

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

In the Matter of)
)
Advanced Communications Corporation)
)
Application for Extension of Time to)
Construct, Launch, and Operate a) File No. DBS 94-11EXT
Direct Broadcast Satellite System)
)
Application for Consent to Assign)
Direct Broadcast Satellite Construction)
Permit from Advanced Communications) File No. DBS 94-15ACP
Corporation to Tempo DBS, Inc.)
)
Application for Modification of Direct)
Broadcast Satellite Service Construction Permit) File No. DBS 94-16MP

Memorandum Opinion and Order

Adopted: January 7, 2003

Released: February 21, 2003

By the Commission:

I. Introduction

1. By this Memorandum Opinion and Order, we dismiss a petition submitted to the Federal Communications Commission ("Commission" or "FCC") by Advanced Communications Corporation ("Advanced") on April 3, 2002, requesting that the Commission reopen the record in the above-captioned proceeding to permit what it states is "recently obtained, previously unavailable evidence."¹ In its

1 See Advanced Communications Corporation Petition to Reopen Case Based on Recently Obtained Previously Unavailable Evidence, filed April 3, 2002 ("Petition"). Advanced requested a number of ex parte meetings with the Commission and Commission staff on this matter. All ex parte communications by Advanced have been considered and made part of the record in this proceeding. In addition, we received and considered other correspondence concerning this matter, including: Letter from the Honorable Tim Hutchinson, United States Senator from Arkansas, U.S. Senate to Michael K. Powell, Chairman, FCC, dated July 26, 2002; Letter from Mr. Mike Huckabee, Governor, State of Arkansas, Mr. Winthrop Rockefeller, Lt. Governor, State of Arkansas, and Mr. Jim Pickens, Director, Arkansas Department of Economic Development to Michael K. Powell, Chairman, FCC, dated July 17, 2002 and also forwarded by letter from the Honorable Vic Snyder, Congressman from Arkansas, U.S. House of Representatives to Michael K. Powell, Chairman, FCC, dated July 17, 2002; Letter from Mr. Jim Dailey, Mayor, City of Little Rock to Michael K. Powell, Chairman, FCC, dated August 5, 2002, and also forwarded by letter from the Honorable Vic Snyder, Congressman from Arkansas, U.S. House of Representatives to Michael K. Powell, Chairman, FCC, dated September 10, 2002; Letter from Jim Dailey, Mayor, City of Little Rock to Mr. Tom Tycz, Chief, Satellite Division and Barbara Esbin, Associate Chief, Media Bureau, dated October 21, 2002; Letter from the Honorable Blanche L. Lincoln, United States Senator from Arkansas, U.S. Senate to Michael K. Powell, Chairman, FCC, dated January 8, 2003.

Petition, Advanced seeks to have the Commission set aside its final decision in this proceeding² and re-adjudicate Advanced's 1994 request for an extension of time to construct, launch and operate a DBS system.³ For the reasons discussed below, we dismiss Advanced's Petition.

II. Background

2. This proceeding involves a 1995 International Bureau decision that Advanced has unsuccessfully challenged, over the course of 7 years, before the Commission as well as in various court fora. In April 1995, the International Bureau denied Advanced's August 1994 Extension Request and issued a decision cancelling Advanced's DBS authorizations for failure to meet the express condition of its DBS construction permit (*April 1995 Order*).⁴ On review, in October 1995, the Commission upheld the Bureau's decision (*October 1995 Order*).⁵ In May 1996, the United States Court of Appeals, District of Columbia Circuit ("D.C. Circuit Court") affirmed the Commission's decision,⁶ and, in 1997, the Supreme

² See *Advanced Communications Corp.*, Memorandum Opinion and Order, DA 95-944, 10 FCC Rcd 13337 (Int'l Bur. 1995) ("*April 1995 Order*"), *aff'd* Memorandum Opinion and Order, FCC 95-428, 11 FCC Rcd 3399 (1995) ("*October 1995 Order*"), *aff'd* *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996), *cert. denied*, *Advanced Communications Corp. v. FCC*, 519 U.S. 1071 (1997). See also *Advanced Communications Corp.*, 2001 WL 1699340 (D.C. Cir. 2001). In matters of non-rulemaking documents released by the Commission, as was the case in this proceeding, Commission action is deemed final upon the release date. See 47 C.F.R. § 1.4(b)(2) (2001). The *October 1995 Order* was released on October 18, 1995, and constitutes final Commission action in this proceeding.

