

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Review of the Emergency Alert System) EB Docket No. 04-296
)
To: The Commission

**CONSOLIDATED REPLY TO OPPOSITIONS TO
PETITION FOR PARTIAL RECONSIDERATION**

On December 27, 2005, PanAmSat Corporation (“PanAmSat”), SES Americom, Inc. (“SES Americom”), and Intelsat, Ltd. (“Intelsat,” collectively, “Petitioners”), filed a Petition for Partial Reconsideration (“Petition”) addressing the Commission’s First Report and Order (“First R&O”) in the above-captioned proceeding. Petitioners sought reconsideration of the portion of the First R&O extending Emergency Alert System (“EAS”) obligations to Fixed Satellite Service (“FSS”) satellite operators whose programming distributor customers use Ku-band frequencies to provide Direct-to-Home (“DTH”) service.

DIRECTV Latin America, L.L.C. (“DTVLA”) and EchoStar Satellite L.L.C. (“EchoStar”) filed oppositions (collectively, the “Oppositions”) on March 2, 2006. Petitioners, by their attorneys, hereby reply to the DTVLA and EchoStar Oppositions.

I. INTRODUCTION

The Petition was based upon a simple proposition: the programming distributors who control the content of DTH transmissions are in the best position to incorporate EAS messages into that content. Petitioners showed that, except in the case of DTH-FSS services, the Commission consistently had applied EAS requirements to the programming distributor. Petitioners demonstrated that applying EAS requirements to FSS satellite operators instead of DTH-FSS programming distributors affords no benefits; is dependent on indirect contractual enforcement that undermines the effectiveness of the EAS system;

and imposes unnecessary costs and burdens on FSS satellite operators.¹ Petitioners also relied on the Commission’s finding, in the context of home satellite dish (“HSD”) services, that it would be “very burdensome” for HSD service providers to distribute EAS messages to HSD subscribers because HSD users receive programming directly from programmers. The same is true of FSS operators, because DTH-FSS subscribers receive programming directly from DTH programming distributors, rather than from FSS operators.

DTVLA and EchoStar do not dispute that it is more logical to place the obligations for EAS on the parties who are directly in a position to carry out those obligations. Instead, their primary objection to the Petition is the argument that the Commission lacks jurisdiction to apply EAS obligations to DTH-FSS programming distributors that use unlicensed receive-only dishes. DTVLA and EchoStar suggest that the Commission’s decision to forego active regulation of receive-only antennas deprives the Commission of authority over such operations. There is no basis for such a limitation on Commission jurisdiction.

DTVLA’s and EchoStar’s remaining procedural claims also are without merit and should be rejected. Similarly, EchoStar’s objection to Petitioners’ request for grandfathering does not withstand scrutiny. Accordingly, on reconsideration the Commission should shift DTH-FSS EAS responsibilities from the FSS satellite operator to the DTH-FSS programming distributor and should grant Petitioners’ grandfathering request.

II. THE COMMISSION HAS JURISDICTION OVER DTH-FSS PROGRAMMING DISTRIBUTORS.

EchoStar and DTVLA contend that the Commission cannot place the EAS obligations where they logically belong – with the DTH-FSS programming distributors – because the Commission lacks jurisdiction over these entities.² Section 303(v) of the Communications Act³ lays this contention to rest. It gives the Commission “exclusive

¹ Petitioners also requested that the Commission provide an exemption for DTH-FSS services that are directed primarily to consumers outside the United States. Neither of the Oppositions addresses this request and, as a result, it is not discussed in Petitioners’ reply.

² EchoStar Opposition at 7-8; DTVLA Opposition at 3-5.

