

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Applications of
TELQUEST VENTURES, L.L.C.
For a License for a Fixed-Satellite Transmit/
Receive Earth Station to Communicate with a
Canadian DBS Satellite to be located at
91 Degrees W.L. and for Blanket License
Authority to Construct and Operate One
Million Receive-Only Earth Stations for use
with a Canadian DBS Satellite to be
Located at 91 Degrees W.L.
and
WESTERN TELECOMMUNICATIONS, INC.
For a License for a Fixed-Satellite Transmit/
Receive Earth Station to Communicate with
Transponders of a Canadian DBS Satellite
to be Located at 82 Degrees W.L.

File Nos. 758-DSE-P/L-96
759-DSE-P/L-96

File No. 844-DSE-P/L-96

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 2001

Released: August 1, 2001

By the Commission:

I. INTRODUCTION

1. In this Order, we deny applications for review filed by TelQuest Ventures, L.L.C. (TelQuest) and Western Tele-Communications, Inc. (WTCI). By this action, we affirm that the International Bureau's (Bureau's) practice to refrain from granting premature earth station applications is reasonable.

II. BACKGROUND

2. In 1996, TelQuest and WTCI filed applications for authority to construct and operate earth stations in the United States to communicate with Canadian satellites to be operated by Telesat Canada (Telesat) and provide Direct Broadcast Satellite (DBS) service. At the time TelQuest and WTCI filed their earth station applications, Canada had not issued licenses for the

1 TelQuest Ventures, L.L.C., Western Tele-Communications, Inc., Report and Order, 11 FCC Rcd 8151 (Int'l Bur., 1996) (Dismissal Order).

satellites they proposed to use.<sup>2</sup> The Bureau denied these applications without prejudice.<sup>3</sup> The Bureau explained that it generally did not act on earth station applications unless the space station with which the earth station intends to operate has been licensed. According to the Bureau, this practice avoids the need to expend administrative resources reviewing premature earth station applications pending the outcome of uncertain licensing decisions.<sup>4</sup> The Bureau also did not wish to encourage entities to file earth station applications in the United States in the hope of influencing space station licensing decisions in foreign administrations.<sup>5</sup> Because the Bureau dismissed the earth station applications on procedural grounds, without prejudice, it did not reach any of the several substantive issues raised by these applications.<sup>6</sup>

3. TelQuest and WTCI filed petitions for reconsideration of the *Dismissal Order*.<sup>7</sup> In support of their petitions, TelQuest and WTCI submitted a copy of a letter from the Canadian Minister of Industry to Telesat stating conditional "support in principle" for Telesat's space station applications. Telesat, however, was required to meet ten conditions before Industry Canada would grant it satellite licenses.<sup>8</sup> The Bureau concluded that many of the conditions listed in the *1996 Conditional Support in Principle* could preclude Telesat from receiving the space station authorizations it had requested.<sup>9</sup> Accordingly, the Bureau found that the *1996 Conditional Support in Principle* could not be treated as a license, and denied TelQuest's and WTCI's petitions for reconsideration.<sup>10</sup>

4. TelQuest and WTCI filed applications for review of the *Reconsideration Order*. Five parties, listed in Appendix A, filed oppositions. No party supported the applications. TelQuest and WTCI filed replies.

### III. DISCUSSION

5. TelQuest and WTCI raise a variety of issues in their applications for review. For example, they claim that dismissal of their earth station applications was an unjustified departure from established precedent. They also contend that the Bureau should have concluded that

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<sup>2</sup> TelQuest requested authority to communicate with a satellite it claimed would eventually be placed at 91° W.L., and WTCI requested authority for a proposed satellite to be placed at 82° W.L. *Dismissal Order*, 11 FCC Rcd at 8151-52 (paras. 1-2).

<sup>3</sup> *Dismissal Order*, 11 FCC Rcd at 8154 (para. 9).

<sup>4</sup> *Dismissal Order*, 11 FCC Rcd at 8154 (para. 10).

<sup>5</sup> *Dismissal Order*, 11 FCC Rcd at 8154 (para. 10).

<sup>6</sup> *Dismissal Order*, 11 FCC Rcd at 8155 (para. 12).

<sup>7</sup> TelQuest Ventures, L.L.C., Western Tele-Communications, Inc., *Report and Order*, 11 FCC Rcd 13943 (Int'l Bur., 1996) (*Reconsideration Order*).

<sup>8</sup> See *Reconsideration Order*, 11 FCC Rcd at 13947 (para. 11), citing Letter from Minister John Manley, Industry Canada, to Larry Boisvert, President and CEO, Telesat (dated Feb. 27, 1996) (attached to WTCI petition for reconsideration as Exhibit 1) (*1996 Conditional Support in Principle*).

<sup>9</sup> *Reconsideration Order*, 11 FCC Rcd at 13949 (para. 15).

<sup>10</sup> *Reconsideration Order*, 11 FCC Rcd at 13949 (para. 15).

Canada had granted satellite licenses to Telesat and therefore their earth station applications were ripe for grant. Finally, they maintain that the *Dismissal Order* violates a number of statutory and Constitutional requirements. We find that none of these arguments warrants reversing the Bureau's decision in this case.

