

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
EchoStar Corporation)
)
Application for a Geostationary C-Band)
Satellite in the Fixed-Satellite Service at 85°)
W.L.)

File No. SAT-LOA-20080523-00112

FILED/ACCEPTED
AUG - 1 2008

Federal Communications Commission
Office of the Secretary

MOTION TO DISMISS

Intelsat North America LLC (“Intelsat”), by its attorneys, submits this Motion to Dismiss the application filed by EchoStar Corporation (“EchoStar”) to launch and operate a geostationary C-band satellite in the fixed-satellite service at 85° W.L.¹ EchoStar filed its application before the filing window for the C-band frequencies at the 85° W.L. opened at 11:00 AM EST. Accordingly, the Federal Communications Commission (“FCC” or “Commission”) must dismiss EchoStar’s application as premature under Section 25.112(a) of the FCC’s rules.²

On April 23, 2003, the FCC adopted a first-come, first-served licensing process for geostationary satellite orbit satellites operating in the Fixed-Satellite Service.³ That order indicated that the FCC “will consider an orbit location to become ‘available’ ... upon release of a public notice announcing that a licensee has surrendered its license”.⁴ On June 23, 2003, the

¹ EchoStar Corporation, Application for Authority to Construct, Launch, And Operate a Geostationary C-Band Satellite in the Fixed-Satellite Service at 84.9° W.L. Orbital Location, File No. SAT-LOA-20080523-00112 (filed May 23, 2008).

² 47 C.F.R. § 25.112(a).

³ *Amendment of the Comm’ns Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10,760 (2003).

⁴ *Id.*, 18 FCC Rcd at 10,806 (¶ 113).

FCC issued a public notice announcing a public forum on July 8, 2003 “to discuss implementation of these new satellite application procedures.⁵ At that public meeting, the FCC distributed written “Frequently Asked Questions On the *First Space Station Reform Order*” unequivocally establishing that an orbital location becomes available at 11:00 AM, regardless of the time at which public notice is physically available:

9. When does a previously-licensed orbit location become available for purposes of filing satellite applications? When a license is revoked or surrendered, we will announce it either in an Order or a Public Notice. The orbit location will become available at 11:00 AM on the day that the Order or Public Notice is released...⁶

During the Public Forum, senior IB staff further explained that a public notice announcing the availability of an orbital location would become effective at 11:00 AM:

In the frequently asked questions, some of the questions that we had been asked in the past is when will an orbital location become available if somebody surrenders or has a license revoked and I think just by unilateral fiat we decided that for those purposes we would treat the public notices as released at 11:00 on that date just because we wanted to pick a time. I think our understanding is that it is usually aimed for around the 10:00 or 11:00 o'clock time frame.⁷

On May 23, 2008, the Commission in a public notice announced that “the 5925-6425 MHz (Earth-to-space) and 3700-4200 MHz (space-to-Earth) frequencies at the 85 W.L. orbital location are now available for reassignment.”⁸ That notice was physically available for review at the Commission, posted on the website and emailed to subscribers of the FCC Daily Digest prior

⁵ International Bureau Schedules Public Forum to Answer Questions Related to *First Space Station Reform Order*, Public Notice, 18 FCC Rcd 12,304 (2003).

⁶ Frequently Asked Questions On the *First Space Station Reform Order* (July 28, 2003) (attached as Exhibit 1).

⁷ Archived Recordings of Public Forums, New Satellite Application Procedures (July 8, 2003), available at <http://www.fcc.gov/realaudio/publicforums.html> (last visited June 3, 2008; now archived and available from the FCC upon request).

