

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

In the Matter of)
)
EchoStar Corporation) File No. SAT-LOA-20080523-00112
)
Application for a Geostationary C-Band)
Satellite in the Fixed-Satellite Service at 85°)
W.L.)

REPLY TO OPPOSITION TO MOTION TO DISMISS

Intelsat North America LLC (“Intelsat”), by its attorneys, replies to the Opposition to Motion to Dismiss filed by EchoStar Corporation (“EchoStar”).¹ In its Motion to Dismiss,² Intelsat requests that the Commission dismiss as premature EchoStar’s application to launch and operate a geostationary C-band satellite in the fixed-satellite service at 85° W.L.³ because it was filed before the Public Notice of availability became effective. EchoStar’s Opposition argues that the agency’s failure to specify an effective time in a published rule or in the applicable public notice permitted it to file its application upon receipt of the notice. As shown below, the Commission previously established an 11:00 AM start-time as a binding interpretive or procedural rule grounded in sound public policy. The FCC’s May 23, 2008 Public Notice did not modify the 11:00 AM start time and any interpretation to the contrary would be arbitrary and capricious. Intelsat ascertained and followed the procedures articulated by the agency.

EchoStar’s failure to undertake a similar effort properly calls for a dismissal of EchoStar’s

¹ EchoStar Corp., Opposition to Motion to Dismiss (filed Aug. 8, 2008) (“EchoStar Opposition”).

² Intelsat North America LLC, Motion to Dismiss (filed Aug. 1, 2008) (“Intelsat Motion”).

³ 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).

prematurely filed application.

I. BACKGROUND

The facts relating to this motion are not in dispute. On April 23, 2003, the FCC's *First Space Station Reform Order* adopted a first-come, first-served licensing process for geostationary satellite orbit satellites operating in the Fixed-Satellite Service.⁴ The new regime's centerpiece was the elevation of "first to file" after slot availability as the sole *Ashbacker* comparative criteria.⁵ Recognizing that a common trigger point was essential to a "first to file" regime, the Commission issued a July 23, 2003 public notice announcing a public forum to be held July 8, 2003 "to discuss implementation of these new satellite application procedures".⁶ On July 8, 2003, the FCC distributed written "Frequently Asked Questions On the *First Space Station Reform Order*" stating:

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 released⁷

At that same forum, IB staff explained:

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

⁴ *Amendment of the Comm'n's Space Station Licensing Rules and Policies*, 18 FCC Rcd 10,760 (2003) (First Report and Order and Further Notice of Proposed Rulemaking) ("*First Space Station Reform Order*").

⁵ *Id.* at ¶ 100.

⁶ International Bureau Schedules Public Forum to Answer Questions Related to *First Space Station Reform Order*, Public Notice, 18 FCC Rcd 12,304 (2003).

⁷ Frequently Asked Questions on the *First Space Station Reform Order* (July 28, 2003) (attached as Exhibit 1 to Intelsat Motion).

it is usually aimed for around the 10:00 or 11:00 o'clock time frame.⁸

On January 24, 2008, SES Americom, Inc. ("SES") filed an application to relocate AMC-21 from 85° W.L. to 100.95° W.L. noting that it would surrender its C-band frequencies at the 85° W.L. orbital location upon grant.⁹ Over the next four months, Intelsat and EchoStar prepared applications for the 85° W.L. C-band frequencies. On May 19, 2008, the FCC granted SES's application. The following Friday, May 23, 2008, the Commission issued a public notice announcing 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."¹⁰ EchoStar filed its application at 10:50:14:806 AM. Intelsat filed its application at 11:00:07:493 AM.¹¹

II. THE FILING WINDOW FOR C-BAND CAPACITY AT 85° W.L. OPENED AT 11:00 AM

The sole issue presented is whether the window for filing applications for the C-band frequencies at 85° W.L. opened at 11:00 AM on May 23, 2008, or some other earlier, indeterminate time.

EchoStar claims that "there is no rule establishing 11:00 AM as the appropriate time to file first-come, first served applications"¹² and that the agency's written and oral statements are

⁸ Archived Recordings of Public Forums, New Satellite Application Procedures (July 8, 2003), available at <http://www.fcc.gov/realaudio/publicforums.html> (last visited August 13, 2008).

