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

FEB 10 2005

Federal Communications Commission
Office of Secretary

In the Matter of)
)
ECHOSTAR SATELLITE LLC)
(f/k/a EchoStar Satellite Corporation))
Application for Authority to Construct, Launch and)
Operate a Geostationary Satellite in the Fixed)
Satellite Service Using the Extended Ku-Band)
Frequencies at the 101° W.L. Orbital Location)

File Nos. SAT-LOA-20030827-00179
SAT-AMD-20031126-00343
Call Sign S2492

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Policy Branch
International Bureau

OPPOSITION TO APPLICATION FOR REVIEW

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Dated: February 10, 2005

Summary

In 2003, the Commission established a new first-come, first-served procedure for licensing satellites. The Commission explained that this new licensing procedure would expedite service to the public by establishing operating rights clearly and quickly. To expedite processing, the Commission instructed the International Bureau to reject any applications that are not "substantially complete" as filed.

Soon after these new procedures were established, EchoStar submitted an application that failed to specify the frequencies it sought to use, including the geographic areas in which it would use certain frequencies, all in violation of specific requirements in the rules. This was one of nine applications that EchoStar filed simultaneously; this particular application proposed a system that required a number of other waivers of the Commission rules and seemed unlikely ever to be built. In response to EchoStar's failure to specify the frequencies it proposed to use (and without addressing various other flaws), the Satellite Division dismissed EchoStar's application as not "substantially complete." After a challenge from EchoStar, the Bureau upheld the Division's decision.

EchoStar here repeats its argument that the admitted flaws in its application are insignificant. As the Bureau has found before, however, EchoStar's failure to properly identify the frequencies it proposes to use is as fundamental as any flaw can be in a satellite application, particularly in a first-come, first-served environment. By making it impossible to know what frequencies EchoStar proposed to use and where they proposed to use them, other potential applications for those frequencies were precluded, which is unfair and counter-productive.

EchoStar argues that the decision to dismiss its application was a deviation from precedent. The cases EchoStar cites, however, are easily distinguished, since they all involve

applications that were incomplete only because of ambiguities in the Commission's own rules. Here, quite to the contrary, the rules—and EchoStar's failure to comply with them—are clear.

Finally, EchoStar makes another new argument, that the decision to dismiss its application was flawed because it failed to distinguish between defects in its original application and defects in a subsequent amendment. This argument ignores the fact that both the application and the subsequent amendment contained at least one of the flaws that was the basis for dismissing EchoStar's application. It also ignores the other flaws in the original EchoStar application (which the Commission has not yet addressed), including at least one that was the basis for dismissal of another EchoStar application filed the same day as the one at issue here. Moreover, this new argument is woefully untimely; the rules prevent EchoStar from raising this issue now.

MSV has relied on the Division's decision in amending its own application and in developing its next-generation system. In designing its system architecture and negotiating with satellite manufacturers, MSV has reasonably assumed that it will have access to all 500 MHz of Planned Ku-band feeder link spectrum. A decision to reinstate EchoStar's application would not only violate Commission rules and policy, it would be prejudicial to MSV's efforts to deploy a next-generation MSS system.

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OPPOSITION TO APPLICATION FOR REVIEW

Mobile Satellite Ventures Subsidiary LLC (“MSV”) hereby files this Opposition to the Application for Review filed by EchoStar Satellite L.L.C. (“EchoStar”) of the decision of the International Bureau (“Bureau”) upholding the Satellite Division’s (“Division”) dismissal of EchoStar’s application to launch and operate a satellite at 101°W.¹ EchoStar provides no basis for reversal of the Bureau’s conclusion that the Division appropriately applied the “substantially complete” standard in dismissing EchoStar’s application based on its fundamental failure to include relevant, required information regarding the frequencies it proposed to use. As both the Bureau and Division found, these were material errors which prejudiced other applicants and potential applicants, thus warranting dismissal.

Background

First-Come, First-Served Licensing. In April 2003, the Commission decided to eliminate its processing-round approach for considering satellite applications and replaced it with a new

¹ See EchoStar Satellite L.L.C., Application for Review, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (January 26, 2005) (“*EchoStar AFR*”).

first-come, first-served licensing policy for geostationary (“GSO”) satellites.² The Commission explained that this policy would serve the public interest by enabling it to act on satellite applications more quickly and efficiently than under the processing-round procedure. *SSLR Order* ¶¶ 4, 7, 74. The Commission explained that this would benefit consumers by ensuring they receive service faster. *Id.* Moreover, the Commission stated that the first-come, first-served approach will lead to more efficient spectrum usage because it will reduce the amount of time spectrum lies fallow. *Id.* The Commission also affirmed that satellite applications must be “substantially complete” as filed. *Id.* ¶ 244. The Commission explained that any lesser standard would encourage speculative applications. *Id.*

MSV’s interest in this proceeding. MSV is the entity authorized by the Commission in 1989 to construct, launch, and operate a United States Mobile Satellite Service (“MSS”) system in the L-band.³ MSV’s current satellite was launched in 1995 and operates at 101°W. In July 1998, MSV filed an application to launch and operate a higher-power, replacement satellite with substantially greater capacity.⁴ To accommodate this greater capacity, MSV subsequently requested authority to use an additional 300 MHz of Planned Ku-band spectrum for feeder links beyond the 200 MHz for which MSV is already licensed.⁵ MSV has first-in-line status for these frequencies.