⁸ *Policy Branch Information, Actions Taken*, Public Notice, Report No. SAT-00524, DA 08-1204 (May 23, 2008).


to 11:00 AM, thus creating the precise situation anticipated and addressed by the Commission in its Frequently Asked Questions and public meeting. Notwithstanding the position of the Commission that this public notice became effective and the 85° W.L. orbital location became available at 11:00 AM, EchoStar filed its application at 10:50:14:806 AM.⁹

Section 25.112(a) requires the FCC to dismiss an application that “does not substantially comply with the Commission’s rules, regulations, specific requests for additional information, or other requirements.”¹⁰ Consistent with this rule, the FCC routinely dismisses untimely applications.¹¹ If the Commission is to maintain the orderly process it set forth in the Frequently Asked Questions and the public briefing, applications filed before a public notice is effective and an orbital location is available must be dismissed. EchoStar filed prematurely. Therefore, EchoStar’s application is facially defective, and the FCC must dismiss it.

Respectfully submitted,

Intelsat North America LLC

By:



~~Bert W. Rein~~
Jennifer D. Hindin
Carl R. Frank
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
Counsel to Intelsat North America LLC

Dated: August 1, 2008

⁹ At 11:00:07:493 AM, Intelsat filed the first timely application, requesting authority to relocate Galaxy 11 (S2253) to 84.9° W.L. File No. SAT-LOA-20080523-00113 (filed May 23, 2008).

¹⁰ 47 C.F.R. § 25.112(a)(2).

¹¹ See, e.g., Letter from Thomas S. Tycz, Chief, Satellite Division, International Bureau, FCC to Peter D. Shields, Counsel for Iridium 2GHz LLC, File Nos. SAT-MOD-20030609-00103, SAT-WAV-20030609-00104 (July 3, 2003) (dismissing an application filed during a freeze).

Exhibit 1

Frequently Asked Questions
On the First Space Station Reform Order
July 8, 2003

I. Mechanics of the Queue

1. Can applicants file a single application for multiple GSO-like satellites?

Yes, but each orbital location counts against the limit, and the applicant has to post one bond per satellite.

2. What if someone files at a location and someone else files for the same location at another frequency?

With respect to the queue, as is our policy now, the two satellites are not mutually exclusive. Both applications would be granted, assuming that both applicants are qualified.

Conceivably, there may be an issue of avoiding physical contact, but since there are several examples of two collocated satellites operating in different frequency bands, the two licensees should be able to coordinate easily.

3. Do letters of intent, petitions for declaratory ruling, and earth station modifications to add a new non-U.S. satellite planning to access the U.S. market as a point of communication go into the queue?

Yes, we plan to include these applications in the queue.

4. What if the first-in-line for a particular orbit location does not have ITU priority?

Generally, an applicant that doesn't have ITU priority will be licensed, if at all, conditioned upon completion of coordination with the party with ITU priority, or will be required to cease operations when the higher-priority satellite is launched. This is consistent with Commission precedent.

5. How will the feeder link procedure work?

Feeder links can be either GSO-like or NGSO-like. GSO-like feeder link requests will be considered pursuant to the first-come, first-served procedure, and NGSO-like feeder link requests will be considered pursuant to modified processing rounds. (This is unclear in the Order. We have issued an erratum to correct this.)

6. Can GSO-like applicants specify alternative orbit locations in their applications?

No. The Commission eliminated the fungibility policy in the *First Space Station Reform Order*. If an applicant were to ask the Commission to accommodate the applicant by determining which of two or more orbit locations were available, it would be inconsistent with the Commission's decision to eliminate the fungibility policy. (This is unclear in the Order. We have issued an erratum to correct this.) We will dismiss applications requesting alternative locations as unacceptable for filing.

7. Can an NGSO-like licensee file a modification to change its system with a GSO-like system, and vice versa?

Generally, the Commission will grant a modification application unless it determines that the modification will not serve the public interest, convenience, and necessity. The *First Space Station Reform Order* did not change this standard. The only changes to the license modification rule adopted in the *First Space Station Reform Order* are (1) modifications to GSO-like satellite licenses seeking a change in GSO-like orbit location or new frequency bands are placed at the end of the queue, and (2) modifications to NGSO-like systems seeking additional spectrum are not allowed, unless it is part of a transfer of control or assignment.

