



placed MSV's amended replacement application on *Public Notice* in March 2001 and no party filed a competing application or objected to MSV's request to operate its replacement satellite using Planned Ku-band spectrum for feeder links. *See* Report No. SAT-00066 (March 19, 2001).

In August 2003, over five years after MSV filed its replacement application, EchoStar filed an application for authority to launch and operate a satellite at 101°W using 250 MHz of Planned Ku-band frequencies that MSV had already requested as well as an additional 50 MHz that MSV had not previously requested.<sup>4</sup> On November 26, 2003, EchoStar amended its application.<sup>5</sup> On February 9, 2004, the Bureau dismissed EchoStar's application as incomplete and otherwise not in compliance with the Commission's rules.<sup>6</sup>

Upon dismissal of EchoStar's application, MSV filed an amendment to its pending replacement application to request the remaining 50 MHz of Planned Ku-band frequencies it had not previously requested.<sup>7</sup> On February 10, 2004, one day after MSV filed its amendment, EchoStar refiled its application for 300 MHz of Planned Ku-band frequencies at 101°W. *See*

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<sup>4</sup> Application of EchoStar, File No. SAT-LOA-20030827-00179 (filed August 27, 2003).

<sup>5</sup> EchoStar, Amendment, File No. SAT-AMD-20031126-00343 (November 26, 2003).

<sup>6</sup> *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).

<sup>7</sup> MSV, Amendment, File No. SAT-AMD-20090209-00014 (filed February 9, 2004) ("*MSV February 2004 Amendment*"). On March 10, 2004, EchoStar filed a Petition for Reconsideration of the Bureau's February 9, 2004 decision dismissing EchoStar's November 26, 2003 amendment. *See* EchoStar, Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 10, 2004). EchoStar asked the Bureau to reinstate its application *nunc pro tunc*. *Id.* In its Reply to MSV's Opposition to its Petition for Reconsideration, EchoStar accepts that if its application is reinstated *nunc pro tunc*, it will not assume first-in-line status for the 250 MHz of Planned Ku-band frequencies for which MSV originally filed in December 2000 (11.2-11.45 GHz band (downlink) and 12.75-13.00 GHz band (uplink)). *See* EchoStar, Reply, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (April 5, 2004), at 9. EchoStar's Petition for Reconsideration is pending.

*EchoStar Application.* EchoStar stated its view that MSV and EchoStar can share these frequencies at 101°W over the same geographic area. *See id.*, Technical Annex at 25-26.

On April 23, 2004, the Bureau dismissed MSV's February 9, 2004 amendment for purportedly failing to include an interference analysis, but did not dismiss the underlying application.<sup>8</sup> Thus, as of this date, MSV is either licensed or first-in-line for the following 450 MHz of Planned Ku-band frequencies: 10.75-10.95 & 11.2-11.45 GHz (downlink) and 12.75-13.15 & 13.20-13.25 GHz (uplink). If the Bureau reconsiders its April 23rd decision, MSV also will be first-in-line for the remaining 50 MHz of Planned Ku-band frequencies: 10.70-10.75 GHz (downlink) and 13.15-13.20 GHz (uplink).

The Bureau placed EchoStar's application on *Public Notice* on March 26, 2004. *See* Report No. SAT-00203 (March 26, 2004). MSV filed Comments explaining that: (i) the Bureau must defer action on EchoStar's application with respect to the 250 MHz for which it is second-in-line behind MSV; (ii) the Bureau should defer action on EchoStar's application with respect to the remaining 50 MHz for which MSV will be first-in-line if the Bureau reconsiders its recent decision dismissing MSV's prior-filed application for these same frequencies; and (iii) after MSV's application is granted, if MSV and EchoStar are able to reach a sharing agreement, then it may be possible to grant EchoStar's application, subject to any relevant conditions on EchoStar's license.<sup>9</sup>

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<sup>8</sup> *See* Letter from Thomas Tycz, FCC, to Lon C. Levin, MSV, File No. SAT-AMD-20040209-00015, DA 04-1095 (April 23, 2004). The deadline for a challenge of this decision has not passed.

