

December 19, 2008

Via U.S. Mail and Electronic Filing

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: DIRECTV Enterprises LLC
FCC File Nos. SAT-AMD-20080321-00077; SAT-AMD-20080114-00014;
SAT-LOA-2006-0908-00100 (Call Sign S2712)

Dear Ms. Dortch:

Spectrum Five LLC (“Spectrum Five”) submits this letter regarding the above-referenced 17/24 GHz Broadcasting Satellite Service (“BSS”) application of DIRECTV Enterprises LLC (“DIRECTV”) to operate a space station at the nominal 103° W.L. orbital location.¹ DIRECTV’s application fails to calculate power under Clear Skies conditions as required by 47 C.F.R. § 25.208(w). Because of this fatal defect inherent in DIRECTV’s application, the Federal Communications Commission (“the Commission”) must dismiss it. Upon dismissal, the Commission should expeditiously approve Spectrum Five’s petition to provide service to the U.S. market from the 103.15° W.L. orbital location.²

The Commission has fashioned a very specific process governing BSS applications, one deeply embedded in the Commission’s rules. As the D.C. Circuit has noted, such procedural requirements serve important public interests: the Commission imposes licensing requirements and deadlines “to attract all competitive applications for a particular license within a fixed and reasonably short time frame,”³ and to “serve[] the public’s interest in administrative finality and

¹ *Application of DIRECTV Enterprises, LLC To Amend Its Application for Authorization To Launch and Operate DIRECTV RB-2, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 103° W.L.*, FCC File No. SAT-AMD-20080114-00014 (Jan. 14, 2008) (“DIRECTV 103° W.L. Amendment”), *accepted for filing*, Public Notice, *Satellite Space Applications Accepted for Filing*, Rpt. No. SAT-00535, 2008 WL 2627669, at *3 (rel. July 2, 2008) (“IB Acceptance Notice”).

² *See* Petition for Declaratory Ruling To Serve the U.S. Market from the 103.15° W.L. Orbital Location in the 17/24 Broadcasting Satellite Service Band, *In re Spectrum Five LLC*, FCC File No. SAT-LOI-20081119-00217, at 6-9 (Nov. 19, 2008) (“Spectrum Five 103.15° W.L. Petition”).

³ *Northpoint Tech., Ltd. v. FCC*, 414 F.3d 61, 74 (D.C. Cir. 2005) (quoting *Oregon v. FCC*, 102 F.3d 583, 584 (D.C. Cir. 1996)).

Marlene H. Dortch
December 19, 2008
Page 2

prompt issuance of licenses.”⁴ In any case, “it is elementary that an agency must adhere to its own rules and regulations.”⁵

DIRECTV has flouted the BSS application rules, and the Commission should not approve its application. Were it to do so, the Commission would permit a blatant violation of its rules, and would disregard the clear process it established to consider BSS applications.

I. THE COMMISSION HAS ESTABLISHED A VERY EXPLICIT PROCESS FOR BSS APPLICATIONS.

A. BSS Report and Order

The Commission has been very thorough in its consideration of rules governing BSS applications. On May 4, 2007, the Commission issued processing and service rules for BSS space stations.⁶ In its BSS Report and Order, the Commission required DIRECTV, EchoStar, Intelsat, and Pegasus to submit amendments to their twenty-two pending BSS applications to comply with the order’s four-degree spacing requirement.⁷ The Commission directed the International Bureau (the “Bureau”) to specify a deadline for amendment and to “dismiss[] as defective” any application not amended by that deadline.⁸ The Commission also required the Bureau to “return ... as defective any amended applications that are not substantially complete.”⁹ Even after applications were placed on Public Notice as acceptable for filing, the Commission reserved the right to return an application not in conformance with its rules.¹⁰

These rules largely originated in the Commission’s 2003 order reforming space station licensing.¹¹ In that order, the Commission sought to give each space station application a “hard look” for substantial completeness,¹² so as to prevent applicants from placing defective

⁴ *McElroy Elecs. Corp. v. FCC*, 86 F.3d 248, 257 (D.C. Cir. 1996).

⁵ *AT&T Corp. v. FCC*, 448 F.3d 426, 434 (D.C. Cir. 2006) (quoting *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986)); cf. *BDPCS, Inc. v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003) (“The Commission abuses its discretion when it arbitrarily violates its own rules . . .”).

⁶ Report and Order and Further Notice of Proposed Rulemaking, *The Establishment of Policies and Service Rules for the Broadcasting-Satellite Service at the 17.3-17.7 GHz Frequency Band and at the 17.7-17.8 GHz Frequency Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-directionally in the 17.3-17.8 GHz Frequency Band*, IB Docket No. 06-123, FCC 07-76, 22 F.C.C.R. 8842 (rel. May 4, 2007) (“BSS Report and Order”).