If an NGSO-like licensee filed a modification seeking to change its licensed system to a GSO-like (GSO FSS) satellite, we would consider it only if the licensee does not request an increase in spectrum.

If an GSO-like licensee filed a modification seeking to change its licensed system to a NGSO-like system, we would consider it, but treat it like a change in orbit location and place the request at the end of the queue.

GSO MSS satellite systems are defined as NGSO-like. We would consider a modification to change an NGSO system to a GSO MSS system, or vice versa, outside of the queue as long as there is no request for increased spectrum.

II. Available Orbit Locations

8. When does an international frequency allocation take effect for purposes of filing satellite applications?

At each WRC, the ITU specifies a date when each of the new frequency allocations and other rules adopted at that Conference will take effect. Those new rules take effect at 12:00:00.001 AM Geneva Time on the date specified (6:00:00.001 PM on the day before, Eastern Time).

9. When does a previously-licensed orbit location become available for purposes of filing satellite applications?

When a licensed is revoked or surrendered, we will announce it either in an Order or a Public Notice. The orbit location will become available at 11:00 AM on the day that the Order or Public Notice is released. (The Order said when the Order was adopted, but that was corrected in the erratum.)

10. If a previously-licensed orbit location becomes available, does the new licensee have to comply with the specifications in the original ITU filing?

The new licensee can choose between complying with the existing ITU filing or submitting a new one.

11. When will the new rules take effect?

We don't know what day the rules will be published in the Federal Register. The rules will take effect at 12:00:00.001 AM of that day.

12. What clock does the Commission use to establish the exact date and time for all electronically filed space station applications?

The Commission uses the Naval Observatory's clock to establish the exact date and time for all electronically filed space station applications. The Commission's central server dials out to the National Observatory every three hours to get the current time. A benchmark effort confirmed that this is the optimal time space. The IBFS database server syncs its internal clock on an hourly basis with the central server.

III. Bond Issues

13. What would the required bond amount be if a licensee applied for a hybrid GSO-like satellite?

\$5 million. Hybrid satellites are still counted as one GSO-like for purposes of the bond amount. Please note, however, that if the licensee is granted authority for each frequency band at different times, the licensee will be required to submit the bond 30 days after the first grant of authority is issued. Also, all the milestone dates are based on the date the first grant of authority is issued.

14. What would the required bond amount be if a licensee applied for a GSO MSS satellite system with GSO-like feeder links?

\$7.5 million. GSO MSS systems are defined to be NGSO-like. We consider the GSO MSS satellite and its feeder links to be one NGSO-like system. Please note, however, that if the licensee is granted authority for each frequency band at different times, the licensee will be required to submit the bond 30 days after the first grant of authority is issued. Also, all the milestone dates are based on the date the first grant of authority is issued.

15. What would the required bond amount be if a licensee applied for a GSO MSS satellite system with multiple GSO satellites?

\$7.5 million. GSO MSS systems are defined to be NGSO-like, but it would count as one NGSO-like system regardless of the number of GSO satellites in the system.

16. If the Commission grants a license modification to change from an NGSO-like to a GSO-like system, would the licensee get a reduction in the bond price?

We would consider the merits of the request at that time.

17. What if the surety company goes bankrupt?

All surety companies must maintain minimum capitalization to be approved by the Department of the Treasury to post bonds, and must report to the Department of the Treasury four times per year. Treasury has authority to monitor surety companies to make sure that they are complying with those capitalization requirements. If a surety company becomes insolvent, Treasury can prohibit the surety company from posting any more bonds, and can require the satellite licensee to provide more security. Thus, there are measures in place to prevent surety companies from going bankrupt, surety companies have an incentive to avoid becoming insolvent, and licensees have a strong incentive to avoid surety companies likely to become insolvent. (See 31 U.S.C. § 9305.)

