

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Application of)
)
EchoStar Communications Corporation (a)
Nevada Corporation), General Motors, and)
Hughes Electronics Corporation (Delaware)
Corporations))
)
(Transferors))
)
and)
)
EchoStar Communications Corporation (a)
Delaware Corporation))
)
(Transferee))

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Federal Communications Commission
Office of Secretary

CS Docket No. 01-348

To: Chief Administrative Law Judge
Richard L. Sippel

**ENFORCEMENT BUREAU'S OPPOSITION TO
PETITION TO INTERVENE**

1. On November 1, 2002, Advanced Communications Corporation ("Advanced") filed a Petition to Intervene and Seek Continuance of Hearing ("Petition") in the above-captioned proceeding, pursuant to sections 1.223 and 1.205 of the Commission's rules and paragraph 298 of the Commission's Hearing Designation Order ("*HDO*").¹ For the reasons discussed below, Advanced is not a party in interest and fails to demonstrate that its participation will assist the Commission in a

¹ See *In the Matter of Application of EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, Hearing Designation Order, FCC 02-284 (rel. Oct. 18, 2002). In paragraph 298 of the *HDO*, the Commission noted that "any person seeking to participate as a party in the hearing may file a petition to intervene." pursuant to section 1.223 of the Commission's rules. *Id.*

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determination of the hearing issues. Accordingly, the Enforcement Bureau ("Bureau") opposes Advanced's Petition as substantively deficient.'

2. Section 1.223 of the Commission's rules provides, in relevant part, that any person wishing to participate as a party in any hearing "must set forth the interest of petitioner in the proceedings. [and] must show how such petitioner's participation will assist the Commission in the determination of the issues in question."³ As shown below, Advanced has not demonstrated that it is entitled to full-party status. Similarly, Advanced fails to satisfy the good-cause standard of securing a continuance under section 1.205 of the Commission's rules.

3. Advanced's attempt to intervene in this proceeding is the latest salvo in a seven-year odyssey. Since 1995, Advanced has unsuccessfully challenged the Commission's decision to cancel Advanced's authorization to construct a DBS system at the 110° W.L. orbital location, the spectrum at issue in the hearing. Advanced was unable to complete and launch its system by the initial deadline and sought a four-year extension, which the Commission granted. Four months before the revised deadline of December 7, 1994, Advanced requested a second four-year extension. Advanced also filed an application to modify its permit and assign its interest to Tempo DBS or, alternatively, sell its rights to the transponder capacity on the satellites to TCI in exchange for 545 million in TCI common stock and other monetary incentives.' The International Bureau ("IB") denied the extension based on Advanced's failure to comply with the Commission's due diligence requirements and cancelled

² The Enforcement Bureau also notes that Advanced's Petition is procedurally deficient, Advanced did not properly direct its Petition to the Chief Administrative Law Judge, as required by sections 1.291(a)(2) and (4), 1.209, and 0.351(f) of the Commission's rules. In fact, Advanced did not direct its Petition to anyone. According to the date-stamp on the copy of the Petition the Bureau received, it appears that Advanced filed its Petition with the Office of the Secretary on November 1, 2002. As a result of Advanced's filing deficiency, the Bureau did not receive a copy of the Petition until November 7, 2002.

³ 47 C.F.R. § 1.223(b)

⁴ See *Advanced Communications Corp.*, Memorandum Opinion and Order, DA 95-944, 10 FCC Rcd 13337 (Int'l Bur 1995), *aff'd* Memorandum Opinion and Order, FCC 95-428, 11 FCC Rcd 3399, 3406 (1995) (1995 Order), *aff'd* *Advanced Communications Corp v FCC*, R4 F.3d 1452 (D.C. Cir. 1906), *cert. denied*, *aff'd* *Advanced Communications Corp v FCC*, 519 U.S. 1071 (1997).

Advanced's construction permit. In 1995, the Commission affirmed the International Bureau's decision, noting that Advanced's "lack of due diligence has resulted in a warehousing of spectrum from which it now seeks to profit."

4. In January 1996, the Commission auctioned the disputed spectrum and awarded it to MCI Telecommunications ("MCI"), the highest bidder at \$682.5 million dollars. MCI ultimately determined that it would not be feasible to continue building out the system and sought Commission approval to transfer its authorization to EchoStar.⁶

5. After the auction, Advanced filed an appeal with the D.C. Circuit Court of Appeals ("the Court"). The Court affirmed the Commission's decision in May 1996, holding that the Commission's decision was not unreasoned and did not break with Commission precedent.⁷ The Court also rejected Advanced's argument that the Commission based its decision on the expectation of auction revenues, in violation of 47 U.S.C. § 309(j)(7)(A), although the Court did not express any opinion as to whether the Commission was barred from considering the expected revenues.⁸ Advanced then filed a petition for *writ of certiorari* with the U.S. Supreme Court, which was denied on January 6, 1997.⁹ On October 11 and 12, 2001, Advanced obtained affidavits from former Commissioners James H. Quello and Andrew C. Barrett, in which both affiants state that "at least one of the Commissioners in the majority based his or her decision in the Advanced Order on the expectation of federal revenues that would result from reassignment by auction."¹⁰

⁵ 1995 Order at 3423.

