

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

COPY

In the Matter of )  
EHOSTAR SATELLITE CORP. )  
Application for Special )  
Temporary Authority To Continue )  
To Operate a DBS System )  
on Odd Channels 1 Through )  
31 at 119° W.L. )  
DIRECTSAT CORPORATION )  
Application for Special )  
Temporary Authority to Operate )  
a DBS System on Even Channels )  
2 Through 32 at 119° W.L. )

File No. 139-SAT-STA-96

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

File No. 138-SAT-STA-96

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AUG 21 1996

CONSOLIDATED OPPOSITION

Satellite Policy Branch  
International Bureau

TEMPO Satellite, Inc. ("TEMPO"), by its attorneys, hereby submits this consolidated opposition to the above-captioned requests by EchoStar Satellite Corporation ("EchoStar") and Directsat Corporation ("Directsat") for special temporary authority to operate DBS satellites on channels 1-32 at 119° W.L.<sup>1</sup>

TEMPO holds a construction permit to offer direct broadcast satellite service on channels 22 through 32 at 119° W.L., the channels on which EchoStar and Directsat now seek to operate.<sup>2</sup> TEMPO is therefore a party in interest.

<sup>1</sup> See Public Notice Report No. SPB-53 (rel. July 17, 1996).

<sup>2</sup> Tempo Satellite, Inc., 7 F.C.C. Rcd 6597 (1992).

EchoStar is authorized to operate an 11-channel DBS system on odd-numbered channels 1 through 21 at 119° W.L., and Directsat, EchoStar's affiliate, is authorized to operate a 10-channel DBS system on even-numbered channels 2 through 20 at 119° W.L.<sup>3</sup> On December 5, 1995, EchoStar requested temporary authority to operate odd-numbered channels 1 through 31. The STA would allow EchoStar to operate all 16 transponders on the satellite it launched in December 1995 until Directsat's system became operational in late 1996. The International Bureau approved the request, finding that:

the STA is acting as a temporary bridge to enable EchoStar to make more efficient use of spectrum resources by operating on sixteen channels immediately, and 21 channels ultimately with Directsat.<sup>4</sup>

TEMPO did not object to EchoStar's request for temporary authority, to the extent that it was otherwise in the public interest and would not interfere with TEMPO's operations.<sup>5</sup>

EchoStar and Directsat now seek to broaden substantially the operating authority originally granted to EchoStar in the STA Order. Unlike the authority granted in the STA Order, the applicants seek to operate a DBS service that is more than 50% larger (32 channels instead of the authorized 21

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<sup>3</sup> EchoStar Satellite Corp., 7 FCC Rcd 1765 (1992); Directsat Corp., 8 FCC Rcd 7962 (Vid. Ser. Div. 1993).

<sup>4</sup> EchoStar Satellite Corp., DA 96-270, FCC File No. DBS 37-SAT-STA-96 (rel. March 4, 1996) ("STA Order").

<sup>5</sup> See Comments of TEMPO Satellite, Inc., FCC File No. DBS-88-01/37-SAT-STA-96 (Feb. 5, 1996).

channels) than they are permitted to provide.<sup>6</sup> EchoStar and Directsat fail to justify the requested relief as required under Section 309 of the Communications Act of 1934, as amended ("Communications Act"). Moreover, the proposed operations could cause significant service disruptions and consumer confusion, contrary to the public interest. Therefore, the requests for temporary authority should be denied to the extent that EchoStar and Directsat seek to operate on more than the authorized 21 channels at 119° W.L.

I. The Requests for STA Are Barred by the Communications Act, and Even if Considered, Do Not Demonstrate Extraordinary Circumstances or Serious Public Harm to Justify Temporary Operation on Channels Assigned to Another DBS Permittee.

Section 309(f) of the Communications Act, upon which EchoStar and Directsat expressly rely, provides:

*When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirement of such subsection may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest, grant a temporary authorization....<sup>7</sup>*

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<sup>6</sup> Directsat's assertion (at 3) that it merely "seeks an STA similar to that granted to its sister company three months ago" ignores the significant difference in the scope of the relief it now requests.

<sup>7</sup> 47 U.S.C. § 309(f) (emphasis added); see also 47 C.F.R. §§ 25.119(b).

