

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

In the Matter of	)	
	)	
Compass Systems, Inc.	)	
	)	File No. DBS-88-01
Application for Review of	)	DA 02-1163
EchoStar Satellite Corporation	)	SAT-LOA-19980128-00046
Assignment of Direct Broadcast Satellite	)	
Orbital Position and Channels	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 26, 2004**

**Released: June 1, 2004**

By the Commission:

**I. INTRODUCTION**

1. This Memorandum Opinion and Order denies the Application for Review filed by Compass Systems, Inc. (Compass). Compass seeks review of an International Bureau, Satellite Division, decision finding that EchoStar Satellite Corporation (EchoStar) satisfied its due diligence obligation for its western orbit location permit to operate a direct broadcast satellite (DBS) system. We find that Compass presents no basis to change the Satellite Division's order. The decision to assign EchoStar DBS channels pursuant to its outstanding western permit is consistent with Commission precedent and is in the public interest.

**II. BACKGROUND**

2. In August 1989, the Commission granted EchoStar a construction permit for a multi-satellite DBS system.<sup>1</sup> This permit was conditioned on the requirement that EchoStar construct its system with "due diligence" as defined by the Commission's rules. Pursuant to the due diligence rules in effect at the time, a DBS permittee was required to first, begin construction or complete contracting for construction of its satellite(s) within one year of the grant of its construction permit. Under the DBS Processing Procedures, particular orbital positions and channels were not assigned to a DBS permittee until it demonstrated it had fulfilled this component of the due diligence requirement.<sup>2</sup> Second, a permittee must have its DBS system in operation within six years of the grant of its construction permit "unless otherwise determined by the Commission upon proper showing in any particular case."<sup>3</sup>

<sup>1</sup> Continental Satellite Corporation, *Memorandum Opinion and Order*, 4 FCC Rcd 6292, 6300 (1989).

<sup>2</sup> Processing Procedures Regarding the Direct Broadcast Satellite Service, *Memorandum Opinion and Order*, 95 FCC 2d 250, 253 (1983).

<sup>3</sup> 47 C.F.R. § 100.19 (b) & (c) (1989). The DBS rules set forth in Part 100 were subsequently revised and incorporated into Part 25 of the Commission's Rules. See Policies and Rules for the Direct Broadcast Service, *Report and Order*, IB Docket No. 98-21, 17 FCC Rcd 11331 (2002) (*DBS Order*). The new DBS due diligence requirements are now set forth in 47 C.F.R. § 25.148(b).

3. In February 1990, EchoStar submitted documents and information to demonstrate compliance with the first component of the due diligence requirement.<sup>4</sup> In 1992, the Commission reviewed the information submitted by EchoStar and concluded it was sufficient to justify an assignment of DBS channels at an eastern orbital location.<sup>5</sup> As to a western orbital location, the Commission found that EchoStar had contracted only for an option for a western satellite and thus concluded that a western orbital position and channel assignment could not be made to EchoStar at that time. Nevertheless, the Commission did not cancel EchoStar's permit. During this "pioneering era" of DBS, the Commission was reluctant to cancel permits "without the benefit of experience."<sup>6</sup> Thus, in view of EchoStar's investment in and commitment to establishing a DBS system, the Commission granted EchoStar three months to demonstrate due diligence with regard to its proposed western satellite.<sup>7</sup> EchoStar filed with the Commission a copy of a contract for the construction of its western satellite within the additional time granted by the Commission. At the Satellite Division's request, EchoStar also filed additional information updating the status of construction.

4. Based on this information, in May 2002, the Satellite Division concluded that EchoStar had contracted for the construction of a western satellite and was entitled to an orbit location and channel assignment.<sup>8</sup> Although the record indicated that EchoStar had contracted for one satellite, EchoStar requested DBS channel assignments at two orbit locations. The Division directed EchoStar to select its preferred channel assignments at one orbit location. EchoStar selected 11 DBS channels at the 157° W.L. orbit location.<sup>9</sup> EchoStar, however, subsequently advised the Division that, under a revised business plan, it could provide timely service to the public by using two orbital locations, 148° W.L. and 157° W.L. The Division approved the plan, noting that EchoStar had permanent authority to operate on 24 channels at 148° W.L., and was operating the remaining eight channels pursuant to special temporary authority. Granting EchoStar permanent authority to use the remaining eight channels at 148° W.L., the Division stated, would allow EchoStar to continue to provide service using a single satellite platform. The Division also granted EchoStar's request to move an operating satellite, EchoStar 4, to provide service using three channels at the 157° W.L. orbital location. Thus, the assignment enabled EchoStar to receive its full complement of 11 channels and provide prompt service to consumers.<sup>10</sup> Further, in the *Assignment Order*, the Division noted that EchoStar's permit required it to commence operations no later than 1995. However, because of the Division's delay in making the orbit location and channel assignment the Division, on its own motion, granted EchoStar an additional three years from the date of

