

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

In re Application of

Continental Satellite Corporation

File No.  
130-SAT-EXT-95

For Extension of Construction Permit

**MEMORANDUM OPINION AND ORDER**

Adopted: November 21, 1995; Released: November 21, 1995

By the Chief, International Bureau:

**INTRODUCTION**

1. The time has come for Direct Broadcast Satellite ("DBS") permittees to deliver to the public the services they have promised. While a few permittees have begun to do so, most have not. In some cases, the blame for this failure to provide service rests with the permittee. The Commission has recently demonstrated that it will take appropriate action where the permittee is at fault.<sup>1</sup> We cannot and will not tolerate warehousing of DBS orbital/channel assignments by permittees unable or unwilling to move promptly towards providing service to the public.

2. In other cases, however, the blame for the failure to provide service rests with the government -- not the permittee. We cannot and will not take permits away from those whose failure to provide service is due to the inaction of the government.

3. Accordingly, this Order grants the unopposed motion of Continental Satellite Corporation ("CSC") for an extension of its conditional construction permit. We no longer grant any extension lightly. But, for the past five years, CSC has been prevented from constructing its satellites by inaction on its application for orbital/channel assignments. We cannot fault CSC for not having progressed further toward realization of its DBS system during the period it was awaiting government action that was a prerequisite to satellite construction. All indications are that CSC intends to move forward promptly. We must allow CSC a fair opportunity to develop the DBS resources it has finally been assigned.

4. With this extension, CSC now has until August 15, 1999 -- just over four years from the date it received its orbital/channel assignments from the Commission -- in

which to construct, launch, and begin operating its DBS system at both of its assigned orbital locations. In order to ensure that CSC follows through on its apparent commitment to develop its system promptly, we will condition the grant by reserving the right to modify or cancel this extension (in whole or in part) if CSC's actions indicate an unwillingness or inability to comply substantially with the construction timetable it has submitted to the Commission and upon which we have relied in reaching our decision. We expect CSC to meet its construction timetable, and we will monitor its progress closely to ensure that the DBS resources assigned to CSC are used as expeditiously as possible.

**Discussion**

5. On August 15, 1989, the Commission issued a conditional DBS construction permit to CSC.<sup>2</sup> That permit was conditioned upon compliance with the Commission's due diligence rules for the DBS service. The due diligence requirement has two distinct components. First, a DBS permittee must either begin construction or complete contracting for construction of its satellite(s) within one year of the grant of its construction permit.<sup>3</sup> A DBS permittee does not receive assigned channels or orbital locations until it demonstrates compliance with this requirement.<sup>4</sup> Those assignments are made to permittees in the order that successful showings are received. Second, a permittee must place its satellite(s) in operation within six years after receiving the permit, "unless otherwise determined by the Commission upon proper showing in any particular case."<sup>5</sup>

6. On August 13, 1990, CSC filed a request for orbital/channel assignments, supported by a due diligence showing that included a copy of portions of a satellite construction contract. *Five years later* -- and only eight days before CSC's six-year construction permit was to expire -- the Commission found that CSC had complied with the first prong of the due diligence requirement and assigned CSC eleven paired DBS channels at two orbital locations.<sup>6</sup> During those five years, CSC had changed satellite suppliers in order to secure a faster timetable for satellite construction, had conducted a preliminary design review, and was consequently prepared to commence actual construction and design activities within ninety days of receiving its orbital/channel assignments from the Commission.<sup>7</sup> It had not, however, begun actual construction of its satellites pending receipt of those assignments.

7. In February 1995, CSC's predecessor in interest<sup>8</sup> filed a motion for extension of the permit, which CSC subsequently adopted.<sup>9</sup> The extension request was placed on public notice,<sup>10</sup> and three parties (Dominion Video Satellite, Inc., James Dixon, and Tempo DBS, Inc.) filed separate comments, to which CSC filed a consolidated reply. Dixon supports the extension request, while the other

<sup>1</sup> *Advanced Communications Corp.*, FCC 95-428 (released Oct. 18, 1995).

<sup>2</sup> See *Continental Satellite Corp.*, 4 F.C.C.R. 6292, 6300 (1989).

<sup>3</sup> See 47 C.F.R. § 100.19(b).