## A. Dismissal of Earth Station Applications

### 1. Consistency with Precedent

6. WTCI cites several Orders in which it claims that the Commission granted earth station operators authority to communicate with satellites before the satellites were licensed.<sup>11</sup> WTCI contends, therefore, that the Bureau's dismissal of its earth station application was a departure from precedent. Parties opposing the applications for review argue that the Orders cited by WTCI are distinguishable from the *Dismissal Order*.<sup>12</sup>

7. We agree with EchoStar and MCI/NewsCorp. that the *Dismissal Order* is consistent and in fact is in accord with the precedents cited by WTCI. In the *Hughes Order* and *Century III Order*, earth station applicants sought authorizations to communicate with satellites that already had been licensed.<sup>13</sup>

8. The *GTE Order* provides another example of our practice to refrain from considering earth station applications to communicate with unlicensed satellites. At the time of the Commission's approval of GTE's application, Telesat had been granted authority to launch Canadian FSS satellites and actually had a scheduled launch date a few months later for the ANIK-C satellite on which GTE was to take service.<sup>14</sup> MCI/NewsCorp. and EchoStar also argue that the *GTE Order* is distinguishable because it fell under an exception created by a 1972 exchange of letters, and this exception was limited to FSS, and so excluded DBS.<sup>15</sup> WTCI and TelQuest reply that there is nothing in the *Dismissal Order* to limit the policy to DBS or FSS, and so the exception in the *GTE Order* should apply to DBS service.<sup>16</sup> We find that the exception created by the 1972 exchange of letters is not relevant to this proceeding because ANIK-C was authorized before we granted licenses to any earth stations. Furthermore, if this exception were

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<sup>11</sup> WTCI Application at 5-6, citing *Hughes Communications Galaxy Corporation, Memorandum Opinion, Order, and Authorization*, 6 FCC Rcd 297 (1990) (*Hughes Order*); *Century III Orlando, Florida, Inc., Memorandum Opinion, Order, and Authorization*, 5 FCC Rcd 3150 (1990) (*Century III Order*); *Intelconsult Corp., Memorandum Opinion, Order, and Authorization*, 4 FCC Rcd 3607 (1989) (*Intelconsult Order*); *GTE Satellite Corporation, Memorandum Opinion, Order, and Authorization*, 90 FCC 2d 1009 (1983) (*GTE Order*); *GTE Satellite Corporation, Memorandum Opinion, Order, and Authorization*, 94 FCC 2d 1184 (1983) (*GTE Reconsideration Order*).

<sup>12</sup> EchoStar Opposition at 9-10; MCI/NewsCorp. Opposition at 4 n.8.

<sup>13</sup> *Hughes Order*, 6 FCC Rcd at 306-08 (Attachments 1 & 2); *Intelconsult Order*, 4 FCC Rcd at 3610-12 (Attachments 1 & 2); *Century III Order*, 5 FCC Rcd at 3157-60 (Attachments 1 & 2).

<sup>14</sup> The authorization was granted in August 1982. The ANIK-C satellite was to be launched in late 1982 and become operational in mid-January 1983. *GTE Reconsideration Order*, 94 FCC 2d at 1012-13 n.34.

<sup>15</sup> MCI/NewsCorp. Opposition at 4 n.8; EchoStar Opposition at 10.

<sup>16</sup> WTCI Reply at 2 n.3; TelQuest Reply at 4 n.10.

relevant, we would conclude that we could not apply it to WTCI's and TelQuest's 1996 earth station applications because the exception was a temporary measure that expired on December 31, 1984.<sup>17</sup>

9. In the *Intelconsult Order*, the space station was licensed conditioned on consultation with INTELSAT under Article XIV(d).<sup>18</sup> WTCI is mistaken in asserting that the condition to consult with INTELSAT under Article XIV(d) is comparable to the conditions in Canada's *1996 Conditional Support in Principle*.<sup>19</sup> INTELSAT Article XIV(d) consultation was a treaty-mandated negotiation and coordination process, designed to avoid interference or economic harm to the INTELSAT satellite system. Thus, in the INTELSAT Article XIV(d) consultation process, the question is not whether the satellite will be licensed, but how the satellite will be operated. Alternatively, the conditions in the *1996 Conditional Support in Principle* raised serious doubts as to whether Telesat's satellites would ever be launched.<sup>20</sup>

## 2. Form 493

10. WTCI claims that the Commission's practice is to require earth station applicants simply to identify the satellite with which it plans to operate, not that the satellite be in operation.<sup>21</sup> In support of this contention, WTCI notes that Form 493, the earth station application form in use at the time, did not state that the earth station applicant must identify a satellite in operation, and so failure to do so cannot justify a denial of an earth station application.<sup>22</sup>

11. WTCI implicitly assumes that it is not required to comply with any requirement unless it is set forth in the application form. WTCI provides no basis for us to conclude that such an assumption is reasonable. Earth station application forms are necessarily limited to specifying information requirements for earth station license applications.<sup>23</sup> Earth stations applicants cannot assume that other requirements, such as the rules governing the operation of earth stations, or policies regarding the timing of the submission of applications, are all contained in the basic application form.<sup>24</sup> Accordingly, we reject WTCI's contention that the Bureau could not dismiss

<sup>17</sup> See *GTE Order*, 90 FCC 2d at 1012-13 (para. 7).

<sup>18</sup> *Intelconsult Order*, 4 FCC Rcd at 3609-10 (paras. 12-13). See also *EchoStar Opposition* at 9-10.

<sup>19</sup> WTCI Reply at 2 n.3.

<sup>20</sup> *Dismissal Order*, 11 FCC Rcd at 8154-55 (para. 11); *Reconsideration Order*, 11 FCC Rcd at 13946-48 (paras. 10-12).

<sup>21</sup> WTCI Application at 6-7; WTCI Reply at 2 n.3.

<sup>22</sup> WTCI Application at 6-7; WTCI Reply at 2-3. Form 493 has been replaced by Form 312.