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<sup>4</sup> EchoStar Satellite Corporation, Assignment of Direct Broadcast Satellite Orbital Positions and Channels, *Memorandum Opinion and Order*, 7 FCC Rcd 1765 (1992) (*EchoStar Due Diligence Order*).

<sup>5</sup> *EchoStar Due Diligence Order*, 7 FCC Rcd at 1770. At the time EchoStar's permit was issued, DBS orbit locations were assigned in east/west pairs, with service to the eastern half of the contiguous United States (CONUS) permitted from the four eastern orbit locations (61.5° W.L., 101° W.L., 110° W.L., and 119° W.L.) and western half-CONUS service permitted from the four western orbit locations (148° W.L., 157° W.L., 166° W.L., and 175° W.L.). The east/west pairing policy was subsequently eliminated because full-CONUS coverage is technically feasible from several of the eastern locations.

<sup>6</sup> Advanced Communications Corporation, *Memorandum Opinion and Order*, 11 FCC Rcd 3399, 3408 (1995).

<sup>7</sup> *EchoStar Due Diligence Order*, 7 FCC Rcd at 1772.

<sup>8</sup> EchoStar Satellite Corporation, Assignment of Direct Broadcast Satellite Orbital Position and Channels, *Memorandum Opinion and Order*, 17 FCC Rcd 8827 (Sat. Div., Int'l Bur. 2002) (*Assignment Order*).

<sup>9</sup> Letter to Marlene H. Dortch, Secretary FCC, from Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation, dated May 28, 2002.

<sup>10</sup> EchoStar Satellite Corporation, Assignment of Direct Broadcast Satellite Orbital Position and Channels, *Order*, 18 FCC Rcd 9396 (Sat. Div., Int'l Bur. 2003).

the Order to commence operations.<sup>11</sup>

5. In a separate proceeding, EchoStar requested an extension of its second due diligence requirement, to commence operations within six years of authorization, for its DBS permit at the 175° W.L. location. This permit is unrelated to the permit at issue in the *Assignment Order*.<sup>12</sup> The Satellite Division reviewed EchoStar's request for an extension of its operation milestone under the requisite "totality of circumstances" standard, in effect for DBS permittees at the time EchoStar's 175° W.L. authorization was granted. Under that standard, the Division examined various factors including efforts made, difficulties encountered, and the ultimate goal of service to the public. Given the importance of milestone enforcement to ensure valuable spectrum resources are efficiently put to use, the Satellite Division carefully scrutinized EchoStar's extension request. The Satellite Division concluded that EchoStar failed to complete construction of its satellite within the time frame required by the 175° W.L. permit, and did not present a sufficient justification to warrant an extension of the operation milestone. Thus, the Satellite Division found that EchoStar had not made any progress toward completing its system since receiving its orbit location and channel assignment. Accordingly, in an Order released concurrently with the *Assignment Order*, the Division cancelled EchoStar's DBS permit for the 175° W.L. orbit location, making the channels at 175° W.L. available for reassignment.<sup>13</sup>