<sup>4</sup> *Processing Procedures Regarding the Direct Broadcast Service*, 95 F.C.C.2d 250, 253 (1983).

<sup>5</sup> 47 C.F.R. § 100.19(b).

<sup>6</sup> See *Continental Satellite Corp.*, DA 95-1733 (released Aug. 7, 1995) ("Continental/Assignment").

<sup>7</sup> *Id.* at ¶¶ 7, 10.

<sup>8</sup> In 1994, the Commission conditionally authorized CSC to

assign its permit to Nevada DBS, Inc., subject to the outcome of then-pending arbitration between CSC and Loral Aerospace Holdings, Inc. After that arbitration proceeding concluded, the Commission rescinded the assignment authorization, and the permit reverted to CSC. See *Continental Satellite Corp.*, DA 95-1015 (released May 2, 1995). Nevada DBS filed the original extension request with respect to this permit in February 1995.

<sup>9</sup> See Letter from William P. Welty to William Caton (dated Aug. 16, 1995).

<sup>10</sup> See Public Notice, Rep. No. SPB-21, Mimeo No. 55074 (July 31, 1995).

two neither support nor oppose it. Dominion asserts that CSC should have no priority with respect to any DBS spectrum that becomes available in the future.<sup>11</sup> Tempo argues that granting an extension to CSC would be inconsistent with the Bureau's recent denial of a similar extension request by another DBS permittee, Advanced Communication Corporation,<sup>12</sup> but also maintains that that order was wrongly decided and should therefore be disregarded.

8. In ruling on requests for extension of time in which to complete construction, the Commission has said that the totality of circumstances -- those efforts made and not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public -- must be considered.<sup>13</sup> In this instance we think that an extension is warranted in light of the relevant circumstances.

9. We recognize that CSC has not yet begun actual construction of its satellites. But it is an understatement to acknowledge that we -- and not CSC -- are to blame. CSC delayed the commencement of satellite construction pending receipt from the Commission of orbital/channel assignments -- a process that consumed the last five years of CSC's six-year permit term. We have previously acknowledged that little construction progress may be made absent specific orbital/channel assignments, as such information enables contractors to order long lead parts, complete satellite designs, and begin construction based on a particular satellite configuration best suited to a particular orbital location.<sup>14</sup> *The time taken to process due diligence showings in the DBS service effectively deprived CSC of all but eight days of its six year construction period.*

10. In finding that CSC had satisfied the first prong of the due diligence requirement, we came to the conclusion that "CSC has done what a reasonable and prudent permittee facing the same uncertainties in the administrative process would have done."<sup>15</sup> We found that CSC's conduct -- especially its actions to negotiate a new construction contract in order to secure a more expeditious construction commitment and to prevail upon its contractor to perform preliminary design work ahead of schedule -- tended to confirm that CSC remained intent on implementing its DBS system.<sup>16</sup>

11. CSC's actions since we issued that order have further demonstrated its commitment. Pursuant to our *Continental/Assignment* order, CSC has filed with the Commission: (1) an updated construction milestone calendar that indicates delivery of two satellites on July 1, 1998, and two more satellites on February 1, 1999, along with a report on interference parameters of its proposed system;<sup>17</sup> and (2) confirmation that it has satisfied the first payment condition in its satellite construction contract, in the amount of \$ 2,292,409.<sup>18</sup> CSC has confirmed that all conditions prerequisite to the commencement of its construction con-

tract have now been satisfied;<sup>19</sup> thus, consistent with its representations to the Commission, CSC is now ready to begin construction less than ninety days after receiving its orbital/channel assignments. We believe that CSC has continued to demonstrate significant progress toward implementation of its system, given the circumstances under which it has had to operate, and is now in a position to proceed expeditiously toward providing DBS service to the public.