<sup>23</sup> See 47 C.F.R. § 25.130(a) (1995).

<sup>24</sup> See *Fleshman v. West*, 138 F.3d 1429, 1432 (Fed. Cir. 1998) (filling out prescribed application form is a "necessary condition" for compliance with statute governing Veterans Administration benefits, but filling out application form is not the only requirement the statute imposes on applicants); *United States v. Dawes*, 951 F.2d 1189, 1192 n.3 ("It would be nonsensical and extremely inefficient to require a tax return to contain all of the information found in the regulations and instructions.")

WTCI's earth station license application without prejudice unless its practice to require the associated space station to be licensed was set forth in Form 493.

### 3. Policy Rationale

12. WTCI asserts that the public interest goal of expediting DBS service outweighs the Bureau's administrative resource concerns and, therefore, that the Bureau did not provide an adequate rationale for dismissing WTCI's earth station application.<sup>25</sup> We emphasize that the Bureau dismissed WTCI's and TelQuest's applications *without prejudice*.<sup>26</sup> The Bureau did not deny either application on its merits. Therefore, contrary to WTCI's assertion, the competing policy goals weighed in the *Dismissal Order* were not a balancing of the conservation of Bureau resources against the expedition of the provision of DBS service. The *Dismissal Order* identified the policy rationale that supported dismissing WTCI's and TelQuest's premature earth station applications as both conservation of administrative resources and the desire to avoid influencing space station licensing decisions in foreign administrations.<sup>27</sup> On the other hand, neither WTCI nor TelQuest explain how they could provide DBS service before the satellite with which they plan to communicate is in operation.<sup>28</sup> As a result, neither WTCI nor TelQuest show that attempting to consider the merits of premature earth station applications would expedite provision of DBS service. Nor do they identify any other public interest goal that considering premature earth station applications would promote. In the absence of any countervailing public interest goal, we find that the two policy rationales set forth in the *Dismissal Order* are more than sufficient to justify the Bureau's actions in that Order.

### 4. Notice and Opportunity for Comment

13. TelQuest contends that the practice of requiring earth station applications to identify a licensed satellite is a rule adopted without notice and opportunity for comment, in violation of the Administrative Procedure Act (APA).<sup>29</sup> We find TelQuest's contention unpersuasive. The Bureau's practice affects *when* earth station applications should be filed, not *whether* any particular application will be granted or denied when considered on its merits.<sup>30</sup> Accordingly, this is a procedural requirement, not a substantive rule.<sup>31</sup> The APA does not require notice-and-

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<sup>25</sup> WTCI Application at 7; WTCI Reply at 3.

<sup>26</sup> *Dismissal Order*, 11 FCC Rcd at 8155 (para. 12).

<sup>27</sup> *Dismissal Order*, 11 FCC Rcd at 8154 (para. 10).

<sup>28</sup> TelQuest asserts without elaboration that the Commission could have granted its earth station application conditioned on Telesat meeting its conditions. TelQuest Reply at 2-3. TelQuest does not explain how this would be any different from dismissing its earth station application without prejudice so that it could reapply when Telesat had met its conditions. In either case, TelQuest would not be able to begin providing DBS service until Telesat brought its satellite into operation. Thus, we cannot read TelQuest's assertion as providing a basis for granting its earth station application.

<sup>29</sup> TelQuest Application at 5-6.

<sup>30</sup> *See Dismissal Order*, 11 FCC Rcd at 8155 (para. 12).

<sup>31</sup> Procedural rules "do not by themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629, 637 (D.C. Cir. 1984). *See also* *Batterton v. Marshall*,

comment rulemaking proceedings for procedural requirements,<sup>32</sup> and therefore the Bureau had authority to apply this policy to the earth station applications in this case.

14. Furthermore, assuming for the sake of argument that the Bureau's practice is a substantive rule, the Bureau has authority to establish this practice in the context of an adjudication. The Supreme Court has recognized that administrative agencies are confronted with cases of first impression from time to time, and must be free to address those issues in the absence of a general rule.<sup>33</sup> "[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."<sup>34</sup> Furthermore, EchoStar is correct that requiring a notice-and-comment rulemaking proceeding to resolve every question regarding filing requirements could cause extensive delay and all but paralyze this agency.<sup>35</sup> The Bureau correctly relied on adequate policy rationales in dismissing these earth station applications.

### 5. Reliance on Unpublished Documents

15. In the *Dismissal Order*, the Bureau cited two letters as examples of earth station applications it had returned because the applicants sought authority to communicate with unlicensed satellites.<sup>36</sup> TelQuest maintains that Section 0.445(e) precludes the Commission from relying on unpublished letters as precedent.<sup>37</sup>

16. We find that the Bureau did not cite the two letters as binding precedent, but instead cited the letters as examples of its general practice.<sup>38</sup> This finding, however, does not require us to reverse the *Dismissal Order* or the *Reconsideration Order*. The Bureau's rationale in dismissing the earth station applications was based on sound policy other than these unpublished letters, and therefore its decision was adequately supported.<sup>39</sup> As explained in the *Dismissal*

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648 F.2d 694, 707 (D.C. Cir. 1980); *National Association of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983).

<sup>32</sup> 5 U.S.C. § 553(b)(3)(A).

<sup>33</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (*Chenery*).

<sup>34</sup> *Chenery*, 332 U.S. at 203, *citing* *Columbia Broadcasting System v. United States*, 316 U.S. 407, 421 (1942).

<sup>35</sup> EchoStar Opposition at 11-13.