⁹ SES Americom, Inc., File No. SAT-MOD-20080124-00030 at 2 n.2 (filed Jan. 24, 2008).

¹⁰ *Policy Branch Information, Actions Taken*, Public Notice, Report No. SAT-00524, DA 08-1204 (May 23, 2008).

¹¹ Intelsat had actual notice of the May 23, 2008 Public Notice before EchoStar filed and deliberately filed its application only after the window opened at 11:00 AM.

¹² EchoStar Opposition at 1-2.

not binding because they were not subject to notice and comment as required by the Administrative Procedure Act.¹³ However, the FCC determination that the filing window for first-come, first served applications opens at 11:00 AM on the day of notice—as announced in the written frequently asked questions and IB staff public meeting—is a binding interpretive or procedural rule. As the Circuit Court of Appeals for the D.C. Circuit consistently has explained, “[r]ules that ‘prescribe . . . a timetable for asserting substantive rights’ are procedural”¹⁴ Such rules do not need to be promulgated through a notice and comment process¹⁵ or published in the Federal Register.¹⁶ Finally, no other statute, rule or FCC order contradicts the 11:00 AM deadline established by this interpretive or procedural rule.¹⁷

EchoStar cites *Salzer*¹⁸ for the proposition that the “unpublished 11:00 AM window” cannot be controlling.¹⁹ That case merely underscores that license applicants are entitled to clear notice of the time the filing window opens a under first-come, first-served regime—clarity provided here by the 11:00 AM rule. As *Salzer* reminds, “the less forgiving the FCC’s

¹³ EchoStar Opposition at 3 n.6.

¹⁴ *Nat’l Whistleblower Ctr. v. Nuclear Regulatory Comm’n*, 208 F.3d 256, 262 (D.C. Cir. 2000) (quoting *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983)).

¹⁵ 5 U.S.C. § 553(b)(A).

¹⁶ *Stuart-James Co. v. Secs. & Exch. Comm’n*, 857 F.2d 796, 800 (D.C. Cir. 1988) (“The rulemaking provision of the APA requires agencies to publish in advance only substantive rules. It expressly excludes from the publishing requirement ‘interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.’ 5 U.S.C. Sec. 553(b)(A).”).

¹⁷ EchoStar Opposition at 2 (noting that Sections 25.255 and 25.158 do not reference any set time for slot availability).

¹⁸ *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (“Although we believe that Salzer had adequate notice of what information had to be filed, we hold that the Commission was impermissibly vague with respect to when the new submissions were required and what form they had to take.”). Here, there is no such ambiguity.

¹⁹ EchoStar Opposition at 4.

acceptability standard, the more precise its requirements must be.”²⁰ Given the exacting “first-filed” criteria for selecting among mutually exclusive satellite applications and the adverse consequences of being other than first to file, the start time must be equally precise. Absent a specific start time, the first to file selection rule would be arbitrary and capricious. The Commission here provided such a specific start time: 11:00 AM.

EchoStar’s after-the-fact and alternative approach to selecting a start time for first-come, first-served applications would lead to chaos and continuing dispute. FCC Public Notices are disseminated by paper at the Commission’s headquarters in Washington, D.C., posted on the FCC’s website and sent by electronic mail to Daily Digest subscribers—all at different times. Even EchoStar does not profess to know when the filing window opened, if not 11:00 AM. EchoStar only states that the “public notice was released *at or before* 10:36 AM on May 23, 2008”.²¹ Thus, under EchoStar’s argument, it would be impossible to know exactly what time the window filing window opened, which would render it impossible for the Commission to determine which party timely filed. Such ambiguity was exactly what first-come, first-served was designed to eliminate.

For this reason, the FCC’s 11:00 AM start time for accepting applications is sound public policy. Making orbital locations available upon actual receipt of a Public Notice could unfairly disadvantage applicants located outside Washington, D.C.²² Worse yet, EchoStar’s interpretation would encourage applicants anticipating the availability of an orbital location to submit multiple “spam-sat” applications with the hope that one, randomly, would be deemed the

²⁰ *Salzer v. FCC*, 778 F.2d at 875.

