

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

In the Matter of)	
)	
DISH Operating L.L.C.)	File No: SAT-MOD-20091027-00114
)	SAT-AMD-20100510-00096
Application to Suspend Operations)	
at the 148° W.L. Orbital Location)	Call Sign: S2658
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 2012

Released: May 31, 2012

By the Chief, International Bureau:

I. INTRODUCTION

1. By this Order, we deny DISH Operating L.L.C’s (DISH’s) request to suspend operations on Direct Broadcast Service (DBS) channels at the 148° W.L. orbital location.¹ DISH de-orbited its EchoStar 5 space station from the 148° W.L. location in August 2009. DISH states that it will not be in a position until late 2012 to determine which of its in-orbit satellites may be available to move to the vacant orbital location. Allowing DISH to continue to suspend operations at a location that it has left vacant for over two years – and for which it still has no committed plans – would allow DISH to warehouse scarce orbit and spectrum resources, contrary to Commission policy. Consequently, we will make DBS channels 1-32 at the 148° W.L. orbital location available for reassignment when the Commission lifts the freeze for filing new DBS applications.²

II. BACKGROUND

2. In 1996, the Commission authorized DISH, by its predecessor in interest, to operate on 24 of the 32 DBS channels at the 148° W.L. orbital location.³ In 2003, the Commission authorized DISH

¹ The specific orbital location at issue here is 147.925° W.L. For ease of reference, we refer to this location as 148° W.L. throughout this document.

² DBS satellites transmit to user “dishes” in the 12.2-12.7 GHz (space-to-Earth) frequency band. DBS channels 1-32 operate in discrete portions of this 500 megahertz of downlink spectrum. Each of the 32 channels at a given orbit location can transmit multiple channels of programs to customers. For example, DBS Channel 1 at the 148° W.L. orbital location may provide three to twelve programming channels to homes, depending on the bandwidth required for each program (High Definition program channels require more bandwidth).

³ EchoStar DBS Corporation, *Order*, 11 FCC Rcd 16291 (Int’l Bur. 1996).

to operate on the remaining channels at that location.⁴ DISH provided service on these channels using the EchoStar 1 and EchoStar 2 space stations. In July 2008, the EchoStar 2 space station experienced an in-orbit failure.⁵ The International Bureau (Bureau) granted DISH authority to relocate its EchoStar 5 space station to the 148° W.L. orbital location and to operate on all 32 DBS channels.⁶ EchoStar 5 commenced operations at the 148° W.L. orbital location in June 2009. In the same month, DISH relocated EchoStar 1 from 148° W.L. to 77.15° W.L., where it now operates under Mexican authority. DISH de-orbited EchoStar 5 in August 2009 due to low fuel reserves.⁷ DISH has not operated a space station at the 148° W.L. orbital location since that time.

3. In its October 2009 Modification Application, DISH stated that the next available DBS satellite suitable for service at the 148° W.L. orbital location, which is not “earmarked for other service,” is the EchoStar 8 space station.⁸ EchoStar 8 is operating at the 77° W.L. orbital location under Mexican authority.⁹ DISH maintained that upon the successful launch of the Mexican space station, QuetzSat-1, to the 77° W.L. orbital location, it will relocate EchoStar 8 to 148° W.L. and restore service from that location.¹⁰

4. In the Modification Application, DISH requested authority to suspend operations at the 148° W.L. location for more than 90 days pursuant to Section 25.161(c) of the Commission’s rules.¹¹ This rule provides that a license will automatically terminate upon removal or modification of the facilities which renders the station not operational for more than 90 days, unless specific authority is requested. DISH stated in its Modification Application that grant of its request is warranted for several reasons. First, DISH stated there is no “unacceptable lapse in service to customers” because it has transitioned all customers receiving service from the 148° W.L. orbital location to other satellites.¹² Second, DISH maintained that its request does not violate the Commission’s anti-warehousing policy

⁴ See EchoStar Satellite Corporation, *Memorandum Opinion and Order*, 13 FCC Rcd 8595 (1998) and EchoStar Satellite Corporation, *Order*, 18 FCC Rcd 9396 (2003). On August 11, 2009, EchoStar Satellite Operating L.L.C. changed its name to DISH Operating L.L.C. See Letter to Marlene H. Dortch, Secretary, FCC, from Pantelis Michalopoulos, Counsel for DISH Operating L.L.C. (Sept. 9, 2009).