⁷ *Id.* paras. 145-46.

⁸ *Id.* para. 145.

⁹ *Id.*

¹⁰ *Id.* para. 145 n.454.

¹¹ *In re Amendment of the Commission’s Space Station Licensing Rules and Policies*, IB Docket No. 02-34, 18 F.C.C.R. 10,760 (May 19, 2003) (“First Space Station Licensing Reform Order”), amended by Erratum, DA 03-2087, 18 F.C.C.R. 12,674 (June 26, 2004).

¹² *Id.* para. 244; see also *In re Amendment of the Commission’s Space Station Licensing Rules and Policies*, IB Docket No. 02-34, 18 F.C.C.R. 3847, para. 93 (Feb. 28, 2002).

Marlene H. Dortch
December 19, 2008
Page 3

applications early in the queue and then correcting them later by amendment. At the time, the Commission reasoned that “any relaxation of the [substantial completeness] requirement . . . could encourage speculative applications,”¹³ and it therefore required that “[a]mendments to ‘defective’ space station applications . . . not be considered.”¹⁴ Since then, the Commission has ruled that applications must be “substantially complete when filed,”¹⁵ and that attempts “to correct a prior deficiency in a dismissed application cannot be used to reinstate an initial application or maintain a previous position in the queue.”¹⁶ In the BSS Report and Order, the Commission directed applicants to “submit substantially complete applications or face dismissal,” describing this rule as among the “safeguards designed to discourage speculative applications.”¹⁷

B. Reconsideration Order

By an Order on Reconsideration (“Reconsideration Order”) on September 28, 2007, the Commission modified the four-degree spacing policy established in its BSS Report and Order.¹⁸ The Reconsideration Order amended § 25.262 to allow satellites to operate at full power and with full interference protection up to one degree from the on-grid Appendix F orbital locations, but only if there were no licensed or prior-filed applications for full-power satellites less than four degrees away.¹⁹ The Commission permitted current applicants to amend their pending applications in accordance with this new rule. The Commission “direct[ed] the Bureau to dismiss, as defective, any application that is not amended by the date specified [by the Bureau] in the Public Notice,”²⁰ and to “dismiss as defective any amended applications that are not

¹³ First Space Station Licensing Reform Order para. 244.

¹⁴ *Id.* at 10,889; *see also* 47 C.F.R. § 25.116(b)(5); Public Notice, *International Bureau Clarifies Requirements for Filing Satellite License Applications*, Rpt. No. SPB-188, DA 03-2603, 188 F.C.C.R. 16,285, 16,286 n.5 (Aug. 6, 2003) (noting that applications “must be substantially complete when filed” and that “amendments to defective applications will not be considered”).

¹⁵ Order on Reconsideration, *In re Applications of PanAmSat Licensee Corp. for Authority To Construct, Launch, and Operate a Hybrid Satellite in its Separate International Communications Satellite System*, DA 03-3633, 18 F.C.C.R. 23,916 para. 6 (rel. Nov. 13, 2003) (“PanAmSat Reconsideration Order”), *cited in* Order on Reconsideration, *The Establishment of Policies and Service Rules for the Broadcasting-Satellite Service at the 17.3-17.7 GHz Frequency Band and at the 17.7-17.8 GHz Frequency Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-directionally in the 17.3-17.8 GHz Frequency Band*, IB Docket No. 06-123, FCC 07-174, 22 F.C.C.R. 17,951, para. 37 n.69 (rel. Sept. 28, 2007) (“Reconsideration Order”).

¹⁶ *Id.* para. 7; *see also id.* (refusing to consider added information “for first-come, first served license treatment unless and until” it is included as part of a full and “substantially complete satellite application”).

¹⁷ BSS Report and Order para. 12 & n.48.

¹⁸ *See* Reconsideration Order para. 1.

¹⁹ *Id.*; § 25.262(b).

²⁰ Reconsideration Order para. 35.