³ 47 U.S.C. § 303(v).

jurisdiction to regulate the provision of direct-to-home satellite services” which are defined in Section 303(v) as “the *distribution* or broadcasting of programming or services by satellite directly to the subscriber’s premises”⁴

As demonstrated in the Petition, moreover, the Commission has jurisdiction over DTH-FSS programming distributors by virtue of its authority over the receive-only earth stations that the programming distributors employ to provide their service.⁵ If the Commission wished to buttress this authority, it could make compliance with EAS requirements specifically a pre-condition to qualifying for the provisions in Section 25.131(j) of the rules exempting certain receive-only earth stations from licensing requirements.⁶

This action would not, as suggested in the Oppositions, roll back the deregulatory trend of the past decades, which Petitioners fully support. Rather, it would provide a means of implementing the Commission’s legal authority over DTH-FSS programming distributors without imposing any practical change, apart from the application of EAS requirements, in the manner in which receive-only earth stations are regulated.⁷

III. THE DBS PUBLIC INTEREST PROCEEDING IS DISTINGUISHABLE.

EchoStar claims that EAS requirements should apply to FSS operators rather than DTH-FSS programming distributors because the Commission previously applied DBS public interest requirements to the former and not the latter.⁸ EchoStar, however, has not properly taken into account critical distinctions between EAS requirements and DBS public interest requirements.

⁴ *Id.* (emphasis added).

⁵ Petitioners also raised the possibility in the Petition of re-instituting licensing for receive-only earth stations and immediately granting a blanket license for present and future stations, conditioned only upon compliance with EAS requirements. DTVLA’s assertion that the Commission rejected a similar proposal in the DBS public interest proceeding, DTVLA Opposition at 3-4, is incorrect. No such proposal was made in that proceeding, and the citation given by DTVLA in support of its assertion makes no reference to such a proposal.

⁶ In addition to the Commission’s general authority to regulate interstate communications, the EAS proceeding invokes its Section 151 authority to “promot[e] . . . safety of life and property through the use of wire and radio communication” as well as certain other jurisdictional bases. In light of these jurisdictional bases and the fact that DTH-FSS programmers are engaged in “communication by wire or radio,” the decision cited by DTVLA, *Am. Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), DTVLA Opposition at n.18, is inapposite.

⁷ In a similar context, the Commission has used its authority over receive-only earth stations to exercise jurisdiction over operators of non-U.S. licensed satellites seeking to serve the U.S. market.

⁸ EchoStar Opposition at 4-5; *see also* DTVLA Opposition at 3-4.

In the DBS public interest proceeding, the Commission made FSS operators, rather than DTH-FSS programming distributors, subject to DBS public interest requirements after concluding that Congress, in Section 335 of the Communications Act, had required it to do so.⁹ No such consideration is present in this proceeding, leaving the Commission free to make a *de novo* determination.

The educational programming and political broadcasting requirements at issue in the DBS public interest proceeding, moreover, implicate a host of legal and policy factors that are specific to those requirements. Petitioners have demonstrated in this proceeding, based on practical, financial and policy considerations that are specific to EAS, that making the EAS requirements directly applicable to DTH-FSS programming distributors will maximize the effectiveness of the EAS system, preserve the integrity of the Commission's regulations, and avoid the imposition of unnecessary and counterproductive regulatory burdens. In light of these considerations, the Commission's choice is clear.

IV. IF THE COMMISSION DECLINES TO MODIFY ITS EAS RULES AS REQUESTED IN THE PETITION, IT SHOULD GRANDFATHER EXISTING CONTRACTS.

In their Petition, Petitioners made two simple points in support of their grandfathering request: *first*, that they have no way, other than through contracts, to force their customers to participate in the EAS system, and *second*, that existing contracts do not give them the right to force programming distributors to participate in the EAS system. As a result, the Petitioners asked the Commission to grandfather existing contracts if it declines to grant Petitioner's request to impose the EAS obligations directly on DTH-FSS programming distributors.

EchoStar contends that FSS operators should have begun including EAS provisions in their contracts when the NPRM was released in 2004.¹⁰ It even suggests that FSS operators should have begun including provisions broad enough to cover EAS requirements in their contracts as early as 1998, based on the fact that the Commission

⁹ See *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations*, Second Order on Reconsideration of First Report and Order ("Public Interest Second Reconsideration Order") at ¶¶ 9, 14.

