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

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JAN 26 2005

Federal Communications Commission
Office of Secretary

In the Matter of)

ECHOSTAR SATELLITE L.L.C.)

(f/k/a EchoStar Satellite Corporation))

Application for Authority to Construct,
Launch and Operate a Geostationary
Satellite in the Fixed Satellite Service
Using the Allotted Extended Ku-band
Frequencies at the 101° W Orbital Location)

File Nos. SAT-LOA-20030827-00179
SAT-AMD-20031126-00343

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Policy Branch
International Bureau

APPLICATION FOR REVIEW

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APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115, EchoStar Satellite L.L.C. ("EchoStar") hereby requests that the Federal Communications Commission ("Commission") review the International Bureau's ("Bureau") Order on Reconsideration ("Order") released on December 27, 2004.¹ In that Order, the Bureau wrongly dismissed EchoStar's Application and related Amendment for an allotted extended Ku-band satellite at 101° W.L.² on the basis that they were not "substantially complete."³

¹ *In the Matter of EchoStar Satellite L.L.C. (f/k/a EchoStar Satellite Corporation), Order on Reconsideration*, DA 04-4056 (rel. Dec. 27, 2004) ("Order").

² In this Application for Review, "Application" refers to SAT-LOA-20030827-00179 and "Amendment" refers to SAT-AMD-20031126-00343.

³ *Order* at ¶ 16 ("EchoStar's application did not contain all of the information required by the Commission's rules and thus was not substantially complete when filed.").

I. INTRODUCTION AND SUMMARY

The Bureau based its dismissal of EchoStar's Application and Amendment on two minor defects: (1) one of the tables in the Technical Annex to the Amendment incorrectly referred to frequency bands different from the frequency bands actually applied for and specifically noted in the Application and Amendment; and (2) the Amendment failed to identify which transponders would be connected to which spot beam in either the uplink or downlink directions.⁴ EchoStar seeks review of the Order on the grounds that the Bureau misapplied the substantially complete standard by ignoring applicable Commission and court precedent regarding that standard. What is worse, the Bureau appears to have significantly tightened the "substantially complete" standard despite the Commission's express disavowal of a "letter-perfect" standard for satellite applications. While the Bureau protests that it did not apply a "letter-perfect" standard in dismissing EchoStar's Application and Amendment, no other conclusion can be drawn in light of the triviality of the errors at issue.

First, Commission precedent on the "substantially complete" standard is clear that discrepancies in an application will not render it unacceptable for filing if the discrepancy can be resolved, "confidently and reliably, drawing on the application as a whole." Only those discrepancies that are not resolvable by looking at the application *as a whole* justify dismissal. The incorrect frequency reference in Table A.4-1 of the Technical Annex to the Amendment is precisely this kind of resolvable discrepancy. The correct downlink frequencies in the allotted extended Ku-bands (10.7-10.75 GHz and 11.2-11.45 GHz) are mentioned no fewer than ten times throughout the Application and Amendment, including in the FCC Form 312 submitted

⁴ Order at ¶¶ 11-12; Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to David K. Moskowitz, Senior Vice President and General Counsel, EchoStar Satellite Corporation, DA 04-323 (Feb. 9, 2004) at 2-3 ("EchoStar Dismissal Letter"). See 47 C.F.R. §§ 25.112 and 25.114(c)(5).

with the Amendment. Moreover, the fact that EchoStar intended to apply for frequencies in the allotted portion of the extended Ku-band is patently clear from the inclusion of "Appendix 30B" technical information, which is only required for these frequency bands. The infirmity of the Bureau's Order is evidenced by the lone counter example it cites to illustrate the kind of mistake that would *not* justify dismissal -- an example involving a discrepancy that in fact is no different than the one at issue here.

Second, court precedent is likewise clear that, under a "substantially complete" standard, applications must be accepted "even if they contain minor errors or infractions of agency rules, so long as any such defects may be cured without injury to public or private interest." The missing information regarding which transponders are connected with which spot beams is just such a curable defect. Contrary to the Bureau's view, the missing technical information was not necessary for EchoStar's or any other user's interference analysis for the proposed satellite. Instead, based on EchoStar's proposed use of the satellite for direct-to-home services, other users of the band will correctly assume that there will be simultaneous uplink and downlink frequency overlaps and the beams could be pointed anywhere within the service areas.

