

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
ECHOSTAR SATELLITE CORPORATION)
)
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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File No. 138-SAT-STA-96

Satellite Policy Branch
International Bureau

REPLY OF TEMPO SATELLITE, INC.

TEMPO Satellite, Inc. ("TEMPO"), by its attorneys, hereby replies to the August 26, 1996 "Joint Reply" of EchoStar Satellite Corporation ("EchoStar") and Directsat Corporation ("Directsat") which seek special temporary authority to operate DBS channels at 119°W. EchoStar and Directsat wholly fail to rebut the showing made in TEMPO's August 16, 1996 Consolidated Opposition ("Opposition") that there is no legal authority under Section 309(f) of the Communications Act of 1934, as amended, supporting their requests for special temporary authority to operate on the DBS channels assigned to TEMPO. The requests, therefore, should be denied.¹

¹ On its face, the Joint Reply violates Section 1.49 of the Commission's Rules, which requires pleadings in excess of 10 pages to include a summary and a table of contents. The Commission, therefore, should dismiss the pleading or return it so that it

- I. Since EchoStar and Directsat Do Not Have Pending Applications for Additional Channels at 119°W, the Expedited Application Processing Procedures of Section 309(f) of the Communications Act Provide No Support for, and in Fact Are Wholly Inapplicable to, Their Requests for Temporary Authorizations.

In the Opposition, TEMPO demonstrated that Section 309(f), upon which EchoStar and Directsat expressly and solely rely, authorizes the Commission to grant special temporary authority ("STA") only where "an application subject to subsection (b) has been filed," and the Commission finds "that there are extraordinary circumstances requiring temporary operations" and that delay would "seriously prejudice the public interest."² Since neither EchoStar nor Directsat has filed, nor could they file, an application for authority to operate on TEMPO's channels, section 309(f) has no applicability to, and provides no support for, grant of the requested STAs. TEMPO also noted that EchoStar and Directsat failed to cite any case in which the Commission had granted an STA under Section 309(f) for operation of a space station to provide a new and otherwise unauthorized service on channels that were assigned to another entity. In short, EchoStar's and Directsat's requested relief is statutorily barred.

Although EchoStar and Directsat in response acknowledge that Section 309(f) "is not 'free-standing' -- that is, it must be appurtenant to some other application,"³ they assert that no pending application is required since their "public interest

may be conformed to the Commission's pleading requirements.

² Opposition at 3 (quoting Section 309(f)).

³ Joint Reply at 3.

qualifications" as DBS permittees have previously been established.⁴ EchoStar and Directsat, however, do not explain, nor could they, how the existence *vel non* of their public interest qualifications in any manner satisfies the clear-cut requirement of Section 309(f) as to the pendency of an application.

Section 309(f), by its terms, applies only to a *pending* application: "[w]hen an application subject to subsection (b) has been filed ..., " the Commission may authorize temporarily a new service, upon a proper showing, "notwithstanding the requirements of such subsection....." In turn, subsection (b) provides that no application "shall be granted earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application ..."⁵ In other words, Section 309(f) merely authorizes the Commission to disregard the 30-day public notice waiting period in the case of applications which present "extraordinary circumstances requiring temporary operations in the public interest ..."⁶

As noted above, there is not pending any application to provide the service for which EchoStar and Directsat seek extraordinary relief. Nor have they cited to any case to substantiate their claim that WTCI's interpretation of Section 309(f), based upon its express terms, is "not supported by the case law."⁷ Indeed, EchoStar and

⁴ *Id.* at 3.

⁵ 47 U.S.C. § 309(f),(b).

⁶ 47 U.S.C. § 309(f).

⁷ Joint Reply at 2-3. The only citation provided by EchoStar and Directsat on this issue is to Folkways Broadcasting Co. v. FCC, 379 F.2d 447 (D.C. Cir. 1967), which they assert "suggests" that the "policy" of Section 309(f) is to ensure that the

Directsat are silent as to TEMPO's contention that the Commission has never granted an STA pursuant to Section 309(f) where no application is pending and the proponent seeks to offer a service using frequencies assigned to another party. By the plain language of the statute, therefore, the requests of EchoStar and Directsat should be denied.

