

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter of )  
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ECHOSTAR SATELLITE L.L.C. )  
)  
Application for an Allotted Extended )  
Ku-band Satellite at 101° W.L. )

MAR 02 2005

Federal Communications Commission  
Office of Secretary

Policy Branch  
File Nos. SAT-LOA-20030827-00179  
International Bureau SAT-AMD-20031126-00343  
Call Sign S2492

**REPLY TO OPPOSITION TO APPLICATION FOR REVIEW**

Pursuant to 47 C.F.R. § 1.115(d), EchoStar Satellite L.L.C. ("EchoStar") hereby replies to the opposition filed by Mobile Satellite Ventures Subsidiary LLC ("MSV") on February 10, 2005, in the above-referenced proceeding.<sup>1</sup>

Contrary to MSV's contention, not every inconsistency or mistake in frequencies is grounds for dismissing an application for not being substantially complete. The decisions cited by MSV are not authority to the contrary, and the Bureau did not rely upon them to support its decision.<sup>2</sup> In fact, the Bureau itself provides an example of a frequency error that would not warrant dismissal. As EchoStar has pointed out, the Commission has explained how inconsistencies and discrepancies are to be treated under a substantially complete standard in the

<sup>1</sup> Opposition to Application for Review of Mobile Satellite Ventures Subsidiary LLC, (filed Feb. 10, 2005) ("MSV Opposition").

<sup>2</sup> With respect to *Mobile Phone of Texas, Inc.*, 5 FCC Rcd 3459 (C.C. Bur. 1990), it is unclear whether that case involved the substantially complete standard, but even if it did, it is easily distinguishable. The multiple inconsistencies in that case were such that they could not be resolved "confidently and reliably" from the application as a whole. See *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19936, Appendix D (1985) ("*FM and TV Order*").

*Coachella Valley Wireless Corp.*, 7 FCC Rcd 4252 (1992), did involve the substantially complete or "hard look" standard in the broadcast context but, contrary to MSV's contention, the decision confirms that resolvable discrepancies do not render an application unacceptable for filing. *Id.* at 4252-53 ("The Commission has made a commitment . . . to resolve tenderability defects if the necessary information can be derived confidently and reliably from the face of the application. Although a coordinate discrepancy is considered an acceptability defect, the staff will, within reason, nonetheless attempt to resolve any discrepancies found in an application."). Ultimately, *Coachella* is distinguishable on its facts because the coordinate discrepancies in that case could not be resolved. *Ocean Waves Broadcasting*, 3 FCC Rcd 4637 (Audio Serv. Div. 1988) is distinguishable for the same reason.

*FM and TV Order* -- if the “discrepancy [can be] resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender.”<sup>3</sup> In this case, it is clear from the Application and Amendment “as a whole” that EchoStar intended to apply for the allotted extended Ku-band frequencies. MSV’s claim that it is “impossible” to resolve the one incorrect frequency reference by looking at the multiple references to the correct frequencies in the rest of the application severely underestimates the competence and ability of the Commission’s staff.<sup>4</sup>

MSV argues that information about which spot beams are connected or switchable to which transponder 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.”<sup>5</sup> In fact, as EchoStar’s expert has declared,<sup>6</sup> such information would make no practical difference and MSV has made no attempt to show otherwise. Indeed, EchoStar’s coordination proposal is based on spatial separation between the small number of MSV feeder link earth stations and the spot beams on EchoStar’s proposed satellite. Assuming that MSV will be using all of its assigned frequencies in each of its feeder link beams, the question of which transponder is connected with which spot beam is not relevant to such a sharing proposal.

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<sup>3</sup> *FM and TV Order* at Appendix D.

<sup>4</sup> MSV further contends that “potential applicants were prejudiced [by the discrepancy] 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 . . .” EchoStar hereby incorporates by reference its response to this argument in its earlier reply. *See Reply to Opposition to Petition for Reconsideration* at 6-7 (filed Apr. 5, 2004).

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *See Application for Review at Attachment A (Declaration of Richard Barnett), filed In the Matter of EchoStar Satellite LLC, SAT-LOA-20030827-00179, SAT-AMD-20031126-00343, Call Sign S2492 (filed Jan. 26, 2005).*

MSV also accuses EchoStar of failing to specify the precise pointing directions of its spot beams.<sup>7</sup> However, the International Bureau (“Bureau”) did not dismiss EchoStar’s Application<sup>8</sup> and Amendment<sup>9</sup> on this ground, and rightly so. As noted above, EchoStar’s sharing proposal is based on spatial separation between EchoStar’s spot beams and MSV’s feeder link earth stations. But, because the precise location of MSV’s feeder link earth stations is also uncertain, it is not possible to determine *ex ante* the optimum pointing directions of EchoStar’s spot beams that would also protect MSV’s earth stations. EchoStar expects that the precise pointing directions will be determined after any necessary coordination with licensed collocated satellites.

