

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

In the Matter of

Directsat Corporation File No. 130-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, with conditions, the request of Directsat Corporation ("Directsat") for a four year extension of time to construct, launch, and operate a Direct Broadcast Satellite ("DBS") system.<sup>1</sup> We granted Directsat a construction permit for its DBS system in 1989, and in 1993 assigned eleven channels at an eastern orbital location, 119° W.L., and eleven channels at a western orbital location, 175° W.L., for its DBS system.<sup>2</sup> This order also denies a petition for reconsideration, filed by Dominion Video Satellite, Inc. ("DVS"), of our order assigning channels and orbital locations to Directsat.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> Directsat clearly falls into that latter group.

3. Directsat is scheduled to launch its first satellite to the 119° orbital location in the summer of 1996. Grant of the requested extension 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. With this extension, Directsat now has until August 15, 1999 in which to construct, launch, and begin operating its DBS system at both of its assigned orbital locations. As a condition of the grant, we explicitly reserve the right to modify or cancel this extension, in

whole or in part, if Directsat's actions indicate an unwillingness or inability to comply substantially with or accelerate the construction timetable it has submitted to the Commission and upon which we have relied in reaching our decision. We expect Directsat to move expeditiously to meet its construction timetable, and we will monitor its progress closely to ensure that the DBS resources assigned to Directsat are used as rapidly as possible.

**BACKGROUND**

4. On August 15, 1989, the Commission issued a conditional DBS construction permit to Directsat. That permit was conditioned upon Directsat's compliance with the Commission's due diligence rules in 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>6</sup> A DBS permittee does not receive assigned channels or orbital locations until it demonstrates compliance with this requirement.<sup>7</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>8</sup>

5. On March 21, 1990, Directsat filed a request for channel/orbital assignments, supported by a due diligence showing that included a copy of portions of a satellite construction contract. Three and a half years later, and less than two years before Directsat's six-year construction permit was to expire, the Commission found that Directsat had complied with the first prong of the due diligence requirement and assigned Directsat eleven paired DBS channels at two orbital locations.<sup>9</sup> Less than three months after receiving its orbital/channel assignments from the Commission, Directsat and the parent company of EchoStar Satellite Corporation, a DBS permittee, reached an agreement to merge.<sup>10</sup> Within two months the two permittees sought Commission approval of the merger, in order to permit the two DBS systems to meet more effectively the financial requirements of developing their systems and to accumulate sufficient channel capacity to compete with cable systems and with other DBS systems.<sup>11</sup> We approved the requested merger in January, 1995.<sup>12</sup> Directsat now plans a complementary service with affiliate Echostar that will include more than 125 video channels.<sup>13</sup>

6. Directsat states that it has proceeded with due diligence in implementing its DBS system. At the time of the award of orbital/channel assignments, Directsat's satellite construction schedule called for delivery of its first

<sup>1</sup> Directsat Extension Request at 1.

<sup>2</sup> *Directsat Corp.*, 8 FCC Rcd 7962, 7964 (1993) ("Assignment Order").

<sup>3</sup> DVS Petition for Reconsideration, filed December 6, 1993.

<sup>4</sup> *Advanced Communications Corp.*, FCC 95-428 (released October 18, 1995) ("ACC Cancellation Order").

<sup>5</sup> See, e.g., *Continental Satellite Corp.*, DA 95-2347 (released November 21, 1995).

<sup>6</sup> See 47 C.F.R. § 100.19(b).

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

<sup>8</sup> 47 C.F.R. § 100.19(b).

<sup>9</sup> *Assignment Order*, 8 FCC Rcd at 7964.

<sup>10</sup> See *Directsat Semi-annual Report* (filed February 25, 1994) at 2.

<sup>11</sup> See *Directsat and EchoStar Application for Transfer of Control*, File No. DBS-88-01/88-02/94-08TCP/M, *Public Notice*, Mimeo No. 42588, Report No. DBS/PN 94-08 (April 12, 1994), at 14.

<sup>12</sup> *Directsat Corp.*, 10 FCC Rcd 88 (1995).

