

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

In the Matter of

EchoStar Satellite Corporation

File No.
131-SAT-EXT-95

Application for Extension of Time to Construct,
Launch, and Operate a Direct Broadcast
Satellite System

ORDER

Adopted: December 21, 1995; Released: January 11, 1996

By the Chief, International Bureau:

INTRODUCTION

1. In this Order, we grant in part the request of EchoStar Satellite Corporation ("EchoStar") for an extension of time to construct, launch, and operate its DBS system. We granted a conditional construction permit to EchoStar in 1989. In 1992, we assigned EchoStar eleven channels at an eastern orbital location, 119° W.L., and conditioned assignment of channels at a western orbital location on EchoStar's demonstration of completion of satellite construction contracting.¹ EchoStar seeks a one-year extension of time to launch and operate its eastern satellite, and a four-year extension of time to construct, launch, and operate its western satellite.²

2. The Commission has recently demonstrated its willingness to cancel DBS permits where the permittee has failed to make sufficient use of the DBS resources bestowed upon it.³ It has also shown that it will not penalize permittees whose demonstrated commitment to providing DBS service has been delayed by factors beyond their control.⁴ EchoStar clearly falls into that latter group.

3. EchoStar is scheduled to launch its first satellite to the 119° location on December 28, 1995. Grant of the requested extension with respect to this eastern location is consistent with our due diligence requirements, fosters the expeditious use of public DBS spectrum resources, and ensures the rapid delivery of DBS service to the public. Due to the government-wide furlough, however, we are not

able at this time to rule on EchoStar's due diligence with respect to its western orbital location, and therefore will defer consideration of the second half of its extension request until we are able to make that due diligence determination. With this extension, EchoStar now has until August 15, 1996 in which to construct, launch, and begin operating its DBS satellite at its eastern orbital location -- a period that should be more than adequate given its planned December 1995 launch date.

BACKGROUND

4. On August 15, 1989, the Commission issued a DBS construction permit to EchoStar, conditioned upon EchoStar's compliance with the Commission's due diligence rules in the DBS service.⁵ 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.⁶ A DBS permittee does not receive assigned channels or orbital locations until it demonstrates compliance with this requirement.⁷ 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."⁸

5. On March 23, 1990, EchoStar filed a request for orbital/channel assignments, supported by a due diligence showing that included a copy of portions of a satellite construction contract. On March 5, 1992, the Commission found that EchoStar had complied with the first prong of the due diligence requirement for its eastern satellite, and assigned EchoStar eleven DBS channels at the 119° orbital location.⁹

6. EchoStar states that both construction and payment is complete for its eastern satellite.¹⁰ EchoStar states that it has contracted for launch of that satellite and paid tens of millions of dollars for launch services and insurance.¹¹ EchoStar reports that completion of construction of its eastern satellite was delayed by the satellite contractor, following an in-orbit malfunction of the same model satellite in late 1994.¹² Moreover, an early 1995 launch failure delayed all scheduled launches by China Great Wall Industry Corporation.¹³ Accordingly, the launch date, originally scheduled for August 1, 1995, is currently scheduled for December 28, 1995. EchoStar expects to start transmissions to homes in early 1996.¹⁴

7. EchoStar asserts that grant of the requested extensions is in public interest. It contends that grant of its requests would promote a diverse, high-quality multichannel dis-

¹ *EchoStar Satellite Corp.*, 7 F.C.C.R. 1765, 1772 (1992) ("*EchoStar*").

² EchoStar's assignment of channels at 119° W.L. was conditioned upon the outcome of a then-pending petition filed by Dominion Video Satellite, Inc. ("DVS") for reinstatement of its channel assignment at 119° W.L. DVS' petition has since been denied, *Dominion Video Satellite, Inc.*, 8 F.C.C.R. 6680 (1993), *aff'd Dominion Video Satellite, Inc.*, FCC 95-421 (released October 5, 1995).

³ *Advanced Communications Corp.*, FCC 95-428 (released October 18, 1995) ("*ACC Cancellation Order*").

⁴ See, e.g., *Continental Satellite Corp.*, DA 95-2347 (released

November 21, 1995).

⁵ *Continental Satellite Corp.*, 4 F.C.C.R. 6292, 6300-01 (1989).