Marlene H. Dortch
December 19, 2008
Page 4

substantially complete.”²¹ The Reconsideration Order also directed each applicant to “provide the appropriate technical showing to support [its] request.”²²

C. Public Notice

The Reconsideration Order instructed the Bureau to issue Public Notices “consistent with this Order,”²³ and, in particular, to issue a Public Notice inviting amendments to pending applications.²⁴ The Bureau did so on December 5, 2007, establishing deadlines of January 14, 2008 for filing amended applications, and February 13, 2008 for further amendments for certain offset applicants in circumstances not relevant here.²⁵ The Bureau reiterated the Commission’s requirement that any application not amended by January 14, 2008 would be “dismissed as defective.”²⁶

The Bureau also noted that amended applications must be “complete in substance” and “not defective under the Commission’s rules,” as well as “complete with respect to . . . informational showings.”²⁷ The Bureau added that “[a]pplications that are not substantially complete will be returned to the applicant as defective.”²⁸ Furthermore, it stated that “applicants are required to demonstrate that they comply with the power flux density limits in new Section 25.208(w), or, if they do not, to demonstrate how they will affect adjacent 17/24 GHz BSS satellite networks, and that the operators of those networks agree to the applicant’s proposed operations.”²⁹

II. DIRECTV’S NOMINAL 103° W.L. APPLICATION IS DEFECTIVE AND MUST BE DISMISSED.

A. DIRECTV’s nominal 103° W.L. application violates §§ 25.114(d)(15) and 25.208(w).

On January 14, 2008, DIRECTV amended its application to establish a 17/24 GHz BSS space station at the nominal 103° W.L. orbital location.³⁰ However, its amended application violates the Commission’s rules, in particular §§ 25.114(d)(15) and 25.208(w).

²¹ *Id.* para. 37.

²² *Id.*

²³ *Id.* para. 45.

²⁴ *Id.* para. 35.

²⁵ See Public Notice, *International Bureau Establishes Deadline for Amendments to Pending 17/24 GHz BSS Applications*, DA 07-4895, 22 F.C.C.R. 20,991, 20,991-92 (rel. Dec. 5, 2007) (“IB Deadline Notice”); *cf.* Reconsideration Order paras. 33-35.

²⁶ *Id.* at 20,991.

²⁷ *Id.* at 20,993.

²⁸ *Id.* at 20,992.

²⁹ *Id.* at 20,993-94 (footnote omitted).

³⁰ See DIRECTV 103° W.L. Amendment.

Marlene H. Dortch
December 19, 2008
Page 5

Section 25.114(d)(15) required DIRECTV to “provide a demonstration that [its] proposed space station will comply with the power flux density limits set forth in § 25.208(w),” or, alternatively, to certify that “all potentially affected parties acknowledge and do not object to the use of the applicant’s higher power flux densities.”³¹ Section 25.208(w), in turn, requires applicants to adhere to maximum power flux density limits “for all conditions, including clear sky.”³² DIRECTV’s application, however, incorporated in its power flux density calculations an adjustment for “atmospheric attenuation,” which includes variable effects due to clouds and increased humidity in the atmosphere.³³

The very purpose of the clear-sky requirement is to exclude variable effects, so that satellite signals would not unduly interfere with one another depending upon the weather. Other applicants have recognized that “clear sky” calculations exclude such adjustments, as has DIRECTV itself in previous submissions to the Commission.³⁴ Because DIRECTV enhanced its power based on variable weather conditions, its proposed 103° W.L. space station would have excessive power flux density—overshooting the Commission’s limits by 13 percent—and would create intolerable interference when the skies are clear.³⁵

As a result, DIRECTV’s nominal 103° W.L. application failed to comply with § 25.208(w). Nor did DIRECTV certify that potentially affected parties had recognized and consented to its violation of the power flux density limits, as § 25.114(d) alternatively permits.³⁶ Thus, it did not “provide the appropriate technical showing to support [its] request” required by the Reconsideration Order.³⁷

³¹ § 25.114(d)(15)(i)-(ii).

³² § 25.208(w).

³³ See, e.g., DIRECTV 103° W.L. Amendment, Exh. B, at 12.

³⁴ See sources cited in Spectrum Five 103.15° W.L. Petition at 10-11.

³⁵ See Spectrum Five 103.15° W.L. Petition at 3, 8.

³⁶ Section 25.114(d)(15)(ii) defines affected parties as those operating within $\pm 6^\circ$ of the proposed space station. Both Echostar and Pegasus have applied to operate 17/24 GHz BSS space stations at the 107° W.L. orbital location. See Amendment, *In re Pegasus Development DBS Corp. Authority To Construct, Launch, and Operate a System of Broadcasting Satellite Service Satellites*, FCC File No. SAT-AMD-20080114-00024 (Jan. 14, 2008); Second Amendment, *In re EchoStar Corp. Second Amendment To Application for Authority To Construct, Launch, and Operate a Satellite in the 17/24 GHz Broadcasting-Satellite Service*, FCC File No. SAT-AMD-20080213-00043 (Feb. 13, 2008). Intelsat has applied to operate at the nominal 99° W.L. orbital location. See *S2660—Amendment to Pending 17/24 GHz BSS Application*, FCC File No. SAT-AMD-20080114-00012 (Jan. 14, 2008).