As the quoted language indicates, Section 309 specifies the circumstances when the Commission may act on an application and grant temporary authority to the applicant without adhering to the public notice and other procedural requirements of Section 309. Thus, special temporary authority under Section 309(f) is available *only to applicants for a Commission authorization*. Quite clearly, therefore, EchoStar and Directsat are not entitled to the relief which they request since they fail to meet the basic eligibility requirement of the statute, *i.e.*, they are not applicants for a construction permit for the facilities covered by the request for special temporary authorization.

Neither EchoStar nor Directsat has filed (nor could they file) any application for authority to use in the aggregate more than 21 channels at the 119° W.L. orbital position. As explained above, all of the remaining channels at 119° W.L. have been assigned to TEMPO. Consequently, there is no authority to grant the authorizations, and the requests should be dismissed out of hand.<sup>8</sup>

The authority cited by EchoStar and Directsat is simply inapposite to their requests. None of the cases granted

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<sup>8</sup> See Folkways Broadcasting Co., Inc. v. Federal Communications Commission, 379 F.2d 447 (D.C. Cir. 1967) (finding the Commission does not have inherent power to permit temporary operations and reversing grant of an STA); Mid-Michigan Broadcasting Corp., 38 F.C.C.2d 63 (1972) (holding that the Commission is barred from granting an STA where grant of the underlying application may not have been "otherwise authorized by law," as required by § 309(f)).

temporary authority pursuant to Section 309(f) to operate a space segment to provide a new and otherwise unauthorized service.<sup>9</sup> None of the applicants, moreover, used an orbital slot and frequencies that were specifically assigned to another licensee or permittee, or provided service in excess of their authorizations. In contrast, EchoStar and Directsat propose to provide service using the 11 channels allocated to TEMPO at 119° W.L. for DBS service.

Even if the requests are not dismissed outright, moreover, EchoStar and Directsat have failed to establish any "extraordinary circumstances" or "serious[] prejudice" to the public interest to justify an STA as required by the Communications Act. Rather, the applicants principally assert business reasons to justify the requests, such as providing their customers with an "expanded range of programming options for American consumers than would otherwise be possible."<sup>10</sup>

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<sup>9</sup> See Mobile Datacom Corp., 10 FCC Rcd 4552 (Int. Bur. 1995) (application granted to operate earth stations to provide RDSS service); Newcomb Communications, Inc., 8 FCC Rcd 3631 (Com. Car. Bur. 1993) (application granted to operate earth stations to provide RDSS service); American Mobile Satellite Corp., 7 FCC Rcd 942 (1992) (applications granted to operate earth stations to provide LMSS service); ARC Professional Services Group, Inc., 5 FCC Rcd 5398 (Com. Car. Bur. 1990) (C-band services to NASA and other government users authorized); and Satellite Business Systems, Mimeo No. 5207 (Com Car. Bur. 1984) (application granted to operate an authorized satellite temporarily at an unassigned orbital location).

<sup>10</sup> Directsat Request at 3; EchoStar Request at 3.

Neither EchoStar nor Directsat, however, offers any tangible evidence that their combined 21 transponder system, capable of 124 channels of service, could not accommodate the public interest programming or experimental services they desire to carry on TEMPO's channels, or compete effectively against other multichannel video programming distributors.

Directsat also asserts that without the extraordinary relief of an STA it "has no way of knowing whether to acquire rights to programming for those additional channels and take other steps necessary to implement a service operating with sixteen transponders instead of ten."<sup>11</sup> The Commission has already issued EchoStar and Directsat permanent authority to operate a 21 transponder DBS system at 119° W.L. Thus, there is no uncertainty about the capacity of their systems requiring extraordinary relief from the Commission. In addition, the Commission's rules specifically prohibit the grant of special temporary authority on the grounds asserted by Directsat: "Convenience to the applicant, such as marketing considerations," is not sufficient to justify temporary authority.<sup>12</sup>

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<sup>11</sup> Directsat Request at 6; see also EchoStar Request at 4 (noting ongoing negotiations for programming services for five additional transponders).

<sup>12</sup> 47 C.F.R. § 25.119(b). Directsat's suggestion (at 6) that the Commission has granted an STA to facilitate a "company's ability to make business arrangements necessary to the provision of its service" is directly contradicted by the cited authority. Thus, in Columbia Communications Corp., DA (continued...)

II. Grant of the EchoStar and Directsat Requests Would Cause Serious Prejudice to TEMPO and Would Not Serve the Public Interest.