EchoStar and Directsat alternatively argue that even if Section 309(f) requires a pending application, which it clearly does, then they have satisfied this requirement because each company previously applied for a 16 channel system, but was authorized in Continental Satellite Corp.⁸ to operate only 11 channels.⁹ Quite clearly, however, Section 309(f) has no relevance to these applications as to which the Commission

parties using the air waves demonstrate their qualifications. This argument ignores the fundamental legal holding of the case. Folkways clearly requires that all statutory requirements of Section 309(f), not merely legal qualifications, be established as a precondition to receiving an STA. The fact that EchoStar and Directsat may satisfy one criterion does not excuse them from meeting the other requirements (e.g., availability of the channels for which they apply).

Further, the court in Folkways expressly recognized that discontinuing service could cause hardship, but held that the Commission's authority to permit temporary service is limited by the language of the statute. Indeed, the court found unpersuasive the Commission's "benign" assertion that "'it is of course axiomatic that the continued operation of an existing service is in the public interest.'" Id. at 449. Absent satisfaction of all statutory criteria for an STA, the Commission is simply powerless to grant one. See Mid-Michigan Broadcasting Corp., 38 F.C.C.2d 63 (1972) (holding that the Commission is barred from approving an STA where grant of the underlying application may not have been "otherwise authorized by law," as required by § 309(f)).

⁸ 4 FCC Rcd 6292, 6299 (1989).

⁹ Joint Reply at 4.

satisfied the 30-day notice requirement of Section 309(b) eight years ago.¹⁰ If their applications were still pending, moreover, EchoStar and Directsat would require no relief under Section 309(f) -- the Commission could simply grant the applications if otherwise consistent with law. In fact, the applications to which EchoStar and Directsat refer cannot be granted and *have been denied*.¹¹

Moreover, even if the claims for unfulfilled channel requests somehow survived Continental, they clearly were extinguished by the Commission in the December 1995 order adopting competitive bidding as the means by which DBS frequencies would be reallocated. Thus, in eliminating the pro rata scheme adopted seven years ago in Continental and implementing auctions for future allocations, the Commission expressly adopted "a rule that modifies construction permits awarded in that [Continental] processing round by removing claims on additional channels under certain

¹⁰ EchoStar's and Directsat's applications for new DBS systems were filed and placed on public notice in 1988. See Continental Satellite Corp., 4 FCC Rcd at 6292.

¹¹ In Continental, the Commission merely stated that it would allocate any channels relinquished in the future to permittees with unfulfilled channel requests on a first-come, first-served basis upon demonstration of due diligence. 4 FCC Rcd at 6299. Accordingly, the unfulfilled channel requests of EchoStar and Directsat scarcely amount to pending applications for TEMPO's channels. Under the now rescinded Continental procedures, EchoStar and Directsat could not have obtained TEMPO's channels unless (1) TEMPO relinquished the channels; (2) EchoStar and Directsat demonstrated due diligence in a timely manner; and (3) no other permittee with unfulfilled channel requests (there were six) filed a competing request for the relinquished channels. In short, EchoStar and Directsat, after Continental, were nothing more than "disappointed applicants." See Coalition for the Preservation of Hispanic Broadcasting v. FCC, 931 F.2d 73, 79 (D.C. Cir.), cert. denied, 112 S. Ct. 298 (1989).

conditions."¹² In this regard, EchoStar and Directsat, who have appealed the DBS Order, note only that the status of their putative "applications is currently clouded by litigation."¹³ The DBS Order, however, was not stayed and is effective. Therefore, neither EchoStar nor Directsat has any claim for unfulfilled channel requests, much less an application on file to which Section 309(f) could apply and as to which the Commission could grant temporary authority prior to expiration of the 30-day statutory public notice period.¹⁴

In sum, the reliance of EchoStar and Directsat on Section 309(f) is entirely misplaced. The requests, therefore, lack any statutory foundation and should be denied.

II. EchoStar and Directsat Demonstrate No "Extraordinary Circumstances" or Prejudice to the Public to Support Their Requests for Special Relief.

In the Opposition, TEMPO demonstrated that EchoStar and Directsat failed to identify any "extraordinary circumstances" that would justify STAs, as required by the

¹² Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168, FCC 95-507 (rel. Dec. 15, 1995) ("DBS Order"), at ¶ 144, appeal pending DIRECTV v. FCC, No. 96-1001 (and consolidated cases).

¹³ Joint Reply at 4.