² *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, FCC 03-102 (rel. May 19, 2003) (“*SSLR Order*”).

³ *Order and Authorization*, 4 FCC Rcd 6041 (1989); *remanded by Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991); *Final Decision on Remand*, 7 FCC Rcd 266 (1992); *aff’d, Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275 (D.C. Cir. 1993); *see also AMSC Subsidiary Corporation, Memorandum Opinion and Order*, 8 FCC Rcd 4040 (1993).

⁴ *See Application of AMSC*, File No. SAT-LOA-19980702-00066 (July 2, 1998).

⁵ *See Application of Motient Services Inc.*, SAT-AMD-20001214-00171 (December 14, 2000). Specifically, MSV’s replacement application requested the following Planned Ku-band

Procedural History of EchoStar Application. On August 27, 2003, EchoStar filed an application for authority to launch and operate a satellite at 101°W using 250 MHz of Planned Ku-band frequencies for which MSV had already applied as well as the remaining 50 MHz of Planned Ku-band frequencies (*i.e.*, 10.70-10.75 GHz and 13.15-13.20 GHz) for which no entity at that point had applied.⁶ EchoStar was thus second-in-line behind MSV with respect to 250 MHz of the 300 MHz it requested and first-in-line with respect to the remaining 50 MHz. This application was one of nine applications EchoStar filed that day.

In its application, EchoStar claimed that its receive terminals would be able to co-exist with terrestrial operators that share the Planned Ku-band downlink “while maintaining an acceptable quality of service.” *EchoStar August 2003 Application* at 20, Exhibit 1 at 19. EchoStar did not address what impact the massive deployment of receive terminals will have on the suitability of the Planned Ku-band downlink for future terrestrial operators. EchoStar’s proposal would have required new terrestrial operators to coordinate with thousands if not millions of EchoStar’s receive terminal, thus rendering the Planned Ku-band downlink unsuitable for terrestrial services. EchoStar also proposed to offer a two-way service which would entail unlimited deployment of transmitting earth stations in the Planned Ku-band uplink. *Id.*, Exhibit 1 at 1, 8, 10. EchoStar never addressed the coordination burden this proposal would place on CARS, BAS, and other licensees sharing the Planned Ku-band uplink.

frequencies at 101°W: 10.75-10.95 & 11.2-11.45 GHz (downlink) and 12.75-13.15 & 13.20-13.25 GHz (uplink). Throughout this Opposition, references to the amount of spectrum refer to its use in both the uplink and downlink direction. On February 9, 2004, MSV filed an amendment to its pending application to request the 50 MHz of Planned Ku-band frequencies at 101°W for which it was not licensed and had not previously requested (10.70-10.75 GHz and 13.15-13.20 GHz). *See MSV, Amendment, File No. SAT-AMD-20090209-00014* (filed February 9, 2004) (“*MSV February 2004 Amendment*”).

⁶ *See Application of EchoStar, File No. SAT-LOA-20030827-00179* (filed August 27, 2003) (“*EchoStar August 2003 Application*”).

MSV challenged the EchoStar application on the grounds that, among other things, the application proposed to provide domestic service without requesting a waiver of the rules limiting use of the requested frequencies to international systems.⁷ The Commission has never acted on this Petition.

On November 26, 2003, EchoStar amended its pending application to try to correct the deficiencies identified by MSV.⁸ On February 9, 2004, however, the Division dismissed EchoStar's amended application as incomplete and otherwise not in compliance with the Commission's rules. The Division cited two independent reasons.⁹ First, the Division ruled that EchoStar's application did not comply with Section 25.114(c)(4)(iii) of the rules because it failed to indicate which transponders will be connected to which spot beam in either the uplink or downlink direction, thus making it impossible to tell where EchoStar intended to use various frequencies. *EchoStar Dismissal* at 2. Second, the Division cited EchoStar's failure to clearly identify the downlink frequencies it was requesting. *Id.* at 1-2. Specifically, in one table containing a detailed listing of its frequency plan, EchoStar specified downlink frequencies in the 10.95-11.2 GHz band. *EchoStar November 2003 Amendment*, Attachment A, Section A4, Table A4-1. In two other sections of its amended application, however, EchoStar mentioned downlink frequencies in the 10.70-10.75 GHz band. *See id.*, Attachment A, Section A1, p.1-2 and Section A24, p. 26. In a third part of the document, EchoStar provided a Channel Frequency Plan showing no transponders operating in the 10.70-10.75 GHz band. As a result, the Division ruled

⁷ See Mobile Satellite Ventures Subsidiary LLC, Petition to Deny, File No. SAT-LOA-20030827-00179 (filed November 17, 2003) ("*MSV Petition to Deny*").

⁸ See EchoStar, Amendment, File No. SAT-AMD-20031126-00343 (November 26, 2003) ("*EchoStar November 2003 Amendment*").

⁹ See Letter from Thomas S. Tycz, FCC, to David K. Moskowitz, EchoStar, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (February 9, 2004) ("*EchoStar Dismissal*").

that it was unable to determine the precise frequencies for which EchoStar was applying.

