

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

In the Matter of
EchoStar Satellite Corporation
Directsat Corporation
Direct Broadcasting Satellite Corporation
Consolidated Request for Additional Time to
Commence Operation
SAT-MOD-19981125-00089
SAT-MOD-19981125-00091
SAT-MOD-19981125-00092

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 the consolidated application filed by Directsat Corporation ("Directsat"), Direct Broadcasting Satellite Corporation ("Direct Broadcasting") and EchoStar Satellite Corporation ("ESC") seeking an extension of time to commence Direct Broadcast Satellite ("DBS") service from their assigned channels at the 175° W.L. orbit location. Directsat, ESC's predecessor-in-interest, and Direct Broadcasting, a subsidiary of ESC (hereafter collectively "EchoStar") were required to commence DBS operations by August 15, 1999 and November 30, 1998 respectively. EchoStar has requested an extension of these operation milestones until December 2002. We find that EchoStar has failed to demonstrate that an extension of its DBS permit is warranted. Consequently, its permit for the 22 channels at the 175° W.L. orbital location is cancelled.

II. Background

2. In August 1989, the Commission granted EchoStar DBS construction permits conditioned upon compliance with the Commission's due diligence rules for the DBS service. 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

1 At the time the consolidated application was filed Directsat and Direct Broadcasting were wholly owned subsidiaries of EchoStar Communications Corporation. Subsequent to this filing, EchoStar Communications Corporation underwent a corporate reorganization, which included mergers of Directsat and DBSC into EchoStar.

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

permit. Specific orbit positions and channels are assigned only after the permittee satisfies this due diligence showing.³ 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.”⁴ We evaluate EchoStar’s extension request under the second prong of the due diligence rule.

III. Discussion

3. In 1993, the Commission determined that EchoStar met the first due diligence requirement and assigned EchoStar 22 channels at the 175° W.L. orbit location.⁵ EchoStar’s original deadline to begin operations at 175° W.L. was August 1995. Thereafter, extensions of this deadline were granted, requiring EchoStar to begin operating eleven channels before November 30, 1998⁶ and the remaining eleven channels in August 1999.⁷

4. EchoStar is also authorized to provide service from the 148° W.L., orbit location. The operation milestone for a satellite at this location is December 2002. In 1997, EchoStar requested permission to “realign” or switch the earlier milestones for the 175° W.L. orbit location with the December 2002 milestone for the 148° W.L. orbit location.⁸ EchoStar claimed that by launching a satellite into the 148° W.L. orbit location before 175° W.L., it could optimize its deployment schedule and provide residents of Hawaii with improved and expeditious service. The International Bureau dismissed EchoStar’s request to realign its milestones, finding the application was actually a request for extension of time of the operational milestones at 175° W.L., and directed EchoStar to file the appropriate extension application.⁹ EchoStar did so in November 1998.¹⁰

5. In its consolidated application, EchoStar requested an extension of its operation milestones for the 175° W.L. orbit location from November 30, 1998 (for 11 channels) and August 15,

³ 47 C.F.R. § 100.19(b); Direct Broadcast Satellite Service, 95 FCC 2d 250 (1983).

⁴ 47 C.F.R. § 100.19.

⁵ Direct Broadcasting Satellite Corp., 8 FCC Rcd 7959 (1993), and Directsat Corp., 8 FCC Rcd 7962 (1993). In 1989, EchoStar Satellite Corporation’s authorization included providing service from two or more satellites delivering 11 channels to each half of the United States. In 1992, EchoStar Satellite Corp. was assigned channels at its eastern orbit location. Its assignment of western channels was conditioned on its demonstration of completion of satellite construction contracting.

⁶ Direct Broadcasting Satellite Corp., 11 FCC Rcd 9681 (1995).

⁷ Direct Broadcasting Satellite Corp., 11 FCC Rcd 9681 (1995) and Directsat Corp., 11 FCC Rcd 1775 (1996)

⁸ EchoStar Satellite Corp., EchoStar DBS Corp., Application for Authority to Make Minor Modifications to Direct Broadcast Satellite Authorizations, Launch and Operational Authority, *Memorandum Opinion and Order*, 13 FCC Rcd 8595, 8597 (Int’l Bur. 1998).