12. Tempo's contention that granting CSC's extension request would be inconsistent with the rationale of the Bureau's recent decision to deny a similar request by Advanced is absurd. That decision -- which was recently affirmed by the full Commission:<sup>20</sup> -- focused on the permittee's failure to make sufficient progress toward construction and operation of its system in the critical period after it received its orbital/channel assignments. Advanced was at the front of the assignment queue, and thus received its assignments with over three years left on its construction permit. Unlike CSC, Advanced could have begun construction well before the expiration of its permit. It simply did not. Although it had the advantage of early assignments, Advanced chose instead to engage in negotiations to sell its permit or combine with other permittees, and as a result failed to make progress toward actual construction and operation of its system. In addition, the transaction Advanced ultimately proposed would have required the total and immediate liquidation of the company. By contrast, since receiving its orbital/channel assignments, CSC has demonstrated its intention to move expeditiously toward implementation and operation of its own system. The differences between the actions of Advanced and CSC in the critical period after each received its orbital/channel assignments justifies a different conclusion on their respective extension requests. Thus, Tempo is just plain wrong in arguing that granting CSC's request would be inconsistent with our disposition of Advanced's request.

13. We therefore conclude that the totality of the circumstances justifies an extension of the construction permit to allow CSC a fair opportunity to put its orbital/channel assignments to productive use. We note that the original extension request did not propose any definite period for extension of the permit. Apparently, this detail was omitted based upon the observation that all DBS permittees who have received extensions have been granted a four-year term from the date their original permits expired.<sup>21</sup> CSC has subsequently made an explicit request that the permit's expiration date be reset to a date four years from the release date of the order granting the request, rather than from the date of its permit's expiration.<sup>22</sup>

14. The updated construction schedule submitted by CSC provides for construction and launch of four satellites by February 1999. We therefore believe that a four-year extension is reasonable under the circumstances, but see no reason why that four-year period should not run from the

<sup>11</sup> That issue is not currently before us, and we decline to address it in this order.

<sup>12</sup> *Advanced Communications Corp.*, DA 95-944 (Int'l Bur., released April 27, 1995), *rev. denied*, FCC 95-428 (released Oct. 18, 1995).

<sup>13</sup> *United States Satellite Broadcasting Co.*, 3 F.C.C.R. 6858, 6860 (1988).

<sup>14</sup> *See Dominion Video Satellite, Inc.*, DA 95-1734 (Int'l Bur., released Aug. 7, 1995) at ¶ 8.

<sup>15</sup> *Continental/Assignment* at ¶ 23.

<sup>16</sup> *Id.* at ¶ 22.

<sup>17</sup> *See* Letter from William P. Welty to Scott Blake Harris (dated Oct. 2, 1995).

<sup>18</sup> *See* Letter from James H. Schollard and William P. Welty to William Caton (dated Nov. 1, 1995).

<sup>19</sup> *Id.*

<sup>20</sup> *See* footnote 12, *supra.*

<sup>21</sup> *See* Letter from William P. Welty to William Caton (dated Aug. 16, 1995).

<sup>22</sup> *Id.*

date that the original construction permit expired, as we have done with other DBS permittees. Such an extension -- until August 15, 1999 -- will provide CSC six months more than should be necessary for construction and launch of all four satellites for which it has contracted.

15. As discussed above, our decision to grant the requested extension is based in large measure upon CSC's apparent commitment to develop the DBS resources that have been assigned to it, and in particular to adhere to its current construction schedule. If CSC's actions at any point appear to belie that commitment -- for example, by incorporating significant delays into its construction schedule -- we must be able to revise this order in light of the changed circumstances. As noted above, the time has come for all DBS permittees promptly to use the public resources assigned to them. Accordingly, as a condition of this grant, we will explicitly reserve the right to modify or cancel this extension, in whole or in part, to the extent justified by CSC's failure or inability to comply substantially with its current timetable for construction and operation of its DBS system. We will therefore monitor CSC's semi-annual reports very closely to ensure that it maintains consistent progress toward realization of its entire system consistent with that schedule.

#### CONCLUSION

16. Accordingly, IT IS ORDERED that the Motion for Extension of DBS Construction Permit IS GRANTED, subject to the condition stated below.

17. IT IS FURTHER ORDERED that the term of the construction permit issued to Continental Satellite Corporation IS EXTENDED to August 15, 1999, subject to the condition that the Commission may reconsider this extension and modify or cancel it, in whole or in part, if Continental fails to make progress toward construction and operation of its DBS system substantially in compliance with the timetable submitted in the letter from William P. Welty to Scott Blake Harris, dated October 2, 1995.

#### FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris  
Chief, International Bureau