¹⁴ EchoStar also asserts that it has an application pending for assignment of channels at a "western" orbital location. Joint Reply at 4. This application similarly cannot support the STA request for use of channels at an eastern orbital location. In Dominion Video Satellite, Inc., the International Bureau denied a request by Dominion to relocate western channels to an eastern orbital location on the ground that the requested modification of its permit would constitute a major change requiring a new processing round. DA 96-541, rel. April 8, 1996, ¶ 4. Given the ruling in Dominion, no such application has been, or could be, filed by EchoStar.

statute and the Commission's rules. Nor did EchoStar or Directsat point to any "serious[] prejudice" to the public if they were not allowed immediately to institute more service than they were authorized to provide. Rather, they recited merely business reasons, such as a desire to offer an "expanded range of programming options," to justify their requests. Moreover, as TEMPO noted, grant of the STAs would generate significant public confusion.

In response, EchoStar and Directsat claim an entitlement to the STAs because they would operate from TEMPO's channels before TEMPO would launch a satellite, and they would compete against other multichannel video distribution programmers ("MVPDs"), such as cable systems.¹⁵ Their arguments are unavailing.

First, EchoStar and Directsat distort the facts and misconstrue TEMPO's position by asserting that TEMPO, which did not oppose EchoStar's original request for STA, has had a "change of heart."¹⁶ EchoStar and Directsat can reach this conclusion only by asserting, contrary to the facts, that the two companies seek "an identical authorization" to that previously issued to EchoStar to operate on a total of 16 transponders.¹⁷ In fact, there is no legal or factual similarity between the requests.

As the International Bureau found, EchoStar's initial authorization served 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

¹⁵ Joint Reply at 7-8.

¹⁶ Id. at 5.

¹⁷ Id.

Directsat."¹⁸ In contrast, the parties now seek to operate a DBS service that is over 50% larger (32 channels instead of 21 channels) than they are authorized to provide.¹⁹ Indeed, the vigorous attempt to equate EchoStar's original STA and the extraordinary relief EchoStar and Directsat now seek clearly exposes the legal infirmity of their pending requests.

Second, EchoStar and Directsat argue that the STA requests should be granted because they would soon be able to commence additional service on the channels for which they hold no authorizations.²⁰ However, the Commission has previously found that while prompt introduction of a service is a desirable goal, the commencement of new service, by itself, cannot justify an authorization where the proposal otherwise lacks legal authority. Thus, the Commission denied the application of Advanced Communications Corporation to extend its construction permit even though, through arrangements with an affiliate of TEMPO, it could have commenced service in only a matter of months.²¹

Third, EchoStar and Directsat fail to articulate, as required by the statute, any serious prejudice to the public that would occur unless they can offer temporary

¹⁸ EchoStar Satellite Corp., DA 96-270, FCC File No. 37-SAT-STA-96 (rel. March 4, 1996).

¹⁹ As stated in the Opposition, TEMPO objects to the requests only to the extent that EchoStar and Directsat combined seek to operate on more than the authorized 21 channels. TEMPO Opposition at 3.

²⁰ Joint Reply at 7-8.

²¹ Advanced Communications Corp., 11 FCC Rcd 3399 (1995).

service. Rather, they attempt to turn the statutory burden on its head by alleging that any detriment suffered in the marketplace by the termination of one-third of their service offering is their "mistake to make."²² In this regard, EchoStar and Directsat do not dispute TEMPO's assertion that they will not notify their subscribers as to how quickly one-third of their service could terminate, and that subscribers who sign long-term contracts would nevertheless be obligated to maintain service even after the loss of substantial programming. EchoStar and Directsat scarcely demonstrate how a delay in temporary operations would "seriously prejudice the public interest." To the contrary, their proposals would cause significant consumer harm and confusion.

III. Conclusion


EchoStar's and Directsat's pleas to offer service in excess of their permits cannot overcome the basic legal infirmity of their requests for STAs. There is no predicate for Commission action: no applications are pending for the service which EchoStar and Directsat seek to provide as required by the express language of Section 309(f), the provision upon which they rely. Nor do EchoStar or Directsat cite to any authority where the Commission has granted an STA pursuant to Section 309(f) to provide a temporary service at the same orbital location and on the same frequencies that are authorized to another permittee. EchoStar and Directsat also fail to demonstrate the "extraordinary circumstances" and "serious[] prejudice" to the public

²² Joint Reply at 10.

interest that Section 309(f) require. Indeed, TEMPO has shown that grant of the request would be contrary to the public interest. Therefore, the requests for STA should be dismissed or denied to the extent EchoStar and Directsat would provide service in excess of 21 channels at 119° W.L.

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September 6, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September 1996, I caused copies of the foregoing "Reply of TEMPO Satellite, Inc." to be hand delivery (as indicated by asterisk) or to be mailed first class postage paid to the following:

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