EchoStar Dismissal at 2.¹⁰

EchoStar's initial challenge to the dismissal of its application. On March 10, 2004, EchoStar filed a Petition for Reconsideration of this decision.¹¹ In its Petition, EchoStar did not dispute that its application contained the errors and omissions identified by the Division. Rather, EchoStar argued that these errors and omissions were minor and its application was “substantially complete” taken as a whole. *EchoStar Recon Petition* at 2. MSV opposed this Petition, noting that EchoStar’s failure to specify clearly the frequencies it was requesting was material in that it prejudiced other applicants and potential applicants.¹² MSV also explained that EchoStar’s failure to indicate which transponders would be connected to which spot beam deprived MSV of information that would have been useful in determining whether EchoStar’s coordination proposal is technically feasible. *MSV Opposition to EchoStar Recon Petition* at 7.

The Bureau's rejection of EchoStar's challenge. On December 27, 2004, the Bureau released a decision upholding the Division’s dismissal of EchoStar’s application.¹³ The Bureau

¹⁰ On February 10, 2004, EchoStar refiled an application for the 300 MHz of Planned Ku-band frequencies it previously requested in its November 2003 Amendment. See Application of EchoStar, File No. SAT-LOA-20040210-00015 (February 10, 2004). This application is second-in-line behind MSV’s February 2004 amendment. The Bureau subsequently placed EchoStar’s application on *Public Notice*. See Report No. SAT-00203 (March 26, 2004). In its Comments on the application, MSV has explained that the Bureau must defer action on EchoStar’s application until after MSV’s first-in-line application is processed and granted. See Comments of MSV, File No. SAT-LOA-20040210-00015 (April 26, 2004) (“*MSV Comments*”); Response of MSV, File No. SAT-LOA-20040210-00015 (May 21, 2004) (“*MSV Response*”).

¹¹ See EchoStar, Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 10, 2004) (“*EchoStar Recon Petition*”).

¹² See MSV, Opposition to Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 24, 2004), at 5-7 (“*MSV Opposition to EchoStar Recon Petition*”).

¹³ See *EchoStar Satellite LLC, Order on Reconsideration*, DA 04-4056 (International Bureau, December 27, 2004) (“*Bureau Decision*”).

rejected EchoStar's contention that the Division applied a "letter-perfect" rather than a "substantially complete" standard in reviewing EchoStar's application. *Bureau Decision* ¶ 9. The Bureau explained that under a "substantially complete" standard, a typographical or similar obvious error would not constitute a sufficient basis for dismissal, as would be the case if the Division applied a "letter perfect" standard. *Id.* ¶ 10. The Bureau explained, however, that EchoStar's errors were not merely typographical nor were they minor. *Id.* First, the Bureau noted that EchoStar failed to disclose which antenna beams are connected or switchable to each transponder and TT&C function, which is mandated by Section 25.114(c)(4)(iii) of the Commission's rules. *Id.* ¶ 11. The Bureau noted that this information allows the Commission, existing 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." *Id.* Second, the Bureau noted that EchoStar's application contained discrepancies in requested frequency assignments. *Id.* ¶ 12. The Bureau explained that frequency information is "one of the essential technical parameters that is used to determine whether an application is mutually-exclusive with a previously filed application." *Id.*

The Bureau also explained that requiring applications to be substantially complete when filed is an important part of the new first-come, first-served satellite licensing procedures. *Bureau Decision* ¶ 13. The goal of this new licensing procedure is to establish operating rights "clearly and quickly, and as a result, allow[] licensees to provide service to the public much sooner than might be possible under [the] previous licensing procedure." *Id.* ¶ 9. The Bureau noted that allowing applicants to cure defects after they are filed "could adversely impact other applicants filing complete applications that are 'second-in-line.'" *Id.* ¶ 13. Moreover, allowing

applicants to correct deficiencies would encourage applicants to file incomplete, internally inconsistent applications, which would delay service to the public. *Id.* Finally, the Bureau explained how dismissal of EchoStar's application was consistent with precedent. *Id.* ¶¶ 14-16.

EchoStar's current challenge. On January 26, 2005, EchoStar filed the instant Application for Review of the Bureau's decision. *See EchoStar AFR.* EchoStar again admits that its application contained the errors and omissions identified by the Bureau but repeats its arguments that its application nonetheless met the "substantially complete" standard. EchoStar also claims that the Bureau has failed to treat similar applications consistently. *Id.* at 13-17. EchoStar contends that on several occasions the Bureau has allowed applicants to correct deficiencies, rather than dismissing them outright. *Id.* at 13-14. For the first time, EchoStar also argues that the Bureau cannot dismiss both its amendment and its underlying application without an explanation as to how this is consistent with precedent. *Id.*

Discussion

I. THE BUREAU PROPERLY APPLIED THE "SUBSTANTIALLY COMPLETE" STANDARD

As the Bureau properly concluded, EchoStar's application failed to clearly identify (i) the manner in which its transponders and spot beams are to be connected and (ii) the downlink frequencies that it is requesting. *Bureau Decision* at 1-2. EchoStar admits that it made these omissions. *EchoStar AFR* at 5, 15. Its only claim is that these omissions were "minor infractions." As the Bureau correctly decided, these omissions were material errors which prejudiced other applicants and potential applicants, thus warranting dismissal. *Bureau Decision* ¶ 11-12.

