

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
EchoStar Satellite Corporation)	File No. DBS-88-01
)	
For Assignment of Direct Broadcast)	
Satellite Orbital Position and Channels)	
)	
)	

Memorandum Opinion and Order

Adopted: May 15, 2002

Released: May 16, 2002

By the Chief, Satellite Division:

I. Introduction

1. In this Order, we address EchoStar Satellite Corporation’s (EchoStar’s) compliance with its due diligence obligations for a western orbit location permit to operate a Direct Broadcast Satellite (DBS) system. We find that EchoStar has met its obligations and are ready to assign EchoStar channels at a western orbit location. While EchoStar has requested channels at two orbit locations, as set forth below, we direct EchoStar to select one location and advise the Commission of its selection within 10 days of the date of this order.

II. Background

2. In August 1989, the Commission granted EchoStar authority to construct a DBS system conditioned on EchoStar’s due diligence in the construction of its system.¹ The due diligence requirement has two components. First, a DBS permittee must either begin construction or complete contracting for construction of its satellite(s) within one year of the grant of its construction permit. Specific orbit positions and channels are assigned only after the permittee satisfies this due diligence showing.² Second, a permittee must place its satellite(s) in operation within six years after receiving its permit “unless otherwise determined by the Commission upon proper showing in any particular case.”³ EchoStar’s request for a western channel assignment is reviewed under the first prong of the rule.

3. At the time the EchoStar permit at issue was granted, the “east/west pairing rule” was in effect. Under this rule, DBS channels would be assigned in east/west pairs with service to the eastern half

¹ Continental Satellite Corp., *Memorandum Opinion and Order*, 4 FCC Rcd 6292 (1989).

² 47 C.F.R. § 100.19(b); *Processing Procedures Regarding Direct Broadcast Satellite Service*, 95 FCC 2d 250 (1983) (*DBS Processing Procedures*).

³ 47 C.F.R. § 100.19.

of the contiguous United States (CONUS) permitted from the four eastern orbital locations and western half-CONUS service permitted from the four western orbital locations.⁴ This policy was instituted to facilitate the Commission's goals of ensuring full-CONUS DBS service at a time when the Commission was unsure of a single satellite's ability to transmit full-CONUS signals. While the Commission granted EchoStar assignments for various orbit locations in 1992, one of its requests for a western orbit location and channel assignment remains outstanding.⁵

III. Discussion

4. In determining EchoStar's request for an assignment of channels at a western location, our decision is guided by the first prong of the Commission's due diligence requirements. Under the policy established by the Commission in the *DBS Processing Procedures*, particular orbital positions and channels were not assigned to a DBS permittee unless and until the permittee demonstrated that it had fulfilled this component of the due diligence requirement by beginning construction or completing contracting for the construction of its satellite. In March 1992, the Commission considered information submitted by EchoStar and determined that EchoStar had not satisfied its due diligence requirement.⁶ Accordingly, the Commission concluded that it could not assign a western orbital position and channel assignment. The Commission also stated, however, that the public interest would not be served by canceling EchoStar's western orbit/channel reservation at that time. Instead, it afforded EchoStar an additional three months, until June 1992, to demonstrate due diligence with regard to its proposed western satellite. In June 1992, EchoStar filed with the Commission a copy of a contract for the construction of its western satellite.⁷ Subsequently, at the Bureau's request, EchoStar filed, in January 2002, additional information updating the status of its construction.⁸ EchoStar also filed a request specifying its assignment preference of eight channels at 148° W.L. and three of the ten even-numbered channels at 175° W.L. that have not already been assigned to EchoStar.⁹

5. In demonstrating compliance with the first component of the due diligence requirement the Commission has stated that the licensee must show there is a:

[C]ontract signed by both parties which contains no unresolved contingencies which could preclude substantial construction of the satellites... Specific satellites and their design characteristics are identified, and dates for the start and completion of construction are specified. The payment terms and schedule are described sufficiently to demonstrate the parties' investment/commitment to completion of the system.¹⁰

⁴ The eastern orbital positions were 61.5° W.L., 101° W.L., 110° W.L., and 119° W.L. The western orbit positions were 148° W.L., 157° W.L., 166° W.L., and 175° W.L. Subsequently, the east/west pairing policy was eliminated because full-CONUS coverage is technically possible from several of the eastern orbit locations.

⁵ See EchoStar Satellite Corporation, Assignment of Direct Broadcast Satellite Orbital Positions and Channels, *Memorandum Opinion and Order*, 7 FCC Rcd 1765, 1771 (1992) (stating that a western orbit position and channel assignment cannot be made to EchoStar at this time and affording EchoStar additional time to demonstrate due diligence with regard to its proposed western satellite).

⁶ *Id.* at 1770.

