

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

In the Matter of
EchoStar Satellite Corporation
Application for Authority to Construct,
Launch, and Operate a Ka-band Satellite System
in the Fixed-Satellite Service
File Nos. 167-SAT-P/LA-95
168-SAT-P/LA-95
54-SAT-AMEND-96
SAT-MOD-20010608-00055

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 2002

Released: July 1, 2002

By the Chief, International Bureau:

I. INTRODUCTION

1. In this Order, we cancel EchoStar Satellite Corporation's ("EchoStar") authorization to construct, launch, and operate a Ka-band satellite system in the fixed-satellite service. EchoStar has failed to satisfy the initial, mandatory implementation milestone explicitly set forth in its authorization. This milestone requires EchoStar to commence construction of its Ka-band satellite system by January 2002. Consequently, EchoStar's authorization is null and void. The orbit locations that had been assigned to EchoStar are available for reassignment.

II. BACKGROUND

2. In May 1997, as part of the first Ka-band processing round, the International Bureau ("Bureau") authorized EchoStar to launch and operate a geostationary satellite orbit ("GSO") system to provide fixed-satellite service in the Ka-band. EchoStar was licensed to use 500 MHz of uplink and 500 MHz of downlink spectrum in portions of the Ka-band at both the 83° W.L. and 121° W.L. orbital locations. EchoStar represented that it intended to use the system to provide a variety of two-way services, including video, telephony, video conferencing, voice communications, and computer access to on-line information to customers throughout the United States. EchoStar intended to interconnect its two satellites with inter-satellite links ("ISLs"). When we authorized EchoStar's system, we deferred assigning ISL frequencies because none of the requested bands were suitable at the time for ISL service. Because we were not in a position to assign EchoStar a specific range of ISL frequencies, we did not require EchoStar to begin building its satellite system and thus did not include implementation

1 EchoStar Satellite Corporation, Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service, Order and Authorization, DA 97-969, 13 FCC Rcd 5664 (Int'l Bur. 1997) (EchoStar Authorization Order).

2 EchoStar Authorization Order, 13 FCC Rcd at 5665.

milestones in its authorization. We did state, however, that we would impose a strict milestone schedule once ISL frequencies were authorized.³

3. In January 2001, the Bureau modified EchoStar's Ka-band system to authorize EchoStar to operate ISLs.⁴ At that time we also assigned implementation milestones for the construction, launch, and operation of the satellite system. The first implementation milestone required EchoStar to commence construction of its first satellite by January 2002. The license provides that failure to meet any of the implementation milestones will render the satellite authorization null and void.⁵

4. To determine whether EchoStar has complied with its implementation milestone, the Bureau's Satellite Division directed EchoStar to submit a copy of an executed contract verifying that construction has commenced and that EchoStar's Ka-band satellite will be built within the time frame specified in EchoStar's license.⁶ In response, EchoStar submitted an executed copy of a construction contract subject to a request for confidential treatment.

III. DISCUSSION

5. It is long standing Commission policy to impose mandatory construction commencement milestones upon licensees in the fixed-satellite service.⁷ The milestone schedule included in each authorization is designed to ensure that licensed entities are proceeding with construction and will launch their satellites in a timely manner, and that the orbit spectrum is not being held by licensees unable or unwilling to proceed with their plans. Requiring licensees to adhere strictly to a milestone schedule prevents orbital locations from being warehoused by licensees to the exclusion of qualified entities that are prepared to implement systems immediately.⁸ Moreover, the Commission has consistently required licensees to execute non-contingent satellite construction contracts in order to meet their construction commencement milestones.⁹ Because it is in the public interest to ensure that the scarce orbit spectrum resource is being used efficiently, the Commission has strictly enforced milestone schedules.¹⁰

³ *Id.* at 5672.

⁴ EchoStar Satellite Corporation, Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service, *Order and Authorization*, DA 01-224, 16 FCC Rcd 2453 (Int'l Bur. 2001) (*EchoStar Modification Order*).

⁵ *Id.* at 2458.

⁶ Letter to Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation, from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division (January 28, 2002). Thereafter, the Bureau's Policy Branch made two additional requests to EchoStar to provide information regarding EchoStar's construction contract. See Letter to Pantelis Michalopoulos, Counsel for EchoStar from Jennifer M. Gilson, Chief, Policy Branch (March 22, 2002) (requesting a signed copy of an unredacted contract), and Letter to Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation from Jennifer M. Gilson, Chief, Policy Branch (May 23, 2002) (requesting Exhibits A and B to the contract, a confirmation of payments made, and an explanation of the relationship between the licensee and the contracting party, EchoStar Orbital Corporation).