A. The EchoStar application failed to provide required information that was material

The Bureau acted properly in upholding the dismissal of EchoStar's application because EchoStar violated an unambiguous Commission rule when it failed to identify which transponders will be connected to which spot beam. 47 C.F.R. § 25.114(c)(4)(iii); see *Bureau Decision* ¶ 11. While EchoStar now tries to offer a number of reasons for why this information may not be relevant to its application, EchoStar is not at liberty to disregard a Commission rule because it deems the rule to be inconsequential. *EchoStar AFR* at 11-12. To the extent EchoStar believes Section 25.114(c)(4)(iii) was irrelevant, it should have asked the Commission to eliminate it or, at the very least, request a waiver. See *Bureau Decision* n.8. But EchoStar never made such a request or filed a timely showing, and it is too late to try to do so now.¹⁴

In any event, EchoStar fails to demonstrate that information concerning which transponders will be connected to which spot beams is irrelevant in its case. *EchoStar AFR* at 11-12. As the Bureau properly noted and as MSV explained previously, this information would have been useful in determining which frequencies and locations are impacted by EchoStar's application and whether EchoStar's coordination proposal is technically workable.¹⁵ Thus, given the harm caused to other applicants, EchoStar's failure to demonstrate which transponders will be connected to which spot beam cannot be considered immaterial. As such, EchoStar's

¹⁴ The Bureau has explained that information provided in a Petition for Reconsideration of a decision dismissing an application cannot be used to reinstate an initial application. *PanAmSat Licensee Corp., Order on Reconsideration*, DA 03-3633 (rel. Nov. 13, 2003), at ¶ 7.

¹⁵ See *Bureau Decision* ¶ 11; *MSV Opposition to EchoStar Recon Petition* at 7. EchoStar claims that the precise pointing of its spot beams could only be determined after coordination with MSV. *EchoStar AFR* at 11. Even if this claim was accurate, it does not excuse EchoStar's failure to provide precise pointing of its spot beams for the 50 MHz of Planned Ku-band frequencies for which it was the only applicant prior to the dismissal of its application (*i.e.*, 10.70-10.75 GHz and 13.15-13.20 GHz) and for which co-frequency sharing was not applicable.

application was not “substantially complete” as filed, and the Bureau acted properly in upholding the decision to dismiss it.

B. The EchoStar application was inconsistent as to what frequencies it was proposing to use

The Bureau acted properly in upholding the dismissal of EchoStar’s application because EchoStar’s application was internally inconsistent with respect to its requested frequency assignments. *See Bureau Decision* ¶ 12.¹⁶ Given the inconsistent frequencies listed in EchoStar’s application, it appeared that EchoStar was applying for frequencies in the 10.95-11.2 GHz band, though it was impossible to determine with certainty given the references to both the 10.95-11.2 MHz and the 10.70-10.75 GHz band. Clear and accurate specification of frequencies requested in an application is essential so that potential applicants have unambiguous notice as to which frequencies are available for assignment, thereby avoiding prejudice to other potential applicants.¹⁷ The frequencies EchoStar was requesting could not be “easily resolved” by looking

¹⁶ *See* 47 C.F.R. § 25.114(c)(4) (requiring application to list radio frequencies requested); 47 C.F.R. § 25.112(a)(1) (listing internal inconsistencies as grounds for dismissal of an application).

¹⁷ *Bureau Decision* ¶ 12 (noting that frequency information “is one of the essential technical parameters that is used to determine whether an application is mutually-exclusive with a previously filed application”). EchoStar in its *AFR* also “acknowledges that frequency selection is an important part of all satellite applications.” *EchoStar AFR* at 8.

The Commission has previously recognized that inconsistencies in the precise spectrum requested cannot be considered a mere clerical error because of the potential for prejudice to other applicants. *Mobile Phone of Texas, Inc., Memorandum Opinion and Order*, 5 FCC Rcd 3459 (Chief, Common Carrier Bureau, June 12, 1990). In *Mobile Phone*, in response to a *Public Notice* establishing a 60-day cut-off window for Public Land Mobile Service frequency 152.15 MHz, Mobile Phone filed an application that was internally inconsistent as to whether it was requesting frequency 152.15 MHz or 152.09 MHz. Mobile Phone later filed a letter clarifying that it intended to apply for frequency 152.15 MHz. The Mobile Services Division (“MSD”) deemed this letter to be a major amendment causing Mobile Phone’s application to be filed outside of the 60-day cut-off window. The MSD thus dismissed the application. Mobile Phone filed a Petition for Reconsideration of the MSD’s action seeking reinstatement of its application arguing that its letter was merely intended “to clarify ambiguous information in its timely filed application.” *Id.* ¶ 5. The Common Carrier Bureau rejected Mobile Phone’s Petition because

at the application as a whole, as EchoStar contends. *EchoStar AFR* at 8. While EchoStar now states that it was applying for frequencies in the 10.70-10.75 GHz band and not the 10.95-11.2 MHz band (*id.* at 9-10), there was no way for the Commission or potential applicants to divine EchoStar's intentions given the internal inconsistencies in its application.¹⁸ EchoStar's *post hoc* clarification cannot cure the defects in its application as filed. In this case, due to the ambiguities in EchoStar's application, potential applicants were prejudiced because they were forced to consider whether to expend resources preparing an application for the 10.70-10.75 GHz band that might ultimately obtain only second-in-line status if EchoStar in fact was ultimately deemed to have applied for these frequencies.

reinstating its application would be unfair to other applicants by increasing the number of mutually exclusive applicants and would harm the public interest by delaying service to the public. *Id.* ¶ 8. Moreover, while the Common Carrier Bureau recognized that it had been the practice of the MSD to request corrections regarding minor technical data, it explained that "this practice is not utilized to correct frequency errors." *Id.* n.14.