<sup>9</sup> Comments of MSV, File No. SAT-LOA-20040210-00015 (April 26, 2004) ("*MSV Comments*").

EchoStar filed a Reply to MSV's Comments on May 11, 2004.<sup>10</sup> As an initial matter, EchoStar notes that grant of its application is contingent upon MSV and EchoStar reaching an agreement on sharing of frequencies. *EchoStar Reply* at 2-3. Despite this, EchoStar contends that its application can be granted prior to MSV's because the two applications are not mutually exclusive due to the possibility of co-frequency sharing. *Id.* Moreover, EchoStar argues that the Bureau should not defer grant of its application until after MSV's application is granted because it claims without any support that it will make expeditious use of the spectrum whereas MSV's ability and commitment to making use of the spectrum is in question. *Id.* at 5-6. EchoStar bases its allegations regarding MSV on the following: (i) MSV has filed amendments to its application over the six years the application has been pending; (ii) MSV has requested a waiver of the requirement that it post a bond; and (iii) MSV has yet to complete construction of its satellite. *Id.* EchoStar argues further that the Bureau should have dismissed MSV's application in its entirety, which would result in EchoStar assuming first-in-line status for the entire 300 MHz it has requested. *Id.* at 4-5. Finally, EchoStar contends that there is no reason to defer consideration of its application with respect to the 50 MHz for which it is currently first-in-line because the Bureau's decision dismissing MSV's prior-filed application for the same frequencies is effective despite MSV's challenge of the decision. *Id.* at 3.

#### **Discussion**

##### **I. The Bureau Must Defer Action on EchoStar's Application Until After MSV's Prior-Filed, First-in-Line Application Is Processed and Granted**

As MSV demonstrated in its Comments, until MSV's first-in-line application is processed and granted, the Bureau must defer action on EchoStar's mutually exclusive application with respect to the 250 MHz for which EchoStar is second-in-line. *MSV Comments*

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<sup>10</sup> Reply Comments of EchoStar Satellite LLC, File No. SAT-LOA-20040210-00015 (May 11, 2004) ("*EchoStar Reply*").

at 5. EchoStar is wrong when it claims that its application is not mutually exclusive with MSV's and therefore can be granted first. *EchoStar Reply* at 2-3. EchoStar's argument is premised on its belief that co-frequency sharing between MSV and EchoStar is technically feasible. *Id.* at 2. While MSV agrees that the possibility of sharing frequencies with EchoStar is worth exploring, the feasibility and practicality of sharing cannot be determined unless and until MSV and EchoStar hold further discussions and conclude any agreement on sharing. At this point, the parties have held an initial discussion but are far from reaching a definitive agreement. As MSV demonstrated in its Comments, and which EchoStar has conceded, the Bureau cannot grant EchoStar's application unless and until MSV and EchoStar conclude such an agreement. *MSV Comments* at 6; *EchoStar Reply* at 2-3.<sup>11</sup>

As the first-in-line applicant for these frequencies, MSV has priority and has no obligation to explore the possibility of sharing with EchoStar. Despite this, MSV has agreed to engage in discussions with EchoStar in the interests of promoting sharing and increased use of spectrum. MSV, however, has never concluded that sharing is possible, only that it is worth investigating. Should the Bureau grant EchoStar's second-in-line application prior to MSV's first-in-line application, however, EchoStar will assume priority and will be able to dictate the terms of any sharing agreement--that is assuming that EchoStar still has an incentive to share with MSV. In doing so, the Bureau will have rescinded the rights held by MSV as a first-in-line applicant. Moreover, grant of EchoStar's second-in-line application prior to MSV's would turn first-come, first-served processing on its head. First-in-line priority would cease to have any

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<sup>11</sup> In its Application, EchoStar concedes that its proposal to use Planned Ku-band frequencies at 101°W is dependent upon its conclusion of an agreement with MSV detailing the conditions for sharing. See *EchoStar Application*, Technical Annex at 1, 7, 12 n.3, 22, 25, 26.

importance if a second-in-line application can be granted before a first-in-line application based on the theoretical but unproven possibility of sharing.

EchoStar's claims that grant of its application should not be deferred because MSV is not able and committed to making expeditious use of Planned Ku-band spectrum are baseless.

