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Before the
Federal Communications Commission
Washington, D.C.

Federal Communications Commission
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Satellite Policy Branch
International Bureau

In the Matter of)

Directsat Corporation)

Application for Special)
Temporary Authority to)
Operate a Direct Broadcast)
Satellite System)

File No. 138-SAT-STA-96

In the Matter of)

EchoStar Satellite Corporation)

Application for Special)
Temporary Authority to)
Operate a Direct Broadcast)
Satellite System)

File No. 139-SAT-STA-96

**REPLY TO OPPOSITION OF TEMPO SATELLITE, INC.
TO CONSOLIDATED PETITIONS FOR RECONSIDERATION**

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January 13, 1997

SUMMARY

EchoStar Satellite Corporation ("EchoStar") and Directsat Corporation ("Directsat," collectively "EchoStar/Directsat") hereby reply to the opposition of Tempo Satellite, Inc. ("Tempo") to EchoStar/Directsat's Petition to reconsider the Bureau's Orders released November 26, 1996 in the above-captioned proceedings. In these two Orders, the Bureau denied EchoStar and Directsat their respective requests for Special Temporary Authority ("STA") that would allow them to use currently idle Direct Broadcast Satellite ("DBS") frequencies assigned to Tempo at the 119° W.L. orbital location. The STAs would have permitted EchoStar and Directsat to use temporarily the full capacity of their two DBS satellites, each of which is equipped with 16 transponders and allowed them to add a substantial number of DBS channels for the benefit of consumers across the country, as well as to test and augment new and existing technologies.

Tempo's opposition is not supported by the law or the facts and should be rejected. First, Tempo contends that only a narrow class of applicants -- those who have applied "for a construction permit for the facilities covered by the requests for special temporary authority" -- qualify for STAs, and that EchoStar and Directsat do not meet this definition. Tempo Opposition at 5-8. Neither Section 309(f) of the Communications Act, nor any case precedent, supports such an inflexible construction of the Commission's authority. The Commission has never adopted such a narrow construction of its STA powers. Indeed, the Bureau has granted STAs in many circumstances not covered by Tempo's definition, including the

STA previously granted to EchoStar to use five of the same channels at the 119° W.L. orbital location at issue in this case.^{1/}

Second, Tempo incorrectly contends that STAs cannot be issued for orbital slots and frequencies assigned to other permittees. The Commission has frequently granted STAs for unused orbital slots and frequencies assigned to other parties.^{2/} Further, both EchoStar and Directsat have on file outstanding applications for additional DBS channels that have not been disposed of by the Commission. In addition, EchoStar has 11 unassigned channels and both EchoStar and Directsat have permits covering several other DBS frequency assignments, but do not yet use these assignments.

Third, Tempo argues that the STA grants in Newcomb Communications, Inc., 8 FCC Rcd. 3631 (1993), and Mobile Datacom Corporation, 10 FCC Rcd. 4552 (1995), are distinguishable from the instant requests on the grounds that those cases afforded easier customer adaptability and greater transition flexibility. Tempo, however, completely fails to address EchoStar and Directsat's showing that these distinctions are not valid. In fact, the Newcomb and Mobile Datacom cases presented much greater transition difficulties and risk of customer

^{1/} See In the Matter of EchoStar Satellite Corporation Application for Special Temporary Authority to Operate a Direct Broadcast Satellite, DA 96-270 (rel. March 4, 1996) ("EchoStar STA Grant") at ¶ 1; In the Matter of Hughes Communications Galaxy, Inc. Application for Interim Authority to Use Capacity on Brazilsat A1 Satellite for U.S. Domestic Service, DA 96-2176 (rel. December 24, 1996) ("Hughes Galaxy -- Brazilsat") at ¶ 14 & n.8; In the Matter of EchoStar Licensee Corporation Application for Special Temporary Authority to Operate a Direct Broadcast Satellite, DA 96-1918 (rel. November 18, 1996) at ¶ 5-7; In the Matter of Hughes Communications Galaxy, Inc. Application for Special Temporary Authority for the DBS-2A Direct Broadcast Satellite, 10 FCC Rcd. 9339 (1995) ("Hughes Galaxy").

^{2/} See, e.g., EchoStar STA Grant at ¶ 1, Hughes Galaxy, 10 FCC Rcd 9339, at ¶ 1, and, most recently, Hughes Galaxy -- Brazilsat at ¶ 14 & n.8.

confusion than the present case. In Newcomb and Mobile Datacom customers would lose all ability to use the equipment in question upon expiration of their STAs. EchoStar/Direcstsat subscribers, on the other hand, will only face a reduction in their programming options.