Finally, in dismissing EchoStar's Application and Amendment, the Bureau exhibited a disturbing failure to treat similar applications consistently. On several occasions, the Bureau has permitted applicants to correct much more egregious defects in their first-come, first-serve applications, such as failures to include two-degree spacing analysis or "effective competitive opportunities" analysis. In defense of its action, the Bureau first attempts to draw a distinction between "insufficient" and "non-existent." However, such a distinction is not borne out by the facts, and even if it were, a test based on such unfathomably fine differences would be a license for arbitrariness. The Bureau then makes the remarkable admission that if it made a

mistake in its past treatment of another applicant, it should not repeat its mistake here. While it may be true that an agency is not required to repeat an error, unsupported claims of prior error cannot excuse an agency's failure to act in a consistent fashion.

In sum, the Bureau's Order misapplied the "substantially complete" standard to EchoStar's Application and Amendment and is inconsistent with Commission and court precedent. The Order cannot be upheld, because to do so would essentially give the Bureau free rein to apply any standard it wanted to judge the adequacy of applications, and excuse any differences in treatment by reasoning that if it made a mistake the last time, it can simply ignore that precedent. This would be a particularly prejudicial result as it would undermine the Commission's first-come, first-served processing guidelines. Under that system, "substantially complete" filings are to receive priority processing rights based on the frequencies sought and the time of application, measured to the thousandth of a second. It would mock the precision of that mechanism if completeness were to be judged in an ever shifting, standardless manner. The Commission should, therefore, reverse the Order and reinstate the Application and Amendment into its proper place in the space station application processing queue.

II. QUESTION PRESENTED

The questions presented in this application for review are:

- Whether the Bureau acted in conflict with Commission and court precedent in applying its "substantially complete" standard for accepting satellite applications, or otherwise misapplied that standard or in fact applied a letter-perfect standard, when it dismissed EchoStar's Application and Amendment; and
- Whether the Bureau committed prejudicial error by failing to treat like applications similarly.

III. BACKGROUND

On August 27, 2003, EchoStar filed an Application to construct, launch and operate a geostationary satellite to provide Fixed-Satellite Service ("FSS") using the allotted extended Ku-band frequencies at the 101° W.L. orbital location under the Commission's new "first-come-first-served" filing procedures. Throughout the Application, EchoStar made it clear that it was requesting operating authority for the 10.70-10.75 GHz and 11.20-11.45 GHz (downlink) and the 12.75-13.00 GHz and 13.15-13.20 GHz (uplink) frequencies, which are part of the allotted extended Ku-band governed by Appendix 30B of the International Telecommunication Union ("ITU") Radio Regulations. Indeed, EchoStar submitted ITU Appendix 30B information with its Application, which is only necessary for requests to use frequencies in this band.

In November 2003, EchoStar amended its application to (1) increase the service area over which uplink transmissions, used primarily for feeder link type earth stations, may be received; and (2) add steerable uplink and fixed downlink spot beams to facilitate any needed coordination with other satellite systems in the allotted extended Ku-band.⁵ EchoStar did not request a change in frequency bands and, in all but one table, referred always to the allotted Appendix 30B Ku-band frequencies throughout the Amendment.

On February 9, 2004, the Bureau issued a letter dismissing EchoStar's Application and Amendment without prejudice to re-filing.⁶ The only two reasons given for dismissal were that: (1) Table A.4-1 of Section A.4 of the Technical Annex to the EchoStar Amendment incorrectly referred to frequency bands different from the frequency bands requested elsewhere in the Application and Amendment; and (2) the Amendment failed to

⁵ *Amendment* at 1.

⁶ EchoStar Dismissal Letter at 1.

identify which transponders would be connected to which spot beam in either the uplink or downlink directions.⁷ On February 10, 2004, EchoStar refiled a corrected application, but discovered that Mobile Satellite Ventures Subsidiary, LLC (“MSV”) had already filed an amendment to its pending application to request all of the same frequencies on February 9, 2004.⁸ On March 10, 2004, EchoStar sought reconsideration of the EchoStar Dismissal Letter.⁹

On December 27, 2004, the Bureau released its Order on Reconsideration denying EchoStar’s petition for reconsideration and affirming the EchoStar Dismissal Letter. On reconsideration, the Bureau relied again on the discrepancy in the frequency table and the missing information as to which transponders would be connected to which spot beam to reach its conclusion that the Application and Amendment were not “substantially complete.”

IV. THE BUREAU WRONGFULLY IGNORED COMMISSION AND COURT PRECEDENT ON THE “SUBSTANTIALLY COMPLETE” STANDARD WHEN IT DISMISSED THE ECHOSTAR APPLICATION AND AMENDMENT

A substantially complete standard for accepting satellite applications does not mean that applications must be “letter-perfect,” and indeed the Bureau disclaims reliance on a “letter-perfect” standard.¹⁰ However, as explained below, while purporting to apply the substantially complete standard, the Bureau has ignored important Commission and court precedent on the meaning of that standard and has failed to act in a manner consistent with such precedent.

⁷ EchoStar Dismissal Letter at 2-3. *See* 47 C.F.R. §§ 25.112 and 25.114(c)(5).

⁸ *See* SAT-AMD-20040209-00014.

⁹ *See* EchoStar Petition.

¹⁰ *See* Order at ¶ 9.

A. Under The Substantially Complete Standard, Applications That Contain Discrepancies That Can Be Resolved “Confidently And Reliably, Drawing On the Application As A Whole” Must be Accepted For Filing

When it affirmed the continued use of a substantially complete standard for accepting satellite applications in the *First Space Station Licensing Reform Order*,¹¹ the Commission explained that this standard is “comparable to the ‘hard look’ policy the Commission included as part its broadcast license first-come, first-served approach.”¹² Indeed, the Commission specifically cited the *FM and TV Order*, in which the Commission set out detailed guidelines on when an application would be “substantially complete” and acceptable for filing under its broadcast licensing rules.¹³ The Commission’s prior decisions on the application of the substantially complete standard in the broadcast context are therefore directly relevant here.

The *FM and TV Order* includes guidelines on how applications containing visibly incorrect or inconsistent information should be treated under the substantially complete standard:

If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. *If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender.*¹⁴

¹¹ *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 ¶ 244 (2003) (“*First Space Station Licensing Reform Order*”).

¹² *Amendment of the Commission’s Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking, 17 FCC Rcd 3847 at ¶ 93 n. 123 (2002) (“*Space Station Licensing NPRM*”), cited in *First Space Station Licensing Reform Order* at ¶ 244.

¹³ See *Processing of FM and TV Broadcast Applications*, MM Docket No. 84-750, 50 Fed. Reg. 19936 (1985) (“*FM and TV Order*”), cited in *First Space Station Licensing Reform Order* at ¶ 244 n. 578 and *Space Station Licensing NPRM* at ¶ 93 n.123.

¹⁴ See *FM and TV Order* at Appendix D (1985) (“*FM and TV Order*”) (emphasis added).

The Bureau simply ignores this precedent, reasoning instead that “frequency information is required to be filed because . . . it is one of the essential technical parameters that is used to determine whether an application is mutually-exclusive with a previously filed application”¹⁵ and that it is not the responsibility of the agency “to select for an applicant the desired frequencies among differing frequencies provided in an application.”¹⁶

EchoStar acknowledges that frequency selection is an important part of all satellite applications. However, under a substantially complete standard, even the selection of frequencies need not be “letter-perfect.” Indeed, the Bureau accepts that some incorrect frequency references, such as putting the decimal point in the wrong place (*e.g.*, specifying 5.925-6.425 MHz rather than 5925-6425 MHz or 5.925-6.425 GHz), “would be recognized immediately as a typographical error.”¹⁷ But the only reason that such an error would be “recognized immediately” as typographical presumably is because the Commission staff can “confidently and reliably” ascertain the correct frequencies from the application as a whole, *i.e.*, it is clear from the rest of the application that the applicant intended to select the C-band frequencies.

The incorrect frequency reference in Table A.4-1 of the Technical Annex to the Amendment is precisely the kind of discrepancy that can be easily resolved. The correct downlink frequencies in the allotted extended Ku-bands (10.7-10.75 GHz and 11.2-11.45 GHz) are mentioned no fewer than ten times throughout the Application and Amendment,¹⁸ whereas

¹⁵ Order at ¶ 12.

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 10.

¹⁸ *See, e.g.*, Application at 2 (“Specifically, EchoStar requests authority to launch and operate the following GSO FSS satellites: . . . a satellite at 101° W.L. that would operate in a portion of the allotted extended Ku-band – 10.70-10.75 GHz and 11.20-11.45 GHz from space-

the incorrect reference to non-allotted extended Ku-band frequencies (10.95-11.2 GHz) appears only once in a table attached to the Amendment. Moreover, the fact that EchoStar intended to apply for frequencies in the allotted portion of the extended Ku-band is patently clear from the inclusion of otherwise unnecessary "Appendix 30B" technical information.

Inexplicably, the Bureau points to all these other references to the correct allotted extended Ku-band frequencies in the Application and Amendment as sources of confusion,¹⁹ when in fact they make clear exactly which frequencies EchoStar intended to apply for in its Application and Amendment. Using the Bureau's own example, a reference to 5.925-6.425 MHz is obviously a typographical error because it must be clear from the application "as a whole" that the request is for C-band frequencies. On that basis, EchoStar's reference to frequencies in the 10.95-11.2 GHz band must similarly be viewed as a typographical error

to-Earth, and 12.75-13.00 GHz and 13.15-13.20 GHz from Earth-to-space."); *id.* at 5 ("The payload in the allotted portion of the extended Ku-band at 101° W.L. will consist of 18 transponders each of 27 MHz usable bandwidth covering 300 MHz in each direction (10.70-10.75 GHz and 11.20-11.45 GHz from space-to-Earth, and 12.75-13.00 GHz, 13.15-13.20 GHz from Earth-to-space."); *id.* at Exhibit 1 - A.1 ("The satellite will use the 11.2-11.45 GHz band and a portion of the 10.7-10.75 GHz band for downlink transmissions and the 12.75-13.0 GHz band and a portion of the 13.15-13.2 GHz band for uplink transmissions."); *id.* at Exhibit 1 - A.23 (listing the correct allotted extended Ku-band frequencies for the Sharing Analysis with Other Services and Allocations); *id.* at Exhibit 2 (listing the correct allotted extended Ku-band frequencies).

See also, e.g., Amendment at 4 ("The use of the bands 10.7-11.7 GHz (space-to-Earth) and 12.75-13.25 GHz (Earth-to-space) by the fixed-satellite service in the geostationary-satellite orbit"); *id.* at Attachment A - A.1 ("The satellite will use the 11.2-11.45 GHz band and a portion of the 10.7-10.75 GHz band for downlink transmissions and the 12.75-13.0 GHz band and a portion of the 13.15-13.2 GHz band for uplink transmissions (portions of spectrum of the ITU Appendix 30B FSS allotment band."); *id.* at Attachment A - A.23 (referring to MSV's pending application to use the allotted extended Ku-band frequencies at the same location); *id.* at Attachment A - A.24 (referring to the correct allotted extended Ku-band frequencies).

¹⁹ Order at ¶¶ 4-5 (reciting the many references to the allotted extended Ku-band frequencies (10.7-10.75 GHz) and the single inconsistent reference in Table A.4-1 of Section A.4 of the Attachment to the Amendment, and concluding "Given these inconsistencies, the Division was unable to determine precisely which frequency assignments EchoStar was seeking.").

because it is clear from the EchoStar Application and Amendment “as a whole” that EchoStar always intended to apply for the allotted extended Ku-band frequencies.²⁰

Thus, under the applicable precedent on the treatment of inconsistent information under the “substantially complete” standard, the incorrect frequency reference in Table A.4-1 of the Technical Annex to the Amendment is no basis for dismissing the Application and Amendment. Moreover, this typographical error should not be conflated with the question of the transponder connections. The error can easily be resolved on the face of the Application and Amendment as a whole, and once resolved, it is no longer a source of confusion, nor is it an indication that together with additional concerns, the Application should be dismissed.

B. Under The Substantially Complete Standard, Applications Must Be Accepted “Even If They Contain Minor Errors Or Infractions Of Agency Rules, So Long As Any Defects May Be Cured Without Injury To Public Or Private Interest”

As noted above, a substantially complete standard does not mean a “letter-perfect” standard. In fact, the D.C. Circuit has explained that, under a substantially complete standard, applications must be accepted “even if they contain minor errors or infractions of agency rules, so long as any defects may be cured without injury to public or private interest.”²¹ The Bureau appears to have ignored this precedent by insisting that “substantially complete” means “providing the information which is required by the Commission’s rules”²² and by

²⁰ The isolated frequency discrepancy in this case is quite different from the scenario where an application is replete with inconsistent frequency references such that the Commission staff cannot readily ascertain which frequencies were intended to be selected. In the latter scenario, the application would not be acceptable for filing. *Application of Mobile Phone of Texas, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd. 3459 (C.C.B., June 12, 1990) (Mobile Phone’s cover letter, the accompanying FCC Form 401, application, and engineering statements all contained differing and conflicting frequency requests).

²¹ *Salzer v. FCC*, 778 F.2d 869, 872 n.7 (D.C. Cir. 1985) (citing *James River Broad. Corp. v. FCC*, 399 F.2d 581 (DC Cir. 1968)).

²² Order at ¶ 9.

concluding that “EchoStar’s application did not contain all of the information required by the Commission’s rules and thus was not substantially complete when filed.”²³ A requirement to provide “all information required by the Commission’s rules” is consonant with the “letter-perfect” standard rejected by the Commission, but is not consistent with a substantially complete standard, which by definition must tolerate some “infractions of agency rules.”²⁴

The missing information regarding which transponders are connected or switchable to which spot beams, though required by the Commission’s rules, is just the kind of minor “infraction” that can be cured without prejudice to anyone. The Bureau claims that the missing information would “allow[] the Commission, operators and potential applicants to identify which frequencies and locations are impacted by the pending application, which ones are available and the extent to which the proposed frequency uses and locations require coordination.”²⁵ In fact, the absence or presence of the missing technical information would not affect EchoStar’s or any other user’s interference analysis for the proposed satellite or the orbital locations that it might impact.²⁶ Given EchoStar’s proposed use of the satellite for direct-to-home services, other users of the band must assume, correctly, that there will be simultaneous uplink and downlink frequency overlaps and that the beams could be pointed towards any part of the service area. In fact, the Amendment clearly explains in Section A5.2 of the Technical Annex that the precise pointing directions of the spot beams, and hence the channels to be assigned to each spot beam, can only be determined after coordination with the proposed MSV satellite. Therefore, by maintaining flexibility in the connectivity arrangements, coordination

²³ *Id.* at ¶ 16.

²⁴ *Salzer*, 778 F.2d at 872 n.7 (citing *James River*, 399 F.2d 581).

²⁵ Order at ¶ 11.

²⁶ See Attachment A -- Declaration of Richard Barnett (Jan. 26, 2004).

with other satellites is *facilitated*, contrary to the Bureau's claims that the lack of specificity would *impede* frequency sharing arrangements with other satellites. Any more specific information as to which transponder is connected or switchable would make no practical difference, except in the context of a coordination with a particular operator at which point the specific connectivity would have to be determined to facilitate coordination. Clearly, the changes to the proposed satellite introduced by the Amendment were intended to provide flexibility in coordination. Thus, allowing EchoStar to cure this omission would make no practical difference to any public or private interest.

The Bureau expresses concern that “[a]llowing applicants to cure applications after they are filed could adversely impact other applicants filing complete applications that are ‘second-in-line’ to the first application.”²⁷ This cannot be the kind of public or private interest injury that the courts or the Commission imagined would justify dismissal under a substantially complete standard, as this kind of injury would be present in every case involving an application with a defect, no matter how minor. Taken to its logical conclusion, the Bureau's approach would result in *every* defective application being dismissed because failure to do so could impact second-in-line applicants. This would be an impermissible shift from a “substantially complete” standard to a “letter-perfect” standard.

In addition, the public interest would not be harmed by allowing EchoStar to correct its omission without dismissing its Application and Amendment. The processing of this application, as amended, could have waited for EchoStar to supplement its filing with the requested information. No harm to the public would have resulted from any such minimal delays. Indeed, by allowing EchoStar to re-file its application with the requested information,

²⁷ *Id.* at ¶ 13.

the Bureau presumably will continue to process essentially the same application. In fact, the overzealous dismissal of applications with inconsequential errors is likely to be a greater source of delay than any request to cure such applications.

Thus, under applicable court precedent, the omission of technical information identifying which transponders are connected or switchable to which spot beam also cannot be the basis for dismissing EchoStar's application.

V. THE BUREAU HAS FAILED TO TREAT LIKE APPLICATIONS SIMILARLY

In dismissing the Application and Amendment, the Bureau has demonstrated a disturbing failure to treat like applications similarly.²⁸ While it is true that the Bureau has dismissed quite a number of applications since the *First Space Station Licensing Reform Order*, it has also permitted on several occasions applicants to correct defects in their applications.²⁹

²⁸ 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.”).

²⁹ 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) (“*Loral Skynet Oct. 16 Letter*”); Letter from Robert G. Nelson, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary, LLC, SAT-AMD-20031118-00335 (Apr. 23, 2004) (“*MSV Information Request Letter*”); See *In the Matter of DirecTV Enterprises, LLC Application for Authority to Launch and Operate DirecTV 7S*, Order and Authorization, 19 FCC Rcd. 7754, ¶ 6 (2004) (“On November 17, 2003, the Satellite Division sent a letter to DIRECTV, requesting additional information required by Section 25.114 of the Commission’s rules, including a Form 312 and certain technical information required by Sections 25.114(c) of the Commission’s rules.”); Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to David K. Moskowitz, EchoStar Satellite Corp., SAT-LOA-20030605-00109, SAT-LOA-20030606-00107, SAT-LOA-20030609-00113 (Feb. 12, 2004); Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to Peter Hadinger, Northrop Grumman Space & Mission Sys. Corp., DA 04-1725, Jun. 16, 2004; Letter from Thomas S. Tycz, FCC to David M. Drucker,

Many of the defects that the Bureau has allowed applicants to correct have been much more egregious than the minor discrepancy and omission found in EchoStar's Application and Amendment, including the absence of any two-degree spacing analysis in satellite applications and the absence of information on "effective competitive opportunities" in applications seeking authority to communicate with a foreign-licensed satellite.

For example, in *Loral Skynet*, the Bureau gave the applicant an opportunity to correct its application to communicate with a foreign-licensed satellite by requesting "additional technical information and information that was missing from the original application."³⁰ The missing information apparently included information necessary for the Bureau to conduct an "effective competitive opportunities" analysis under the Commission's *DISCO II* order. The Bureau ultimately dismissed the application, but only after the applicant failed to respond to the Bureau's request for information.

The Bureau has attempted to distinguish *Loral Skynet* from the present case on the grounds that the missing *DISCO II* information was not missing after all, but was merely "insufficient for [the Bureau] to make a determination."³¹ Apparently, the applicant had made a bare assertion that the satellite market of the foreign country in question was open to U.S.

contactMEO Communications LLC, DA 04-1722, Jun. 16, 2004 (same) ("*@contact Reversal Letter*").

³⁰ Letter from William Howden, Satellite Division, FCC to Stan Edinger, Loral Skynet Network Services, Inc., DA 03-3904, SES-MOD-20030919-01302, at 1 (Dec. 11, 2003) (dismissing Loral Skynet's application for failure to provide the information requested by the *Loral Skynet Oct. 16 Letter*, *supra* note 29).

³¹ *Loral Skynet Oct. 16 Letter* at 2. See also Order at ¶ 16 n.52 ("The *December 11 Letter* incorrectly referred to Loral's failure to supply 'missing' information required by the Commission's *DISCO II Order*.").

satellite operators.³² This is no distinction at all. In the case under review, EchoStar also provided some of the technical information regarding which antenna beams are connected or switchable to which transponders, as required by 47 C.F.R. 25.114(c)(4)(iii), albeit not all of the requested information. As the Bureau's careful review of the Application and Amendment would have revealed, EchoStar's proposed satellite could operate in two different modes – one involving one of two large downlink beams, and the other involving nine smaller spot beams.³³ When the satellite is transmitting on one of two large downlink beams, the Amendment states that “all transponders may be switched as a block between one or the other of the two beams.”³⁴ In addition, in the Appendix 30B information submitted with the original Application, there is both (a) a note indicating that either large downlink beam can be used with any downlink frequency assignment, and (b) a strapping table showing which uplink frequencies are associated with which downlink frequencies. Only the information regarding which spot beams are connected with which transponder is missing for when the satellite is operating in the other mode. Thus, the Application and Amendment is not any more deficient, and is significantly more complete than, the information supplied by the applicant in *Loral Skynet*. The Bureau cannot dismiss the Application and Amendment in this case, while giving the similarly situated applicant in *Loral Skynet* the opportunity to supplement or correct its application, without

³² See SES-MOD-20030919-01302, Appendix A, at A-40 (“The Kingdom of Tonga is awaiting admission to the WTO and currently enjoys “Observer” status at the WTO. China is a WTO member nation. Tongasat has confirmed that earth stations in Tonga have been authorized to communicate with U.S. licensed satellites.”); Order at ¶ 16 n. 52 (“To this end, Loral attached an exhibit to its application stating that Tonga’s satellite market is open to U.S. satellite operators. . . . [T]he staff requested additional information pursuant to 47 C.F.R. § 25.111(a) because it was not clear whether Loral had adequately shown that Tonga’s satellite market is open to U.S. satellite operators.”).