*EchoStar Reply* at 5-6. First, while MSV has filed four amendments to its pending application, and not eight as EchoStar alleges (*id.* at 5), none of these amendments were intended to delay grant of the application.<sup>12</sup> Far from inviting further delay, MSV's November 2003 amendment was filed to reflect the new MSS satellite technology that had evolved during the over five years the application was pending at that time. Similarly, MSV's fourth and most recent amendment was not motivated by delay but instead by the opportunity to assume first-in-line status for the remaining 50 MHz of Planned Ku-band frequencies that had become available upon dismissal of EchoStar's first-in-line application. Second, MSV's request that the Bureau refrain from applying the new bond requirement does not call into question MSV's ability or commitment to construct and launch a satellite. Rather, as MSV has demonstrated, a \$5 or \$7.5 million bond will add a substantial and unnecessary cost to MSV's development of a replacement MSS

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<sup>12</sup> Since MSV originally filed its replacement application almost six years ago in July 1998, it has filed four amendments. The first was filed on December 14, 2000. *See Application of Motient Services Inc., SAT-AMD-20001214-00171* (December 14, 2000) (requesting additional Planned Ku-band feeder link frequencies). The second amendment was filed on March 2, 2001. *See Application of Motient Services Inc. and MSV, File No. SAT-ASG-20010302-00017 et al.* (March 2, 2001). The Bureau placed the application on *Public Notice* after the second amendment. *See Public Notice*, Report No. SAT-00066 (March 19, 2001). The third amendment was a minor amendment filed on November 18, 2003, thirty months after the pleading cycle closed on MSV's March 2001 application, to reflect revised technical parameters for the proposed replacement satellite. *See Minor Amendment of MSV, File No. SAT-AMD-20031118-00335* (November 18, 2003). The fourth and most recent amendment was filed on February 9, 2004 to request the remaining 50 MHz of Planned Ku-band frequencies that had become available when EchoStar's application was dismissed. *MSV February 2004 Amendment.*

system.<sup>13</sup> Indeed, EchoStar itself has recognized the burdens associated with posting a bond.<sup>14</sup> MSV has demonstrated that imposition of the bond in its case would be particularly egregious and unfair because (i) concerns about speculation and warehousing are not present;<sup>15</sup> (ii) the Bureau would be applying a new set of rules to an application that was ripe for grant for two years before the new rules were adopted;<sup>16</sup> and (iii) MSV's satellite will be used to provide critical public safety services which the Commission has held is an independent basis for waiver of the bond.<sup>17</sup> Third, EchoStar's argument that MSV will not make expeditious use of spectrum because it has not yet constructed its satellite is particularly absurd. *EchoStar Reply* at 5. It is entirely reasonable and in fact customary for an applicant to wait until grant of its application before constructing its satellite. Indeed, EchoStar, which claims that it will make expeditious use of the spectrum, provides no evidence that it has begun construction of its proposed satellite.

EchoStar is also mistaken when it argues that grant of its application should not be deferred because MSV's entire application should have been dismissed, resulting in EchoStar assuming first-in-line status for the entire 300 MHz it has requested. *EchoStar Reply* at 4-5.<sup>18</sup>

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<sup>13</sup> See Letter from Lon C. Levin, MSV, to Ms. Marlene H. Dortch, FCC, File No. SAT-ASG-20010302-00017 et al. (November 4, 2003) ("*MSV Bond Letter*"); Letter from Lon C. Levin, MSV, to Ms. Marlene H. Dortch, FCC File No. SAT-ASG-20010302-00017 et al. (November 26, 2003) ("*MSV Bond Reply Letter*").

<sup>14</sup> See Letter from Pantelis Michalopoulos, Counsel for EchoStar Satellite LLC, to Ms. Marlene H. Dortch, IB Docket No. 02-34, IB Docket No. 00-248 (February 11, 2004) ("EchoStar's recent experience with obtaining such performance bonds demonstrates that the transaction and related costs are significant.").

<sup>15</sup> *MSV Bond Letter* at 7-8; *MSV Bond Reply Letter* at 4.