³⁷ Reconsideration Order para. 35. DIRECTV also submitted amended applications for 17/24 GHz space stations in the nominal 99°, 107°, 111°, and 119° W.L. orbital locations, all of which similarly included an adjustment for atmospheric attenuation. See *Application of DIRECTV Enterprises, LLC To Amend Its Application for Authorization To Launch and Operate DIRECTV RB-1, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 99° W.L.*, FCC File No. SAT-AMD-20080114-00013, Ex. B, at 12 (Jan. 14, 2008), *accepted for filing*, IB Acceptance Notice, 2008 WL 2627669, at *2; *Application of DIRECTV Enterprises, LLC To Amend Its Application for Authorization To Launch and Operate DIRECTV RB-3, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 107° W.L.*, FCC File No. SAT-AMD-20080114-00015, Ex. B, at 12 (Jan. 14, 2008), *accepted for filing (corrected)*, Public Notice, *Satellite Space Applications Accepted for Filing*, Rpt. No. SAT-00537, 2008 WL 2714535, at *1 (rel. July 11, 2008); *Application of DIRECTV Enterprises, LLC To Amend Its Application for*

Marlene H. Dortch
December 19, 2008
Page 6

B. DIRECTV's defective application must be dismissed.

The violations described above rendered DIRECTV's nominal 103° W.L. application unacceptable for filing under § 25.112(a)(2).³⁸ The Commission requires applications to be "substantially complete when filed."³⁹ The Commission has also stated that applications missing any of the information required by § 25.114(d) are not substantially complete.⁴⁰

Prior to filing its amended application in January, DIRECTV had been advised by the Bureau that amended applications must be "complete in substance" and "not defective under the Commission's rules," as well as "complete with respect to . . . informational showings."⁴¹ The Bureau specifically noted that applicants must "demonstrate that they comply with [§ 25.208(w)'s] power flux density limits" or have obtained the consent of affected networks' operators.⁴² The Reconsideration Order specifically directed the Bureau to "dismiss as defective any amended applications that are not substantially complete,"⁴³ even those already accepted for filing.⁴⁴ The Bureau has no discretion to accept an application that is not substantially complete,⁴⁵ for the Commission has stated that doing so would "not [be] consistent with [its] rules and policies . . . and only serves to create uncertainty and inefficiencies in the licensing process."⁴⁶

(... cont'd)

Authorization To Launch and Operate DIRECTV RB-4, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 111° W.L., FCC File No. SAT-AMD-20080114-00016, Ex. B, at 12 (Jan. 14, 2008), *accepted for filing*, IB Acceptance Notice, 2008 WL 2627669, at *1; *Application of DIRECTV Enterprises, LLC To Amend Its Application for Authorization To Launch and Operate DIRECTV RB-5, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 119° W.L.*, FCC File No. SAT-AMD-20080114-00017 (Jan. 14, 2008), *accepted for filing*, IB Acceptance Notice, 2008 WL 2627669, at *1, *dismissed*, Public Notice, *Actions Taken*, Rpt. No. SAT-00569, 2008 WL 5205209 (rel. Dec. 12, 2008) ("IB Dismissal Notice"); *see also* Petition for Declaratory Ruling To Serve the U.S. Market from the 118.8° W.L. Orbital Location in the 17/24 Broadcasting Satellite Service Band, *In re Spectrum Five LLC*, FCC File No. SAT-LOI-20081113-00216, at 3, 9-12 (Nov. 13, 2008) (describing the flaws in the nominal 119° W.L. application).

DIRECTV's nominal 119° W.L. application was withdrawn on December 9, 2008, and was subsequently dismissed. *See* IB Dismissal Notice. Should DIRECTV attempt to resubmit this application in the future, Spectrum Five reserves the right to challenge that new application on these and other grounds.

³⁸ *See* § 25.112(a), (a)(2) (deeming applications "unacceptable for filing" if they "do[] not substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements").

³⁹ PanAmSat Reconsideration Order para. 6.

⁴⁰ *See* BSS Report and Order para. 16 & n.63; *see also* PanAmSat Reconsideration Order para. 6 n.12 ("[A]pplicants are required to submit substantially complete applications, including *all* the information in Section 25.114." (emphasis added)).

⁴¹ IB Deadline Notice at 20,993.

⁴² *Id.* at 20,993-94.

⁴³ Reconsideration Order para. 37; *cf.* IB Deadline Notice at 20,992.

⁴⁴ Reconsideration Order para. 37 n.69; *see also* IB Deadline Notice, 22 F.C.C.R. at 20,992 n.11.