¹⁰ EchoStar Opposition at 8-9.

adopted rules in a separate proceeding - the DBS public interest proceeding – implementing a statutory provision that had nothing to do with EAS.¹¹

EchoStar’s argument is divorced from reality. The Commission makes new rulemaking proposals all the time. Some are adopted. Some are not. Some are adopted in a form that is materially different than what had been proposed. Licensees cannot reasonably be expected to enter into contractual arrangements based on proposals that may or may not be adopted. And licensees are in no position to get their customers to commit contractually to legal requirements that may never come into force.¹²

EchoStar, moreover, overlooks the fact that Petitioners already have entered into contracts that did not include “EAS clauses,” and wishing that they had will not make it so. The reality is that these contracts do not delegate EAS responsibilities to Petitioners’ customers, and Petitioners have no means of implementing EAS messages themselves. Imposing a mandate when FSS operators have no legal right, and no practical means, to meet that mandate will do nothing for the EAS system or for the objectives of this proceeding.

EchoStar suggests that there is no reason to grandfather DTH- FSS capacity agreements because “the Commission has already decided to defer the effectiveness of its EAS obligations on DBS providers - including DTH-FSS satellite operators - until May 31, 2007.”¹³ EchoStar is mistaken, because many DTH-FSS capacity agreements are long-term contracts with terms extending beyond 2007. The effective date of the First R&O does not resolve the grandfathering issue with respect to such contracts.

EchoStar complains that grandfathering pre-existing DTH-FSS agreements would be unfair unless the Commission also were to grandfather “existing DBS satellites and satellites under construction.”¹⁴ The situation FSS operators find themselves in and the circumstances facing DBS licensees, however, are readily distinguishable. FSS operators are incapable of implementing the EAS requirements, and they cannot delegate EAS responsibilities to their customers in cases in which they have already entered into

¹¹ *Id.*

¹² Applying new legal requirements to contracts that have already been executed also would raise issues as to retroactive rulemaking. *See, e.g., Yakima Valley Cablevision v. FCC*, 794 F.2d 737, 745 (D.C. Cir.1986) (“[C]ourts have long hesitated to permit retroactive rulemaking and have noted its troubling nature.”).

¹³ EchoStar Opposition at 8-9.

¹⁴ EchoStar Opposition at 8.

capacity agreements with those customers. DBS licensees face no comparable constraints. They have no need to delegate EAS responsibilities contractually, because as DTH programming distributors they have control over program content and can implement the EAS requirements themselves.

Finally, EchoStar asserts that grandfathering would be unfair to consumers.¹⁵ There is a simple answer to EchoStar's assertion. If the Commission grants the relief Petitioners have requested and applies the EAS requirements to DTH-FSS programming distributors instead of FSS operators, then there will be no need for grandfathering, and all DTH-FSS consumers can receive the immediate benefits of the EAS system.

V. THE PETITION IS PROCEDURALLY SOUND.

EchoStar asserts that the Petition is procedurally defective because it relies on facts that, according to EchoStar, were not previously presented to the Commission.¹⁶ The objection in the Petition to applying EAS requirements to FSS operators, however, is the same objection that was made in an *ex parte* presentation that was filed with the Commission prior to the adoption of the First R&O.¹⁷

It was stated in the *ex parte* presentation that: "Operators of Fixed Satellite Service ("FSS") space stations that are used to provide direct-to-home ("DTH") services do not control the content of the DTH services, and therefore are not in a position to implement an Emergency Alert System ("EAS") in connection with the DTH services."¹⁸ All of the issues addressed in the Oppositions arise by virtue of this basic fact. Accordingly, the Petition relies on facts that already have been presented to the Commission, and it is procedurally sound.¹⁹

¹⁵ EchoStar Opposition at 9.

¹⁶ EchoStar Opposition at 2-3.