⁹ *Id.* at 8600.

¹⁰ EchoStar Satellite Corporation, Directsat Corporation, Direct Broadcasting Satellite Corporation, Consolidated Request for Additional Time to Commence Operation, Filed November 25, 1998 (*Consolidated Request*).

1999 (for 11 channels) to December 2002.¹¹ EchoStar claimed an extension was needed due to circumstances beyond its control. Specifically, EchoStar explained that its satellite, EchoStar 4, had been slated to operate at 119° W.L. but experienced serious technical and mechanical problems upon launch. It further states that it had intended to use EchoStar 4 to provide full-CONUS service but that technical difficulties made this imprudent. Thus, EchoStar moved EchoStar 4 to the 148° W.L. orbit location instead. As a result of the problems with EchoStar 4, EchoStar stated it was compelled to change its priorities for implementing its satellite fleet to add a full-CONUS satellite and thus intended to build a satellite for launch into its previously assigned 119° W.L. orbit location. EchoStar therefore requested extensions of the milestones for the 175° W.L. orbit location.¹²

6. Since filing its Consolidated Request, EchoStar has launched and is operating two satellites at full-CONUS (contiguous United States) locations.¹³ EchoStar asserts, however, that additional time is still needed for the satellite at 175° W.L. to comply with the Commission's "spectrum intensive" rules governing must-carry requirements.¹⁴ Pursuant to these requirements, EchoStar states it must now carry all of the local broadcast stations requesting carriage in areas where EchoStar offers any local station. EchoStar maintains there is "no serious question" that its next satellites must be devoted to state of the art spot beam satellites located at full-CONUS locations.¹⁵ Thus, EchoStar recently launched the EchoStar 7 satellite to 119° W.L. and intends to launch its next satellite, EchoStar 8, to 110° W.L., instead of satellites that would operate from 175° W.L.¹⁶

7. In a supplemental filing, EchoStar reiterates that the 175° W.L. orbital location is suited to serve many Pacific Rim countries, including Japan and parts of Australia and China. EchoStar notes that it does not yet have the necessary authority from the respective foreign administrations to serve these countries. Until these markets become available, EchoStar states that it will not have access to crucial revenue for service from the 175° W.L. orbit location¹⁷ We also note that in its supplemental request, EchoStar indicates that it will apply to move EchoStar 4 to the 175° W.L. orbital location once EchoStar 7 or EchoStar 8 is successfully launched. Although EchoStar 7 has been successfully launched into the 119° W.L. orbit location, EchoStar has not requested authority to relocate EchoStar 4.

8. We find that EchoStar has not met its due diligence obligations with respect to its

¹¹ *Id.* at 1.

¹² *Id.* at 6.

¹³ EchoStar V was launched to 110° W.L. on September 23, 1999 and EchoStar VI was a launched to 119° W.L. on July 14, 2000. See www.dishnetwork.com.

¹⁴ EchoStar Satellite Corporation, Consolidated Request for Additional Time to Commence Operation, Filed January 8, 2002 (*EchoStar Supplemental Request*).

¹⁵ *EchoStar Supplemental Request* at 2.

¹⁶ *EchoStar Supplemental Request* at 3. On January 16, 2002, the Satellite and Radiocommunication Division, International Bureau, authorized EchoStar to launch its satellite EchoStar 7 to the 119° W.L. orbit location. EchoStar Satellite Corporation, Minor Modification of Direct Broadcast Satellite Authorization, Launch and Operating Authority for EchoStar 7, *Order and Authorization*, DA 02-118 (rel. Jan. 16, 2002). EchoStar 7 was launched on February 21, 2002.

¹⁷ *EchoStar Supplemental Request* at 3.

assigned channels at 175° W.L. The due diligence rules were designed to ensure that valuable spectrum is utilized, not warehoused, and that service is deployed for the benefit of the public. As a policy matter, the Commission has elected not to conduct protracted proceedings such as comparative hearings to determine a licensee's financial and technical capabilities to build and operate a DBS system. Rather, the Commission conditioned DBS construction permits by requiring the permittee to construct and commence operations of the satellite within a specific time frame. As set forth in its authorization, EchoStar was required to complete contracting for construction of its satellite within one year of grant of its construction permit. In 1993, we found that EchoStar had met this first prong of its due diligence requirement and assigned EchoStar 22 channels at the 175° W.L. orbital location. In addition, EchoStar's permit was conditioned on its commencing operations by November 1998 for the first 11 channels and by August 1999 for the other 11 channels. EchoStar has not built or launched any satellites to 175° W.L. The permits provide that the extension may be modified or cancelled if EchoStar fails to make progress toward construction and operation of its DBS system.¹⁸

9. In deciding whether to grant an extension of due diligence milestones, the Commission considers the "totality of circumstances" which includes the following four factors: 1) those efforts made and not made; 2) the difficulties encountered and those overcome; 3) the rights of all of the parties; and 4) the ultimate goal of service to the public.¹⁹ During the developing years of DBS, the Commission considered in this analysis the industry's infancy when evaluating due diligence deadlines to encourage licensees to develop their DBS services and provide competition to other multi-channel video programming distribution service providers. In 1995, however, the Commission noted that such latitude is no longer appropriate in an era in which DBS licensees are successfully operating and competing for subscribers.²⁰ Consequently, the Commission began to cancel DBS permits when permittees did not make "concrete progress" toward system implementation.²¹ Because strict enforcement of our DBS milestones furthers the important spectrum management goal of ensuring that valuable spectrum resources are efficiently put to use, we reserve extension requests for situations involving extraordinary circumstances.²²

10. In considering the first factor under the totality of circumstances standard, EchoStar acknowledges that it has not taken any concrete steps toward the construction, launch, and initiation of service at 175° W.L. EchoStar has also failed to show that it encountered any difficulties in bringing its channels at 175° W.L. into use. The technical difficulties arising from EchoStar 4 did not impede EchoStar's ability to move forward with the construction of a satellite system for 175° W.L. Instead, EchoStar elected to defer construction of a satellite for the 175° W.L. location in favor of a full-CONUS

¹⁸ Directsat Corp., Application for Extension of Time to Construct, Launch, and Operate a Direct Broadcast System, *Order*, 11 FCC Rcd 1775 (1996); Direct Broadcasting Satellite Corp., *Order*, 11 FCC Rcd 9681 (1995).

¹⁹ RL/DBS Company, LLC for Extension of its Direct Broadcast Satellite Construction Permit, *Memorandum Opinion and Order*, 16 FCC Rcd 9, 13 (Int'l Bur. 2000).

²⁰ Advanced Communications Corp., Application for Extension of Time to Construct, Launch, and Operate a Direct Broadcast Satellite, *Memorandum Opinion and Order*, 10 FCC Rcd 13337, 13340 (Int. Bur. 1995); *aff'd*, 11 FCC Rcd 3399 (1995); *aff'd*, *Advanced Communications Corp., v. FCC*, 84 F. 3d 1452 (1996); *cert. denied*, 117 S. Ct. 718 (1997).

²¹ *Advanced Communications Corp.*, 11 FCC Rcd at 3412.