<sup>13</sup> *Directsat Extension Request* at 2.

spacecraft in September 1997, and for delivery of its second spacecraft in March 1998.<sup>14</sup> Directsat states that its first satellite is now two-thirds complete and is scheduled for launch in the summer of 1996, a full year ahead of the date contemplated by the Commission in Directsat's *Assignment Order*.<sup>15</sup> Directsat notes that it has made all pre-launch payments to satellite contractor Martin Marietta, and is meeting contractual obligations for its western satellite at 175° W.L.<sup>16</sup>

7. Directsat cites the following actions taken to implement its DBS system: (1) it has made all launch payments on its first satellite; (2) its satellite contractor has secured an export license for that satellite; (3) through its parent company, it has contracted for tracking, telemetry, and control services ("TT&C"); (4) the Commission has approved an uplink facility in Cheyenne, Wyoming for Directsat and EchoStar; and (5) its parent company has entered into contracts with several programmers. Moreover, Directsat states that its parent company has raised substantial capital to finance EchoStar's and Directsat's DBS systems: \$323.3 million in a June 1994 public debt offering, and \$63.3 million in a June 1995 equity offering.<sup>17</sup>

8. Directsat contends that grant of its extension request would serve the public interest in several ways: (1) it would promote competition in the multichannel video programming distribution ("MVPD") market by increasing the number and diversity of programming sources;<sup>18</sup> (2) Directsat and EchoStar will deliver over 100 channels of digital audio programming, as well as data services; (3) programming offered by Directsat and EchoStar will not be bundled or tiered; (4) service to rural areas is a central focus of its business plan; and (5) its market strategy is focused on low-priced equipment installation and subscription.<sup>19</sup> Directsat maintains that grant of an extension will permit Directsat to deliver service to public by the end of 1996.

9. Tempo Satellite, Inc. ("Tempo") and Advanced Communications Corporation ("ACC") filed comments concerning Directsat's request for an extension of time. They contend that under the International Bureau's decision to deny ACC's request for extension of time, consideration of a third party's progress in satellite construction would contravene the public interest.<sup>20</sup> ACC and Tempo assert that Directsat's accelerated construction schedule is possible only because Directsat will launch a satellite previously

being built for EchoStar. Each maintains that Directsat merely delayed construction and payment schedules pending the sale of Directsat to EchoStar's parent company.<sup>21</sup> ACC and Tempo argue, therefore, that Directsat's lack of progress before the transfer and reliance on EchoStar's prior construction does not satisfy due diligence as articulated in the *ACC Cancellation Order*.<sup>22</sup>

10. Directsat maintains that the proper comparison is between Directsat and ACC at the time of their respective extension requests rather than at the time of Directsat's transfer of control application.<sup>23</sup> Directsat states that while ACC sought an extension of time in order to transfer its license, Directsat seeks an extension for the purpose of bringing service to the public.<sup>24</sup>

## DISCUSSION

11. 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.<sup>25</sup> Prior to the recent round of extension requests, we had granted extensions on only 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.<sup>26</sup>

12. Directsat's actions since its orbital/channel assignments demonstrate its intent to ensure the swift implementation and operation of a viable DBS system. Directsat's revised construction schedule will allow it to begin operation within one year of the scheduled expiration of its permit and less than three years after receiving its orbital/channel assignments. Its first satellite is nearly two-thirds complete, and Directsat has made all pre-launch payments. In addition, Directsat's parent company has secured financing, TT&C and programming contracts, and ground facilities. We find that Directsat has shown that it has a continuing capability and commitment to implement its DBS system.

13. We recognize that Commission delays in awarding Directsat's orbital/channel assignments may have significantly hindered its progress toward construction and opera-

<sup>14</sup> *Assignment Order*, 8 FCC Rcd at 7963. That schedule was later modified to include a third satellite and to delay by four months the satellite delivery and launch dates: under Contract Modification No. 7, Directsat's first satellite was to be delivered in January 1998, its second in July 1998, and its third in January 1999. See Directsat Semi-Annual Report (dated August 15, 1994), Exhibit A at 1-2.

<sup>15</sup> *Id.* at 1-2.

<sup>16</sup> See Directsat Semi-Annual Report (dated June 16, 1995) at 2.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> Directsat asserts that EchoStar and Directsat are the only permittees close to providing service that are not affiliated with any cable operator or other incumbent MVPD competitor. *Id.* at 7.

<sup>19</sup> *Id.* at 7-9.

<sup>20</sup> Tempo Comments at 3-4; ACC Comments at 10. Advanced's request for an extension of time has since been denied by the Commission. See *ACC Cancellation Order* at ¶ 80.