⁶ See 47 C.F.R. § 100.19(b).

⁷ *Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 F.C.C.2d 250, 253 (1983).

⁸ 47 C.F.R. § 100.19(b).

⁹ *EchoStar*, 7 F.C.C.R. at 1772.

¹⁰ *EchoStar Extension Request* at 2.

¹¹ *Id.* at 2.

¹² *Id.* at 2-4.

¹³ *Id.* at 3-4.

¹⁴ *Id.* at 2.

tribution service, and satisfy the need, recognized by Congress, for competition to cable from unaffiliated distributors in the market for multichannel video programming.¹⁵ Further, EchoStar states that its DBS system will: (1) provide the public with affordable access to entertainment, informational, shopping, and educational services; (2) use state-of-the-art MPEG-2 digital technology for full multimedia compatibility; and (5) include service to rural areas as a core component of its business plan.¹⁶

8. Echostar maintains that it has substantially complied with the Commission's due diligence requirements. It asserts that it has completed construction of its first satellite only three years after receiving eastern orbital/channel assignments.¹⁷ In this regard, EchoStar points to progress in deploying its system as follows: (1) its eastern satellite is undergoing final testing; (2) its satellite contractor has obtained an export license to permit transfer of the satellite for launch; (3) it has procured launch insurance; (4) it has a contract with AT&T for satellite tracking, telemetry and control ("TT&C") and maintenance services; and (4) it has more than adequate cash on hand to commence operations of its DBS system.¹⁸

9. Tempo Satellite, Inc. ("Tempo") and Advanced Communications Corporation ("ACC") filed comments concerning grant of an extension of time to EchoStar. Tempo argues that EchoStar's request for extension of time must be denied if a similar request filed by ACC is denied, noting that ACC and EchoStar had roughly the same amount of time (after assignment of channels and orbital locations) to construct and launch a DBS system.¹⁹ Tempo further argues that denial of ACC's request requires denial of an extension of time for the DBS construction permit of Directsat Corporation ("Directsat"). Directsat is now controlled by EchoStar's parent company and is scheduled to operate on a companion basis with EchoStar's DBS system. As a consequence, asserts Tempo, denial of Directsat's application will delay competition in DBS for years because EchoStar is dependent upon Directsat's channels for the viability of its system.²⁰

10. ACC argues that because EchoStar failed to commence operation of its DBS system before expiration of its construction permit on August 15, 1995, its permit is "null and void" under Commission precedent established in the *ACC Cancellation Order*. ACC points out that EchoStar had four months more than ACC in which to launch its DBS system after assignment of channels and orbital locations.²¹ ACC maintains that EchoStar's lack of cable affiliation is not important given the Commission's finding in *Tempo Satellite, Inc.*, 7 F.C.C.R. 2728 (1992), that entry of a cable-affiliated entity into the DBS service would create new competition.²²

11. Echostar argues that its DBS system will promote competition among multichannel video programming distributors ("MVPDs") because it is independent of any cable interests, and thus extension of its DBS permit is consistent with the Commission's policy of promoting DBS as independent alternative to cable in MVPD market.²³ It notes that Tempo is a wholly-owned subsidiary of the largest cable operator in the United States.²⁴

DISCUSSION

12. In ruling on requests for extension of time, we have said that the totality of circumstances -- those efforts made and those 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.²⁵ Prior to the recent round of extension requests, we had granted extensions on two occasions since 1991. The record in those cases demonstrated that the permittees had made significant progress toward the realization of a DBS system, including substantial monetary investment, arranging for financing for completion and launch of the system, contracting with suppliers of DBS home receiving equipment, and contracting for satellite launch services.²⁶

13. EchoStar's actions since the award of its orbital/channel assignments demonstrate its capability and commitment to provide DBS service to the public as rapidly as possible. It originally planned to launch its first satellite two weeks before the expiration of its construction permit. Only circumstances beyond EchoStar's control -- namely an in-orbit malfunction of a similar satellite and the grounding of the Chinese launch capability -- prevented EchoStar from achieving construction, launch, and operation of its system at the 119° orbital location during the term of its existing construction permit. Nevertheless, EchoStar will begin operations less than six months after the scheduled expiration date, and less than four years after award of its orbital/channel assignments. It has made all pre-launch payments. In addition, it has secured financing, TT&C and programming contracts, and a license for its ground facilities.