⁵ See SAT-STA-20090130-00013 (grant stamped June 12, 2009) and SAT-T/C-20090217-00027 (grant stamped Sept. 17, 2010).

⁶ EchoStar Satellite Operating L.L.C., IBFS File No. SAT-A/O-20081003-00215 (grant stamped with conditions Feb. 3, 2009).

⁷ EchoStar Satellite Operating L.L.C., IBFS File No. SAT-STA-20090729-00078 (grant stamped with conditions July 31, 2009).

⁸ DISH Operating L.L.C., SAT-MOD20091027-00114 (filed October 27, 2009), Narrative at 4 (*Modification Application*). DISH does not own the EchoStar 8 space station, but leases capacity on the satellite from EchoStar Corporation. *Id.* at n.21.

⁹ *Id.*, Narrative at 4.

¹⁰ *Id.* at 6.

¹¹ 47 C.F.R. § 25.161(c).

¹² *Modification Application*, Narrative at 4.

because DISH has not been “hoarding” DBS spectrum, and no other party has expressed an interest in providing DBS service from the 148° W.L. orbital location.¹³ Third, DISH stated that grant is consistent with previous grants by the Bureau.¹⁴ Last, DISH maintained that its proposal to relocate EchoStar 8 to 148° W.L. upon the launch of QuetzSat-1 will allow DISH to bring the spectrum back into use as soon as possible.¹⁵

5. In a May 2010 amendment to its Modification Application, DISH stated that the launch window for QuetzSat-1 was November 2011, and it anticipated relocating EchoStar 8 to 148° W.L. around June 2012.¹⁶ On February 2, 2012, DISH provided updated information regarding its plans to restore service at the 148° W.L. orbital location.¹⁷ DISH now states that the expected launch of the EchoStar 16 space station, in August 2012, coupled with the commencement of operations of QuetzSat-1, will make “a number of satellites potentially available for a move to 148° W.L.”¹⁸ DISH maintains that these two events should provide it the flexibility and resources to redeploy another space station to the 148° W.L. orbital location. Until the EchoStar 16 satellite is placed into operation, DISH states that it is not possible to determine which satellites it will position at various orbital locations. DISH, therefore, asks the Commission to hold its request to suspend operations in abeyance until 90 days after EchoStar 16’s launch.¹⁹

III. DISCUSSION

6. Although DISH requests a favorable finding under Section 25.161(c) of the Commission’s rules, we must first analyze whether grant of its request is warranted under the Commission’s replacement policy regarding replacement satellites. We then address DISH’s request under Section 25.161(c).

7. *Replacement Policy.* The Commission has consistently said that orbital assignments confer no permanent rights of use. It has, however, recognized the importance of giving satellite operators assurances that they will be able to continue to serve their customers from the same orbital location as older satellites are retired.²⁰ The Commission has stated that without this assurance, space station operators and their customers would be required to undertake the potentially disruptive and costly process of repointing antennas to space stations at different locations when older satellites are taken out

¹³ *Id.* at 5.

¹⁴ *Id.*

¹⁵ The *Modification Application* was put on Public Notice. See Policy Branch Information, *Public Notice*, Report No. SAT-00636 (Nov. 13, 2009). No comments were filed in response to the Notice.

¹⁶ DISH Operating L.L.C., SAT-AMD-20100510-00096 (filed May 10, 2010) (*Amendment*).

¹⁷ Letter to Marlene H. Dortch, Secretary, FCC, from Jeffrey H. Blum, Senior Vice President, Deputy General Counsel, DISH Operating L.L.C. (Feb. 2, 2012)(*Letter*).

¹⁸ *Letter* at 1.

¹⁹ *Id.* at 2.