<sup>21</sup> Tempo Comments at 3 and n.5; ACC states that seven contract amendments and four payment schedule amendments produced delays as follows: (1) Directsat Semi-Annual Report dated August 15, 1994 (reflecting payment of approximately one-eighth of one percent of K price); (2) amendments to Directsat's contract and payment schedules which delayed its first major payment (from September 3, 1993 to March 31, 1994, to December 31, 1994, and finally to April 2, 1995). ACC Comments at 3-7.

<sup>22</sup> Tempo Comments at 4 and n.10; ACC Comments at 11.

<sup>23</sup> Consolidated Response of Directsat and EchoStar at 8-9.

<sup>24</sup> *Id.* at 6-8.

<sup>25</sup> *United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858, 6859 (1988) ("USSB I").

<sup>26</sup> See *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680, 6688 (1993), *recon. denied*, FCC 95-297 (released Oct. 5, 1995); *United States Satellite Broadcasting Co.*, 7 FCC Rcd 7247, 7251 (1992).

tion of its DBS system. 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>27</sup> The time taken to process due diligence showings in the DBS service left Directsat with only two years after receiving orbital/channel assignments in which to complete construction of its DBS system.

14. We find no merit in Tempo's and ACC's contention that granting Directsat's extension request would be inconsistent with the rationale of the Bureau's recent decision to deny a similar request by ACC. Tempo and ACC argue (1) that Directsat did not make sufficient progress to meet the due diligence test as applied in the *ACC Cancellation Order*, and (2) that any progress Directsat did make was based on efforts made by a third party (EchoStar), which the Commission found insufficient to satisfy due diligence in the *ACC Cancellation Order*. Tempo and ACC misapprehend our holding in that decision.

15. First, the *ACC Cancellation Order* focused on the permittee's failure to make sufficient progress toward construction and operation of its system *after* it received its orbital/channel assignments. The differences between the actions of ACC and Directsat in the critical period after each received its orbital/channel assignments justifies a different conclusion on their respective extension requests. During the two years between receipt of orbital/channel assignments and the expiration of its permit, Directsat made payments to its satellite construction contractor, completed a merger with EchoStar, and initiated the construction phase of its satellite construction contract. During the three and one half years between its orbital/channel assignment and the expiration of its permit, ACC failed to negotiate a merger agreement with EchoStar or anyone else and never began construction of its DBS system. While both permittees delayed payment schedules and construction milestones, *after* receiving their respective assignments, Directsat delayed construction by only two months while ACC deferred construction for over four years in the comparable period.<sup>28</sup> Directsat now plans to put its DBS system into operation one year ahead of its schedule at the time the Commission awarded Directsat orbital/channel assignments. Even had we approved ACC's extension application, it would not have launched one of Tempo's satellites until more than two years after the launch date promised in its own original construction schedule.<sup>29</sup> In addition, Directsat has a construction contract that provides for the delivery of three satellites by January 1999, six months before the expiration of the four-year extension we grant today. Having arranged a merger to create a viable DBS system, Directsat seeks extension to implement DBS service. ACC sought extension solely for the purpose of assigning its permit, or alienating control over its channels, after which it planned to dissolve.

16. Second, Directsat is not relying on a third party in the way that ACC proposed to do -- even though its first satellite was originally being built for EchoStar, just as ACC planned to use satellites that were being built for Tempo. The Commission held in the *ACC Cancellation Order* that ACC could not use another permittee's construction progress to satisfy its due diligence obligations.<sup>30</sup> Directsat does not today rely on another permittee's progress. The Commission determined that Directsat was proceeding with due diligence at the time it authorized the merger with EchoStar.<sup>31</sup> At that time, Directsat did not seek, and the Commission did not give, any credit for progress made by EchoStar. Once the merger was consummated, it would be absurd for us to refuse to credit Directsat with progress it has been able to make as a result of synergies resulting from that merger -- such as acquiring access to one of EchoStar's satellites and the financing necessary to pay for it. If Directsat had not begun construction on its own satellite(s), sought this extension to merge with EchoStar, and relied on EchoStar's satellite to meet its due diligence requirements, this case would be analogous to ACC's extension request -- and a similar result would be required. That, however, is not the case here.

17. Thus, Tempo and ACC are simply wrong in arguing that granting Directsat's request would be inconsistent with our disposition of ACC's request. On the contrary, under the circumstances presented, our approval of Directsat's request for extension creates incentives for DBS permittees to rapidly use public resources for the public's benefit, and reinforces our policies against warehousing DBS spectrum resources at the cost of delay or denial of DBS service to the public.