6. Compass filed an Application for Review of the *Assignment Order*.<sup>14</sup> At the time EchoStar selected the 157° W.L. orbit location for its western DBS satellite, Compass had filed an application seeking to operate DBS satellites at the 157° W.L. and 166° W.L. orbit locations. As a result of EchoStar's selection of the 157° W.L. orbit location, Compass claimed it was "aggrieved" by the *Assignment Order*. Compass seeks review of the *Assignment Order* on four grounds: First, Compass asserts that EchoStar's permit was automatically cancelled in 1995 because EchoStar failed to meet the requirement to bring its western satellite into operation within six years of the grant of its permit. Second, Compass claims that the *Assignment Order* violates the Commission's policy against warehousing spectrum. According to Compass, the Satellite Division extended EchoStar's operation milestone without any discussion or justification, and that the extension allowed EchoStar to warehouse a western orbital location for 15 years.<sup>15</sup> Third, Compass claims that the Satellite Division failed to explain its disparate treatment between EchoStar's outstanding western permit and its cancelled permits for the 175° W.L. orbit location. Compass states that all of the EchoStar permits at issue in both proceedings had the same operation milestones, yet the Satellite Division cancelled only the permits for the 175° W.L. orbit location. Compass states the Satellite Division's actions are arbitrary and capricious.<sup>16</sup> Finally, Compass argues that the *Assignment Order* stifles competition by preventing new DBS operators, such as Compass, from competing with EchoStar. EchoStar should not, Compass states, be allowed to circumvent the DBS

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<sup>11</sup> *Assignment Order*, 17 FCC Rcd at 8830.

<sup>12</sup> EchoStar Satellite Corporation, DirectSat Corporation, Direct Broadcasting Satellite Corporation, Consolidated Request for Additional Time to Commence Operation, *Memorandum Opinion and Order*, 17 FCC Rcd 8831 (Sat. Div., Int'l Bur. 2002) (*Cancellation Order*). The Commission had previously determined that EchoStar met the first due diligence requirement by entering into a contract for construction of its satellite and assigned EchoStar 22 DBS channels at the 175° W.L. orbital location. See *Cancellation Order*, 17 FCC Rcd at 8832, n.5, and cases cited therein.

<sup>13</sup> *Cancellation Order*, 17 FCC Rcd at 8835. The Commission recently announced an auction for unassigned DBS channels at the 175° W.L., 166° W.L., and 157° W.L. orbit locations. Public Notice, Auction of Direct Broadcast Satellite Service Licenses Rescheduled for July 14, 2004, DA 04-278 (rel. Feb. 6, 2004).

<sup>14</sup> Compass Systems, Inc. Application for Review of EchoStar Satellite Corporation, For Assignment of Direct Broadcast Satellite Orbit Position and Channels, filed June 17, 2002 (*Compass Application for Review*).

<sup>15</sup> *Compass Application for Review* at 11.

<sup>16</sup> *Compass Application for Review* at 14.

application process by resurrecting a stale and abandoned permit.<sup>17</sup>

7. EchoStar filed an opposition to the Application for Review.<sup>18</sup> EchoStar responds that its permit was not cancelled automatically because it had a pending application to extend the operation milestone.<sup>19</sup> Second, EchoStar states it could not have put a satellite in operation without an assigned orbit location.<sup>20</sup> EchoStar maintains that Compass confuses the first and second requirements of the DBS due diligence obligations in addressing EchoStar's permits. In the *Assignment Order*, the issue was whether EchoStar had completed contracting for a western satellite, and Compass acknowledges that EchoStar had indeed executed a construction contract.<sup>21</sup> Accordingly, EchoStar states that there is no basis for the Commission to reconsider the *Assignment Order*. EchoStar also refutes Compass' assertion that EchoStar warehoused spectrum. Rather, EchoStar states, more spectrum became available as a result of the cancellation of EchoStar's permit at 175° W.L. which made available 22 channels of DBS spectrum.<sup>22</sup> Compass filed a reply to EchoStar's opposition.<sup>23</sup>

### III. DISCUSSION

8. Compass' Application for Review fails to persuade us to vacate the Division's order. Rather, it demonstrates that Compass has misread or misinterpreted the Division's Order. Addressing Compass' arguments in turn, we start with the assertion that EchoStar's permit was automatically cancelled for failure to comply with the second milestone requirement, since it did not have a satellite in operation by 1995.<sup>24</sup> As the Division explained in its decision, DBS applicants at that time first received a conditional construction permit, after which they had one year to establish due diligence in building or contracting for the required satellites. Specific orbit locations and channels were assigned only *after* the Commission's determination that the permittee successfully satisfied this first due diligence showing.<sup>25</sup> EchoStar could not launch a satellite and commence operations of its western satellite until this occurred. In this instance, the assignment could not be made until the Commission determined that EchoStar had satisfied its first due diligence requirement. To make this finding, the Commission specifically directed EchoStar, in 1992, to submit information demonstrating that it had completed contracting for the construction of the

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<sup>17</sup> *Compass Application for Review* at 15.