<sup>36</sup> *Dismissal Order*, 11 FCC Rcd at 8154 n.12, *citing* Letter from Chief, Domestic Facilities Division, to Robert D. Briskman, Geostar Positioning Corporation (dated Aug. 29, 1990) (returning earth station applications as premature when applicant failed to identify satellite); Letter from Chief, Domestic Facilities Division, to Satellite CD Radio, Inc. (dated Aug. 2, 1993) (returning earth station applications as premature when the satellite had not been authorized).

<sup>37</sup> TelQuest Application at 6-7; TelQuest Reply at 4, *citing* 47 C.F.R. § 0.445(e).

<sup>38</sup> *Dismissal Order*, 11 FCC Rcd at 8154 (para. 10). *See* EchoStar Opposition at 8 n.10.

<sup>39</sup> Furthermore, the Commission has authority under the Communications Act and the Commission's rules to dismiss license applications that do not serve the public interest, convenience, and necessity. Sections 309(a), 4(i), and 4(j) of the Communications Act, 47 C.F.R. §§ 309(a), 154(i), 154(j); Section 25.156(a) of the Commission's rules, 47 C.F.R. § 25.156(a). For the reasons set forth in the

*Order*, we adopted this practice to avoid the need to expend administrative resources to maintain premature earth station applications pending the outcome of uncertain licensing decisions.<sup>40</sup> In addition, this practice avoids encouraging earth station applications filed in the United States in the hope of influencing space station licensing decisions in foreign administrations.<sup>41</sup>

## 6. Waiver

17. Alternatively, TelQuest argues that we should have waived the receive-only earth station licensing requirement in its case because its service would further the public interest.<sup>42</sup> TelQuest did not request such a waiver in either its earth station application or its petition for reconsideration. Furthermore, the standard for waivers is well established,<sup>43</sup> and the vague assertions regarding the public interest in TelQuest's application for review are not sufficient to meet that standard.

## B. Industry Canada's Conditional Support in Principle

### 1. Background

18. With their Petitions for Reconsideration, and in support of their argument that the satellites were licensed, TelQuest and WTCI submitted a copy of a letter from the Minister of Industry Canada, John Manley, to Telesat. This letter stated "I support in principle your proposal to utilize the 82° W. and the 91° W. orbit positions and associated spectrum for a DBS service."<sup>44</sup> The *1996 Conditional Support in Principle* was subject to ten requirements. Five of these requirements related specifically to Telesat's deployment of service, were it to be licensed.<sup>45</sup> The

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*Dismissal Order* and the *Reconsideration Order* and summarized in this paragraph, the Bureau reasonably concluded that granting earth station applications filed before the associated space stations have been authorized would not serve the public interest, convenience, and necessity.

<sup>40</sup> *Dismissal Order*, 11 FCC Rcd at 8154 (para. 10).

<sup>41</sup> *Dismissal Order*, 11 FCC Rcd at 8154 (para. 10).

<sup>42</sup> TelQuest Reply at 3.

<sup>43</sup> See Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio*); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>44</sup> *1996 Conditional Support in Principle* at 1.

<sup>45</sup> These five requirements are as follows: (1) The DBS licenses would be owned and operated by Telesat, as set out in its proposal, in its capacity as a Canadian carrier under the Telecommunications Act, and would require radio authorization under the Radiocommunication Act; (2) DBS facilities shall be available on a first-come, first-served basis for use by those licensed or seeking licenses under the Broadcasting Act to operate DBS broadcasting undertakings in Canada; (3) Provision of DBS satellite facilities in foreign countries would be subject to their approval under their domestic regulations and policies, and to the successful modifications to the ITU BSS Plan; (4) The authorization fees to be fixed under Industry Canada's authority for the DBS satellites would reflect fair market value of the spectrum and orbit resources; and (5) The support for this request is limited to the specific proposal by Telesat, and any change in the proposal which in Industry Canada's opinion is substantive, could lead to re-evaluation of its support. *1996 Conditional Support in Principle* at 2.

other five factors related to broad regulatory and trade policy issues concerning the Canadian and global satellite market:

- (1) the outcome of the GATS/NGBT<sup>46</sup> talks expected at the end of April 1996;
- (2) any required negotiations with the U.S. administration and with any other involved country;
- (3) achieving any required modifications of the government's DBS/DTH satellite policy;
- (4) obtaining concurrence of affected countries through the ITU coordination process; and,
- (5) establishment of the appropriate fees for each of the orbital positions.<sup>47</sup>

In conclusion, Minister Manley stated, "[o]nce all the requirements and premises outlined above have been met to my satisfaction, I would be prepared to issue a radio authorization to utilize the Canadian orbital positions and associated spectrum as outlined in your request."<sup>48</sup>

19. In the *Reconsideration Order*, the Bureau noted that several of the conditions in the *1996 Conditional Support in Principle* had not been met, and that Industry Canada would not issue any license to Telesat until all the conditions in Minister Manley's letter were met to his satisfaction.<sup>49</sup> Accordingly, the Bureau concluded that the *1996 Conditional Support in Principle* did not constitute a license.<sup>50</sup>

20. Shortly after the release of the *Reconsideration Order*, Industry Canada sent a letter to Telesat withdrawing its *1996 Conditional Support in Principle*.<sup>51</sup> Industry Canada announced plans to invite "applications to develop Canadian DBS facilities using Canadian orbital and spectrum resources."<sup>52</sup> In 1997, Industry Canada granted Telesat a license to operate a satellite at the 91° W.L. orbital location to provide DBS services to Canada.<sup>53</sup>

## 2. Discussion

21. WTCI contends that the Bureau should have construed Industry Canada's conditional support in principle as a license, and so should have construed its earth station application as

<sup>46</sup> This condition referred to the World Trade Organization's (WTO's) discussions regarding basic telecommunications services, related to the General Agreements on Trade and Services and the Negotiating Group for Basic Telecommunications. *See Reconsideration Order*, 11 FCC Rcd at 13947 n.11.