Fourth, Tempo ignores the stated competitive purposes underlying the initial STA grant to EchoStar, see EchoStar STA Grant at ¶¶ 1, 5, and, instead, mischaracterizes the purpose of that order as a "temporary bridge" to the launch of Direcstsat's satellite. Tempo Opposition at 12-14, 16. As EchoStar/Direcstsat have explained in their Petition, the "temporary bridge" language merely explained why customer notification was unnecessary. EchoStar STA Grant at ¶ 6.

Finally, Tempo claims that the scheduled February 27, 1997 launch of its satellite militates against granting the requested STAs. Tempo Opposition at 14-15. The fact that special temporary authority may have a short life span is not a valid reason for denying a legitimate STA request. See Hughes Galaxy at ¶ 1, 4 (granting an eight-week STA request). The stringent customer notification language suggested by EchoStar/Direcstsat would effectively minimize customer confusion. Moreover, there is no basis for Tempo's concern that EchoStar/Direcstsat will not be able to cease their temporary service promptly.

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TO: The International Bureau

**REPLY TO OPPOSITION OF TEMPO SATELLITE, INC.
TO CONSOLIDATED PETITIONS FOR RECONSIDERATION**

EchoStar Satellite Corporation ("EchoStar") and Directsat Corporation ("Directsat," collectively "EchoStar/Directsat") hereby reply to the opposition of Tempo Satellite, Inc. ("Tempo") to EchoStar/Directsat's Consolidated Petition for Reconsideration of the International Bureau's Orders released November 26, 1996 in the above captioned proceedings.^{1/}

^{1/} In the Matter of EchoStar Satellite Corporation Application for Special Temporary Authority to Operate a Direct Broadcast Satellite, Order, DA 96-1977 (rel. Nov. 26, 1996)

(continued ...)

In these two Orders, the Bureau denied EchoStar and Directsat their respective requests for Special Temporary Authority ("STA") that would have allowed them to use currently fallow Direct Broadcast Satellite ("DBS") frequencies at the 119° W.L. orbital location, which are assigned to Tempo. As discussed below, Tempo's arguments have no basis either in law or in fact and should be rejected.

I. ARGUMENT

A. Tempo Misconstrues the Commission's Authority to Grant Special Temporary Authority ("STA") under Section 309(f) of the Communications Act

Tempo attempts to construct a statutory argument based on the first clause of Section 309(f) of the Communications Act. Section 309(f) vests the Commission with the power to issue STAs "[w]hen an application subject to subsection (b) has been filed." 47 U.S.C. § 309(f). Tempo maintains that this language allows the Commission to grant STA "only to applicants for a Commission authorization," and only to those applicants who have applied "for a construction permit for the facilities covered by the requests for special temporary authority." Tempo Opposition at 5-6. Tempo asserts that EchoStar/Directsat are not and cannot be applicants for additional frequencies at the 119° W.L. orbital location (channels 22-32), because those frequencies are assigned to Tempo. Id.

Tempo's statutory argument should be rejected for two reasons. First, neither Section 309(f) nor Commission case law supports Tempo's narrow interpretation of the Commission's STA power and of the meaning of an "applicant" under the statute. Second,

¹ (... continued)
("EchoStar STA Denial"). In the Matter of Directsat Corporation Application for Special Temporary Authority to Operate a Direct Broadcast Satellite, Order, DA 96-1978 (rel. Nov. 26, 1996) ("Directsat STA Denial").

EchoStar and Directsat qualify as applicants, within the meaning of Section 309(f), because they have pending before the Bureau unsatisfied applications for a substantial number of DBS channels.

Section 309(f) must reasonably be read as authorizing the Commission to grant STAs when the grant of an "application," while authorized by law, would be technically infeasible. Neither the Commission nor the Courts have interpreted the language cited by Tempo as requiring the actual filing of an application, and Tempo cites no authority in support of its narrow interpretation. In fact, the Commission routinely grants STA requests to non-applicants. In the Matter of EchoStar Licensee Corporation Application for Special Temporary Authority to Operate a Direct Broadcast Satellite, DA 96-1918 (rel. November 18, 1996) at ¶ 5-7 (granting EchoStar's STA request to use Mexican satellite capacity on a short-term basis, when EchoStar had no application pending); In the Matter of Hughes Communications Galaxy, Inc. Application for Interim Authority to Use Capacity on Brazilsat A1 Satellite for U.S. Domestic Service, DA 96-2176 (rel. December 24, 1996) ("Hughes Galaxy -- Brazilsat") at ¶ 15 (granting STA request to provide service from foreign satellite where no application was pending and for which there could have been no application pending at the Commission).^{2/}