⁶ The Commission approved the transfer in 1999. *See HDO* at para. 6, note 18.

⁷ *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996).

⁸ *Id.*

⁹ *Advanced Communications Corp. v. FCC*, 519 U.S. 1071 (1997).

¹⁰ *See Petition* at Ex. 3, Ex. 4.

6. On October 15, 2001, Advanced filed a new or amended complaint based on the affidavits and also petitioned the Court for a writ of mandamus "directing the FCC to declare void" the Commission's 1995 Order. The Court denied mandamus relief because "the petition provides no reason why the court should grant this extraordinary relief. As petitioner acknowledges, this court has already affirmed the order it seeks to challenge anew."¹¹ The Court also dismissed as untimely Advanced's attempt to file a new or amended petition for review.

7. On April 3, 2002, Advanced filed a Petition to Reopen Case Based on Recently Obtained Previously Unavailable Evidence ("Petition to Reopen"). The Petition to Reopen asks the Commission to set aside its 1995 Order and to re-adjudicate Advanced's 1994 request for an extension of time to construct, launch, and operate a DBS system.¹² The Petition to Reopen is currently pending before the Commission.

8. On October 18, 2002, the Commission released the EchoStar *HDO* to evaluate the potential harms against the potential benefits of granting the currently pending applications of EchoStar and Hughes to launch and operate NEW ECHOSTAR 1, a DBS system at the 110° W.L. orbital location and to determine, ultimately, whether the public interest, convenience and necessity would be served by granting the applications.¹³ On November 1, 2002, Advanced filed the instant Petition.

9. Advanced argues that it is a party in interest because of its pending Petition to Reopen. As set out above, however, Advanced appealed the Commission's 1995 Order to the D.C. Circuit Court, arguing that the Commission based its 1995 Order on improper motives. The Court denied that appeal, and the Supreme Court declined to consider the matter. Advanced subsequently provided the Circuit

¹¹ *Advanced Communications Corp.*, 2001 WL 1699340 (D.C. Cir. 2001).

¹² See *Advanced Communications Corp.*, Memorandum Opinion and Order, DA 95-944, 10 FCC Red 13337 (Int'l Bur. 1995), *aff'd* Memorandum Opinion and Order, FCC 95-428, 11 FCC Red 3399 (1995), *aff'd* *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996), *cert. denied*, *aff'd* *Advanced Communications Corp. v. FCC*, 519 U.S. 1071 (1997).

¹³ *HDO* at para. 289.

Court with the 2001 affidavits from Quello and Barrett in support of its argument that the Commission's decision to cancel its authorization was improper. Now Advanced seeks to re-litigate the matter by injecting itself into the EchoStar hearing. The matter has been thoroughly litigated and rejected by the courts and, in any event, this proceeding is not the proper forum to reopen the Commission's 1995 Order.

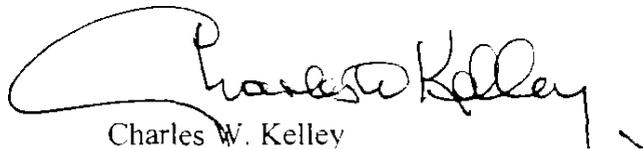
10. Similarly, Advanced fails to establish how its participation as a party will assist the Commission in making a determination of the hearing issues. Advanced argues that its participation in the hearing will assist the Commission because "the relief that Advanced Communications seeks in this petition and in the Petition to Reopen may result in the amelioration or mitigation of one of the Commission's anticompetitive concerns regarding" the EchoStar merger." In other words, Advanced argues that if it had yet another bite at the apple and could re-litigate its stale claim that the Commission improperly cancelled its license, there would be more competition in the satellite market. As noted above, Advanced has already exhausted all avenues for appealing the Commission's 1995 Order and is simply seeking yet another chance to re-litigate its claim that it is the authorized party to the \$6.258 million spectrum. It is clear that permitting Advanced to intervene **will** assist *Advanced*; it is unclear how permitting Advanced to intervene, and affording it full-party status, will assist the *Commission* in the determination of the hearing issues.

11. Finally, Advanced's request for a continuance is premised solely on its claimed entitlement to full-party status. Because it is not entitled to intervene, its request for continuance must also fail.

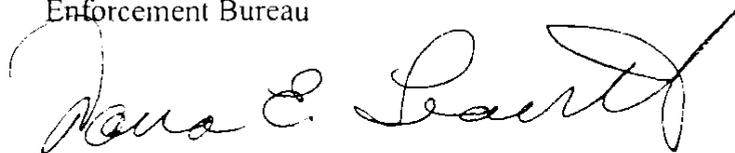
¹⁴ Petition at 5

12. For the reasons above, Advanced has failed to meet the strict standards embodied in section 1.223 for intervention. Similarly, Advanced has failed to establish any good-cause basis to continue the hearing. Accordingly, the Bureau recommends denying Advanced Communications Corporation's Petition to Intervene and Seek *Continuance of Hearing*.

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CERTIFICATE OF SERVICE

I, Karen Richardson, legal technician for the Investigations and Hearings Division, Enforcement Bureau, certify that I have, on this 13th day of November 2002, served copies of the foregoing "Enforcement Bureau's Opposition to Petition to Intervene" via mail or hand to the following persons and entities:



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