⁷ Contract between EchoStar Satellite Corporation and Space Systems/Loral submitted to the Commission on June 4, 1992.

⁸ Letter to William F. Caton, Acting Secretary, FCC from Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation (March 6, 2002).

⁹ *EchoStar Supplemental Request* at 3.

¹⁰ Tempo Enterprises, Inc., 1 FCC Rcd 20 (1986).

Further, the Commission has stated that such submissions must also include regular specific construction progress milestones in the construction timetable, with changes in the timetable submitted as they occur. Contract submissions must continue to include payment schedules with sufficient specificity for the Commission to find that the permittee is making a financial commitment to the construction of the satellite and to indicate that the milestones listed for the early stages of construction constitute meaningful levels of advancement in the satellite construction process.¹¹

6. EchoStar's due diligence showing, its supplemental submissions and semi-annual progress reports demonstrate that EchoStar has contracted for the construction of a western satellite. The initial and amended contracts are signed by both parties. The showing identifies a specific satellite and its design characteristic, and specifies the dates for start and completion of construction. The payments are spread over a three-year period, with the majority of payments to be made well before the end of the construction period. Similarly, the construction timetable includes over 38 construction milestones which allows for the completion and deployment of the satellite within the 6 year time frame required by Section 100.19(b) of our rules.

7. We note that concurrent with the release of this Order, the Bureau released an order denying EchoStar's request for an extension of its operation milestone at the 175° W.L. orbit location.¹² The order states that the reasons for the requested extension were not obstacles beyond EchoStar's control but business decisions made to implement its fleet at locations other than at 175° W.L. While this appears to contradict our finding that EchoStar has contracted for a western satellite, different legal standards apply. Further, given that EchoStar submitted documentation demonstrating it met its first due diligence requirement, there is no legal basis to deny its request for a channel assignment at a western orbital location. We intend to monitor EchoStar's milestones and annual reports closely. While EchoStar has requested channels at both the 148° W.L. and 175° W.L. orbit locations, the record indicates that EchoStar has contracted for one western satellite for its outstanding permit.¹³ Consequently, we direct EchoStar to file with the Commission, within 10 days of the date of this Order, its preferred channel assignments at one western orbital location.

8. Given the time taken to process this due diligence showing we acknowledge that many of the milestone dates for construction progress set forth in the contract are no longer valid. Thus, to enable the Commission to monitor the progress of the construction of EchoStar's satellite, this Order is conditioned on EchoStar's submitting, within 45 days of the release of this Order, a revised construction milestone schedule specifying the particular dates construction milestones are to be completed and particular dates upon which payments are due.¹⁴

¹¹ United States Satellite Broadcasting Company, Inc., *Memorandum Opinion and Order*, 3 FCC Rcd 6858, 6862 n. 20 (1988).

¹² EchoStar Satellite Corporation, Directsat Corporation, Direct Broadcasting Satellite Corporation, Consolidated Request for Additional Time to Commence Operation, *Memorandum Opinion and Order*, DA 02-1164 (rel. May 16, 2002).

¹³ See EchoStar Satellite Corporation Semi-Annual Progress Reports for Eastern and Western Satellites, filed April 17, 2000.

¹⁴ In December 2001, EchoStar was granted special temporary authority to move EchoStar 2 to the 148° W.L. orbit location and operate over 16 even numbered DBS channels at 148° W.L. Eight of the 16 channels were previously assigned to EchoStar, the remaining eight channels were unassigned. See Letter to David Moskowitz, EchoStar Satellite Corporation from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, dated December 28, 2001.

9. In addition, we note that the second component of the due diligence rule requires a DBS permittee to begin operation within six years of receiving its permit. Due to our delay in processing this request, the six-year time frame for EchoStar to commence service under the permit at issue has expired, we grant EchoStar, on our own motion, an extension of the operating deadline to three years from the release date of this Order

IV. Conclusion and Ordering Clauses

10. Based on the foregoing, we find that EchoStar Satellite Corporation has satisfied the first due diligence requirement of our rules. Accordingly, IT IS ORDERED, that EchoStar Satellite Corporation's request for an orbital channel assignment for its western permit is GRANTED. EchoStar has 10 days from the effective date of this order to specify its preferred western orbital location.

11. IT IS FURTHER ORDERED, that EchoStar Satellite Corporation must submit to the Commission, within 45 days of the release of this Order, a revised construction milestone schedule showing the specific dates for the various stages of construction and particular dates upon which payments are due for its satellite system to be implemented.

12. IT IS FURTHER ORDERED, that EchoStar Satellite Corporation must commence DBS service at the channels assigned herein within three years of the date of this Order.

13. This Order is issued pursuant to Section 0.261 of the Commission's rules on delegated authority, 47 C.F.R. § 0.261, and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Thomas S. Tycz
Chief
Satellite Division