³ Advanced Communications held authorizations for 27 channels at the 110° W.L. and 24 channels at the 148° W.L. orbital locations. See, e.g., *Continental Satellite Corp. et al.*, Memorandum Opinion and Order, FCC 89-257, 4 FCC Rcd 6292, 6297 (1989); *Advanced Communications Corp.*, Memorandum Opinion and Order, FCC 91-133, 6 FCC Rcd 2269 (1991); *recon. denied*, *Advanced Communications Corp.*, Memorandum Opinion and Order, FCC 91-370, 6 FCC Rcd 6977 (1991). Under these authorizations, Advanced was required to construct authorized DBS facilities by December 7, 1994. In August 1994, Advanced requested a four-year extension of time for meeting its DBS construction requirement. See Request for Additional Time to Construct and Launch Direct Broadcast Satellites, DBS-84-01/95-11EXT (August 8, 1994) ("August 1994 Extension Request").

⁴ See *April 1995 Order*, DA 95-944, 10 FCC Rcd 13337 (Int'l Bur. 1995). Advanced was required to construct authorized DBS facilities by December 7, 1994. The Commission denied Advanced's application for a 4-year extension of time and thus declared its construction permit null and void.

⁵ See *October 1995 Order*, FCC 95-428, 11 FCC Rcd 3399 (1995). In 1995, the Commission auctioned unassigned DBS channels, including channels at the 110° W.L. and 148° W.L. orbital locations initially assigned to Advanced and subsequently cancelled by effect of the *October 1995 Order*. MCI Telecommunications Corp. won the auction for the channels at the 110° W.L. orbital location, and EchoStar won the channels at 148° W.L. See *Application of MCI Telecommunications Corporation For Authority to Construct, Launch and Operate a Direct Broadcast Satellite System at 110° W.L.*, Order, DA 96-1793, 11 FCC Rcd 16275 (Int'l Bur. 1996); *Application of EchoStar DBS Corporation For Authority to Construct, Launch and Operate a Direct Broadcast Satellite System at 148° W.L.*, Order, DA 96-2164, 12 FCC Rcd 11946 (Int'l Bur. 1996). In 1998, MCI assigned its authorizations for the 28 channels at the 110° W.L. orbital location to EchoStar. See *Application of MCI Telecommunications Corporation, and EchoStar 110° Corporation for Consent to Assignment of Authorization to Construct, Launch, and Operate a Direct Broadcast Satellite System Using 28 Channels at the 110° W.L. Orbital Location*, Memorandum Opinion and Order, FCC 99-110, 14 FCC Rcd 11077 (1999). Since obtaining these authorizations at 110° W.L., along with authorizations at 119° W.L., 148° W.L. and 61.5° W.L., EchoStar has offered DBS service to consumers throughout the United States, and currently has over 7 million DBS customers nationwide. See EchoStar Communications Corp., Securities and Exchange Commission Form 10-Q, Quarterly Report for quarter ending June 30, 2002 Report at 18.

⁶ *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996) (unpublished opinion).

Court denied Advanced's petition for *writ of certiorari*.⁷ In 1998, the U.S. District Court for the Eastern District of Arkansas dismissed a related contract claim brought by Advanced against MCI Communications Corporation ("MCI"),⁸ and in August 2001, the Eighth Circuit Court denied Advanced's petition for rehearing of the Arkansas Court's decision.⁹ In October 2001, Advanced filed an amended petition for review, or, in the alternative, petition for mandamus, with the D.C. Circuit Court, basing its filing on the acquisition of affidavits from two former FCC Commissioners who had participated in the *October 1995 Order*. In December 2001, the D.C. Circuit Court ruled on Advanced's filing, stating that to the extent Advanced's petition was a new or amended petition for review, it was dismissed as untimely. Further, to the extent Advanced's filing was a petition for mandamus, it was denied because it provided no reason why the court should grant such extraordinary relief.¹⁰

3. Advanced now petitions the Commission to reopen this proceeding based upon the same two affidavits it presented in its October 2001 filing to the D.C. Circuit Court.¹¹ Specifically, Advanced states that "[a]t no time in the FCC proceedings, during the direct appeal before th[e] D.C. Court of Appeals, during the Arkansas litigation, or during the mandamus proceedings before the D.C. Court of Appeals" has it been "allowed the opportunity to present or develop a factual record to prove its claims that the FCC violated the Communications Act by taking into consideration factors barred by law" in reaching the decision set forth in the *October 1995 Order*.¹² Thus, Advanced seeks to reopen this proceeding based on two former Commissioners' affidavits that it contends provide compelling evidence in support of its claim that the Commission acted unlawfully in denying its August 1994 Extension Request. This evidence, Advanced submits, was not reasonably available at the time of the original Commission proceedings or at the time of its direct appeal to the D.C. Circuit Court. If considered, Advanced claims, this evidence would show that the *October 1995 Order* violated the Communications Act and was arbitrary, capricious, and an abuse of Commission discretion.¹³

⁷ *Advanced Communications Corp. v. FCC*, 519 S.Ct. 1071 (1997).