⁴⁵ Reconsideration Order para. 37 ("The Bureau *will* dismiss as defective any amended applications that are not substantially complete." (emphasis added)).

⁴⁶ PanAmSat Reconsideration Order, para. 6.

Marlene H. Dortch
December 19, 2008
Page 7

DIRECTV's nominal 103° W.L. application is therefore defective and must be dismissed. Moreover, DIRECTV cannot now cure the defect in its application because Commission rules would deem any such amendment to be null and void. Section 25.116(b)(5)—a crucial feature of the Commission's "hard look" approach to enforcing first-come, first-served processing rules—unambiguously states that "[a]mendments to 'defective' space station applications . . . will not be considered." And as the Commission has ruled in the past, new filings "cannot be used to reinstate an initial application or maintain a previous position in the queue."⁴⁷

Because the amended application that DIRECTV filed in January is defective, DIRECTV has no valid application for a space station at the nominal 103° W.L. orbital location that can be considered by the Commission. Under the terms of the first-come, first-served system, after a 17/24 GHz BSS application is dismissed or denied, "the next 17/24 GHz application in the queue seeking to operate at the same Appendix F location, or its associated offsets, will be processed."⁴⁸ Spectrum Five has submitted a timely filed and substantially complete petition to provide service from the 103.15° W.L. orbital location. This petition represents the next application in the queue for the nominal 103° W.L. orbital location.⁴⁹ It should be approved by the Commission expeditiously.

III. CONCLUSION

The Commission adopted specific rules to govern the pending BSS applications, rules that DIRECTV violated. Despite the priority granted to the pending applications, the Commission has been very clear that defective applications will not be considered by the Commission under any circumstances. Failure to follow the rules precludes the consideration of DIRECTV's nominal 103° W.L. application.

Spectrum Five "has at all times complied with" the Commission's filing rules, and, as both the Commission and the D.C. Circuit have "long recognized, such diligent applicants have a legitimate expectation that the [procedural] rules will be enforced."⁵⁰ The D.C. Circuit held in *McElroy Electronics Corp. v. FCC* that "timely filers who have diligently complied with the Commission's requirements have an equitable interest in enforcement of the cut-off rules," at least as against those who have violated the Commission's procedural requirements.⁵¹ This conclusion has more recently been reiterated in *Bachow Communications, Inc. v. FCC*, which

⁴⁷ *Id.* para. 7.

⁴⁸ Public Notice, *International Bureau Lifts Freeze on Filing 17/24 GHz BSS Applications*, DA 08-1887, 2008 WL 3318965, at *1 (rel. Aug. 11, 2008).

⁴⁹ See Spectrum Five 103.15° W.L. Petition at 4, 11.

⁵⁰ *Fla. Inst. of Tech. v. FCC*, 952 F.2d 549, 554 (D.C. Cir. 1992).

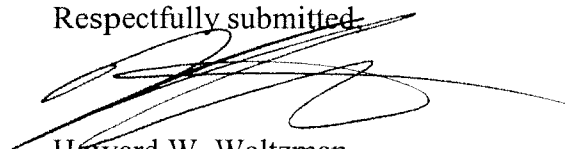
⁵¹ *McElroy*, 86 F.3d at 257.

Marlene H. Dortch
December 19, 2008
Page 8

described *McElroy* as establishing an “‘equitable interest’ in . . . the Commission enforcing its filing and notice rules.”⁵²

DIRECTV failed to file an application that was substantially complete at the time of processing and that complied with the Commission’s power flux density requirements. Both the Commission’s rules and D.C. Circuit precedent require the Commission to reject DIRECTV’s application and to approve that of Spectrum Five.

Respectfully submitted,



Howard W. Waltzman
Counsel to Spectrum Five LLC

cc: Andrea Kelly
Policy Branch Chief
Satellite Division

⁵² 237 F.3d 683, 687 (D.C. Cir. 2001); *see also id.* (noting that “*McElroy* stands for the proposition that the Commission must follow its own rules”).

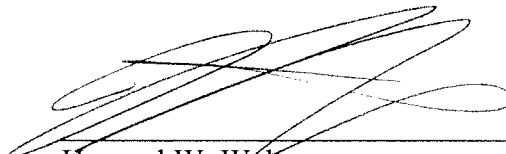
Marlene H. Dortch
December 19, 2008
Page 9

CERTIFICATE OF SERVICE

I, Howard W. Waltzman, hereby certify that on this 19th day of December, 2008, I caused to be delivered a true copy of the foregoing by first-class United States mail, postage prepaid, upon the following:

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