²⁰ Amendment of the Commission’s Space Station Licensing Rules and Policies, *First Report and Order*, IB Docket No. 02-34, 18 FCC Rcd 10760, 10854-55 (2003) (*Space Station Licensing Reform Order*).

of service. Thus, the Commission has stated it will generally authorize replacement satellites at the same orbital location as the older space station, without considering competing applications.²¹

8. The Commission defines a replacement satellite as one that is “authorized to be operated at the same orbit location, in the same frequency bands, and with the same coverage area as one of the licensee’s existing satellites,” and is “scheduled to be launched so that it will be brought into use at approximately the same time, but no later than, the existing satellite is retired.”²² Where a space station operator fails to replace a space station, the spectrum is made available for reassessment.

9. In situations where a satellite has a catastrophic in-orbit or launch failure, the Commission may authorize “emergency replacement” satellites, without considering competing applications – even if there is some lapse in service. The Commission has authorized emergency replacement satellites in cases where the licensee has promptly filed an application to construct, launch, and operate a new satellite that will serve as a replacement, or has filed an application to move an in-orbit satellite into that location that will restore service promptly.²³

10. In its October 2009 Modification Application, DISH stated that it had to de-orbit EchoStar 5 unexpectedly in August 2009.²⁴ In the two-plus years since, DISH has not filed an application to build another satellite or to move an in-orbit satellite into the 148° W.L. orbital location as an emergency replacement for EchoStar 5. In the Modification Application, DISH maintained that it

²¹ See Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972, n.31 (1988). See also Licensing of Space Stations in the Domestic Fixed-Satellite Service, 50 FR 36071, ¶ 27 (Sept. 5, 1985); Amendment of the Commission’s Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-34, 18 FCC Rcd 10760, 10854 (2003) (*Space Station Licensing Reform Order*); GE American Communications Corp., *Order and Authorization*, 10 FCC Rcd 13775 at 13775-76 (Int’l Bur. 1995); and Loral SpaceCom Corp., *Order and Authorization*, 13 FCC Rcd 16348, 16440 (Int’l Bur., Sat. and Rad. Div. 1995).

²² 47 C.F.R. § 25.165(e)(1) and (2).

²³ See, e.g., Loral Spacecom Corp., *Order and Authorization*, 13 FCC Rcd 16438 (Sat. Div. 1998) (granted application filed in April 1997 requesting authority to launch and operate a ground spare as an emergency replacement for the Satcom IV satellite that suffered an in-orbit failure in January 1997); Volunteers in Technical Assistance, *Order*, 12 FCC Rcd 3094 (Int’l Bur. 1997) (granted application filed in January 1996 to launch and operate an emergency replacement satellite for the VITASAT-1 satellite that was destroyed by launch failure in August 1995; replacement satellite to be launched by March 1997); American Telephone and Telegraph Company, *Order and Authorization*, DA 95-1972, 10 FCC Rcd 12132 (Int’l Bur. 1995) (authorizing the launch and operation of Telstar 402R by December 1995, which was to serve as an emergency replacement satellite for the Telstar 402 satellite lost shortly after its launch in September 1994); Hughes Communications Galaxy, Inc., *Memorandum Opinion, Order and Authorization*, 8 FCC Rcd 5089 (1993) (granting Hughes’s October 1992 application to construct, launch, and operate an emergency replacement satellite by December 1994 to replace the satellite that failed in August 1992); and GE American Communications, Inc., *Order and Authorization*, 7 FCC Rcd 3212 (Com. Car. Bur. 1992) (granting GE’s October 1991 application to operate the in-orbit Anik D satellite as an emergency replacement for the Satcom IV satellite which failed in the fall of 1991).

²⁴ *Modification Application*, Narrative at 4. EchoStar 5 was launched in September 1999. It experienced technical anomalies in 2003 that required “greater propellant expenditure” to keep the satellite properly oriented. By 2009, EchoStar 5 was nearing its end of life. See DISH Operating LLC, SAT-STA-20090729-00078 (granted July 31, 2009), at 1-2. Thus, DISH should have been formulating plans for replacement capacity for EchoStar 5 well before EchoStar 5’s de-orbit.

intended to move the “next available” satellite -- EchoStar 8 -- into 148° W.L. once the QuetzSat-1 satellite was launched in late 2011.²⁵ QuetzSat-1 was successfully launched in September 2011. However, DISH did not file an application to relocate EchoStar 8 to 148° W.L. Indeed, the only application DISH has filed regarding EchoStar 8 was a November 2010 application requesting authority to move EchoStar 8 to 86.5° W.L. and to operate it indefinitely from that location.²⁶ Thus, DISH’s plans for EchoStar 8 were inconsistent with its prior statement that it would move EchoStar 8 to the 148° W.L. orbital location after QuetzSat-1 was launched.