MSV attempts to refute EchoStar’s claim of unequal treatment by distinguishing the present case from *Loral Skynet*.<sup>10</sup> MSV contends that *Loral Skynet* was different because the Bureau “never challenged the completeness of the [Loral] application.”<sup>11</sup> Not so. In *Loral Skynet*, the Bureau dismissed Loral’s application only after it failed to provide “additional technical information and information that was missing from the original application,”<sup>12</sup> as previously requested by the Bureau. While the Bureau in this case has attempted to back away from this rationale,<sup>13</sup> it is clear from the original letter to Loral requesting additional information that the *DISCO II* information in the application was “insufficient for [the Bureau] to make a determination.”<sup>14</sup> This is clearly a challenge to the completeness of the application. In any

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<sup>7</sup> MSV Opposition at 8 n.15.

<sup>8</sup> SAT-LOA-20030827-00179 (filed Aug. 27, 2003) (“Application”).

<sup>9</sup> SAT-AMD-20031126-00343 (filed Nov. 26, 2003) (“Amendment”).

<sup>10</sup> Letter from William Howden, FCC to Stan Edinger, Loral Skynet Network Services, Inc., DA 03-3904, SES-MOD-20030919-013202 (Dec. 11, 2003).

<sup>11</sup> MSV Opposition at 13.

<sup>12</sup> *Id.* at 1.

<sup>13</sup> 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*.”).

<sup>14</sup> Letter from William Howden, FCC to Stan Edinger, Loral Skynet Network Services, Inc., SES-MOD-20030919-01302, at 2 (Oct. 16, 2003).

event, as EchoStar has shown,<sup>15</sup> the Application and Amendment in the present case is not any more deficient, and is significantly more complete, than the information originally supplied by the applicant in *Loral Skynet*. Accordingly, the Bureau should not have dismissed the Application and Amendment but instead should have requested additional information from EchoStar, as it did in *Loral Skynet*.

MSV also contends that the Bureau properly dismissed both the Application and Amendment because both failed to identify the connections between the spot beams and transponders. This is inaccurate. The Application did not contain information about spot beam-transponder connectivity because the satellite as originally proposed did not have spot beams. The operation of the proposed satellite in a spot beam configuration was introduced by the Amendment. The omission of the connectivity information is therefore an alleged defect in the Amendment only. Moreover, the disparity in treatment did not become apparent until after the pleading cycle for EchoStar's petition for reconsideration had closed. EchoStar filed its reply in the proceedings below on April 5, 2004, while the Bureau's dismissal of defective amendments without also dismissing the underlying applications did not occur until April 23, 2004 and June 10, 2004.<sup>16</sup>

MSV raises the absence of a request for a waiver of footnote NG104 as an alternative basis for dismissal. In fact, such a waiver was requested in the Amendment.<sup>17</sup> Moreover, the Bureau did not rely on the absence of the waiver in the original application as a ground for dismissing the Application and Amendment, which indicates that the waiver request in the Amendment was enough. In connection with footnote NG104, MSV also raises the

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<sup>15</sup> EchoStar Application for Review at 14-16.

<sup>16</sup> See Application for Review at 17 n.38 & 39. To the extent that EchoStar needs a waiver of 47 C.F.R. § 1.115(c) to raise this issue now, it hereby requests such a waiver. There is good cause for such waiver because the argument is based on events that occurred after the close of the pleading cycle and so could not have been raised before the Bureau.

<sup>17</sup> Amendment at 4-5.

question of coordination with terrestrial services. However, that question ultimately goes to the merits of the application and not the acceptability of the Application and Amendment for filing. In any event, EchoStar has said that the primary use to which the satellite will be put is the provision of one-way, direct-to-home ("DTH") service.<sup>18</sup> The Commission has already accepted the possibility of co-existence between receive-only DTH terminals and terrestrial services in the non-allotted extended Ku-band,<sup>19</sup> and similar co-existence should also be feasible in the allotted extended Ku-band. The possibility of providing two-way services by means of the proposed satellite was always subject to successful coordination.<sup>20</sup>

Finally, MSV contends that if EchoStar's Application and Amendment were to be reinstated, then any curative amendment permitted by the Commission should be treated as a major amendment, which would have the effect of relegating EchoStar's Application and Amendment to the bottom of the satellite processing queue.<sup>21</sup> This argument is misconceived. Reinstatement of the Application and Amendment would mean that the errors were (by definition) minor and therefore correctable with a request for additional information under 47 C.F.R. § 25.111.

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February 24, 2005

<sup>18</sup> See Amendment at 2, 11; Application at 1, 8.

<sup>19</sup> See *In the Matter of EchoStar Satellite L.L.C.*, DA 04-3163, SAT-LOA-20031211-00350 (rel. Sept. 30, 2004); *In the Matter of EchoStar Satellite L.L.C.*, DA 04-3164, SAT-LOA-20031215-00355 (rel. Sept. 30, 2004).

<sup>20</sup> See Amendment at 2, 11, 14; Application at 1, 8, 10.

<sup>21</sup> MSV Opposition at 17.

## CERTIFICATE OF SERVICE

I, Chung Hsiang Mah, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on February 24, 2005, I caused a true copy of the foregoing to be served by hand (where indicated by \*) or first class mail, postage prepaid, upon the following:

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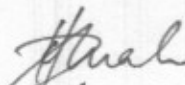
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