licensees facing changes in economic conditions that would lead them to alter business plans "regardless of its intent, the actions of a licensee who obtains a license and surrenders it later have the same effect as the actions of a licensee who warehouses scarce orbit and spectrum resources"³¹ The situation involving Rainbow is on point, and we see no reason to upset that determination and the public interest for the benefit of one licensee.

³¹ *Fifth Report and Order* at 12652