18. We note, however, that Directsat has not filed an updated satellite construction contract since its merger with EchoStar. The last contract filed by Directsat has an effective date of June 17, 1994, and calls for Directsat to receive its first satellite on January 2, 1998, with two others to follow on July 2, 1998 and January 2, 1999, respectively.<sup>32</sup> Directsat has informed us, however, that it is still negotiating final language for a contract amendment that will "significantly speed the construction of the Directsat DBS system, and Directsat I particularly."<sup>33</sup> The extension we grant today would allow Directsat to complete construction of all satellites under its original construction contract, and we will condition the extension on meeting or accelerating that timetable since it is an important factor in our decision. However, we encourage Directsat to reach final agreement on its amended contract and to expedite construction and launch of additional satellites for its DBS system, to the greatest degree possible.

19. Directsat has requested approval of a minor modification to its DBS application, to permit TT&C operations in

<sup>27</sup> See *Dominion Video Satellite, Inc.*, DA 95-1734 (Int'l Bur., released Aug. 7, 1995) at ¶ 8.

<sup>28</sup> *ACC Cancellation Order* at ¶ 60.

<sup>29</sup> At the time the Commission determined ACC to have met the first prong of the due diligence test, ACC's construction contract provided for complete construction of its first satellite

in January 1994. See *ACC Cancellation Order* at ¶ 60. The first of Tempo's satellites that ACC proposed to use would not have been launched until the early summer of 1996.

<sup>30</sup> *Id.* at ¶ 41.

<sup>31</sup> *Directsat*, 10 FCC Rcd at 89.

<sup>32</sup> See *Directsat Semi-Annual Report* (dated August 15, 1994).

<sup>33</sup> See *Directsat Semi-Annual Report* (dated June 20, 1995).

frequency bands currently allocated for government use."<sup>34</sup> That request is under consideration pending completion of coordination with government users of that spectrum. Our grant of Directsat's extension request in this order in no way prejudices the outcome of Directsat's pending modification request.

20. *DVS Petition for Reconsideration.* DVS has failed to cite any errors of law or fact to justify reconsideration of the award of orbital/channel assignments to Directsat. DVS argues that the *Assignment Order* was based on a double standard, by which DVS was required to submit its "full contract" for DBS satellite construction while Directsat received its channel/orbital assignments after submitting only portions of its satellite construction contract. We disagree. The Commission has clearly delineated the contracting information that must be submitted, and has put all permittees on notice that additional submissions might be required where questions arise as to the contents of or compliance with a satellite construction contract.<sup>35</sup> Directsat submitted sufficient information to satisfy due diligence requirements for assignment of orbital positions and channels, making it unnecessary to seek further information regarding its satellite construction contract. However, the Commission specifically and repeatedly requested clarification of DVS's original due diligence demonstration. DVS's failure to timely demonstrate due diligence, including its failure to submit its satellite construction contract as requested, ultimately resulted in revocation of its orbital/channel assignments.<sup>36</sup> Thus, the requirements imposed on DVS were consistent with established Commission policies and with the circumstances of its case. The differing results in their respective cases reflect their differing levels of compliance with those requirements.

#### ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that Directsat Corporation's Motion for Extension of DBS Construction Permit IS GRANTED, subject to the condition stated below.

22. IT IS FURTHER ORDERED that the term of the construction permit issued to Directsat 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 Directsat fails to make progress toward construction and operation of its DBS system substantially in compliance with the timetable submitted pursuant to Amendment No. 7 of its satellite construction contract, dated June 17, 1995, or with a more expedited timetable.

23. IT IS FURTHER ORDERED that the petition of Dominion Video Satellite, Inc. for reconsideration of the award of orbital/channel assignments to Directsat Corporation IS DENIED.

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

#### FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris  
Chief, International Bureau

<sup>34</sup> Directsat Application for Modification of Permit, DBS File Nos. DBS-88-02/53-SAT-ML-95 (filed January 31, 1995), *Public Notice Report No. SPB-6* (March 6, 1995).

<sup>35</sup> *USSB I*, 3 F.C.C.R. at 6861.

<sup>36</sup> *Dominion Video Satellite, Inc.*, 8 FCC Rcd at 6685-87.