EchoStar's attempt to distinguish *Mobile Phone* is unavailing. *EchoStar AFR* at 10 n.20. Even if *Mobile Phone*'s application was "replete" with inconsistent frequency references, as EchoStar alleges, nothing in *Mobile Phone* states or implies that it is the number of inconsistent frequency references that renders an application unacceptable for filing. Rather, *Mobile Phone* stands for the basic proposition that an inconsistent frequency reference in an application must be considered more than just a mere clerical error because of the prejudicial impact on other applicants.

Similar to *Mobile Phone*, the Commission has held that an application for a broadcast station will be dismissed if there are internal inconsistencies regarding the coordinates proposed for the transmitter site. *Coachella Valley Wireless Corp., Memorandum Opinion and Order*, 7 FCC Rcd 4252 (July 2, 1992). Among other things, such information is crucial for determining the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license necessary to determinations of mutual exclusivity and compliance with spacing rules. *Ocean Waves Broadcasting, Hearing Designation Order*, 3 FCC Rcd 4637 (Chief, Audio Services Division, August 3, 1988).

¹⁸ As the Bureau noted in upholding the Division's dismissal, it is not the responsibility of the Commission "to select for an applicant the desired frequencies from among differing frequencies provided in an application." *Bureau Decision* ¶ 12.

C. The Division and the Bureau were not required to provide EchoStar an opportunity to supplement or clarify its application; such an opportunity would undermine the new licensing procedures

As the Bureau properly concluded, EchoStar's assertion that the Bureau should have requested that EchoStar provide the missing information and clarify the ambiguities in its application undermines the intent of the new first-come, first-served policies. *EchoStar AFR at 12; see Bureau Decision* ¶ 13. Under EchoStar's view, an applicant could file an incomplete and ambiguous application and wait for the Bureau to request any missing information and to clarify any ambiguities.¹⁹ If the Bureau were to adopt such a policy, however, the public interest in expedited licensing, service to the public, and use of available spectrum would be disserved while the Bureau takes time to investigate what an applicant intended to request in its application. The Commission adopted first-come, first-served to expedite satellite licensing. This goal would not be served if the Bureau continued past policies of requesting applicants to clarify materially deficient applications.²⁰

D. The decisions of the Division and the Bureau are fully consistent with precedent; in the other cases EchoStar cites, the Bureau permitted supplemental filings only because the rules were ambiguous

EchoStar is wrong when it argues that the Bureau deviated from precedent in dismissing its application while in other cases it has simply requested clarifying information from applicants rather than dismissing the application. *EchoStar AFR at 13-16*. The cases EchoStar cites are

¹⁹ As the Bureau explained, "allowing applicants to 'cure' defects, of the type noted herein, after filing could encourage applicants to file incomplete, internally inconsistent, or otherwise defective applications to receive 'first-in-line' status. This is patently inconsistent with the rationale underlying the 'first-come, first-served' procedure, which is designed to expedite service to *the public*." *See Bureau Decision* ¶ 13 (emphasis in original).

²⁰ *See PanAmSat Licensee Corp., Order on Reconsideration*, DA 03-3633 (rel. Nov. 13, 2003), at ¶ 6 ("PanAmSat's argument that dismissal of its application as incomplete is inconsistent with previous practices is not convincing . . . Finding incomplete applications acceptable for filing is not consistent with the rules and policies adopted by the Commission in the [SSLR] Order and only serves to create uncertainty and inefficiencies in the licensing process.").

inapposite because none involved internally conflicting requests for frequencies or failure to identify which transponders will be connected to which spot beam. Rather, they all involved at most an applicant's failure to comply with an ambiguous rule.²¹ In such an instance, it is normal

²¹ See *Bureau Decision* ¶ 14 (“In those unusual instances where the Commission’s satellite information requirements have not been clearly set forth in a Commission rule, Order or Public Notice, we issue Public Notices to clarify the rules, but do not dismiss applications that do not contain the relevant information if they were filed before the release of the Public Notice.”)

See Letter from Robert Nelson, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary LLC, File No. SAT-AMD-20031118-00335 (April 23, 2004) and Letter from Thomas S. Tycz, Chief, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary LLC, DA 04-1095, File No. SAT-AMD-20040209-00014 (April 23, 2004). In these cases, the Bureau had issued a *Public Notice* in December 2003 clarifying an ambiguity in its rules regarding the need for a two-degree spacing analysis. See *December 2003 Public Notice*. Consistent with this *Public Notice*, the Bureau dismissed an amendment filed by MSV filed after December 2003 without this analysis but asked MSV to file a supplemental analysis in connection with an application that was filed prior to December 2003. Given the ambiguity in the Commission’s requirements, it was appropriate for the Bureau to require MSV to supplement rather than to dismiss the application filed before the issuance of the *Public Notice* clarifying the ambiguity. Conversely, in EchoStar’s case, there is no ambiguity in the requirements it failed to meet.