<sup>16</sup> *MSV Bond Letter* at 8-9; *MSV Bond Reply Letter* at 5-6.

<sup>17</sup> *MSV Bond Letter* at 9-10; *MSV Bond Reply Letter* at 7-8.

<sup>18</sup> MSV notes that EchoStar's position is entirely inconsistent with the position it has taken on reconsideration of the Bureau's dismissal of EchoStar's November 2003 amendment. EchoStar has accepted that if its November 2003 amendment is reinstated, it will not assume priority over MSV's February 2004 amendment with respect to the 250 MHz of Planned Ku-band frequencies

As an initial matter, MSV believes its February 2004 amendment will be reinstated. Moreover, the Bureau rightfully chose not to dismiss MSV's underlying application. Between the time MSV filed its November 2003 and February 2004 amendments, the Bureau issued a *Public Notice* clarifying its requirements with respect to a two degree spacing analysis.<sup>19</sup> The Bureau specifically stated that an application filed after December 3, 2003 that did not contain this analysis would be dismissed but an application filed before December 3, 2003 that did not contain this analysis would have to be supplemented but would not be dismissed. *Interference Analysis Public Notice* at 2. In MSV's case, the Bureau followed this stated policy by dismissing the February 2004 amendment<sup>20</sup> and requesting that MSV supplement its November 2003 amendment.<sup>21</sup> To do otherwise would have expressly violated the Bureau's stated procedures. Moreover, while EchoStar cites two cases to support its claims that the Bureau should have dismissed MSV's underlying application along with its amendment, these cases are inapplicable to MSV's case. *EchoStar Reply* at 4-5. In both of these cases, the Bureau found that the amendment "subsumed" the underlying application.<sup>22</sup> The Bureau properly did not make such a finding with respect to MSV's February 2004 amendment. MSV stated that its amendment was

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for which MSV originally filed in December 2000. See *EchoStar, Reply*, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (April 5, 2004), at 9. EchoStar has taken such a position despite its apparent belief that MSV's February 2004 amendment was "major," purportedly resulting in the application being newly filed as of February 2004, after EchoStar's November 2003 amendment. *EchoStar Reply* at 4-5.

<sup>19</sup> See *Public Notice, Clarification of Space Station Application Interference Analysis*, SPB-195, DA 03-3863 (December 3, 2003) ("*Interference Analysis Public Notice*").

<sup>20</sup> See Letter from Thomas S. Tycz, FCC, to Lon C. Levin, MSV, File No. SAT-AMD-20040209-00015, DA 04-1095 (April 23, 2004).

<sup>21</sup> See Letter from Robert Nelson, FCC, to Lon C. Levin, MSV, File No. SAT-AMD-20031118-00335 (April 23, 2004).

<sup>22</sup> See Letter from Thomas Tycz, FCC, to David K. Moskowitz, EchoStar, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (February 9, 2004) at 1, 3; Letter from Thomas Tycz, FCC, to Kalpak Gude, File No. SAT-LOA-19951012-00165 et al (October 22, 2003) at 1.



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.<sup>23</sup> Finally, it would have been fundamentally unfair for the Bureau to have dismissed MSV’s entire replacement application based on an amendment that was filed solely to assume first-in-line status for the remaining 50 MHz of Planned Ku-band frequencies that had become available upon dismissal of EchoStar’s first-in-line application. Dismissal of the underlying application would mean that MSV would lose priority for the other 250 MHz for which MSV filed over three and one-half years ago, which had already been on *Public Notice*, and which received no opposition or competing applications. Given these circumstances, fundamental fairness dictates that the Bureau ensure MSV’s priority with respect to these 250 MHz.