<sup>18</sup> Opposition of EchoStar Satellite Corporation, filed July 2, 2002 (*EchoStar Opposition*).

<sup>19</sup> EchoStar's Application for Extension of Time requested an additional year to construct its first satellite, and four years for its western satellite "once the Commission grants EchoStar specific western orbital assignments." In 1996, the International Bureau granted the first part of EchoStar's application, but deferred its request for an extension with respect to the western orbit location because EchoStar's request for assignment of western channels remained outstanding. The Bureau reserved the question for consideration in connection with the orbit and channel assignment. EchoStar Satellite Corporation, Application for Extension of Time to Construct, Launch, and Operate a Direct Broadcast Satellite System, *Order*, 11 FCC Rcd 3017 (Int'l Bur. 1996). In the *Assignment Order*, however, the Satellite Division, on its own motion, granted EchoStar a three-year extension to complete construction and launch its western satellite. *Assignment Order*, 17 FCC Rcd at 8830. Consequently, we dismiss the remaining portion of the pending extension request as moot.

<sup>20</sup> *EchoStar Opposition* at 3.

<sup>21</sup> *EchoStar Opposition* at 4.

<sup>22</sup> *EchoStar Opposition* at 6.

<sup>23</sup> Compass System's Inc., Reply to Opposition to Application for Review, filed July 12, 2002.

<sup>24</sup> In the Application for Review, Compass states EchoStar's DBS *application* was automatically cancelled. There is no provision, however, for DBS applications to be "automatically cancelled." A permit, however, may be declared null and void for failure to comply with its express terms. Because EchoStar had a permit for a western orbit location, we will refer to the permit in addressing this argument.

<sup>25</sup> *EchoStar Due Diligence Order*, 7 FCC Rcd at 1765.

satellite.<sup>26</sup> EchoStar complied with this directive.<sup>27</sup> Upon review of the contractual information, the Satellite Division concluded, in 2002, that EchoStar had satisfied its first due diligence requirement, and subsequently assigned EchoStar to operate on a total of 11 DBS channels at two western orbit locations. We could not have expected EchoStar to begin construction prior to this action or, as Compass asserts, to have a satellite in orbit seven years before the Division's decision. Once the Division made its finding that EchoStar was in compliance with the first due diligence requirement, EchoStar promptly proceeded with system implementation. Thus, we reject Compass' argument that EchoStar's permit was automatically cancelled in 1995.

9. We also reject Compass' assertion that the Division's order violates the Commission's policy against warehousing spectrum. EchoStar did not, as Compass states, "warehouse a western orbital slot," and the Division did not ignore "EchoStar's inaction."<sup>28</sup> Warehousing generally refers to licensees that are not willing or able to build their systems in a timely manner. The DBS due diligence rules were designed to ensure that valuable spectrum was not warehoused.<sup>29</sup> As noted above, EchoStar submitted contractual information as requested by the Commission, a fact not contested by Compass.<sup>30</sup> It was, however, the Division's inaction – not EchoStar's – that led to the delay in the assignment and use of EchoStar's 11 DBS channels.<sup>31</sup> Thus, there is no basis to find that EchoStar did not intend to proceed with its DBS system. In reviewing DBS due diligence requirements, the Commission recognized that a DBS permittee could encounter significant difficulty in proceeding with the construction of its system prior to receiving its specific orbital and channel assignments.<sup>32</sup> In the *Assignment Order*, the Division properly limited its consideration to whether EchoStar's construction contract satisfied the first due diligence requirement, an action necessary to make the channel and orbit assignment. Contrary to Compass' assertion, the Division could not consider EchoStar's compliance with the second due diligence requirement, commencing operations, until it determined that EchoStar had satisfied the first requirement.

10. Compass' third argument, that the Satellite Division's order was arbitrary and capricious, is also flawed. Compass makes this assertion in comparing the *Assignment Order* with the Division's same-day cancellation of EchoStar's authorization of 22 DBS channels at the 175° W.L. orbit location. Compass states that the Division failed to explain how its application of the rules created vastly different results in the two orders.<sup>33</sup> The different results arise from the different facts presented in each case. In the *Cancellation Order*, EchoStar had been assigned 22 channels at the 175° W.L. orbit location. The Division cancelled EchoStar's permit because EchoStar did not demonstrate, under the requisite "totality of the circumstances" standard, that it had been prevented from launching a satellite.<sup>34</sup> In contrast, in the *Assignment Order*, EchoStar had not been assigned any channels prior to that Order. In that case, the Division first reviewed the relevant documentation and determined that EchoStar had satisfied its first due

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<sup>26</sup> *EchoStar Due Diligence Order*, 7 FCC Rcd at 1771.