EchoStar also cites *DirecTV Enterprises LLC, Order and Authorization*, 19 FCC Rcd 7754 (2004). See also Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to David K. Moskowitz, EchoStar Satellite Corp., File Nos. SAT-LOA-20030605-00109, SAT-LOA-20030606-00107, SAT-LOA-20030609-00113 (Feb. 12, 2004). In these cases, the Bureau had issued a *Public Notice* in January 2004 clarifying that, although DBS applicants are not subject to first-come, first-served processing, they are nonetheless subject to the same “substantially complete” standard adopted in the *SSLR Order* for other satellite applicants. See *DBS Public Notice*, 19 FCC Rcd 1346 (2004). The Bureau requested the DBS applicants to supplement applications filed prior to January 2004 with certain information. Given the ambiguity in the Commission’s requirements pertaining to DBS applicants, it was appropriate for the Bureau to require the DBS applicants to supplement rather than to dismiss the applications filed before the issuance of the *Public Notice* clarifying the ambiguity. Conversely, in EchoStar’s case, there is no ambiguity in the requirements it failed to meet.

Finally, EchoStar cites two additional cases, Letter from Thomas S. Tycz, FCC, to Peter Hadinger, Northrop Grumman Space & Mission Systems Corporation, File No. SAT-AMD-20040312-00032 et al, DA 04-1725 (June 16, 2004) and Letter from Thomas S. Tycz, FCC, to David M. Drucker, contactMEO Communications, LLC, File No. SAT-AMD-20040322-00057 et al, DA 04-1722 (June 16, 2004). In these cases, the Bureau had issued two *Public Notices* in June 2004 clarifying ambiguities in its rules regarding (i) the need for a two-degree spacing analysis when there are no satellites using the same frequencies within two degrees of the proposed orbital location, and (ii) the information required for a casualty risk assessment. See

and appropriate for the Bureau to permit the applicant to supplement its application rather than have it dismissed. EchoStar places significant weight on an unchallenged Branch-level decision allowing an applicant to file supplemental information. See *EchoStar AFR* at 14-17 (citing *Loral Skynet*).²² This case, however, is fundamentally different than the case here because the application in that case included all the information required by the Commission's rules. *Bureau Decision* ¶ 16. The Bureau later requested the applicant to simplify the technical information provided and to verify certain assertions made, but it never challenged the completeness of the application.²³ In a case where an applicant complies with the Commission's rules, it is appropriate to request clarifications rather than to dismiss the application.²⁴ Unlike the applicant in that case, however, EchoStar failed to comply with two unambiguous Commission rules when it (i) omitted information regarding the manner in which its transponders and spot beams are to

June 2004 Public Notice; Public Notice, SPB-208, DA 04-1724 (June 2004). Given the ambiguity in the Commission's requirements, it was appropriate for the Bureau to reinstate applications dismissed prior to the release of the *Public Notices* for failing to provide the information as clarified. Conversely, in EchoStar's case, there is no ambiguity in the requirements it failed to meet.

²² See Letter from William Howden, Chief, Systems Analysis Branch, Satellite Division, International Bureau, FCC, to Stan Edinger, Loral Skynet Network Services, Inc., File No. SES-MOD-20030919-01302 (October 16, 2003) ("*Loral Skynet*").

²³ The Bureau acknowledged that it had not defined the showing required for an "effective competitive opportunities" analysis, thus making it appropriate for the Bureau to require the applicant in *Loral Skynet* to provide supplemental information in connection with this analysis rather than dismissing its application. See *Bureau Decision* n.52 (noting that the "Commission's rules do not require the applicant to provide specific documentation to affirm market access").

²⁴ EchoStar places particular emphasis on a footnote in which the Bureau stated that, even if the Systems Analysis Branch erred in failing to dismiss the application in *Loral Skynet*, the Bureau need not repeat the error here. *EchoStar AFR* at 17 (citing *Bureau Decision* ¶ 16 n.45). While accurate, this statement is nonetheless *dicta* and thus has no decisional significance here. Moreover, the Bureau did not state that it made a mistake in *Loral Skynet*. In fact, the Bureau clearly explained why it was proper to request supplemental information in *Loral Skynet* (because the applicant complied with all Commission rules and requirements) and inappropriate in this case (because EchoStar violated two unambiguous Commission rules which resulted in prejudice to the public and potential applicants). *Bureau Decision* ¶ 16.

be connected and (ii) failed to precisely identify the downlink frequencies that it was requesting.²⁵ Moreover, unlike in the present case, there was no evidence in the case EchoStar cites that other applicants or the public were prejudiced by the Bureau's having requested clarifications rather than dismissing the application.²⁶

²⁵ If the Commission were to reinstate EchoStar's application, fundamental fairness would dictate that the Bureau re-evaluate and potentially reinstate the approximately twenty other applications that have been dismissed since the beginning of first-come, first-served processing for failing to provide information mandated by unambiguous Commission rules and policies. In none of these cases did the Bureau afford applicants the opportunity to supplement their applications given the clear requirements of the Commission's rules. *See, e.g.*, Letter from Fern J. Jarmulnek, Deputy Chief, Satellite Division, Int'l. Bur., FCC to Mr. Robert Lewis, SkyTerra Communications Inc., DA 05-274, File Nos. SAT-LOA-20041029-00205, SAT-AMD-20041202-00215 (February 3, 2005) (dismissing application for failing to include downlink link budgets and appropriate antenna contour diagrams); Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to Mr. Brian Park, AfriSpace, Inc., DA 04-1719, File No. SAT-LOA-20040413-00082 (June 16, 2004) (dismissing application for failure to specify sufficient cross-polarization isolation); Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to Mr. Koichiro Matsufuji, Space Communications Corporation, DA 04-730, File No. SAT-PPL-20040120-00006 (April 22, 2004) (dismissing application for failure to provide technical information); Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to Mr. Vicente Rubio Carreton, Hispamar Satellites, S.A., File No. SAT-PPL-20040106-00001 (Feb. 24, 2004) (dismissing application for failure to provide technical information); Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to David K. Moskowitz, EchoStar Satellite Corp. DA 03-3893, File No. SAT-LOA-20030827-00170 (Dec. 8, 2003) (dismissing an application for failing to request a waiver to use proposed frequencies); Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to Kalpak Gude, PanAmSat Licensee Corp., DA 03-3313, File Nos. SAT-LOA-19951012-00165, SAT-AMD-19960202-00016, and SAT-AMD-20030827-00284 (Oct. 22, 2003) (dismissing application and amendment for failing to provide gain contours).

²⁶ *See Bureau Decision* ¶ 12 (stating that information concerning which transponders will be connected to which spot beam "allows the Commission, existing 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"); *see also MSV Opposition to EchoStar Recon Petition* at 7 (noting that EchoStar's failure to identify which transponders will be connected to which spot beam deprived MSV of information that would have been useful in determining whether EchoStar's sharing proposal is technically feasible); *id.* at 5-7 (noting that EchoStar's failure to specify which frequencies it was requesting prejudiced potential applicants by forcing them to consider whether to risk expending resources preparing an application for the 10.70-10.75 GHz band that might ultimately obtain only second-in-line status if EchoStar in fact was ultimately deemed to have applied for these frequencies).

E. The Division and the Bureau properly decided to dismiss both the original application and the subsequent amendment

EchoStar is also wrong when it argues that the Bureau deviated from precedent by dismissing its August 2003 application in addition to its November 2003 amendment. *EchoStar AFR* at 17. This argument ignores the fact that both its original application and its subsequent amendment contained the same failure to identify the connections between the spot beams and transponders. It also ignores the fact that the failure of the original application to seek a waiver of NG104 was the basis for the dismissal of another EchoStar application filed the same day.²⁷ MSV challenged the original application on this ground, among others, and this issue must be addressed before the Commission's gives any consideration to reinstatement of EchoStar's application. Finally, EchoStar never raised this argument before the Bureau in its Petition for Reconsideration, and it is thus barred from raising this issue in its Application for Review. 47 C.F.R. § 1.115(c).²⁸

²⁷ See Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to David K. Moskowitz, EchoStar Satellite Corp., DA 03-3893, File No. SAT-LOA-20030827-00170 (December 8, 2003).

²⁸ The two cases EchoStar cites to support its claim are inapposite. In the MSV case, the Bureau issued a *Public Notice* in December 2003 clarifying an ambiguity in its rules regarding the need for a two-degree spacing analysis. See *December 2003 Public Notice*. Consistent with this *Public Notice*, the Bureau dismissed an MSV amendment that was filed after December 2003 without this analysis but asked MSV to file a supplemental analysis in connection with the underlying application that was filed prior to December 2003. See Letter from Robert Nelson, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary LLC, File No. SAT-AMD-20031118-00335 (April 23, 2004) (requesting supplemental information for application filed prior to December 2003) and Letter from Thomas S. Tycz, Chief, Satellite Division, FCC, to Lon C. Levin, Vice President, Mobile Satellite Ventures Subsidiary LLC, DA 04-1095, File No. SAT-AMD-20040209-00014 (April 23, 2004) (dismissing amendment to same application filed after December 2003). Given the clarification of the ambiguity in the Commission's requirements, it was appropriate and consistent with established policy for the Bureau to keep MSV's underlying application on file while dismissing its amendment. MSV's amendment was subsequently reinstated because the Bureau found that its requirements were ambiguous. See *MSV Reinstatement Order*.

II. COMMISSION REVIEW MUST BE FAIR TO MSV

A. The Commission must consider the deficiencies MSV raised in its 2003 Petition to Deny

Before the Commission permits EchoStar to amend its application to correct its errors, it must also address the deficiencies raised in MSV's 2003 Petition to Deny. *See MSV Petition to Deny*, supra note 7. As discussed above, these include at least one deficiency -- the failure to request a waiver of the prohibition on the use of the frequencies for domestic service -- that has already been the basis for dismissal of another application EchoStar filed simultaneously.²⁹

In the SES case, the applicant included an analog emission designator for the first time in an amendment but failed to provide required technical information for this type of service. *See* Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to Karis A. Hastings, Counsel for SES Americom, Inc., DA 04-1707, File No. SAT-AMD-20040528-00110 (June 10, 2004). The original underlying application, however, was substantially complete as filed and thus was not dismissed.

Moreover, unlike in the MSV and SES cases, the Division found that EchoStar's amendment subsumed its original application. *EchoStar Dismissal* at 1. The Division acted consistently with established precedent in dismissing EchoStar's original application and amendment based on the finding that the amendment subsumed the original underlying application. *See* Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC to Kalpak Gude, PanAmSat Licensee Corp., DA 03-3313, File Nos. SAT-LOA-19951012-00165, SAT-AMD-19960202-00016, and SAT-AMD-20030827-00284 (Oct. 22, 2003) (dismissing both application and amendments based on finding that original application was subsumed by subsequent amendments); *see also* Letter from Thomas Tycz, FCC, to Peter Hadinger, Northrop Grumman Space & Mission Systems Corporation, File No. SAT-LOA-19970904-00081 et al (May 18, 2004) (dismissing an underlying application based on a deficient amendment because amendment replaced technical information in underlying application). In the MSV case, the Bureau properly did not make a finding that MSV's February 2004 amendment subsumed its original application. MSV stated that its amendment was filed solely to request an additional 50 MHz of feeder link spectrum. *MSV February 2004 Amendment* at 1. While MSV amended and restated the Technical Appendix from its November 2003 application "for the convenience of Commission staff" (*id.* at 1-2), MSV never stated or implied that this amendment was intended to replace the November 2003 application in its entirety.

²⁹ *See* Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to David K. Moskowitz, EchoStar Satellite Corp., DA 03-3893, File No. SAT-LOA-20030827-00170 (December 8, 2003).

B. The Commission must treat any amendment by EchoStar as a major amendment

EchoStar asked the Bureau to reinstate its application and stated that after reinstatement it would file a further amendment correcting the errors in its application. *EchoStar Recon Petition* at 11. This would require EchoStar to change the frequencies it is requesting in one of the conflicting sections of its application. The Commission's rules, however, specify that any "change" in the frequencies requested in a pending application is a major amendment. 47 C.F.R. § 25.116(b)(2).³⁰ A major amendment to a pending application causes the application to be considered newly filed. *SSLR Order* ¶ 139. Thus, even if the Bureau reinstates EchoStar's application, it must be considered as filed at the time EchoStar files its further major amendment.

C. The Commission should not penalize MSV for relying on the dismissal of EchoStar's application in amending its own application

Even before EchoStar's application was dismissed, MSV was first-in-line relative to EchoStar for 250 MHz. Since the dismissal, and in reliance on it, MSV submitted an amendment requesting the additional 50 MHz, for which it is now also first in line. Moreover, MSV has relied on the availability of these frequencies to design and develop its next-generation system, including negotiations with satellite manufacturers. A decision now to reinstate EchoStar's application thus has the potential to be extremely prejudicial to MSV.

Should the Commission nonetheless reinstate EchoStar's application *nunc pro tunc* as filed on November 26, 2003, the Bureau should ensure at a minimum that EchoStar does not assume first-in-line status with respect to the 250 MHz of Planned Ku-band spectrum for which MSV originally filed in December 2000 (11.2-11.45 GHz band (downlink) and 12.75-13.00 GHz

³⁰ See also *Mobile Phone* (holding that a letter purporting to correct a "clerical error" as to which frequency was requested constitutes a major amendment that caused the application to be considered newly filed).

band (uplink)). In MSV's *February 2004 Amendment*, MSV merely requested the additional 50 MHz of Planned Ku-band spectrum for which it did not previously apply in December 2000 (10.70-10.75 GHz (downlink) and 13.15-13.20 GHz (uplink)). The Bureau's dismissal of EchoStar's application clarified any ambiguity as to whether EchoStar in fact had an application on file for frequencies in the 10.70-10.75 GHz band. Based on this dismissal, MSV was able to amend its application to add these additional frequencies and obtain first-in-line status. To obtain first-in-line status, MSV had no choice but to file this amendment immediately upon dismissal of EchoStar's application before any other potential applicant submitted an application and before a challenge of the Bureau's decision became final.³¹ EchoStar has agreed that MSV should retain first-in-line status for the 250 MHz of Planned Ku-band frequencies for which MSV originally filed in December 2000.³²

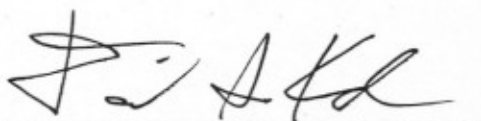
³¹ If MSV had waited until a challenge of the Bureau's decision became final to file this amendment, MSV would have been prevented from obtaining first-in-line status by EchoStar refiling its application at any time while its challenge was pending. Indeed, EchoStar did precisely this by simultaneously challenging the Bureau's decision and refiling a corrected application.

³² See EchoStar, Reply, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (April 5, 2004), at 9 ("EchoStar accepts that upon reinstatement of its application it should not assume first-in-line status for the frequencies originally requested by MSV.").

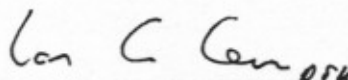
Conclusion

MSV requests that the Commission act consistently with the views expressed herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Sylvia A. Davis, a secretary with the law firm of Shaw Pittman LLP, hereby certify that on this 10th day of February 2005, served a true copy of the foregoing "Opposition to Application for Review" by first class United States mail, postage prepaid, upon the following:

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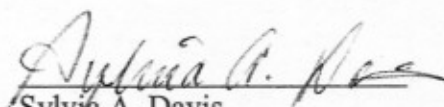
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