Section 309(f) cannot possibly be read as requiring the filing of an application referencing the specific facilities covered by the STA request, as Tempo suggests. DBS applicants (processed in a non-auction environment) need not identify the specific orbital locations proposed for their satellite system. Applicants need only describe their system and identify,

^{2/} The recent Bureau decision in Brazilsat is a case in point. In that case, while Hughes had an application to use capacity on a Brazilian satellite on file, the Commission could not have appropriately taken that application into account since it has not yet adopted rules to govern the processing of applications to provide service to the U.S. from such satellites.

among other things, the number of proposed channels. Indeed, even if applicants were required to identify an orbital location, they would only be expressing a preference. The Commission does not assign specific orbital locations and channels before the lapse of at least one year from grant of a DBS construction permit, and it does not necessarily satisfy each DBS applicant's preferences.

Likewise, applicants in the Fixed-Satellite Service may list preferences for certain orbital locations, but the Commission may, and frequently does, assign an altogether different slot, based on the fundamental rule that domestic orbital locations are fungible. In short, satellite system applications are not deemed to be requests for specific orbital locations. This means that, under Tempo's interpretation, even the filing of such an application would never qualify an applicant to receive Special Temporary Authority to operate from a particular slot and frequency channels. The Commission must resist such a narrow construction of the Act that would condemn to disuse the flexible instrument of Special Temporary Authority.

In any event, EchoStar and Directsat have outstanding applications before the Commission for the award of additional DBS channels and thus qualify as applicants under Section 309(f). Both EchoStar and Directsat originally sought authority to operate 16 eastern and 16 western channels. To date, the Commission has only granted EchoStar and Directsat 11 eastern channels each.^{3/} The Commission has never denied or dismissed the unsatisfied remainder of these applications.^{4/}

^{3/} Continental Satellite Corporation, 4 FCC Rcd. 6292, 6300 (1989).

^{4/} Although the Commission has recently decided not to honor EchoStar's and Directsat's rights to receive additional channels formerly assigned to Advanced Communications Corporation, Revision of Rules and Policies for the Direct Broadcast Satellite Service, 11 FCC

(continued ...)

B. Tempo Errs When It Asserts that STAs Cannot Be Issued For Orbital Slots and Frequencies Assigned to Other Licensees or Permittees

Tempo maintains that there is no precedent for an STA grantee's use of "an orbital slot and frequencies that were specifically assigned to another licensee or permittee." Tempo Opposition at 8. This assertion is flatly wrong. In recent decisions, the Commission has authorized STA grantees to use the orbital slots and/or frequencies assigned to another licensee or permittee. In the Matter of EchoStar Satellite Corporation Application for Special Temporary Authority to Operate a Direct Broadcast Satellite, DA 96-270 (rel. March 4, 1996) ("EchoStar STA Grant") at ¶ 1; In the Matter of Hughes Communications Galaxy, Inc. Application for Special Temporary Authority for the DBS-2A Direct Broadcast Satellite, 10 FCC Rcd. 9339 (1995) ("Hughes Galaxy"); Hughes Galaxy -- Brazilsat at ¶ 14 & n.8.^{4/} Indeed, Tempo fails to

^{4/} (... continued)

Rcd. 9712 (1995), that decision is presently on appeal. See DIRECTV, Inc., et al., Docket Nos. 96-1001, 96-1005, 96-1010, and 96-1011 (D.C. Cir.). More importantly, that decision does not amount to dismissal or denial of the applications of EchoStar and Directsat to the extent they seek more than 11 channels each. In addition, EchoStar has 11 unassigned channels and both EchoStar and Directsat have permits covering several other DBS frequency assignments, but do not yet use these assignments.