11. DISH’s February 2012 supplement demonstrates that it still has no concrete plans to operate a satellite at 148° W.L. and that the orbital location will remain vacant for an indeterminate time. DISH maintains that commencing operations of EchoStar 16 and QuetzSat-1 “*should provide*” DISH the resources to move an in-orbit satellite to the vacant location. In this regard, DISH states that the EchoStar 3, EchoStar 8, EchoStar 12, and EchoStar 15 satellites have the “*potential for reployment*” to the 148° W.L. orbital location.²⁷ Further, DISH asks us to hold its request to suspend operations in abeyance until 90 days after EchoStar 16’s expected launch in August 2012, when it expects its fleet deployment plans to “*crystallize.*”²⁸ These statements make it clear that DISH has made a business decision that it is not a priority to reinstate service from the 148° W.L. orbital location. Under a best-case scenario, the 148° W.L. orbital location will be vacant for more than three years. Further, nothing in the record leads us to believe that this highly speculative best-case scenario will occur. This lengthy gap in service is well beyond the time frame under which we have authorized emergency replacement satellites.²⁹

12. In short, allowing DISH to retain a replacement expectancy at the 148° W.L. orbital location until it decides whether, and when, to operate another satellite at that location would contravene the Commission’s replacement expectancy policy and would encourage warehousing of scarce orbit-spectrum resources to the exclusion of others. We recognize that there is a freeze on filing new DBS applications, and therefore, we cannot make the DBS channels at 148° W.L. available for reassignment at this time. However, we do not view the current freeze on DBS applications as a basis for allowing DISH to continue to hold spectrum it has not used for more than two years and is not committed to using in the near future. Once the Commission lifts the DBS application freeze, DISH may file a new request for a DBS license. We will consider this request together with any other requests filed at that time, pursuant to any rules the Commission may adopt to govern licensing of DBS stations.

13. *Section 25.161(c)*. While we have analyzed DISH’s request under the Commission’s replacement expectancy policy, we recognize that DISH relies on Section 25.161(c) of the Commission’s rules in requesting authority to leave the 148° W.L. orbital location vacant. Section 25.161(c) states that a station authorization shall be automatically terminated upon “[t]he removal...of the facilities which

²⁵ *Modification Application*, Narrative at 6.

²⁶ See EchoStar Corporation, *Memorandum Opinion and Order*, DA 11-1251 (rel. July 26, 2011) (denying EchoStar’s request to use EchoStar 8 to meet EchoStar 86.5’s milestone and to operate EchoStar 8 at the 86.5° W.L. orbital location).

²⁷ *Letter* at 2 (emphasis added).

²⁸ *Letter* at 1.

²⁹ See note 23, *supra*.

renders the station not operational for more than 90 days, unless specific authority is requested.”³⁰ The authorization was for EchoStar 5 to operate at 148° W.L., and once DISH retired and de-orbited the EchoStar 5 space station at its end-of-life, the station authorization (license) for EchoStar 5 ceased to exist. Consequently, Section 25.161(c) does not apply in this case.

14. Alternatively, even assuming Section 25.161(c) could be applied in cases involving the replacement of de-orbited satellites, this would not change the result here and we would still deny DISH’s request on its merits. The Commission has stated that Section 25.161(c) is intended to avoid unacceptable lapses in service to customers and to prevent warehousing of scarce orbital and spectrum resources.³¹ Because DISH has transitioned all of its customers that had been receiving service from the 148° W.L. orbital location to other satellites and has no concrete plans to reinitiate service at 148° W.L. until it is convenient to do so, it is warehousing scarce orbital and spectrum resources contrary to the purpose of the rule.