³³ See Amendment, Technical Annex, at 1.

³⁴ Amendment, Technical Annex, at 5.

reasoned explanation.³⁵ As demonstrated, the Bureau's explanation of the differences between the two cases simply does not withstand scrutiny.

The Bureau tries to hedge its conclusion by suggesting that "[i]n any event, if the Division failed to dismiss an incomplete application, it is a well-settled principle of administrative law that the fact that an agency made an error in one instance does not require the agency to repeat the error."³⁶ This is hardly a justification for the inconsistent treatment of similarly situated applicants under the "substantially complete" standard. While it may be true that an agency is not required to repeat an error, unsupported claims of prior error cannot excuse a failure by an agency to act in a consistent fashion.³⁷ It is far from clear that the Bureau was wrong in *Loral Skynet* and correct in this case. Indeed, the Bureau does not admit that it decided *Loral Skynet* incorrectly. If anything, the Bureau's suggestion that it *might* have been wrong in

³⁵ See *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("An agency changing its course must supply a reasoned analysis."); *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977) ("This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965) ("We think the Commission's refusal at least to explain its differential treatment of appellant and NBC were in error. . . . [W]e think the differences are not so 'obvious' as to remove the need for explanation."); *Communications Control, Inc. v. FCC*, 374 F.3d 1329, (D.C. Cir. 2004) ("The Commission's *ipse dixit* that CCI's typographical error rendered its license void ab initio does not [support its decision], especially in light of the Commission's practice of correcting, without much ado, typographical errors such as this one. The Commission's departure from this practice, with *no* explanation, renders its . . . rationale arbitrary and capricious.").

³⁶ *Order* at ¶ 16 n. 45. Curiously, the Bureau cites *Southeast Telephone, Inc. v. FCC*, 1999 WL 1215855 (D.C. Cir.) in support of its "well-settled" principle, an unpublished opinion that has no precedential value under the rules of the D.C. Circuit. See D.C. CIRCUIT RULE 36(c)(2) ("A panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.").

³⁷ *Chem-Haulers, Inc. v. ICC*, 565 F.2d 728, 730 (D.C. Cir. 1977) ("If it were clear that the instances cited were simply inadvertent departures from a generally uniform course of decision, we would deplore them without permitting them to derange the outcome of other cases. . . . Still, we have before us neither the Commission's statement that it earlier strayed nor the records adverted to, and we cannot rest on its counsel unadorned assertion [that the prior decisions were in error].") (emphasis added).

earlier cases only demonstrates the arbitrary and capricious manner in which the Bureau has been applying the substantially complete standard established by the Commission. The adverse consequences of the Bureau's doctrinal incoherence should not be borne by EchoStar.

Moreover, the Bureau's discriminatory treatment of EchoStar is underscored by its dismissal of both the Application and the Amendment for defects found in the latter, while only dismissing the defective amendments filed by others and allowing their applications to remain on file. On a number of occasions, the Bureau has dismissed an amendment it found not to be substantially complete while retaining the underlying application. For instance, when MSV filed an amendment to its application to request the same allotted extended Ku-band frequencies as EchoStar at 101° W.L., the Bureau initially dismissed only the amendment for incompleteness.³⁸ MSV's underlying application was not dismissed. Similarly, when SES Americom, Inc. ("SES") filed a defective amendment to its application to operate AMC-15 at 105° W.L., the Bureau dismissed only the defective amendment, and not the underlying application.³⁹ Yet in this case, the Bureau decided to dismiss both the Application and Amendment. The Bureau cannot simply treat EchoStar's Application and Amendment differently from the manner in which it treated the applications and amendments filed by MSV and SES, and moreover, do so without any explanation at all.

VI. CONCLUSION

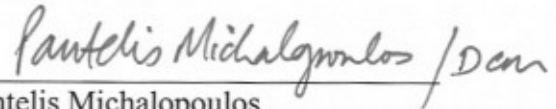
For the reasons stated above, the Bureau's dismissal of EchoStar's Application and Amendment was inconsistent with precedent and failed to treat like applications similarly.

³⁸ See Letter from Thomas S. Tycz, Chief, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary LLC, DA 04-1095, SAT-AMD-20040209-00014 (Apr. 23, 2004). The Bureau later reinstated MSV's amendment. *In the Matter of Mobile Satellite Ventures LLC*, DA 04-2985, Order, SAT-AMD-20040209-00014 (rel. Sept. 15, 2004).

³⁹ See Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to Karis A. Hastings, Counsel for SES Americom, Inc., DA 04-1707, SAT-AMD-20040528-00110 (Jun. 14, 2004).

The dismissal should therefore be reversed and EchoStar's Application and Amendment should be reinstated into their proper place in the satellite application processing queue.

Respectfully submitted,

 Pantelis Michalopoulos / DCN

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Counsel for EchoStar Satellite L.L.C.

January 26, 2005

ATTACHMENT A

DECLARATION OF RICHARD BARNETT

DECLARATION OF RICHARD BARNETT

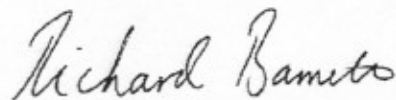
I, Richard Barnett, declare under penalty of perjury under the laws of the United States that the following is true to the best of my knowledge, information and belief:

1. I am an engineer with a BSc(Hons) degree in Electronic Engineering and a PhD degree in the field of Communications Engineering. I have been involved in satellite engineering projects for the past 25 years and have extensive domestic US and international satellite regulatory experience.
2. At EchoStar Satellite L.L.C.'s ("EchoStar") request, I prepared the amendment filed by EchoStar Satellite L.L.C. on November 26, 2003 (SAT-AMD-20031126-00343) ("Amendment").
3. I understand that on February 9, 2004, the International Bureau dismissed the Amendment, along with EchoStar's underlying satellite application (SAT-LOA-20030827-00179) ("Application"), because (a) certain frequencies mentioned in Table A.4-1 of the Amendment was different from the frequencies requested everywhere else in the Application and Amendment; and (b) the Amendment did not identify which transponders would be connected with which spot beam.
4. With respect to the omitted information regarding which transponders would be connected with which spot beam, it is my professional opinion that the absence or presence of such information would not affect EchoStar's or any other user's interference analysis for the proposed satellite or the locations that it might impact, for the following reasons:
 - (a) 2 degree compliance for the proposed EchoStar satellite is demonstrated in the Amendment. Therefore, other satellites spaced 2 degrees or further from 101°W do not represent an interference issue. The main interference issue is with respect to the proposed collocated MSV satellite at 101°W.
 - (b) The Amendment clearly states that all the transponders are switchable to either of the large area coverage beams, and this would represent the worst-case interference situation with respect to the co-frequency, collocated MSV satellite, which proposes to use a limited number of narrow spot beams for its feeder links, with as-yet undefined pointing directions.
 - (c) When the EchoStar transponders are switched from the large area coverage beams to any of the small downlink spot beams, the interference situation with respect to the collocated MSV satellite is improved, because EchoStar has committed, in the Amendment, to coordinate the pointing directions of the spot beams, and the channels used in each spot beam, with MSV.
 - (d) The inherent flexibility in the design of the proposed EchoStar satellite, in terms of its precise spot beam coverage and connectivity, is a deliberate feature to facilitate coordination with the proposed collocated MSV

satellite, which has undefined spot beam locations. It is not an impediment to frequency sharing with affected satellites.

5. Given EchoStar's proposed use of the satellite for direct-to-home services, and EchoStar's stated ability to connect all the transponders to the large area coverage beams, other users of the band will rightly assume that there could be simultaneous uplink and downlink frequency overlap over the entire service area of the EchoStar satellite.
6. Moreover, because the uplink beams will be steerable and the precise pointing directions of the downlink beams have not yet been fixed, other users of the band must also assume that the beams could point towards any part of the service areas.
7. The more specific information as to which transponder is connected or switchable to which spot beam would make no practical difference, except in the context of a coordination with a particular operator at which the point the specific connectivity would be determined to facilitate coordination.

Executed: January 26, 2005



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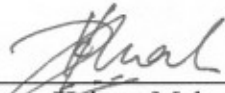
CERTIFICATE OF SERVICE

I, Chung Hsiang Mah, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 26th day of January, 2005, served a true copy of the foregoing "Application for Review," and accompanying Declaration of Richard Barnett, by first class United States mail, postage prepaid, upon the following:

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International Bureau
Federal Communications Commission
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Washington, DC 20554

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Chung Hsiang Mah

* By hand delivery