

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

)	
Petition for Waiver of Direct Broadcast)	
Satellite Public Interest Obligation)	
Implementation Date)	File No. SAT-WAV-19991210-00116
)	
EchoStar Satellite Corporation)	
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)	

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1999

Released: December 17, 1999

By the Commission:

1. By this Order, we deny the request of EchoStar Satellite Corporation (“EchoStar”) for a waiver of the December 15, 1999 date to make its public interest programming available to customers and its request for a six week extension of time to do so. For the reasons set forth below, we find that EchoStar has failed to demonstrate good cause to grant its request. Although we find that EchoStar may be subject to enforcement action for not meeting the December 15, 1999 deadline, no penalties will be imposed on EchoStar for failure to comply with its public interest obligations during the time period of December 16, 1999 to January 7, 2000 due to Year 2000 (“Y2K”) compliance concerns.

I. BACKGROUND

2. In November 1998, the Commission adopted rules imposing certain public interest obligations on direct broadcast satellite (“DBS”) providers.¹ Among other obligations, these rules require DBS providers to set aside four percent of their DBS systems’ total channel capacity exclusively for programming of an educational or informational nature.² The *DBS Public Interest Obligations Order* required DBS providers to make available satellite capacity for public interest programming on June 15, 1999, and provided an additional six-months, or until December 15, 1999, to enter into arrangements with interested programmers for delivery of public interest programming to consumers.³

¹ Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, *Report and Order*, 13 FCC Rcd 23254 (1998) (“*DBS Public Interest Obligations Order*”).

² 47 C.F.R. § 100.5(c)(1).

³ *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23309; *see also* 47 C.F.R. § 100.5(c)(7).

3. On November 24, 1999, the Commission released a *Declaratory Ruling and Order* stating that EchoStar's proposal to place all of its public interest programming on its satellite at the 61.5° W.L. orbit location, which provides limited coverage of the United States, did not comply with the requirements of the Commission's DBS public interest rules.⁴ Instead, the Commission determined that EchoStar must set aside four percent of the channels available at each of its full-continental U.S. ("CONUS") orbit locations for public interest programming. Because the number of channels at its full-CONUS locations is less than the number of its system's total channel capacity, the Commission stated that EchoStar could place the remaining channels at the location of its choice.⁵

4. On December 10, 1999, EchoStar filed a petition requesting that the Commission waive the December 15, 1999 implementation deadline and grant EchoStar an extension of six weeks, or until January 28, 1999, to begin offering its public interest programming.⁶ EchoStar claims additional time is needed due to Y2K date compliance concerns and the *ADEC Declaratory Ruling and Order*. Specifically, EchoStar asserts that its Y2K compliance strategy requires that it not introduce new hardware or software in an effort to control potential Y2K errors.⁷ EchoStar states that the Commission's *Year 2000 Network Stabilization Policy Statement* provides that the Commission will grant waivers if necessary to prevent disruptive system modifications before January 2000.⁸

5. In addition, EchoStar states that as a result of the *ADEC Declaratory Ruling and Order* it must establish a process for determining location assignments for qualified public interest programmers, and may have to reassign certain commercial channels in order to comply with the *Order*.⁹ EchoStar maintains that it can resolve these issues and make available public interest programming to the public on January 28, 2000. According to EchoStar, the delay is of little consequence because many of the public interest programmers seeking carriage will not be ready to start programming until after January 1, 2000.¹⁰

⁴ American Distance Education Consortium, Request for an Expedited Declaratory Ruling and Informal Complaint, *Declaratory Ruling and Order*, FCC 99-367 (rel. Nov. 24, 1999) ("*ADEC Declaratory Ruling and Order*").

⁵ *ADEC Declaratory Ruling and Order* at 7.

⁶ EchoStar Satellite Corporation, Petition for Waiver of December 15, 1999 Implementation Date, filed December 10, 1999 ("*EchoStar Petition for Waiver*").

⁷ *EchoStar Petition for Waiver* at 2.

⁸ *Id.* at 3, citing Minimizing Regulatory and Information Technology Requirements That Could Adversely Affect Progress Fixing the Year 2000 Date Conversion Problem, *Year 2000 Network Stabilization Policy Statement*, FCC 99-272 (rel. October 4, 1999) ("*Year 2000 Network Stabilization Policy Statement*").

⁹ *EchoStar Petition for Waiver* at 4.

¹⁰ *Id.* at 3.

II. DISCUSSION

6. Section 1.3 of the Commission's rules allows the waiver of a rule provision "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."¹¹ In the *DBS Public Interest Obligations Order*, the Commission stated that DBS providers were required to make the public interest programming capacity available as soon as the rules became effective, which was June 15, 1999. The Commission provided an additional six months for programmers and providers to enter into arrangements regarding program carriage. The rules clearly mandate that the public interest programming must be made available "no later than six months" after the effective date of the rules.¹² Therefore, the public interest programming must be made available no later than December 15, 1999.