^{5/} See also Newcomb Communications, Inc., 8 FCC Rcd. 3631 (1993) (granting Newcomb's application for authority to construct and operate 10,000 transmit-only mobile earth stations in the 1610-1626.5 MHz frequency band because there was no significant interference potential between Newcomb's operations and the operations of others now using the band, but requiring Newcomb to terminate operations immediately upon the launch of a satellite by a regularly licensed Big LEO MSS provider in the same band); American Mobile Satellite Corp., 7 FCC Rcd. 942 (1992) (authority to provide interim land mobile satellite service in the lower L-band frequencies granted with condition that interim service providers transition to dedicated upper L-band system when it is brought into service); ARC Professional Services Group, 5 FCC Rcd. 5398 (Com. Car. Bur. 1990) (applicant granted temporary authority to operate tracking and data relay satellite system C-band transponders on a commercial basis until that orbital location was ready to be occupied by a regularly assigned licensee); Satellite Business Systems, Mimeo No. 5207 (Com. Car. Bur. 1984) (licensee granted temporary authority to operate its SBS-4 satellite at 101° W.L. to enable a customer to provide interim satellite service until 101° W. L. was ready to be occupied by a regularly assigned fixed-satellite licensee).

address the Bureau's most recent decision in Hughes Galaxy -- Brazilsat. Nor does Tempo explain how the temporary assignment of its orbital location and frequencies to EchoStar in EchoStar STA Grant can be squared with its assertion that STAs cannot be granted to serve another permittee or licensee's orbital slots and/or frequencies.

Tempo attempts to distinguish the Hughes Galaxy decision by arguing that the purpose of the STA granted in that case was to test the satellite. Tempo Opposition at 9. The distinction suggested by Tempo is not persuasive. The Commission's STA authority under Section 309(f) does not reference testing over other legitimate purposes and the Commission has never construed its authority in such a way. In any event, the two STA denial orders in this case make clear that one of the reasons that EchoStar and Directsat requested new or extended STA authority was "to test innovative technologies such as High Definition Television, or to augment the capabilities of existing technologies, e.g., by linking to the Internet." EchoStar STA Denial at ¶ 3; Directsat STA Denial at ¶ 3.

C. Tempo Fails to Address EchoStar/Directsat's Refutation of the Bureau's Attempt to Distinguish Newcomb and Mobile Datacom

Tempo urges that the Bureau adhere to distinctions that it made between this case and the STA grants in Newcomb and Mobile Datacom.^{6/} Tempo contends that it would be more difficult for "ordinary consumers to adapt to a reduction in service than it would be for a small number of commercial or governmental organizations." Tempo Opposition at 10 (quoting EchoStar STA Denial at ¶ 8; Directsat STA Denial at ¶ 8). EchoStar/Directsat demonstrated in their petitions for reconsideration that the "adaptation" would seem to be much more difficult in

^{6/} Newcomb, 8 FCC Rcd. 3631 (1993); Mobile Datacom Corporation, 10 FCC Rcd. 4552 (1995)

the case of Newcomb and Mobile Datacom where customers would find themselves with terminals that they would no longer be able to use at all.²¹ The subscribers of EchoStar and Directsat, on the other hand, would experience only a reduction in the number of programming options available to them, while continuing to receive up to 130 channels of programming. EchoStar/Directsat Consolidated Petition for Reconsideration at 6 ("EchoStar/Directsat Petitions"). Tempo fails to address this argument, and relies instead on a blanket assertion that EchoStar/Directsat "advance no substantive support for their contrary conclusion." Tempo Opposition at 10. Furthermore, Tempo does not explain why customer adaptation should be so difficult in view of the stringent customer notification language proposed by EchoStar/Directsat in their consolidated petitions. See EchoStar/Directsat Petition at 12.

Tempo also agrees with the Bureau's findings that Mobile Datacom and Newcomb had "greater transition flexibility" than EchoStar/Directat and that the advanced age of the satellites in Mobile Datacom and Newcomb was a significant factor. Tempo Opposition at 10-11. EchoStar/Directsat demonstrated in their petition that these findings were in error. See EchoStar/Directsat Petition at 6-7. Again Tempo, in its opposition, does not address EchoStar/Directsat's arguments.

²¹ Indeed, both Newcomb and Mobile Datacom received authority to construct and operate 10,000 terminals each. Further, Newcomb recently received additional temporary authority to add a link to its terminals, allowing a two-way service. Newcomb Communications, Inc., 11 FCC Rcd. 3084 (1996). This additional authority would seem to make the eventual transition process even more complex for Newcomb's customers compared to the temporary authority requested by EchoStar, which involves use of existing licensed receive-only terminals.