<sup>27</sup> *Assignment Order*, 17 FCC Rcd at 8828.

<sup>28</sup> *Compass Application for Review* at 10.

<sup>29</sup> Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, 17 FCC Rcd 11331 (2002) (*DBS Order*).

<sup>30</sup> *Compass Application for Review* at 5.

<sup>31</sup> In claiming EchoStar has a record of "deadline evasion," Compass asserts that EchoStar failed to submit its channel preference within the time frame specified in the *Assignment Order*. *Compass Application for Review* at 11. The deadline for EchoStar's submission was a holiday and EchoStar timely complied with our rules by filing the information on the following day. 47 C.F.R. § 1.4(j).

<sup>32</sup> *Advanced Order*, 11 FCC Rcd at 3421.

<sup>33</sup> *Application for Review* at 12.

<sup>34</sup> *Cancellation Order*, 17 FCC Rcd at 8834.

diligence milestone, to enter into a valid contract. Only after making this determination did the Division conclude that EchoStar was entitled to an orbital location and channel assignment. EchoStar was not able to launch its satellite before the Division made this assignment. Accordingly, an extension of EchoStar's operating milestone was warranted to allow EchoStar sufficient time to build a satellite with a technical design appropriate for the assigned location and channels. We see no inequitable treatment in the results of these two cases.

11. Finally, we reject Compass' assertion that the Satellite Division's action stifled Compass and other nascent DBS providers from competing with existing providers of DBS service. At the time Compass filed its DBS application, over 80 DBS channels at five different orbit locations were unassigned.<sup>35</sup> In asserting that the Satellite Division's Order preempted Compass' access to 157° W.L., Compass assumed that that it would be assigned to this location.<sup>36</sup> Compass did not, however, cite to any rule or policy that entitled it to priority of channels at a particular location. Furthermore, under the Commission's rules then in effect, DBS orbit locations and channels were considered interchangeable and equivalent.<sup>37</sup> Consequently, there is no basis to find that the Satellite Division's assignment of channels pursuant to EchoStar's outstanding western permit stifled competition in the DBS service. The Commission recently announced the auction of DBS channels at three orbit locations, including 157° W.L. and 166° W.L.<sup>38</sup> Compass is free to participate in the auction.

#### IV. CONCLUSION AND ORDERING CLAUSES

12. Based on the foregoing, we affirm the Satellite Division's decision in EchoStar Satellite Corporation, *Memorandum Opinion and Order*, 17 FCC Rcd 8827 (Int'l Bur. Sat. Div. 2002), finding that EchoStar satisfied its first DBS due diligence requirement of its outstanding western permit.

13. Accordingly, IT IS ORDERED, that the Application for Review filed by Compass Systems, Inc., File No. DBS-88-01, DA 02-1163, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>35</sup> *DBS Order*, 17 FCC Rcd at 11339.

<sup>36</sup> In March 2002, Compass filed an application for a construction permit for a DBS system and for authorization for a terrestrial platform in the DBS frequencies. Compass proposed to use 32 channels at both the 157° W.L. and the 166° W.L. orbit locations. Compass' application was dismissed on March 3, 2003. Letter to Antoinette Cook Bush, Vice President, Compass System's Inc., from Donald Ableson, Chief, International Bureau, and John B. Muletta, Chief, Wireless Bureau, DA 03-410 (March 3, 2003). Compass filed an Application for Review of the Dismissal Letter. File No. SAT-MS-20020325-00054, DA 03-410 (filed April 2, 2003).

<sup>37</sup> 47 C.F.R. § 100.13 (1989). As noted above, the Commission's Part 100 rules were subsequently revised and incorporated into Part 25.

<sup>38</sup> Public Notice, Auction of Direct Broadcast Satellite Services Rescheduled for July 14, 2004, DA 04-278 (rel. Feb. 6, 2004).