⁸ *Advanced Communications Corp. v. MCI Communications Corp.*, 101 F.Supp.2d 1154 (E.D.Ark., 2000). In 1998, Advanced filed a lawsuit in Arkansas state court against MCI alleging tortious interference with contract. It argued that a letter from MCI to Chairman Hundt (cited in footnote 127 of the *October 1995 Order*), improperly influenced the Commission to rule against Advanced, thereby causing it to breach its contract with a satellite provider. The case was removed to a federal district court, which ruled that Advanced was collaterally estopped from litigating the issue of whether the letter had properly influenced the Commission's decision.

⁹ *Advanced Communications Corp. v. MCI Communications, Corp.*, 263 F.3d 793 (C.A. 8th Cir. 2001).

¹⁰ *Advanced Communications Corp.*, 2001 WL 1699340 (D.C. Cir. 2001).

¹¹ See Petition at 10. Advanced also alleges that subsequent events before the Commission provide further evidence of the irregularity of the Commission's *October 1995 Order*. Advanced states that "[s]ince that order was issued, the FCC has continued its routine practice to grant such DBS extension requests," and points out that the Commission granted second extension requests to USSB and Dominion Video Satellite Inc. Petition at 12. Advanced made this same argument on appeal to the D.C. Circuit Court. The Court rejected this claim stating, "[w]e reject appellants' contention that the decision in the Order is irreconcilable with other decisions in which the Commission has either granted an extension or allowed a transfer of control. To the contrary, the Commission has articulated sufficiently principled distinctions from these other cases to withstand review. The Order is not inconsistent with USSB II (granting second extension and permitting modification of DBS permit to allow joint use of a satellite) and Dominion Video Satellite, Inc., 8 FCC Rcd 6680 (1993) (granting second time extension), recons. den., FCC 95-421 (Oct. 5, 1995) ("Dominion "). In each of those cases, the DBS permittee had made significantly greater progress in developing its own DBS system than had ACC." See *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996) (unpublished opinion).

¹² Petition at 10-11.

¹³ Petition at 12-13.

III. Discussion

4. In view of the comprehensive review provided in our *October 1995 Order*, it is unnecessary to restate the underlying facts and issues in this proceeding. The courts have previously determined that the *October 1995 Order* provided a sound and rational basis upon which the Commission acted in affirming the Bureau's *April 1995 Order* denying Advanced an extension of time to construct, launch and operate a DBS system. In the Petition before us, Advanced claims that the "new and previously unavailable" evidence it now submits provides compelling evidence that there was fundamental illegality in the Commission's decisionmaking process, and provides sufficient cause to reopen the case to determine whether the Commission's *October 1995 Order* was illegal and void.

5. We disagree. The new evidence that Advanced submits is nothing more than another attempt to re-argue the issue that it has presented in numerous prior court proceedings – *e.g.*, to the D.C. Circuit Court in 1996, to the Supreme Court in 1997, to the Arkansas courts in 1998 and 2000, and again to the D.C. Circuit Court in 2001. In each of these proceedings, Advanced has made the argument that the Commission's *October 1995 Order* was illegal and thus, void, because it was allegedly based on the expected revenues that would result from an auction of Advanced's cancelled authorizations. As the D.C. Circuit Court stated in its 1996 Order affirming the Commission's decision:

Finally, we address appellants' contention that the FCC violated 47 U.S.C. § 309(j)(7)(A) by allowing the "expectation of Federal revenues [to play] a large role in [the] decision to deny [Advanced's] application." Brief for Appellants at 24 (internal quotations omitted). While the Commission was aware that substantial sums could be realized from the sale of any orbital slots and channels recovered from [Advanced], see Advanced II at ¶ 67 n. 127 (acknowledging the pledge by MCI to open bidding at \$175 million in the event an auction were held), the Order does not base its denial of [Advanced's] renewal application on the expectation of such revenues. Rather, the Commission's decision was predicated on [Advanced's] failure to achieve "any concrete progress toward the actual construction and operation of its DBS system" during its first extension period. *Id.* at ¶ 37.¹⁴

6. The D.C. Circuit Court continued to state that:

Appellants are thus asking us to search beyond the text of the Order to find some alleged illicit motivation on the part of the FCC. This we are unwilling to do. "Agency opinions, like judicial opinions, speak for themselves," *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994); and appellants have pointed to nothing in the record that is sufficient to overcome the "strong presumption of agency regularity." *Louisiana Ass'n of Indep. Producers v. FERC*, 958 F.2d 1101, 1111 (D.C. Cir. 1992). Of course, we express no opinion as to whether the Commission