<sup>47</sup> *1996 Conditional Support in Principle* at 2-3.

<sup>48</sup> *1996 Conditional Support in Principle* at 3.

<sup>49</sup> *Reconsideration Order*, 11 FCC Rcd at 13947 (para. 12).

<sup>50</sup> *Reconsideration Order*, 11 FCC Rcd at 13949 (para. 15).

<sup>51</sup> Letter from Minister John Manley, Industry Canada, to Larry Boisvert, President and CEO, Telesat (dated Oct. 28, 1996) (attached to WTCI Reply) (*October 28 Letter*).

<sup>52</sup> *October 28 Letter* at 2.

<sup>53</sup> Letter from John Manley, Minister of Industry, Canada, to Mr. L.J. Boisvert, President and CEO, Telesat (dated April 7, 1997) (*1997 License Grant*), attached to Letter from James Troup, counsel for TelQuest, to William F. Caton, Acting Secretary, FCC (dated April 29, 1997).



identifying a licensed satellite. WTCI argues that Industry Canada supported Telesat's application, and stated that "[u]ncertainty concerning your access to the orbital positions should not be an impediment to FCC consideration of the applications on their merits."<sup>54</sup> WTCI claims that the Bureau unduly interceded in the licensing procedures of another administration by noting that the conditions may preclude Telesat from receiving the authority it has requested.<sup>55</sup> Finally, WTCI observes that Industry Canada withdrew its letter of support after the *Reconsideration Order* was released.<sup>56</sup> According to many parties opposing the applications for review, this withdrawal shows that the Bureau was correct in concluding that a statement of support in principle, especially as conditioned, is not a license.<sup>57</sup>

22. None of WTCI's contentions convince us that the *1996 Conditional Support in Principle* constituted a license. Rather, that letter listed ten conditions that Telesat was required to meet before Industry Canada would authorize it to operate DBS satellites at the orbital locations at issue. In fact, in the language quoted by WTCI, Industry Canada notes that there is uncertainty concerning Telesat's access to those orbital positions. It would be at best inconsistent to call this letter an authorization for Telesat to use those orbital positions when it recognizes that there is uncertainty over whether Telesat would ever gain access to orbital positions. Furthermore, given that Industry Canada withdrew its conditional support in principle after the *Reconsideration Order*, we find that the Bureau's conclusion that the conditional support in principle was not a license was well founded.

23. WTCI is also mistaken in claiming that the Bureau unduly interceded in Canada's licensing procedures. The Bureau merely noted that there were several conditions which could preclude Telesat from obtaining authorization for its space stations, and that, therefore, WTCI's earth station application for authority to communicate with a space station that might never be authorized was premature. Nothing in the *Dismissal Order* recommends a particular outcome for Industry Canada's licensing proceeding, or offers an opinion on what affect its decision might have or should have on Industry Canada's licensing proceeding.

24. WTCI also observes that the Commission often places conditions on licenses, and that does not cast doubt on the validity of the license itself.<sup>58</sup> The conditions listed in the *1996 Conditional Support in Principle* were nothing like the conditions we impose on the operating authority we grant. For example, we occasionally place conditions on space station authorizations to limit operations in specific frequency bands to specific services.<sup>59</sup> We also

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<sup>54</sup> WTCI Application at 8-9.

<sup>55</sup> WTCI Application at 9 n.15.

<sup>56</sup> WTCI Application at 10 n.23, *citing* "News Release, Industry Canada, dated November 7, 1996, at 3." *See also October 28 Letter*.

<sup>57</sup> MCI/NewsCorp. Opposition at 4-6; USSB Opposition at 2; DIRECTV Opposition at 3, 5-6; EchoStar Opposition at 3-4, 9.

<sup>58</sup> WTCI Application at 9 n.15.

<sup>59</sup> *See* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, GE American Communications, Inc., *Order and Authorization*, 15 FCC Rcd 3385, 3393 (para. 24) (Int'l Bur., Sat and Rad. Div. 1999) (limiting licensee's operations in the 11.45-11.7 GHz band to international service).

condition some space station authorizations to require operation on a non-harmful interference basis pending international coordination.<sup>60</sup> In addition, as discussed above, we conditioned some licenses in the 1980s and early 1990s on completion of INTELSAT Article XIV(d) consultation.<sup>61</sup> In all these cases, the conditions determined how the satellite would be operated, not whether it will be allowed to operate at all. Conversely, the *1996 Conditional Support in Principle* did not grant Telesat operating authority, but listed conditions that Telesat had to meet before it would be granted operating authority.

25. The *1996 Conditional Support in Principle* is not a license issued by Industry Canada. In contrast, for example, in April 1997, Industry Canada authorized Telesat to launch a DBS satellite into the 91° W.L. orbital location.<sup>62</sup> That license stated unequivocally: "It is with great pleasure that I wish to inform you that you have been selected to develop and operate a DBS facility in the 91 degree West longitude orbital position in the 12.2-12.7 GHz and 17.3-17.8 GHz frequency bands. *This letter constitutes a spectrum license granted to Telesat Canada.*"<sup>63</sup> When Industry Canada issues a DBS satellite authorization, it specifically states that it is granting a spectrum license. In addition, the 1997 License Grant did not contain the broad policy conditions present in the *1996 Conditional Support in Principle* that, at the time, had the potential to preclude Telesat from obtaining operating authority. Rather, the conditions accompanying the 1997 License Grant were typical licensing requirements related to the specific deployment and operation of Telesat's service.

