

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

**FILED/ACCEPTED**  
**AUG 26 2008**  
Federal Communications Commission  
Office of the Secretary

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In the Matter of	)	
	)	
<b>ECHOSTAR CORPORATION</b>	)	File No. SAT-LOA-20080523-00112
	)	Call Sign S2752
Application for Authority to Construct,	)	
Launch and Operate a Geostationary	)	
C-band Satellite in the Fixed-Satellite	)	
Service at the 84.9° W.L. Orbital Location	)	
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**REQUEST TO FILE SURREPLY AND SURREPLY**

EchoStar Corporation (“EchoStar”) requests leave to file this brief surreply to Intelsat’s “Reply to Opposition to Motion to Dismiss” EchoStar’s 85° W.L. FSS application.<sup>1</sup> A surreply is warranted to correct the factual record.

Contrary to Intelsat’s assertions, there is no public document that could constitute proper notice of an 11:00 AM start time for the May 23, 2008 filing window established for the 85 degree orbital location. Intelsat attempts to cobble together different documents and events from 2003 to support the position that the Commission established a standard 11:00 AM start time for all FSS applications. By omission, Intelsat has confirmed that the Frequently Asked Questions (“FAQs”) document – the only written document Intelsat cites that contains any reference to 11:00 AM – is not publicly available.

Nonetheless, Intelsat relies on a 2003 Public Notice (the only public document cited by Intelsat) announcing the logistics of an informational forum, which “provides a link to the Commission’s RealAudio archive, where an audio/video recording of the Public Forum

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<sup>1</sup> See Intelsat North America LLC, Reply to Opposition to Motion to Dismiss, *filed in* File No. SAT-LOA-20080523-00112 (filed Aug. 15, 2008) (“Reply”).

resides today.”<sup>2</sup> Neither the 2003 Public Notice nor the referenced video recording provides notice to FSS applicants of a standard 11:00 AM trigger point for FSS applications.

First, the 2003 Public Notice announcing the informational forum was not included in the docket in which the *First Space Station Reform Order* was adopted, IB Docket No. 02-34. Intelsat fails to provide any explanation as to how a prospective applicant in 2008 reviewing applicable Commission rules is reasonably supposed to seek out this 2003 Public Notice that is not archived in the appropriate Commission docket. Even if located, a review of the 2003 Public Notice itself – announcing an informational session – contains no mention of 11:00 AM or any other substantive matter.

Second, with respect to the video recording itself, although it is true that the audio/visual recording is currently active, it could not have served as notice to applicants filing for the 85 degree orbital slot. But for Intelsat’s Motion and EchoStar’s efforts to piece together non-public information, the link to that recording would not be accessible today to prospective applicants or the general public. Specifically, Intelsat fails to mention in its Reply that the link to the recording was only recently activated, because counsel for EchoStar requested access to it after Intelsat’s Motion to Dismiss was filed on August 1, 2008. Intelsat itself acknowledged that the recording was archived and unavailable on the FCC website in its Motion to Dismiss.<sup>3</sup> Regardless, expecting new applicants to piece together filing instructions from a (1) string of oral statements by staff (2) captured on an archived five-year old video (3) referenced in an undocketed public notice cannot possibly constitute proper notice under administrative law.

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<sup>2</sup> *Id.* at 8.

<sup>3</sup> See Intelsat North America LLC, Motion to Dismiss at 2 n.7, *filed in* File No. SAT-LOA-20080523-00112 (filed Aug. 1, 2008).

Intelsat also engages in pure speculation by asserting that the 2003 Public Notice was issued because the Commission “recogniz[es] that a common trigger point was essential to a ‘first to file’ regime,” a statement that lacks any factual basis. Indeed, there is no discussion of a common trigger point in the Commission’s *First Space Station Reform Order* or the 2003 Public Notice. Instead, the trigger time for first-come, first-served filings is dictated by the explicit terms of each public notice announcing the availability of the orbital location; in this case, the May 23, 2008 Public Notice states that the filing window opens “now.”

Moreover, Intelsat attempts to reframe the central legal infirmity with its position by focusing its legal analysis on whether the Commission has the authority to adopt an 11:00 AM window without a notice and comment period. The issue is not whether the Commission could adopt a specific trigger time in the May 2008 Public Notice; it could have and did (“now”). Nor is the issue whether the Commission could have adopted a specific trigger time for all future applications in an earlier Public Notice. It did not do so here.

Rather, Intelsat’s Motion to Dismiss would require the Commission to conclude that non-public oral statements offered by bureau staff in 2003 override the specific language in a 2008 public notice announcing the availability of the orbital slot at issue. We contend that, under any concept of administrative law principles, it cannot. In Intelsat’s own words, the long list of cases cited by both companies stands for the proposition that “applicants are entitled to clear notice of the time the filing window opens.” Reply at 4.<sup>4</sup> In this instance, after reviewing the relevant Commission rules and the *First Space Station Reform Order*, a

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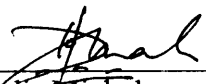
<sup>4</sup> The bulk of Intelsat’s reply addresses the benefits of establishing a fixed predetermined filing window for FSS applications, *i.e.*, avoid ambiguity as to exact availability time. Reply at 5-8. These arguments are irrelevant as to whether the Commission in fact adopted such a window for FSS applications in a manner to provide sufficient notice to prospective applicants.

reasonable applicant in 2008 – five years after the undocketed 2003 forum – would rely on the clear statements in the Commission’s May 2008 Public Notice announcing that the 85° W.L. orbital location was available “now.”

A prospective applicant has no reasonable basis – and no clear notice – to seek out a different pre-determined filing time for its FSS application based on a response in a non-public FAQ from a five-year old informational forum (the recording of which the FCC elected to archive and make unavailable to the public) announced in a Public Notice that is not referenced in the appropriate Commission docket. Contrary to Intelsat’s assertions, this “guidance was [not] readily available to any applicant.” Reply at 7. For these reasons, EchoStar respectfully requests that Intelsat’s motion to dismiss be denied.

Respectfully submitted,

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August 26, 2008

## CERTIFICATE OF SERVICE

I, Chung Hsiang Mah, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 26th day of August, 2008, I served a true copy of the foregoing by first class mail and electronic mail upon the following:

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