¹⁴ *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996) (unpublished opinion).

was in fact barred by law from taking into account the expected impact on federal revenues.¹⁵

7. In an effort to point to something that would overcome the “strong presumption of agency regularity,” Advanced made a recent attempt in the D.C. Circuit Court to seek court review or, in the alternative, mandamus relief of the *1995 October Order* on the basis of the same two affidavits now being presented to us here. In dismissing the Advanced filing, the D.C. Circuit Court stated:

Upon consideration of the amended petition for review and in the alternative, petition for mandamus, it is ORDERED that the relief requested be denied. To the extent petitioner seeks mandamus relief, the request is denied 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. See *Advanced Comm. Corp. v. FCC*, 84 F.3d 1452 D.C. Cir. 1996) (table).

To the extent petitioner seeks to file a new or amended petition for review, the petition is dismissed as untimely. See 28 U.S.C. § 2344 (petitions for review under 47 U.S.C. § 402(a) must be filed "within 60 days after ... entry" of the order).¹⁶

8. The doctrine of administrative finality is firmly established in law. Under this doctrine, the courts have recognized that the laws governing the Commission “establish a structure where at some point the agency order does become final beyond its own power to reconsider, and that investments may be made in reliance on such an order with the protections provided by Congress.”¹⁷ In this way, “the public interest in finality is dominant over the public interest in possibly improving the administrative result on further consideration.”¹⁸ The courts also recognize that, although a prevailing and dominant doctrine, administrative finality is not absolute. Equity doctrines may, in limited cases, permit the reopening of a case “to avoid an unconscionable injustice growing out of misconduct undercutting the integrity of the administrative or judicial process.”¹⁹ Given the public interest importance in orderliness and finality, however, a strong showing of sufficiency of evidence is required.²⁰ In particular, given the time that has passed since the termination of the Advanced proceeding, and the use that has been made of

¹⁵ *Id.*

¹⁶ *Advanced Communications Corp.*, 2001 WL 1699340 (D.C.Cir. 2001).

¹⁷ *See Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 288 (D.C. 1971).

¹⁸ *Id.*

¹⁹ *Id.* at 289.

²⁰ Under ordinary circumstances, relevant Commission precedent generally provides that where an applicant seeks to reopen a proceeding after the close of the record, it must show (1) that it relies on new or newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier; (2) that the new evidence, if proven, would raise a substantial and material question of fact affecting the ultimate outcome of the proceeding, and (3) that there is a substantial likelihood of proving its potentially disqualifying allegations if the case is remanded for further review. *See Eve Ackerman et al.*, FCC 93-308, 8 FCC Rcd 4205 (1993) at ¶ 6. *See also Omaha TV 15, Inc.*, FCC 88-371, 4 FCC Rcd 730 (1988) at ¶ 5; *Apogee, Inc., et al.*, FCC 86-3, 59 Rad. Reg. 2d (P&F) 941 (1986); *Valley Telecasting v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1964); *Eagle Broadcasting Company et al., v. FCC*, 514 F.2d 852, 854, 856 (D.C. Cir. 1975); *Southwestern Bell Telephone Company, et al., v. FCC*, 180 F.3d 307, 312 (D.C. Cir. 1999).

the satellite orbital locations and frequencies, the burden is extraordinarily high in this case.²¹ That burden has not been met in this case. Indeed, with respect to this proceeding, the courts have already found that Advanced's proffered evidence of affidavits by two prior Commissioners is not sufficient to overcome the prevailing doctrine of administrative finality.²² Furthermore, under the circumstances of this case, the Commission has no authority to grant the requested relief without a recall of the court's mandate.²³ Since the court has already ruled that the proffered evidence is insufficient to overcome the interest in administrative finality, we see no basis to request a recall of the court's mandate.

IV. ORDERING CLAUSE

9. Accordingly, IT IS HEREBY ORDERED, that the Petition to Reopen Case Based on Recently Obtained Previously Unavailable Evidence, filed April 3, 2002 by Advanced Communications Corporation, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²¹ See *supra* note 5.

²² See *Advanced Communications Corp.*, 2001 WL 1699340 (D.C.Cir. 2001). See also *supra* note 16.

²³ See, e.g., *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 283 (D.C. Cir. 1971); *Gonzales Broadcasting, Inc.*, 14 FCC Rcd 10,951 (1999); *Folkways Broadcasting Co.*, 61 FCC 2d 912, 914 n.7 (1976).