26. Finally, according to WTCI, Minister Manley sent a letter to Telesat explaining that its conditional statement of support was a license, and that the only thing remaining was U.S. approval of WTCI's earth station application.<sup>64</sup> We disagree with WTCI's interpretation of this letter. While Minister Manley repeats his support in principle for Telesat's proposal, he also emphasizes that Telesat has not met one of the conditions in the *1996 Conditional Support in Principle*.<sup>65</sup> Minister Manley also states that, unless that condition was met by October 31, 1996, three days after he sent the letter to Telesat, he would withdraw his support in principle.<sup>66</sup> There is no basis in the *Industry Canada October 28 Letter* for concluding that Industry Canada had issued a license to Telesat at the time of the Bureau's *Dismissal Order*.

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<sup>60</sup> Loral CyberStar, Inc., Applications for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service, *Order and Authorization*, 15 FCC Rcd 24602, 24610 (para. 24) (Int'l Bur., 2001); Sirius Satellite Radio Inc., *Order and Authorization*, DA 01-639 (Int'l Bur., released Mar. 9, 2001).

<sup>61</sup> *Intelconsult Order*, 4 FCC Rcd at 3609-10 (paras. 12-13).

<sup>62</sup> *1997 License Grant*.

<sup>63</sup> *1997 License Grant* at 1 (emphasis added).

<sup>64</sup> WTCI Reply at 3-4, *citing* Letter from John Manley, Minister of Industry, Industry Canada, to L.J. Boisvert, President and Chief Executive Officer, Telesat Canada (dated Oct. 28, 1996) (*Industry Canada October 28 Letter*) (attached to WTCI's reply).

<sup>65</sup> *Industry Canada October 28 Letter* at 2 (the Canadian and U.S. Administrations had not negotiated any modifications of the U.S. Administration's DBS/DTH satellite policy).

<sup>66</sup> *Industry Canada October 28 Letter* at 2.

## C. Other Issues

### 1. ECO-Sat Test

27. The "Effective Competitive Opportunities for Satellites" test (ECO-Sat test) requires parties to demonstrate that U.S.-licensed satellite systems have effective competitive opportunities in foreign markets.<sup>67</sup> TelQuest and WTCI incorrectly assume that their earth station applications were denied on the basis of the ECO-Sat test, and cite several Orders that they claim preclude us from applying the ECO-Sat test in their case.<sup>68</sup> As we explained above, the Bureau dismissed their applications *without prejudice*, and so did not reach this issue.<sup>69</sup> Accordingly, Orders determining whether to apply the ECO-Sat test are irrelevant to our consideration of TelQuest's and WTCI's applications for review.

### 2. Policy Goals of Communications Act

28. TelQuest notes that Congress included a number of policy directives in the Communications Act, and claims that these policy directives require us to grant TelQuest's earth station application.<sup>70</sup> We note again, however, that the Bureau dismissed the TelQuest's earth station application *without prejudice*.<sup>71</sup> We see nothing in the statutory provisions cited by TelQuest that requires us to consider the merits of premature earth station applications. Thus, all of TelQuest's arguments regarding interpretation of the Communications Act are irrelevant.

29. Furthermore, if we considered TelQuest's arguments, we would conclude that it misinterprets the statutory provisions it cites. For example, TelQuest argues that granting its earth station application would increase the number of DBS providers in the market, and so increase competition.<sup>72</sup> TelQuest argues further that this increased competition helps to "make service available so far as possible, at reasonable charges," and that, therefore, Section 1 of the Act requires us to grant its application.<sup>73</sup> Similarly, TelQuest maintains that authorizing an additional DBS provider, by itself, would further the public interest, convenience, and necessity, and so Section 309(a) "mandates" us to grant its earth station application.<sup>74</sup> Granting any new earth station license, or any existing licensee authority to operate an additional earth station,

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<sup>67</sup> *DISCO II Order*, 12 FCC Rcd at 24112-13 (para. 40); 47 C.F.R. § 25.137(a).

<sup>68</sup> TelQuest Application at 21-22, *citing* Shell Offshore Services Company, *Order and Authorization*, 11 FCC Rcd 10119 (Int'l Bur. 1996); TelQuest Reply at 3 n.6, *citing* Cable & Wireless, Inc., *Order, Authorization, and Certificate*, 11 FCC Rcd 16486 (Int'l Bur. 1996); Telstra, Inc., *Order and Authorization*, 11 FCC Rcd 20428 (Int'l Bur. 1996); WTCI Reply at 4-5, *citing* MCI Telecommunications Corp., *Order*, 11 FCC Rcd 16275, 16286 (para. 27) (Int'l Bur. 1996).

<sup>69</sup> *Dismissal Order*, 11 FCC Rcd at 8155 (para. 12).

<sup>70</sup> *See* TelQuest Application at 7-13, TelQuest Reply at 1-3, 5, *citing* 47 U.S.C. §§ 151, 157, 257, 309(a), 309(j).

<sup>71</sup> *Dismissal Order*, 11 FCC Rcd at 8155 (para. 12).

<sup>72</sup> TelQuest Application at 7.

<sup>73</sup> TelQuest Application at 7-8, *citing* 47 U.S.C. § 151.