²² R/L DBS Company, 16 FCC Rcd at 13.

location. Similarly, compliance with the Commission's must-carry requirements does not justify additional time to comply with the operation milestones. The Satellite Home Viewer Improvement Act became effective in November 1999, after EchoStar was required to commence DBS operations at 175° W.L. The Commission's "carry one, carry all" requirement is not mandatory, but rather "permits" satellite carriers to transmit local television broadcast signals into local markets.²³ EchoStar's business decision to use its new satellites to carry additional broadcast stations from CONUS locations is not a justification for failure to meet its milestone obligations at other orbit locations. Further, EchoStar acknowledges that moving forward at this time is not in accord with its business plans, stating that it would "not make economic sense nor otherwise serve the public interest" to deploy a satellite to 175° W.L. at this time.²⁴ The Commission has held that an uncertain business situation or an unfavorable business climate, in general, has never been an adequate excuse for failure to meet a construction timetable.²⁵ The Commission also stated that "continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS authorization."²⁶

11. In considering the factor of ultimate service to the public, EchoStar has not indicated when in fact it plans to provide service from 175° W.L. Nor has EchoStar represented that it has attempted to obtain landing rights from those Pacific Rim countries it claims are important to generate revenue at this location. Although EchoStar states it will move EchoStar 4 to the 175° W.L. orbit location, EchoStar has not requested authorization for this move from the Commission. As a result, we cannot grant an extension based on this representation. EchoStar's failure to make any progress during the 10-years in which it has held channel assignments at 175° W.L. creates doubt about the extent to which it will implement service at the 175° W.L. orbit location in an expeditious manner if an extension were granted.

12. Unlike the extension request in the case of R/L DBS Company, EchoStar has not persuaded us that a further extension is warranted. In R/L DBS Company, the Commission granted R/L DBS an extension of its operating milestone finding that R/L DBS had expended over \$14 million in connection with its satellite design and construction; overcame the difficulty of having a limited channel assignment by incorporating technological advances into its system design; and overcame a number of legal difficulties not of its own making in connection with its permit.²⁷ EchoStar, on the other hand, by its own admission, has not devoted technical or financial resources to launching a satellite into the 175° W.L. orbit location. EchoStar's rationale for an extension of its due diligence obligations for 175° W.L. is that it will "preserve" EchoStar's plans for western service when the conditions necessary for that service are fulfilled.²⁸

²³ Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, *Report and Order*, 16 FCC Rcd 1918 (2000). The Act provides that if a satellite carrier carries one station in a local market it must carry all stations in that same market.

²⁴ *Consolidated Request for Extension of Time* at 11.

²⁵ United States Satellite Broadcasting Co., Inc. 3 FCC Rcd 6858, 6860 (1988).

²⁶ Advanced Communications Corporation, *Memorandum Opinion and Order*, 11 FCC Rcd 3399, 3404 (1995).

²⁷ R/L DBS Company, LLC, for Extension of its Direct Broadcast Satellite Construction Permit, *Memorandum Opinion and Order*, 15 FCC Rcd 9 (Int'l Bur. 2000).

²⁸ *Consolidated Request for Extension of Time* at 13.

13. The obstacles that EchoStar claim resulted in delays in implementing a satellite at the 175° W.L. orbit location are not obstacles beyond its control. Rather, they are business decisions made by EchoStar for implementing its fleet. Although EchoStar has received previous extensions of time, it has indisputably failed to make progress to provide service from 175° W.L. based on its authorization. Consequently, we find that EchoStar has not presented a sufficient justification to warrant a further extension of its authorization to operate on its assigned DBS channels at the 175° W.L. orbit location.

IV. Conclusion and Ordering Clauses

14. We find that it would not be in the public interest to grant EchoStar a further extension of its due diligence requirements at the 175° W.L. orbit location. The permits for the 175° W.L. orbit location were issued in 1989 and no progress has been made toward implementing service from this location. Consequently, we find that the public interest would be better served if we were to reclaim and reassign the channels to an entity that is committed to bringing them into use in a timely manner. Our action today is without prejudice to EchoStar participating in any reassignment process.

15. Accordingly, IT IS ORDERED, that EchoStar's authorization to operate 22 channels at the 175° W.L. orbit location is CANCELLED, and the orbital assignments granted to Directsat Corp. and Direct Broadcasting Satellite Corp., in Directsat Corp., *Order*, 8 FCC Rcd 7962 (1993) and Direct Broadcasting Satellite Corp., *Order*, 8 FCC Rcd 7959 (1993) are available for reassignment.

16. 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