¹⁷ See Letter from Joseph A. Godles, Attorney for PanAmSat Corporation, to Marlene H. Dortch, Secretary, FCC, dated Oct. 21, 2005.

¹⁸ *Id.*

¹⁹ Petitioners also note that, under 47 C.F.R. § 1.429(b)(3), the Commission may consider facts not previously presented if it determines that such consideration is required in the public interest.

VI. DTVLA'S AND ECHOSTAR'S POSITIONS ARE IMPRACTICAL.

With the advent of local into local and HDTV services, the spectrum requirements for DBS services have skyrocketed. As a result, it is becoming increasingly common for DBS operators to supplement the capacity on the DBS satellites that they own and operate with Ku-band capacity that they lease from FSS operators. In some cases, this FSS capacity is on U.S.-licensed satellites.²⁰ In other cases, the FSS capacity is on satellites that are licensed by other countries.²¹ DBS operators provide their customers with elliptical dishes that can be used to receive signals from multiple satellites, making it possible to provide a “one dish” service comprised of these DBS satellite and FSS satellite components.

The positions taken by DTVLA and EchoStar in their Oppositions, if left undisturbed on reconsideration, will leave in place a crazy quilt of regulation for one dish services. For example, in the case of a one dish service comprised of a DBS satellite, a U.S.-licensed FSS satellite, and an FSS satellite licensed outside the United States, a single entity – the DBS satellite operator – would provide the service, but there would be three separate sets of EAS requirements in connection with the service. The DBS satellite operator would have EAS responsibility for the channels transmitted on its DBS satellites. The U.S.-licensed FSS satellite operator would have EAS responsibility for the channels transmitted on its satellite. And it appears that no one would have EAS responsibility for the channels transmitted on the FSS satellite that is not U.S. licensed.²²

This regulatory structure is impractical in the extreme and will result in customer confusion when EAS alerts appear on some DTH channels, but not all. Making the changes proposed in the Petition would avoid this morass by ensuring that there is a

²⁰ See “DBS, Cable HD Needs Keep FSS Operators Busy & Full, They Say,” Communications Daily, August 17, 2005 (EchoStar leasing capacity on AMC-15 and AMC-16, which are U.S.-licensed FSS satellites, for the purpose of providing high definition television programming to its DBS customers).

²¹ See *EchoStar Satellite, LLC*, Order and Authorization, DA 05-3227 (Int’l Bur., Dec. 20, 2005) (granting EchoStar blanket authority to operate up to one million receive-only earth stations, located in the United States, to receive DTH-FSS programming via Ku-band capacity on Telesat Canada’s ANIK F3 satellite).

²² Section 25.701(a)(3) of the FCC’s rules defines the “DBS providers” that Part 11 of the rules makes subject to EAS requirements as including “[n]on U.S. licensed satellite *operators* in the Ku-band that offer video programming directly to consumers in the United States pursuant to an earth station license” 47 C.F.R. § 25.701(a)(3) (emphasis added). It appears, therefore, that if the holder of a blanket earth station license that is used to provide DTH services via a non-U.S. licensed FSS satellite is not the non U.S. satellite *operator*, and instead is the U.S. DBS operator, that Section 25.701(a)(3) is inapplicable.

single EAS traffic cop – the DTH-FSS programming distributor – for one dish services. Making the proposed changes also would rectify the gap in EAS responsibilities for non-U.S. licensed FSS satellites that exists under the current rules.

CONCLUSION

Rather than taking issue with the merits of the Petition, DTVLA and EchoStar seek to erect a variety of procedural and technical roadblocks that, they assert, should prevent the Commission from considering the sound policy arguments presented in the Petition. For the reasons presented herein, the Commission can and should consider the Petitioners' requests on the merits and, for the reasons set forth herein and in the Petition, should grant their requests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Consolidated Reply to Oppositions to Petition for Partial Reconsideration was sent by first-class mail, postage prepaid, this 15th day of March 2006, to each of the following:

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