²¹ EchoStar Opposition at 2 (emphasis added).

²² *See First Space Station Reform Order*, ¶ 247 (underscoring the agency’s determination not to disadvantage applicants located outside Washington, D.C.).

first filed after a Public Notice is released.²³

Attempting to evade the clear language of the FAQ, EchoStar also argues that the May 23, 2008, Public Notice itself modifies the established first-come, first-served trigger rule: the “‘majority’ of first-come, first-served public notices state that the relevant slot was ‘available for reassignment effective 11:00 AM...’ and a handful of such public notices state that the relevant slot was ‘now available for reassignment.’”²⁴ EchoStar thus asserts that the Commission affirmatively “chose” to make a few orbital locations, including 85° W.L., available “without reference to any particular time.”²⁵

This argument fails for two reasons. *First*, the Commission’s use of “now” in the May 23, 2008 Public Notice embodies the FAQ’s determination, for purposes of first-come, first-served applications, that slot availability notices are effective at 11:00AM on the day of release. Thus, the May 23, 2008 Public Notice, although physically available earlier in the day, was not operative until 11:00 AM. Upon becoming effective at 11:00 AM, the word “now” denotes 11:00 AM.

Second, casually changing the established FAQ trigger rule by an alleged omission in a single Public Notice would render the entire process unlawful. The Supreme Court²⁶ and the

²³ Indeed, to eliminate the possibility of such speculation, the FCC dismissed applications filed during the freeze instituted while considering implementation of its *First Space Station Reform Order*, *See, e.g.*, Letter from International Bureau to Iridium 2GHz LLC, File Nos. SAT-MOD-20030609-00103, SAT-WAV-20030609-00104 (July 3, 2003).

²⁴ EchoStar Opposition at 6.

²⁵ *Id.*

²⁶ *Motor Vehicle Mfg. Ass’n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983) (the “Airbags case”) (while an agency is free to change its policy, the agency must provide an explanation for the change that is plain on its face and rational).

Court of Appeals for the D.C. Circuit²⁷ long-ago confirmed that the FCC is obliged to explain departure from past actions. The May 23, 2008 Public Notice did not announce that the FCC was altering the effective time for public notices or the time for slot availability, much less provide a specific alternative effective time. Thus, under EchoStar's interpretation, the "bare" Public Notice itself would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁸

EchoStar's reliance on the *McElroy* case actually hurts its cause.²⁹ Indeed, *McElroy* supports Intelsat's argument. In *McElroy* the court found that applicants could not be disadvantaged where they had complied with the Commission's statement that a filing window would open in five years.³⁰ Here, if EchoStar's interpretation is accepted, Intelsat would be disadvantaged for complying with the Commission's clear rule on when a filing window opens.

Upon discovery of the May 23, 2008 Public Notice, Intelsat followed prior guidance and waited until precisely 11:00 AM to file its application. That guidance was readily available to any applicant contemplating a filing and expending the resources necessary to prepare an application. Searching the FCC website for "*First Space Station Reform Order*" retrieves, as the fourth document, the Public Notice announcing the Public Forum that implemented the 11:00 AM rule. That Public Notice provides a link to the Commission's RealAudio archive, where a

²⁷ *Greater Boston Tele. Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.").

²⁸ 5 U.S.C. § 706(2)(A).

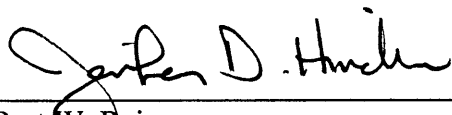
²⁹ EchoStar Opposition at 4-5.

³⁰ *McElroy Elecs. Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993).

audio/video recording of the Public Forum resides today. EchoStar's failure to become aware of the Commission's prior actions cannot rehabilitate its untimely application to the detriment of Intelsat's compliant application.

Respectfully submitted,

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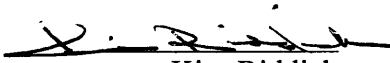
Dated: August 15, 2008

CERTIFICATE OF SERVICE

I, Kim Riddick, do hereby certify that on August 15, 2008, I served a copy of the foregoing Motion to Dismiss upon the following parties by U.S. first-class mail, postage pre-paid:

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