15. DISH cites two cases that it claims warrant a favorable outcome. In the first, the Division authorized EchoStar to relocate EchoStar 5 to 148° W.L. to replace the failed EchoStar 2 satellite pursuant to Section 25.161(c).³² In that case, however, EchoStar filed an application to relocate EchoStar 5 to 148° W.L. within six weeks of EchoStar 2’s in-orbit failure.³³ It also immediately transitioned the EchoStar 2 customers to the EchoStar 1 satellite, which was also operating at the 148° W.L. orbital location. Importantly, EchoStar relocated EchoStar 5 to the 148° W.L. orbital location within seven months of EchoStar 2’s failure.³⁴ Thus, EchoStar acted promptly to restore service after EchoStar 2’s in-orbit failure. Here, in contrast, DISH has no concrete plans to provide service from the 148° W.L. orbital location after a more than two-year gap in service.

16. In the second case cited by DISH, the Bureau granted SES Americom’s application to retain its authorization to operate the AMC-16 space station at the 85° W.L. orbital location while it temporarily relocated AMC-16 to another orbital location.³⁵ The Bureau noted that SES Americom

³⁰ 47 C.F.R. § 25.161(c).

³¹ SES Americom, Inc., *Order and Authorization*, 21 FCC Rcd 3430, 3434 (Int’l Bur. 2006) (*SES Americom*).

³² See EchoStar Satellite Operating LLC, IBFS File No. SAT-MOD-20080825-00158 (granted Feb. 2, 2009) (authorizing EchoStar to restore service at the 148° W.L. orbital location using EchoStar 5 after the in-orbit failure of EchoStar 2) (*EchoStar*).

³³ *Id.*

³⁴ In *EchoStar*, the Satellite Division analyzed the case under Section 25.161(c), rather than treating the request as an emergency replacement satellite application under the Commission’s emergency replacement policy. See note 23, *supra*. Although Section 25.161(c) was not the appropriate rule for that case, the outcome would have been the same. In applying Section 25.161(c), the Division used the same public interest analysis that it would have used to consider whether an entity is entitled to retain an emergency replacement expectancy at a vacated location. Thus, treating the case as a Section 25.161(c) matter “clearly had no bearing on the procedure used or the substance of decision reached,” and so was harmless error. See Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706 (directing courts reviewing administrative decisions to take “due account” of the rule of prejudicial or harmless error). See also *City of Arlington, Texas v. FCC*, 668 F.3d 229, 234 (5th Cir., 2012); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970); *Braniff Airways v. Civil Aeronautics Board*, 379 F.2d 453, 465-66 (D.C. Cir., 1967), quoting *Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States*, 377 U.S. 235, 248 (1964).

³⁵ *SES Americom, Inc.*, 21 FCC Rcd at 3434.

would return AMC-16 to 85° W.L. at a “defined end-date” -- initially eight months after the move, but later extended an additional seven months due to a launch failure.³⁶ The Bureau also noted the relocation would facilitate improved service to one of SES Americom’s customers. In contrast to the facts in SES Americom, the two-plus year vacancy at the 148° W.L. orbital location is not due to a temporary relocation of a satellite. Further, DISH does not provide a specific date by which it will bring another satellite into operation at that orbital location. In fact, DISH does not even have an application on file requesting authority to operate a satellite at this orbital location. Thus, we do not find that the SES Americom case supports a grant here.

IV. CONCLUSION AND ORDERING CLAUSES

17. Based on the foregoing, we find that DISH has no replacement expectancy at the 148° W.L. orbital location. DISH has left the orbital location vacant for more than two years and has not sought authority to operate a satellite at 148° W.L. Consequently, we deny DISH’s request to suspend DBS operations at this location. We also deny DISH’s request to hold our decision in abeyance until 90 days after the launch of EchoStar 16. The DBS channels 1-32 at the 148° W.L. orbital location will be made available once the Commission’s freeze on the filing of new DBS applications is lifted.

18. ACCORDINGLY, IT IS ORDERED that DISH Operating L.L.C.’s request to suspend operations on DBS channels 1-32 at the 147.925° W.L. orbital location, SAT-MOD-20091027-00114, and SAT-AMD-20100510-00096, is DENIED.

19. This *Order* is issued pursuant to Section 0.261 of the Commission’s rules on delegations of authority, 47 C.F.R. § 0.261, and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Mindel De La Torre
Chief, International Bureau

³⁶ SES Americom, Inc., *Memorandum Opinion and Order*, 21 FCC Rcd 14785 (Int’l Bur. 2006).