<sup>74</sup> TelQuest Reply at 1-3, *citing* 47 U.S.C. § 309(a).

would increase the number of licensees providing service, and so would "increase competition." Therefore, under TelQuest's interpretation, Sections 1 and 309(a) would require us to grant every application filed, regardless of the potential for interference to other operators. This would substantially negate the remainder of Title III of the Communications Act.<sup>75</sup>

30. TelQuest asserts that the service it planned to offer was an additional DBS service option, and so was a "new service or new technology" under Section 7.<sup>76</sup> EchoStar replies that TelQuest proposed a standard DBS service, not a new service or a new technology.<sup>77</sup> EchoStar is correct on this issue. TelQuest made no representation that its proposed service would employ any new technology. Thus, TelQuest's proposed service was outside the scope of Section 7.<sup>78</sup>

31. TelQuest also asserts that we should grant its earth station application because Section 257 requires the Commission to eliminate market entry barriers for small businesses.<sup>79</sup> The Commission has already determined that the practice of requiring earth station license applications to propose communicating with licensed space stations does not impose burdens uniquely or predominately on small businesses, and so is not inconsistent with Section 257.<sup>80</sup> TelQuest similarly argues that Section 309(j) compels us to grant its earth station application to promote economic opportunity for small businesses, and to promote diversity.<sup>81</sup> Section 309(j) directs the Commission to promote economic opportunities for small businesses participating in auctions for Commission licenses.<sup>82</sup> Section 309(j) is not applicable here because we do not issue earth station licenses pursuant to auctions.

### 3. Constitutional Arguments

32. TelQuest claims that dismissing its earth station application without prejudice has the effect of restricting its First Amendment right to free speech, and claims that the Bureau did not

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<sup>75</sup> Courts do not interpret clauses of statutes in a way that would make other clauses of the statute meaningless. *See, e.g.,* *Toro Corp. v. White Consolidated Industries, Inc.*, 199 F.3d 1295, 1300 (Fed. Cir. 1999); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *Hughes Air Corp. v. Public Utility Commission of Calif.*, 644 F.2d 1334, 1338 (9th Cir. 1981).

<sup>76</sup> TelQuest Application at 8-10, TelQuest Reply at 2, *citing* 47 U.S.C. § 157.

<sup>77</sup> EchoStar Opposition at 14.

<sup>78</sup> *See* Amendment of Part 74, Subpart E of the Commission's Rules Pertaining to FM Radio Broadcast Translator Stations, Docket No. 19918, *Memorandum Opinion and Order*, 98 FCC 2d 35, 44 (para. 30) (1984) (In this Order, the Commission denied a petition for rulemaking requesting a reduction in minimum signal strength for AM radio stations. The Commission found that its denial was consistent with Section 7 because the petitioner's proposed rule change "would not be a 'new' service within the meaning of the law. Rather, the service would be an extension of an existing service utilizing existing technology.").

<sup>79</sup> TelQuest Application at 12-13, TelQuest Reply at 5, *citing* 47 U.S.C. § 257.

<sup>80</sup> Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, *Report*, 12 FCC Rcd 16802, 16909-10 (paras. 197-98) (1997).

<sup>81</sup> TelQuest Application at 11-12, TelQuest Reply at 5, *citing* 47 U.S.C. § 309(j).

<sup>82</sup> *See* 47 U.S.C. § 309(j)(1).

meet the Supreme Court's standard for adopting a restriction on speech.<sup>83</sup> MCI/NewsCorp. responds that TelQuest's First Amendment rights were not violated because it never had a space station facility to speak through.<sup>84</sup> EchoStar argues that First Amendment rights do not include the right to use radio facilities without a license, or to receive a license.<sup>85</sup> EchoStar also reasons that adopting TelQuest's argument would preclude the Commission from ever denying any Title III application.<sup>86</sup> We are not persuaded by TelQuest's claim. The Supreme Court has considered and rejected arguments that the Communications Act's licensing regime violates the First Amendment simply because some license applications may be denied.<sup>87</sup>

33. TelQuest further alleges that it is a violation of the equal protection clauses of the Fifth and Fourteenth Amendments to require receive-only earth stations to obtain licenses to communicate with non-U.S.-licensed satellites, but not with domestic satellites.<sup>88</sup> EchoStar replies that this requirement is necessary for the Commission to carry out its statutory obligation to regulate foreign communications.<sup>89</sup> EchoStar is correct. In *DISCO II*, we considered and rejected arguments that the licensing requirement for receive-only earth stations communicating with non-U.S.-licensed satellites was inconsistent with the World Trade Organization (WTO) Basic Telecom Agreement to treat U.S.-licensees and non-U.S.-licensees equivalently.<sup>90</sup> The earth station licensing requirement is the only means to ensure that these receive-only operations do not cause harmful interference to other properly authorized operations. Accordingly, we conclude that our licensing requirement is rationally related to a legitimate governmental purpose, and therefore does not violate the equal protection provisions of the Constitution.<sup>91</sup>

34. TelQuest's claims have the common premise that the Bureau should have granted its earth station application because certain other applicants had their applications granted for deployment of earth stations to access already U.S.-licensed and/or U.S.-operating satellites. That being the case, TelQuest believes that its application to deploy earth stations to access a then unlicensed and non-operational Canadian satellite should have been granted. Wholly aside from the facial implausibility of this argument as discussed above, the argument implies that TelQuest has an automatic right to a license grant. The Supreme Court, however, has long upheld the

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<sup>83</sup> TelQuest Application at 13-17.

<sup>84</sup> MCI/NewsCorp. Opposition at 5.