⁷ See, e.g., Norris Satellite Communications, Inc., *Memorandum Opinion and Order*, FCC No. 97-377, 12 FCC Rcd 22299 (1997) (*Norris*); Morning Star Satellite Company LLC, *Memorandum Opinion and Order*, DA 00-1265, 15 FCC Rcd 11350, (Int'l Bur. 2000) (*Morning Star Cancellation Order*) *aff'd*, FCC No. 01-179, 16 FCC Rcd 11550 (2001).

⁸ MCI Communications Corporation, *Memorandum Opinion and Order*, DA 87-24, 2 FCC Rcd 233 (CCB 1987).

⁹ *Norris*, 12 FCC Rcd at 22303.

¹⁰ See, e.g., *Advanced Communications Corporation*, DA 95-944, 10 FCC Rcd 13337 (Int'l Bur. 1995); *Morning Star Cancellation Order*.

6. By its terms, EchoStar's authorization required it to commence construction of its first Ka-band satellite by January 2002.¹¹ To meet this milestone, EchoStar was required to enter into a non-contingent construction contract executed on or before January 2002. The "non-contingent" requirement contemplates that there will be neither significant delays between the execution of the construction contract and the actual commencement of construction, nor conditions precedent to construction.¹²

7. The documents submitted by EchoStar demonstrate that EchoStar has contracted to build a satellite that will operate in the C-band and Ku-band frequencies. The contract does not assure that the Ka-band transponders will ever be operational.¹³ Indeed, the contract does not commit the manufacturer to construct a Ka-band subsystem or to guarantee its operation even if constructed. The policy objective of the milestone requirement is to ensure that unused spectrum is reassigned as quickly as possible to another qualified entity when there are substantial doubts as to whether the licensee intends to or is unable to proceed with its business plan. We do not question EchoStar's intent to build and operate a hybrid C/Ku-band satellite. We do not believe, however, that the Ka-band portion of the contract shows sufficient commitment to meet our standards for this milestone. In this regard, the Ka-band package will be able to operate only under certain limited conditions that may never occur. Thus, we find that EchoStar has failed to meet the beginning construction milestone in EchoStar's Ka-band license. Holding otherwise would undermine our requirement that all licensees enter into non-contingent construction contracts and our ultimate policy objective of allowing scarce orbit /spectrum resources to be held only by those licensees fully committed to providing service to the public.

8. Further, we note that EchoStar has a pending application to modify its Ka-band payload to construct a Ku/Ka-band hybrid satellite. As a result of our action today, we dismiss this application as moot because there is no Ka-band authorization.¹⁴ Had we acted on this modification application prior to our action in this Order, the result today would be the same. The contract upon which we base our decision does not satisfy the construction commencement milestone for the Ka-band satellite for either the authorized single band system or the proposed multi-band system.

IV. CONCLUSION AND ORDERING CLAUSES

9. Based on the foregoing, we conclude that EchoStar has failed to meet the January 2002 construction commencement deadline as required by its authorization. We further conclude that EchoStar's failure to satisfy this condition renders its authorization null and void.

10. Accordingly, IT IS ORDERED, that the authorization held by EchoStar Satellite Corporation, File Nos. 167-SAT-P/LA-95; 168-SAT-P/LA-95; 54-SAT-AMEND-96 is DECLARED NULL and VOID.

11. IT IS FURTHER ORDERED that the orbital assignments granted in EchoStar Satellite Corporation, 13 FCC Rcd 5664 (Int'l Bur. 1997) are available for reassignment.

¹¹ *EchoStar Modification Order*, 16 FCC Rcd at 2459.

¹² See PanAmSat Licensee Corp., Application for Authority to Construct, Launch, and Operate a Ka-Band Communications Satellite System in the Fixed-Satellite Service at Orbital Locations 58° W.L. and 125° W.L., *Memorandum Opinion and Order*, DA 00-1266, 15 FCC Rcd 18720 (Int'l Bur. 2000) *aff'd*, FCC No. 01-178, 16 FCC Rcd 11534 (2001).

¹³ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation (May 31, 2002), Exhibit B, 1-1, confidential treatment requested.

¹⁴ EchoStar Satellite Corporation, Application for Minor Modification of Authorization to Construct, Launch and Operate a Ka-Band Satellite System in the Fixed-Satellite Service, File No. SAT-MOD-200110608-00055 (June 8, 2001).

12. IT IS FURTHER ORDERED, that EchoStar Satellite Corporation's Application for Minor Modification of Authorization to Construct, Launch and Operate a Ka-band Satellite System in the Fixed-Satellite Service, File No. SAT-MOD-20010608-00055, is DISMISSED.

13. This Order is issued pursuant to delegated authority, 47 C.F.R. § 0.261, and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief
International Bureau