The potential for significant harm to the public far outweighs any incremental public interest benefit achieved from EchoStar's and Directsat's proposed short term service gains. The confusion that would inevitably arise from the abrupt termination of more than one-third of their service offerings could prejudice TEMPO's operations and burden the Commission with unnecessary consumer complaints.

EchoStar's and Directsat's proposed notice to advise subscribers of the temporary service would not adequately address this confusion. EchoStar and Directsat represent that service representatives will read an "explanation of the temporary nature of the STA" to customers who wish to subscribe to programming carried on TEMPO's channels.<sup>13</sup> A statement confirming the order and the first bill will contain a similar notice.<sup>14</sup> Upon termination of the STA, the

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<sup>12</sup>(...continued)  
96-703, FCC File No. 95-SAT-STA-96 (rel. May 6, 1996) at ¶ 19 n.23, the Commission noted that action by Intelsat, which would have immediately forced Columbia out of business in certain markets, threatened its "very existence." Id. Intelsat's failure to negotiate a mutually agreeable arrangement, not applicant convenience, "compels our action here." Id. at ¶ 16. Moreover, Columbia involved only a request to remove certain conditions from an authorization on a temporary basis, and not a request to provide a new and previously unauthorized service. Id. at ¶ 8.

<sup>13</sup> EchoStar Request at 6; Directsat Request at 7.

<sup>14</sup> Id.

customer who desired the programming will receive an adjustment to the bill, but apparently will not be allowed to cancel service.<sup>15</sup>

EchoStar has launched a nationwide marketing campaign to provide low-cost receive equipment for subscribers who sign long-term service contracts.<sup>16</sup> Upon termination of the STA, which EchoStar acknowledges may occur within a matter of months, subscribers who may have been attracted to specific programming would nevertheless be obligated to continue service without any notice. EchoStar and Directsat do not propose to inform their subscribers that they would be required to maintain service. Neither the Commission nor TEMPO, whose system would be the putative "cause" of such a termination, should be burdened by the customer confusion and complaints that will undoubtedly result.

### III. Conclusion

As the foregoing demonstrates, EchoStar and Directsat are not eligible for the special temporary authority which they request. Section 309(f) empowers the Commission to grant temporary authorizations only to applicants for

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<sup>15</sup> See EchoStar Request at 7; Directsat Request at 8. The notice does not inform subscribers that service could be terminated in only a few months.

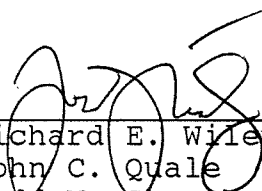
<sup>16</sup> See Communications Daily (Aug. 1, 1996) at 7 (EchoStar begins national promotion offering receivers for \$199 with purchase of \$300 annual programming package).



construction permits. Neither EchoStar nor Directsat has filed (nor could they file) an application for DBS channels assigned to another DBS permittee (TEMPO). In any event, EchoStar and Directsat have failed to show how the public would be "seriously prejudice[d]" without the requested relief. To the contrary, the short term, incremental service gains desired by EchoStar and Directsat cannot overcome the significant risks of service disruption and consumer confusion. Therefore, the Commission should dismiss or deny the requests.

Respectfully submitted,  
TEMPO SATELLITE, INC.

By:

  
Richard E. Wiley  
John C. Quale  
Todd M. Stansbury  
of  
WILEY, REIN & FIELDING  
1776 K Street, N.W.  
Washington, DC 20006  
(202) 429-7000

Its Attorneys

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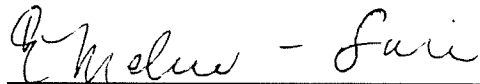
CERTIFICATE OF SERVICE

I, Erin McCue-Sari certify that I have this 16th day of August 1996, caused to be delivered via first-class, postage prepaid mail, a true and correct copy of the foregoing "Consolidated Opposition" of TEMPO Satellite, Inc. to the following:

Donald Gips \*  
Acting Chief  
International Bureau  
Federal Communications Commission  
2000 M Street, N.W. - Suite 880  
Washington, D.C. 20554

David K. Moskowitz, Esq.  
EchoStar Satellite Corporation  
EchoStar DBS Corporation  
90 Inverness Circle East  
Englewood, Colorado 90112

Mark A. Grannis  
Gibson, Dunn & Crutcher LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036

  
Erin McCue-Sari

\* Hand Delivery