14. We reject ACC's and Tempo's contention that EchoStar requests extension under the same circumstances as ACC, and that therefore we must deny its request for extension of time. EchoStar *completed* almost all construction of its first satellite prior to expiration of its permit. Despite delays in satellite construction and launch, EchoStar will begin operations within four years of the award of orbital/channel assignments and within a few months after the scheduled expiration of its permit. ACC *never began* actual satellite construction despite receiving its orbital/channel assignments with over three years left on its permit, and by the time we ruled on its permit extension

¹⁵ *Id.*

¹⁶ *Id.* at 8-10.

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 5. EchoStar states that it raised \$323.3 million in a June 1994 debt offering, and raised another \$63.3 million in a June 1995 equity offering. *Id.* at 5 n.4.

¹⁹ Tempo Comments at 6-8. ACC's request was, of course, denied.

²⁰ Tempo Comments at 6. Tempo maintains that Echostar will lose one-half of its recent debenture offering if Directsat's au-

thorization at 119° is cancelled. *Id.* at 6, n.6.

²¹ ACC Comments at 7-8.

²² *Id.* at 9.

²³ EchoStar and Directsat Consolidated Reply to Tempo Comments at 11-12.

²⁴ *Id.*

²⁵ *United States Satellite Broadcasting Co.*, 3 F.C.C.R. 6858, 6859, (1988).

²⁶ See *Dominion Video Satellite, Inc.*, 8 F.C.C.R. 6680, 6688 (1993); *United States Satellite Broadcasting Co.*, 7 F.C.C.R. 7247, 7251 (1992).

sion, it never intended to begin such construction. Moreover, ACC received its original four-year extension based in part on its citation to delays caused by the failures of launch vehicles²⁷ -- a factor that is also present in this case.

15. Tempo's claim that failure to extend Directsat's permit would jeopardize the viability of EchoStar's system is speculative and must be dismissed. The Commission has consistently held that each request for extension is considered on its own merits, independently of extension requests of other DBS permittees.²⁸ EchoStar's due diligence with respect to its own DBS system warrants grant of its extension request. Thus, grant of EchoStar's extension request is based on its actions to implement its DBS system rather than on speculative predictions with respect to its ultimate success or failure in the DBS market. In any event, Directsat's request for extension of its construction permit is being granted concurrent with this order. Moreover, in light of our decision that the totality of the circumstances warrants grant of EchoStar's extension request, we reject ACC's contention that EchoStar's construction permit is null and void with respect to the eastern orbital location.

16. We believe that EchoStar's imminent launch will bring much needed additional rivalry to MVPD market. It will join DIRECTV and USSB in providing nationwide DBS service to American consumers, providing competition not only within DBS itself, but also in the wider MVPD market. This rivalry can be expected to lead to lower prices and enhanced service options from all MVPDs, and thus clearly will serve the public interest.

17. In this order, we have not considered EchoStar's request for an extension with respect to its western orbital location. EchoStar's request for assignment of western channels is currently pending, and our resolution of that issue may obviate the need for consideration of an extension. In any event, it will be most efficient to consider the extension request in the context of EchoStar's progress toward providing service from a western location. Unfortunately, due to the government shutdown, we are unable at this time to complete that due diligence analysis. Therefore, we will reserve the question for resolution in connection with our due diligence determination on EchoStar's request for assignment of channels at a western orbital location.

ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that EchoStar Corporation's Request for Extension of its DBS construction permit IS GRANTED IN PART such that the permit is extended to August 15, 1996 with respect to EchoStar's channels at the 119° orbital location only.

19. IT IS FURTHER ORDERED that consideration of EchoStar's Request as it applies to a western orbital location, and of the comments filed by Tempo Satellite, Inc. and Advanced Communications, Inc. on that aspect of EchoStar's request, ARE DEFERRED until such time as the Commission has the opportunity to analyze EchoStar's western due diligence showing.

20. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

²⁷ *Advanced Communications Corp.*, 6 F.C.C.R. 2269, 2274 (1991).

²⁸ *Id.*