<sup>85</sup> EchoStar Opposition at 13.

<sup>86</sup> EchoStar Opposition at 13.

<sup>87</sup> National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 226-27 (1943) (*NBC v. United States*).

<sup>88</sup> TelQuest Application at 17-21.

<sup>89</sup> EchoStar Opposition at 13-14.

<sup>90</sup> Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and International Service in the United States, *Report and Order*, IB Docket No. 96-111, 12 FCC Rcd 24094, 24180 (para. 203) (1997) (*DISCO II*).

<sup>91</sup> See Board of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 121 S.Ct. 955, 963-64 (2001), citing Heller v. Doe, 509 U.S. 312, 320 (1993), Nordlinger v. Hahn, 505 U.S. 1 (1992); New Orleans v. Dukes, 427 U.S. 297 (1976).

Commission's right to require a license before spectrum may be used.<sup>92</sup> Therefore, we find that TelQuest's arguments do not support the assertion that the Commission's actions constitute a violation of the Constitution.

#### 4. Delegation of Authority

35. While TelQuest's and WTCI's earth station applications were pending, a number of Executive Agencies filed a joint letter opposing those applications.<sup>93</sup> The Bureau did not reach any of the issues raised in the letter in the *Dismissal Order*, however, because it dismissed the earth station applications on procedural grounds.<sup>94</sup> TelQuest claims that the Bureau did in fact rely on the Executive Agencies Letter, and claims that this reliance amounts to an improper delegation of authority.<sup>95</sup> TelQuest also cites press reports which it claims show that Commission employees were influenced by "conflicting pressures that were unrelated to the matter before the Commission."<sup>96</sup>

36. First, as EchoStar observes, the Bureau acted on procedural grounds, and never reached any substantive issues raised in the *Executive Branch Letter*.<sup>97</sup> Second, if the Bureau had reached any substantive issues, considering the arguments raised in that letter would not be a delegation of authority to another agency. TelQuest and WTCI provide no reason to exclude letters from other Government Agencies from the record.<sup>98</sup> Finally, we find that TelQuest incorrectly assumes that anything published in any press report could possibly compel us to change either of these conclusions.

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<sup>92</sup> See *NBC v. United States*, 319 U.S. at 227 ("The right of free speech does not include the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce.").

<sup>93</sup> *Dismissal Order*, 11 FCC Rcd at 8153 n.10, citing Letter from U.S. Dep't of State, Office of the U.S. Trade Representative, and the U.S. Dep't of Justice to Reed E. Hundt, Chairman, FCC (July 1, 1996) (*Executive Branch Letter*).

<sup>94</sup> *Dismissal Order*, 11 FCC Rcd at 8155 (para. 12).

<sup>95</sup> TelQuest Application at 10-11, citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 846 (1935) (*Schechter Poultry*); Section 0.201(a)(1) of the Commission's rules, 47 C.F.R. § 0.201(a)(1) (general statement that the Commission can delegate authority to Bureau chiefs), TelQuest Reply at 1 n.1. TelQuest also cites Section 309(a) of the Communications Act, 47 U.S.C. § 309(a), which empowers the Commission to determine whether granting a license application would serve the public interest, convenience, and necessity, and, if so, to grant such applications. TelQuest does not explain how Section 309(a) supports its delegation argument.

<sup>96</sup> TelQuest Application at 11 and Exh. 4.

<sup>97</sup> EchoStar Opposition at 14-15.

<sup>98</sup> TelQuest misplaces its reliance on *Schechter Poultry*. That case addressed Congressional delegation of authority to administrative agencies, and how much guidance Congress must give an administrative agency in enabling statutes. It did not consider whether it is appropriate to include certain evidence in the record in an administrative proceeding.

#### D. Substantive Issues

37. Several parties advocate denial of TelQuest's and WTCI's earth station applications in the event that we reverse the Bureau's *Dismissal Order*.<sup>99</sup> Because we affirm the Bureau's Order, we do not need to reach these issues.

#### IV. CONCLUSION

38. In summary, the *Dismissal Order* dismissed two earth station applications without prejudice. Given that the Bureau did not reach any substantive issue, we cannot rely on any of TelQuest's and WTCI's substantive arguments as a basis for reversing the *Dismissal Order*. Furthermore, even if those arguments were relevant, they would not provide a basis for reversal because they are unpersuasive.

#### V. ORDERING CLAUSES

39. Accordingly, pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, IT IS ORDERED that Applications for Review filed by TelQuest Ventures, L.L.C. and Western Tele-Communications, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>99</sup> EchoStar Opposition at 15-16; MCI/NewsCorp. Opposition at 6-7; DIRECTV Opposition at 6-7; Hawaii Opposition at 1-4.

**APPENDIX A**Applications for Review

- TelQuest (filed Nov. 29, 1996)
- WTCI (filed Nov. 27, 1996)

Oppositions

- DIRECTV, Inc. (DIRECTV) (opposing only TelQuest Application) (filed Dec. 12, 1996)
- EchoStar Satellite Corporation and EchoStar DBS Corporation (EchoStar) (filed Dec. 16, 1996)
- MCI Telecommunications Corporation and The News Corporation, Limited (MCI/NewsCorp.) (filed Dec. 12, 1996)
- State of Hawaii (Hawaii) (filed Dec. 12, 1996)
- United States Satellite Broadcasting Company, Inc. (USSB) (opposing only WTCI Application) (filed Dec. 12, 1996)

Replies

- TelQuest (filed Dec. 26, 1996)
- WTCI (filed Dec. 24, 1996)