D. Tempo Has Mischaracterized the Purpose of EchoStar's Initial STA Grant

Tempo erroneously contends that the purpose of the initial EchoStar STA was to serve as a "temporary bridge" until Directsat's satellite was launched and became operational and thus the justification for any STA expired when that event occurred. Tempo Opposition at 12-14, 16. As explained in the EchoStar/Directsat Petitions the purpose of the first STA was to allow EchoStar to compete more effectively. EchoStar/Directsat Petitions at 9. The Bureau found that "[g]rant of this STA request . . . will . . . enable EchoStar to offer more competition and more programming more quickly in the DBS service." EchoStar STA Grant at ¶ 1. In the key paragraph setting forth its rationale, the Bureau concluded that:

Grant of EchoStar's request may enable it to offer a more comprehensive and competitive initial DBS service to the public by making use of all of its available transponder capacity at 119° W.L. The Commission has recently reaffirmed its commitment to fostering competition in the multichannel video programming distribution market, and grant of this STA in the special circumstances of this case will further that objective.

Id. at ¶ 5 (footnote omitted). Tempo provides no explanation for why these considerations are not equally valid for the current STA requests.

Tempo also misconstrues the context in which the phrase "temporary bridge" was used by the Bureau. The Bureau used the "temporary bridge" language to indicate that a future service reduction was not contemplated and to explain why customer notification was therefore not required. EchoStar STA Grant at ¶ 6; EchoStar/Directsat Petition at 8-9. That language cannot reasonably be read to preclude future STAs once the Directsat satellite was launched.

Indeed, the "temporary bridge" justification relied upon by Tempo and the Bureau is inconsistent with the scope of the initial STA. EchoStar stated its intention "to cease

operations on these channels immediately upon either expiration of its STA or launch of Tempo's satellite to 119° W.L.," and the Bureau made this a condition of the grant. EchoStar STA Grant, ¶¶ 5, 9. If that STA was intended as a "temporary bridge," the temporary authority should have been slated to expire upon the sooner of: (a) the end of the 180-day STA period, or (b) launch of Directsat's satellite. Instead, the Bureau ordered that the STA would expire either at the end of the 180-day STA period or upon launch of Tempo's satellite to 119° W.L. -- a result that is not consistent with a "temporary bridge" justification for the STA. EchoStar STA Grant at ¶ 9.

In EchoStar STA Grant, Tempo was satisfied with the condition that EchoStar cease STA operations upon the launch of Tempo's satellite to 119° W.L. EchoStar STA Grant at ¶ 5. EchoStar and Directsat propose to comply with the very same condition in the instant STA requests.

E. The Scheduled Launch of Tempo's Satellite Does Not Warrant Denial of EchoStar/Directsat's STA Requests

Tempo lastly claims that EchoStar/Directsat's STA requests should be denied because Tempo intends to launch a satellite to the orbital location at 119° W.L. on February 27, 1997. Tempo Opposition at 14-15. Tempo's proposed launch date is not a legitimate basis for denying EchoStar and Directsat's STA requests. Recent FCC precedent has resulted in the granting of short-term STA requests. See Hughes Galaxy at ¶¶ 1, 4 (granting an eight-week STA request). In addition, there is no basis for Tempo to assert that customer confusion would result, given that no customer of EchoStar or Directsat will be deprived of DBS service upon expiration of the requested STAs and the unequivocal customer notification that EchoStar and Directsat intend to provide their customers. See EchoStar/Directsat Petitions at 12.

Finally, Tempo contends that EchoStar/Directsat's commitment to ceasing service immediately upon launch of Tempo's satellite is hollow, because EchoStar needed an additional 30 days to terminate service over Tempo's channels upon the Bureau's denial of an STA extension. Tempo Opposition at 15. Tempo's concern is unwarranted: EchoStar needed this limited additional time only to ensure the seamless transition of programming from the five channels 23, 25, 27, 29 and 31 to Directsat's satellite. That transition was possible because EchoStar, as a precautionary measure, had made provision for available capacity on the newly launched DIRECTSAT I to cover that contingency. Upon expiration of the STAs requested here, transition will not necessarily be an issue. EchoStar will only need to discontinue programming over the STA channels. In any event, EchoStar will take measures to be ready for an immediate termination of operations.

II. CONCLUSION

Accordingly, notwithstanding Tempo's opposition, the Bureau should reconsider and grant the STA requests of EchoStar and Directsat, subject to any condition the Bureau considers appropriate, including the termination of operations upon Tempo's launch of a satellite to 119° W.L. and a clear customer notification requirement.

Respectfully submitted,



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January 13, 1997

CERTIFICATE OF SERVICE

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