**II. The Bureau Should Exercise Its Discretion to Refrain from Acting on EchoStar’s Application with Respect to the Remaining 50 MHz for Which It Is Currently First-in-Line Until After Acting on MSV’s Challenge**

EchoStar is also wrong when it argues that there is no reason for the Bureau to defer grant of its application for the 50 MHz for which it is currently first-in-line pending the outcome of MSV’s challenge of the Bureau’s decision dismissing MSV’s prior-filed amendment for the same frequencies. *EchoStar Reply* at 3. MSV believes that its amendment is likely to be reinstated, at which time MSV will return to first-in-line status for these frequencies. Deferring grant of EchoStar’s application until MSV’s application is reinstated will avoid uncertainty and prejudice to any of the parties. Moreover, acting on EchoStar’s application with respect to this

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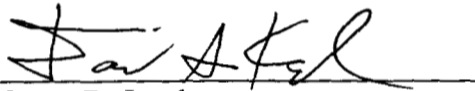
<sup>23</sup> For example, in recently dismissing an underlying application based on a deficient amendment, the Bureau specifically noted that the applicant stated that its amendment “replaces, in its entirety, the technical information” in the underlying application. *See Letter from Thomas Tycz, FCC, to Peter Hadinger, Northrop Grumman Space & Mission Systems Corporation, File No. SAT-LOA-19970904-00081 et al (May 18, 2004).*

50 MHz prior to MSV's challenge does not make practical sense. Given that the Bureau cannot grant EchoStar's application with respect to the 250 MHz for which EchoStar is second-in-line until after MSV's application is granted for the reasons stated above, the only license the Bureau can grant EchoStar prior to MSV is for the 50 MHz for which it is currently first-in-line. It is unlikely that EchoStar will construct and launch a satellite operating on only 50 MHz of spectrum. This is compounded by the fact that (i) use of the downlink (10.70-10.75 GHz) is limited by the need to meet certain out-of-band emission limits to protect radio-astronomy in the adjacent 10.6-10.7 GHz band<sup>24</sup> and (ii) use of the uplink (13.15-13.20 GHz) is limited by the need to share with Broadcast Auxiliary Service and Cable Television Relay Service mobile pickup operations.<sup>25</sup> Nonetheless, to the extent the Bureau does act on EchoStar's application for this 50 MHz prior to acting on MSV's challenge, the Bureau should make clear that any grant of EchoStar's application is subject to modification upon action on MSV's challenge.

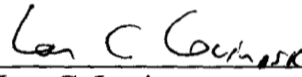
#### Conclusion

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

Respectfully submitted,



Bruce D. Jacobs  
David S. Konczal  
**SHAW PITTMAN LLP**  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8000



Lon C. Levin  
Vice President  
**MOBILE SATELLITE VENTURES  
SUBSIDIARY LLC**  
10802 Park Ridge Boulevard  
Reston, Virginia 20191  
(703) 390-2700

Dated: May 21, 2004

<sup>24</sup> See Letter from Lon C. Levin, MSV, to Ms. Marlene H. Dortch, FCC, File Nos. SAT-AMD-20040209-00014, SAT-AMD-20031118-00335 (May 12, 2004) (committing to meet certain out-of-band emission limits to protect radioastronomy in the 10.6-10.7 GHz band).

<sup>25</sup> See *Boeing, Order and Authorization*, DA 03-2073 (June 24, 2003), at ¶ 18 (prohibiting transmissions in the 13.15-13.2125 GHz band from within 50 kms of a top 100 TV market).

**CERTIFICATE OF SERVICE**

I, Sylvia A. Davis, a secretary with the law firm of Shaw Pittman LLP, hereby certify that on this 21st day of May 2004, served a true copy of the foregoing "Response" by first class United States mail, postage prepaid, upon the following:

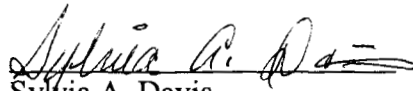
Thomas S. Tycz\*  
International Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Pantelis Michalopoulos  
Philip L. Malet  
Todd B. Lantor  
Lee C. Milstein  
Steptoe & Johnson LLP  
1330 Connecticut Avenue N.W.  
Washington, D.C. 20036

Counsel for EchoStar Satellite LLC

David K. Moskowitz  
EchoStar Satellite LLC  
9601 South Meridian Blvd.  
Englewood, CO 80112

Karen Watson  
Lori Kalani  
EchoStar Satellite LLC  
1233 20<sup>th</sup> Street, NW – Suite 701  
Washington, DC 20036

  
Sylvia A. Davis

\*By hand delivery