18. What if the licensee stops paying on the bond?

Presumably, the licensee would be liable for a breach of contract claim from the surety company. Also, if the bond lapses before the satellite is launched, the licensee would violate the bond rule. Thus, the license would be cancelled and the Enforcement Bureau could impose forfeiture penalties.

19. In a transfer of control, when a buyer who already has bonds outstanding acquires a seller with bonds outstanding, what happens?

The buyer would have to look after his own bonds and take responsibility for the other bonds. In addition, if the post-merger company exceeds the cap on pending applications or unbuilt satellites, it may be required to divest itself of one or more satellites.

20. Does the bond requirement actually discourage speculation?

Yes. The bond requirement increases the licensee's risk of financial loss if it is a mere speculator. Also, if the licensee makes no attempt to construct a satellite, the value of the license decreases as the contract execution milestone approaches, so the bond requirement encourages licensees to try to construct a satellite.

21. How does a licensee get its bond reduced as it meets its milestones?

It files a new bond.

22. Where does a licensee post the bond?

We will issue a public notice shortly to explain this.

23. Are there certain acceptable bond companies?

Yes. The Department of the Treasury lists the acceptable bond companies in the Federal Register. The bond rule adopted in the *First Space Station Reform Order* cites that list.

24. Can licensees open an escrow account instead of posting a bond?

No. Together with the *First Space Station Reform Order*, however, the Commission adopted a Further Notice of Proposed Rulemaking inviting comment on escrow account provisions.

IV. Fee Issues

25. How does the refund provision work?

The refund is a limited exception to the Commission's general refund policy. If an applicant files a GSO-like satellite application pursuant to the new first-come, first-served procedure, then notices that it is mutually exclusive with a previously filed application, and withdraws its application before it is placed on public notice, the applicant may request a refund.

This refund provision does not extend to refund requests filed prior to the time these rules take effect.

26. How do I know when my application will go on public notice?

We will not put an application on public notice until the fee is paid. However, if the fee is not paid within 14 days, we will dismiss the application. Once the fee is paid, it could be placed on public notice at any time.

27. When can I get a fee refund?

Applicants can get a fee refund if (a) they are GSO-like, (b) they filed for a frequency band and an orbit location after someone else files for that band and location, and (c) they withdraw their application before it goes on public notice.

28. Why can't NGSO-like applicants get a fee refund?

The Commission created an exception to its fee refund policy to address a very specific problem: when a GSO-like applicant files for an orbit location without realizing that someone before him in the queue filed for that same location. In this case, the applicant may not always be aware of how unlikely it is that its application would be granted, and may not have filed, or paid the application fee, had it known that there was someone ahead of him. In the NGSO-like case, those applicants are going to get some amount of spectrum regardless of whether they file before or after somebody else, as long as they are qualified, and file before the cut-off date. So, the policy justification for relaxing the fee refund rules for GSO-like applicants does not apply to NGSO-like applicants.

V. Miscellaneous

29. The caption lists Orbital Debris. What are the new Orbital Debris requirements?

The orbital debris rules that we adopt here are only part of the default service rules. When an applicant files an application subject to the default service rules, it must explain its orbital debris mitigation plans in its application.

30. What about pending applications?

We will apply the new procedures to the extent that it furthers the goal of the proceeding to issue licenses faster. Thus, the new procedures will be applied to V-band applications, but not to Ku-band NGSO applications.

31. When will the new forms become available?

That will be announced in the Federal Register. We will give parties 30 days notice before Schedule S will be required. In the meantime, continue to use the existing forms.

CERTIFICATE OF SERVICE

I, Colleen King, do hereby certify that on August 1, 2008, I served a copy of the foregoing Motion to Dismiss upon the following parties by U.S. first-class mail, postage pre-paid:

Pantelis Michalopoulos
Step toe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Counsel to EchoStar Corporation

Linda Kinney
EchoStar Corporation
90 Inverness Circle E.
Englewood, CO 80112


Colleen King