7. We find that EchoStar has failed to demonstrate good cause sufficient to warrant a waiver of the December 15, 1999 implementation date.¹³ First, we are not persuaded by EchoStar's claim that additional time is needed due to the Commission's ruling in the ADEC matter. Since the issuance of the *DBS Public Interest Obligations Order*, in November 1998, EchoStar has had clear notice that it was required to reserve four percent of its system's capacity for public interest programming and make that programming available by December 15, 1999. This obligation did not disappear during the pendency or resolution of the *ADEC Declaratory Ruling and Order*. Like all DBS providers, EchoStar has been under a clear mandate to comply with the December 15, 1999 deadline. The Commission adopted this requirement one year ago and for a specific public interest purpose: to ensure that public interest programming would be available to DBS subscribers. In fact, the Commission adopted a six-month phase in approach to permit DBS providers and programmers to enter into arrangements for carriage.¹⁴ The Commission specifically declined to adopt any period longer than six months so as to "assure prompt compliance."¹⁵ Therefore, it is disingenuous for EchoStar to use the *ADEC Declaratory Ruling and Order* as an excuse to delay the start of its public interest programming obligations. The Commission's *Year 2000 Network Stabilization Policy Statement* cautions parties against using the Policy Statement to forestall "disfavored regulations."¹⁶

¹¹ 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹² 47 C.F.R. § 100.5(c)(7).

¹³ DBS providers were on notice of these obligations as early as 1992 when Congress directed the Commission to require DBS providers to reserve a percentage of their channel capacity exclusively for noncommercial programming of an educational or informational nature. 47 U.S.C. § 335(a). The Commission sought comment on how to implement this congressional directive and subsequently released rules providing ample time for compliance. *See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Service Obligations, Notice of Proposed Rule Making*, 8 FCC Rcd 1589 (1993); 47 C.F.R. § 100.5(c)(7).

¹⁴ *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23309.

¹⁵ *Id.* at 23310.

¹⁶ *Year 2000 Network Stabilization Policy Statement*, ¶ 16.

8. We are also not persuaded by EchoStar's claim that certain public interest programmers are not ready for carriage. The obligation is on the DBS provider, not the programmers. Further, we believe that any lack of preparedness on the part of programmers likely stems, in part, from EchoStar's failure to establish a timely application process to select qualified public interest programmers for carriage on its system.¹⁷ Therefore, this assertion does not absolve EchoStar of its obligation to meet the Commission's implementation deadline. EchoStar was required to make available satellite capacity for public interest programming no later than December 15, 1999, and failed to take the necessary steps to bring its DBS system into compliance with its statutorily mandated public interest obligations.

9. Second, as to EchoStar's Y2K claims, we find that EchoStar has been provided with sufficient time to introduce the necessary software and equipment to ensure the programming could be provided consistent with its Y2K strategy. In light of the one-year notice EchoStar had of the December 15, 1999 deadline, EchoStar should have taken the necessary steps to introduce and test new software for the placement of public interest programming on its satellites. We note that EchoStar has not specified the technical actions that would be necessary to take now or that it could take to ensure Y2K compliance. EchoStar simply states that providing public interest channels would "involve the introduction of new software code and equipment."¹⁸ Nonetheless, out of abundance of caution, and purely to protect consumers from the potential disruption of their service, we will not undertake enforcement action for failure to comply with this obligation from the time period of December 16, 1999 to January 7, 2000. We take this action *sua sponte* to protect the public interest and ensure that EchoStar customers and U.S. consumers will not suffer from EchoStar's failure to plan adequately to meet its obligations. We further emphasize that we do not absolve EchoStar from its failure to meet the December 15, 1999 deadline, and specifically put EchoStar on notice that it may be subject to enforcement action with regard to its apparent failure to comply with our rule.

III. CONCLUSION AND ORDERING CLAUSE

10. EchoStar has had sufficient time to comply with the obligations and responsibilities associated with the Commission's DBS public interest rules. EchoStar's delay in complying with the Commission's rules and resulting Y2K concerns do not constitute good cause warranting a waiver of our rule requiring public interest programming to be in place on December 15, 1999.

11. Accordingly, IT IS ORDERED, that the Petition for Waiver of December 15, 1999 Implementation Date filed by EchoStar Satellite Corporation, File No. SAT-WAV-19991210-00116, IS DENIED. EchoStar is directed to take steps to implement its public interest obligations in compliance with Commission rules. This matter is being referred to the Commission's Enforcement Bureau for possible action for failure to meet the Commission's December 15, 1999 deadline. However, no

¹⁷ *EchoStar Petition for Waiver* at 3.

¹⁸ *Id.* at 2.

enforcement action will be taken against EchoStar for its non-compliance from December 16, 1999 to January 7, 2000.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary