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November 4, 2008

Federal Communications Commission
Office of the Secretary

Todd M. Stansbury
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Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation; File No. SAT-AMD-20080114-00017 and
SAT-AMD-20080908-00166

Dear Ms. Dortch:

On October 31, 2008 and November 3, 2008, David Wilson, President of Spectrum Five, LLC ("Spectrum Five"), discussed with Helen Domenici, Chief of the International Bureau, DIRECTV Enterprises, LLC's above-referenced pending applications to provide service from the 118.4° W.L. orbital location using the 17/24 GHz Broadcast-Satellite Service ("BSS"). Mr. Wilson reiterated Spectrum Five's position that the applications are procedurally and technically defective. As such, Mr. Wilson urged the Commission to dismiss these applications without further action.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, a copy of this letter is being filed for inclusion in the above-noted proceedings.

Sincerely,

/s/ Todd M. Stansbury

Todd M. Stansbury
Counsel to Spectrum Five, LLC

cc: Helen Domenici



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November 20, 2008

Todd M. Stansbury
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Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation; File Nos. SAT-LOI-20080910-00178,
SAT-LOI-20080910-00183, SAT-LOI-20081113-00216, SAT-LOI-
20081119-00217

Dear Ms. Dortch:

On November 19, 2008, David Wilson, President of Spectrum Five, LLC ("Spectrum Five"), met with Chairman Kevin Martin and Charles Mathias to discuss Spectrum Five's above-referenced pending petitions for declaratory ruling to provide service from the nominal 119° W.L. and 103° W.L. orbital locations using the 17/24 GHz Broadcast-Satellite Service ("BSS"). Mr. Wilson's comments were consistent with the arguments raised in these pending petitions.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, a copy of this letter is being filed for inclusion in the above-noted proceedings.

Sincerely,

/s/ Todd M. Stansbury

Todd M. Stansbury
Counsel to Spectrum Five, LLC

cc: The Honorable Kevin Martin
Charles Mathias

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

In the Matter of)		
	)	S2768	SAT-LOI-20080910-00178
Spectrum Five LLC	)	Spectrum Five LLC	IB2008002193
	)	BSSNET119W	
Petition for Declaratory Ruling to Serve the)		
U.S. Market from the 119.0° W.L. Orbital)		
Location in the 17/24 Broadcasting Satellite)		
Service Band)		

PETITION FOR DECLARATORY RULING

Pursuant to Section 1.2 and 25.137 of the Commission’s rules¹ and the Public Notices issued by the International Bureau on August 11, 2008 and August 13, 2008,² Spectrum Five LLC (“Spectrum Five”) hereby requests a declaratory ruling that its provision of service to the U.S. market through a Netherlands-authorized satellite, to be called BSSNET119W, from the 119.0° W.L. orbital location using the 17/24 GHz Broadcast-Satellite Service (“BSS”) band is in the public interest. This petition for declaratory ruling (“Petition”) complies with the Commission’s procedural and substantive requirements for market entry by a foreign-authorized satellite, and is in the public interest. Grant of this Petition will allow additional competition that will benefit consumers by providing a number of different services including video and audio broadcasting, local-into-local, Broadband, and fixed and mobile networks.

¹ 47 C.F.R. §§ 1.2, 25.137.

² See Public Notice, *International Bureau Lifts Freeze on Filing 17/24 GHz BSS Applications*, DA 08-1887 (rel. Aug. 11, 2008); Public Notice, *International Bureau Reschedules Date That Freeze on Filing of 17/24 GHz BSS Applications is Lifted*, DA 08-1900 (rel. Aug. 13, 2008).

The 119.0° W.L. orbital location is one of the orbital locations designated by the Commission for use by satellite operators in the 17/24 GHz BSS band. DIRECTV Enterprises, LLC (“DIRECTV”) currently has an application pending for the 119.0° W.L. (offset) orbital location.³ However, as explained below, this application is defective, and, pursuant to the Commission’s rules, must be dismissed. Spectrum Five files this Petition so that upon dismissal of DIRECTV’s pending application, Spectrum Five will be next in the queue for the 119.0° W.L. orbital location.⁴

Pursuant to Section 25.137(b) of the Commission’s rules,⁵ this Petition is being filed electronically via the International Bureau Filing System as an attachment to FCC Form 312 and Schedule S.

I. INTRODUCTION

In May 2007, the FCC issued a Report and Order adopting a first-come, first-served framework to authorize 17/24 GHz BSS satellites to operate at orbital locations spaced at four degree intervals at precise orbital locations specified in Appendix F to the Report and Order.⁶

³ *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV RB-5, a Satellite in the 17/24 GHz Broadcasting Satellite Service*, File No. SAT-AMD-20080114-00017 (filed Jan. 14, 2008) (“DIRECTV Amendment Application”).

⁴ See Public Notice, *International Bureau Lifts Freeze on Filing 17/24 GHz BSS Applications*, DA 08-1887 (rel. Aug. 11, 2008) (“If a 17/24 GHz BSS application is not acceptable for filing, it will be returned and 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.”)

⁵ 47 C.F.R. § 25.137(b).

⁶ *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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8842 (2007) (“Report and Order”).

119.0° W.L. was one of the specified Appendix F orbital locations. The Commission also imposed a freeze on the ability of new applicants to file for 17/24 GHz BSS orbital slots and decided to treat pending applications as simultaneously filed with priority over any later filed applications.⁷

In September 2007, the FCC issued an Order on Reconsideration to provide additional flexibility to 17/24 GHz BSS space station operators by allowing them to operate at locations other than those specified in Appendix F.⁸ Pending applicants were permitted to amend their applications to take advantage of this new flexibility.⁹ Applicants could request authority to operate in locations offset from Appendix F orbital slots at full power and with full interference protection. However, if a simultaneously filed amendment application requested full power and interference protection from an adjacent on-grid Appendix F location, the applicant for an offset location was required to submit a second amendment to either “change the orbital location to the Appendix F orbital location from which it was offset or [] remain at the offset location at reduced power and with reduced interference protection.”¹⁰ These second amendments were required to be filed within thirty days after submission of the initial round of conforming amendments.¹¹

⁷ *Id.* at ¶ 143.

⁸ *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*, Order on Reconsideration, 22 FCC Rcd 17951 (2007) (“Order on Reconsideration”).

⁹ *Id.* at ¶¶ 33-37.

¹⁰ *Id.* at ¶ 34.

¹¹ *Id.* at ¶ 36.

The Commission also explicitly directed the International Bureau “[o]nce the *two deadlines* for filing have passed” to “dismiss as defective any amended applications that are not substantially complete.”¹²

On January 14, 2008, DIRECTV filed an amendment application, seeking to operate the DIRECTV RB-5 satellite at the offset 118.4° W.L. orbital location¹³ “at full power and with full interference protection.”¹⁴ At the same time, Pegasus Development DBS Corporation (“Pegasus”) filed an amendment application to operate at the adjacent 115° W.L. Appendix F location.¹⁵ Because Pegasus proposed to operate at an Appendix F location that is less than four degrees away from DIRECTV’s offset location, DIRECTV was required to file a second amendment application within 30 days, or by February 13, 2008, to protect Pegasus’ proposed system.¹⁶

Almost seven months later, on September 8, 2008, DIRECTV filed an amendment

¹² *Id.* at ¶ 37 (emphasis added).

¹³ DIRECTV Amendment Application at 9.

¹⁴ *Id.* at 5.

¹⁵ *See Pegasus Development DBS Corporation, Application for Authority to Construct, Launch, and Operate a System of Broadcasting Satellite Service Satellites*, File No. SAT-AMD-20080114-00023 (Call Sign S2700) at 20 (“Pegasus requests authority to operate the proposed satellites at full power with full interference protection (i.e. a full-power Appendix F space station) at the following orbital locations: 91.0°W, 107.0°W, and 115.0°W.”); *see also* Letter from Bruce D. Jacobs, Counsel for Pegasus Development DBS Corporation, to Marlene H. Dortch, FCC at 1-2 (filed Aug. 1, 2008) (stating that “[b]ecause the pending applications for adjacent satellites are considered simultaneously filed and Pegasus has proposed to locate its satellite at an Appendix F location, while DIRECTV has not, the Commission’s rules prohibit DIRECTV’s proposed full power, full protect operations at 118.4° W.”).

¹⁶ *See Public Notice, International Bureau Establishes Deadlines for Amendments to Pending 17/24 GHz BSS Applications*, DA 07-4895 (rel. Dec. 5, 2007); Order on Reconsideration at ¶ 34.

application, purporting to amend its original amendment application to operate at 118.4° W.L. “to comply with the Commission’s rules governing how off-grid systems must operate in the presence of another system at the adjacent on-grid slot.”¹⁷ DIRECTV admits that absent this amendment, “the Commission cannot grant both the Pegasus application and the DIRECTV application in its current form.”¹⁸ This amendment application, however, falls well outside the Commission’s clear instructions regarding when and how second amendment applications must be filed. The Order on Reconsideration explicitly states that “[a]ny applicant proposing a full-power offset space station that conflicts with an application for an adjacent Appendix F space station will have thirty days after the deadline for amended applications . . . to amend its application.”¹⁹ DIRECTV’s September 2008 Amendment Application does not cure DIRECTV’s failure to file its required second amendment application by the deadline clearly established in the Order on Reconsideration. As such, DIRECTV’s application is defective and must be dismissed. Spectrum Five now seeks to provide service from this orbital location.

II. DESCRIPTION OF PROPOSED SYSTEM

A full description of the technical system proposed by Spectrum Five is included in the Technical Narrative attached at Exhibit A.

¹⁷ *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV RB-5, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 118.4° W.L.*, File No. SAT-AMD-20080908-00166 at 1 (filed Sept. 8, 2008) (“DIRECTV September 2008 Amendment Application”).

¹⁸ *Id.* at 3.

¹⁹ Order on Reconsideration at ¶ 36. DIRECTV, relying on the International Bureau’s public notice, claims the February 13, 2008 date is not applicable to its amendment. DIRECTV September 2008 Amendment Application at 4. However, the Commission’s Order on Reconsideration made clear that second amendment applications were to include those that either requested a change of orbital location *or* those that requested to remain at the offset location, but with reduced power and with reduced interference protection as required to protect the on-grid proposal. Order on Reconsideration at ¶ 34.

III. LEGAL, FINANCIAL, AND TECHNICAL QUALIFICATIONS

A. Legal Qualifications

Spectrum Five is legally qualified to provide the service requested in this application. The information provided in the attached Form 312, and the attached ownership exhibit responding to question 40 of Form 312, demonstrate Spectrum Five's compliance with the Commission's basic legal qualifications. In addition, Spectrum Five has previously been authorized to provide service to U.S. customers using Netherlands-authorized satellites.²⁰

B. Financial Qualifications

Spectrum Five will meet the milestone schedule set forth in Section 25.164 of the Commission's rules (*i.e.*, contract in one year, complete critical design review in two years, begin construction in three years, and launch and operate in five years)²¹ and the bond posting requirement set forth in Section 25.165 of the Commission's rules.²²

C. Technical Qualifications

In the attached Form 312, Schedule S, and Technical Narrative, Spectrum Five demonstrates that it is technically qualified to hold the authorization requested herein. Specifically, Spectrum Five provides the information currently required by Section 25.114 of the Commission's rules. In addition, Spectrum Five's Technical Exhibit provides information on its compliance with the orbital debris mitigation rules.

²⁰ *Spectrum Five LLC, Petition for Declaratory Ruling to Serve the U.S. Market Using Broadcast Satellite Spectrum from the 114.5° W.L. Orbital Location*, Order and Authorization, 21 FCC Rcd 14023 (2006) ("Spectrum Five 2006 Authorization").

²¹ 47 C.F.R. § 25.164.

²² 47 C.F.R. § 25.165.

IV. TYPE OF OPERATIONS

Spectrum Five intends to use its proposed satellite on a non-broadcast, non-common carrier basis.

V. GEOGRAPHIC SERVICE REQUIREMENTS

Spectrum Five will provide service to Alaska and Hawaii in compliance with Section 25.225 of the Commission's rules, 47 C.F.R. § 25.225.

VI. NETHERLANDS AUTHORIZATION

The Netherlands and the Netherlands Antilles have granted Spectrum Five the right to use the 119.0° W.L. orbital location and associated frequencies in the 17/24 GHz BSS band through an agreement.²³ The foreign license requirement of Section 25.137 of the Commission's Rules is therefore satisfied.²⁴

Under the Agreement, the Netherlands will act as the sponsoring administration for notification, coordination, examination, and registration of Spectrum Five's networks to the ITU. The Netherlands Radio Communications Agency has made the ITU filings necessary to advance publish, coordinate and notify the frequencies to be used by the Spectrum Five network. The Agreement authorizes Spectrum Five to make exclusive use of the 119.0° W.L. orbital location with respect to the frequencies and services specified in the ITU filings. The duration of the authorization is for the lifetime of Spectrum Five's first operational satellite, and the lifetime of

²³ Letter Agreement between the State of the Netherlands, the Government of the Netherlands Antilles, Spectrum Five LLC and Spectrum Five BV (effective as of August 7, 2007) ("Agreement"). The Netherlands recently enacted a Space Activities Act, with which Spectrum Five must comply, but Spectrum Five's rights in respect of the 119° W.L. orbital slot for 17/24 BSS service derive from the Agreement.

²⁴ *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S Licensed Space Stations to Provide Domestic and International Satellite Service in the United States and Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations*, Report and Order, 12 FCC Rcd 24094, 24177-78 (¶ 196) (1997) ("DISCO II Order").

any additional or replacement satellites placed at this location and launched within five years from the launch of the first operational satellite. The Agreement also provides that Spectrum Five may apply for renewal of the exclusive use rights, and that such renewal will not be unreasonably withheld.

Under the Agreement with the Netherlands and Netherlands Antilles, Spectrum Five is required to perform TT&C operations from a control center in the Netherlands Antilles, which requires a license for use of frequencies for transmit/ receive earth stations. The Netherlands Antilles has agreed to provide all necessary licenses for Spectrum Five's TT&C operations.

VII. GRANT OF THIS PETITION IS IN THE PUBLIC INTEREST

In the *DISCO II Order*, the Commission stated that providing opportunities for foreign-licensed satellites to deliver services in the U.S. could benefit U.S. consumers.²⁵ Grant of Spectrum Five's Petition will serve the public interest in a variety of ways.

A. Grant of the Petition Will Strengthen Competition in the Provision of DTH Services to the Public.

Spectrum Five plans to use the 119° W.L. orbital location for the provision of direct-to-home ("DTH") services. Grant of this application will thus serve the public interest by ensuring greater competition in the delivery of DTH services to the public. In 2006, the Commission authorized Spectrum Five to provide direct broadcast satellite services to the U.S. from the 114.5° W.L. orbital location.²⁶ The Commission found that grant of that petition would "offer an opportunity for increased competition in the U.S. DBS market" and that "[i]ncreased competition could provide consumers more satellite programming choices, more alternatives in subscription video providers and services at reduced prices for those services, and further technological

²⁵ *DISCO II Order*, 12 FCC Rcd at 24097 (¶ 4).

²⁶ Spectrum Five 2006 Authorization, *supra* note 20.

innovation.”²⁷ Grant of the instant Petition will provide Spectrum Five with additional capacity and spectrum and will consequently strengthen the ability of Spectrum Five to provide increased competition in the DTH marketplace.

Currently, only four space station operators have applied to provide services using the 17/24 GHz BSS spectrum. Grant of the instant application will allow a new entrant into this market, and benefit the public through increased competition.

B. The ECO-Sat Test is Satisfied.

The FCC has previously found that Spectrum Five’s use of a Netherlands-authorized satellite to provide DTH services to the U.S. satisfies the ECO-Sat test.²⁸ Grant of this Petition also satisfies the Commission’s ECO-Sat test, under which the agency examines opportunities for U.S.-licensed satellites to serve the home market of the non-U.S. satellite seeking access to the United States. In particular, the Commission examines whether there are any *de jure* or *de facto* barriers to entry for the provision of analogous services in the non-U.S. satellite’s home market.²⁹ The relevant foreign markets are (1) the market of the authority licensing the satellite and (2) the markets in which communications with the U.S. earth stations will originate or terminate.³⁰ In this case, the relevant markets are the Netherlands, the authorizing Administration, and the Netherlands Antilles, from which one channel of TV service on Spectrum Five’s satellites will originate. The relevant service is Direct-to-Home (“DTH”).³¹

²⁷ *Id.* at ¶ 1.

²⁸ Spectrum Five 2006 Authorization at 14030-31 (¶¶ 10-13).

²⁹ *DISCO II Order*, 12 FCC Rcd at 24137 (¶ 99).

³⁰ *Id.* at 24129-133 (¶¶ 76-88).

³¹ *Id.* at 24136-137 (¶ 98).

There are no *de jure* or *de facto* barriers to entry for an entity proposing to use a U.S.-licensed satellite to deliver DTH services to the Netherlands or Netherlands Antilles markets. Several foreign satellite operators already provide DTH services in the Netherlands. The only Dutch regulation applicable to the provision of satellite services requires that a license be obtained from the Radiocommunications Agency Netherlands for the use of frequencies for a satellite earth station.³² There are no restrictions regarding the nationality of the applicant for a license, and in practice, licenses are generally issued within eight weeks, for a (renewable) period of five years. U.S. operators would receive the same treatment as any other operator in this respect.

In the Netherlands Antilles, a distinction is made between (i) a satellite operator who sends a signal to a satellite earth station in the Netherlands Antilles; and (ii) a satellite operator who sends a satellite signal directly to consumers. In the first case, a license is to be obtained for the use of frequencies. There are no restrictions regarding the nationality of the applicant for a license; U.S. operators would receive the same treatment as any other operator in this respect. In the second case, where an operator sends a satellite signal directly to consumers, no license is required.

VIII. WAIVER PURSUANT TO SECTION 304 OF THE ACT

In accordance with Section 304 of the Communications Act of 1934, as amended, 47 U.S.C. § 304, the party to this application hereby waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

IX. CONCLUSION

For the foregoing reasons, Spectrum Five respectfully requests that the Commission

³² No license is required for receive-only terminals.

promptly approve this Petition as in the public interest, convenience and necessity.

Respectfully submitted,

Spectrum Five LLC

By: /s/ David Wilson

David Wilson
President
SPECTRUM FIVE LLC

Richard E. Wiley
Todd Stansbury
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1776 K Street, NW
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(202) 719-7000

Counsel for Spectrum Five LLC

Dated: September 10, 2008

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

In the Matter of)	
)	
Spectrum Five LLC	)	File No. _____
)	
Petition for Declaratory Ruling to Serve the	)	S2773 SAT-LOI-20080910-00183 IB2008002198
U.S. Market from the 119.0° W.L. Orbital	)	Spectrum Five LLC
Location in the 17/24 Broadcasting Satellite	)	BSSNET119W
Service Band		

PETITION FOR DECLARATORY RULING

Pursuant to Section 1.2 and 25.137 of the Commission’s rules¹ and the Public Notices issued by the International Bureau on August 11, 2008 and August 13, 2008,² Spectrum Five LLC (“Spectrum Five”) hereby requests a declaratory ruling that its provision of service to the U.S. market through a Netherlands-authorized satellite, to be called BSSNET119W, from the 119.0° W.L. orbital location using the 17/24 GHz Broadcast-Satellite Service (“BSS”) band is in the public interest. This petition for declaratory ruling (“Petition”) complies with the Commission’s procedural and substantive requirements for market entry by a foreign-authorized satellite, and is in the public interest. Grant of this Petition will allow additional competition that will benefit consumers by providing a number of different services including video and audio broadcasting, local-into-local, Broadband, and fixed and mobile networks.

¹ 47 C.F.R. §§ 1.2, 25.137.

² See Public Notice, *International Bureau Lifts Freeze on Filing 17/24 GHz BSS Applications*, DA 08-1887 (rel. Aug. 11, 2008); Public Notice, *International Bureau Reschedules Date That Freeze on Filing of 17/24 GHz BSS Applications is Lifted*, DA 08-1900 (rel. Aug. 13, 2008).

The 119.0° W.L. orbital location is one of the orbital locations designated by the Commission for use by satellite operators in the 17/24 GHz BSS band. DIRECTV Enterprises, LLC (“DIRECTV”) currently has an application pending for the 119.0° W.L. (offset) orbital location.³ However, as explained below, this application is defective, and, pursuant to the Commission’s rules, must be dismissed. Spectrum Five files this Petition so that upon dismissal of DIRECTV’s pending application, Spectrum Five will be next in the queue for the 119.0° W.L. orbital location.⁴

Pursuant to Section 25.137(b) of the Commission’s rules,⁵ this Petition is being filed electronically via the International Bureau Filing System as an attachment to FCC Form 312 and Schedule S.

I. INTRODUCTION

In May 2007, the FCC issued a Report and Order adopting a first-come, first-served framework to authorize 17/24 GHz BSS satellites to operate at orbital locations spaced at four degree intervals at precise orbital locations specified in Appendix F to the Report and Order.⁶

³ *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV RB-5, a Satellite in the 17/24 GHz Broadcasting Satellite Service*, File No. SAT-AMD-20080114-00017 (filed Jan. 14, 2008) (“DIRECTV Amendment Application”).

⁴ See Public Notice, *International Bureau Lifts Freeze on Filing 17/24 GHz BSS Applications*, DA 08-1887 (rel. Aug. 11, 2008) (“If a 17/24 GHz BSS application is not acceptable for filing, it will be returned and 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.”)

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⁶ *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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8842 (2007) (“Report and Order”).

119.0° W.L. was one of the specified Appendix F orbital locations. The Commission also imposed a freeze on the ability of new applicants to file for 17/24 GHz BSS orbital slots and decided to treat pending applications as simultaneously filed with priority over any later filed applications.⁷

In September 2007, the FCC issued an Order on Reconsideration to provide additional flexibility to 17/24 GHz BSS space station operators by allowing them to operate at locations other than those specified in Appendix F.⁸ Pending applicants were permitted to amend their applications to take advantage of this new flexibility.⁹ Applicants could request authority to operate in locations offset from Appendix F orbital slots at full power and with full interference protection. However, if a simultaneously filed amendment application requested full power and interference protection from an adjacent on-grid Appendix F location, the applicant for an offset location was required to submit a second amendment to either “change the orbital location to the Appendix F orbital location from which it was offset or [] remain at the offset location at reduced power and with reduced interference protection.”¹⁰ These second amendments were required to be filed within thirty days after submission of the initial round of conforming amendments.¹¹

⁷ *Id.* at ¶ 143.

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⁹ *Id.* at ¶¶ 33-37.

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¹¹ *Id.* at ¶ 36.

The Commission also explicitly directed the International Bureau “[o]nce the *two deadlines* for filing have passed” to “dismiss as defective any amended applications that are not substantially complete.”¹²

On January 14, 2008, DIRECTV filed an amendment application, seeking to operate the DIRECTV RB-5 satellite at the offset 118.4° W.L. orbital location¹³ “at full power and with full interference protection.”¹⁴ At the same time, Pegasus Development DBS Corporation (“Pegasus”) filed an amendment application to operate at the adjacent 115° W.L. Appendix F location.¹⁵ Because Pegasus proposed to operate at an Appendix F location that is less than four degrees away from DIRECTV’s offset location, DIRECTV was required to file a second amendment application within 30 days, or by February 13, 2008, to protect Pegasus’ proposed system.¹⁶

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¹² *Id.* at ¶ 37 (emphasis added).

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¹⁵ *See Pegasus Development DBS Corporation, Application for Authority to Construct, Launch, and Operate a System of Broadcasting Satellite Service Satellites*, File No. SAT-AMD-20080114-00023 (Call Sign S2700) at 20 (“Pegasus requests authority to operate the proposed satellites at full power with full interference protection (i.e. a full-power Appendix F space station) at the following orbital locations: 91.0°W, 107.0°W, and 115.0°W.”); *see also* Letter from Bruce D. Jacobs, Counsel for Pegasus Development DBS Corporation, to Marlene H. Dortch, FCC at 1-2 (filed Aug. 1, 2008) (stating that “[b]ecause the pending applications for adjacent satellites are considered simultaneously filed and Pegasus has proposed to locate its satellite at an Appendix F location, while DIRECTV has not, the Commission’s rules prohibit DIRECTV’s proposed full power, full protect operations at 118.4° W.”).

¹⁶ *See* Public Notice, *International Bureau Establishes Deadlines for Amendments to Pending 17/24 GHz BSS Applications*, DA 07-4895 (rel. Dec. 5, 2007); Order on Reconsideration at ¶ 34.

application, purporting to amend its original amendment application to operate at 118.4° W.L. “to comply with the Commission’s rules governing how off-grid systems must operate in the presence of another system at the adjacent on-grid slot.”¹⁷ DIRECTV admits that absent this amendment, “the Commission cannot grant both the Pegasus application and the DIRECTV application in its current form.”¹⁸ This amendment application, however, falls well outside the Commission’s clear instructions regarding when and how second amendment applications must be filed. The Order on Reconsideration explicitly states that “[a]ny applicant proposing a full-power offset space station that conflicts with an application for an adjacent Appendix F space station will have thirty days after the deadline for amended applications . . . to amend its application.”¹⁹ DIRECTV’s September 2008 Amendment Application does not cure DIRECTV’s failure to file its required second amendment application by the deadline clearly established in the Order on Reconsideration. As such, DIRECTV’s application is defective and must be dismissed. Spectrum Five now seeks to provide service from this orbital location.

II. DESCRIPTION OF PROPOSED SYSTEM

A full description of the technical system proposed by Spectrum Five is included in the Technical Narrative attached at Exhibit A.

¹⁷ *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV RB-5, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 118.4° W.L.*, File No. SAT-AMD-20080908-00166 at 1 (filed Sept. 8, 2008) (“DIRECTV September 2008 Amendment Application”).

¹⁸ *Id.* at 3.

¹⁹ Order on Reconsideration at ¶ 36. DIRECTV, relying on the International Bureau’s public notice, claims the February 13, 2008 date is not applicable to its amendment. DIRECTV September 2008 Amendment Application at 4. However, the Commission’s Order on Reconsideration made clear that second amendment applications were to include those that either requested a change of orbital location *or* those that requested to remain at the offset location, but with reduced power and with reduced interference protection as required to protect the on-grid proposal. Order on Reconsideration at ¶ 34.

III. LEGAL, FINANCIAL, AND TECHNICAL QUALIFICATIONS

A. Legal Qualifications

Spectrum Five is legally qualified to provide the service requested in this application. The information provided in the attached Form 312, and the attached ownership exhibit responding to question 40 of Form 312, demonstrate Spectrum Five's compliance with the Commission's basic legal qualifications. In addition, Spectrum Five has previously been authorized to provide service to U.S. customers using Netherlands-authorized satellites.²⁰

B. Financial Qualifications

Spectrum Five will meet the milestone schedule set forth in Section 25.164 of the Commission's rules (*i.e.*, contract in one year, complete critical design review in two years, begin construction in three years, and launch and operate in five years)²¹ and the bond posting requirement set forth in Section 25.165 of the Commission's rules.²²

C. Technical Qualifications

In the attached Form 312, Schedule S, and Technical Narrative, Spectrum Five demonstrates that it is technically qualified to hold the authorization requested herein. Specifically, Spectrum Five provides the information currently required by Section 25.114 of the Commission's rules. In addition, Spectrum Five's Technical Exhibit provides information on its compliance with the orbital debris mitigation rules.

²⁰ *Spectrum Five LLC, Petition for Declaratory Ruling to Serve the U.S. Market Using Broadcast Satellite Spectrum from the 114.5° W.L. Orbital Location*, Order and Authorization, 21 FCC Rcd 14023 (2006) ("Spectrum Five 2006 Authorization").

²¹ 47 C.F.R. § 25.164.

²² 47 C.F.R. § 25.165.

IV. TYPE OF OPERATIONS

Spectrum Five intends to use its proposed satellite on a non-broadcast, non-common carrier basis.

V. GEOGRAPHIC SERVICE REQUIREMENTS

Spectrum Five will provide service to Alaska and Hawaii in compliance with Section 25.225 of the Commission's rules, 47 C.F.R. § 25.225.

VI. NETHERLANDS AUTHORIZATION

The Netherlands and the Netherlands Antilles have granted Spectrum Five the right to use the 119.0° W.L. orbital location and associated frequencies in the 17/24 GHz BSS band through an agreement.²³ The foreign license requirement of Section 25.137 of the Commission's Rules is therefore satisfied.²⁴

Under the Agreement, the Netherlands will act as the sponsoring administration for notification, coordination, examination, and registration of Spectrum Five's networks to the ITU. The Netherlands Radio Communications Agency has made the ITU filings necessary to advance publish, coordinate and notify the frequencies to be used by the Spectrum Five network. The Agreement authorizes Spectrum Five to make exclusive use of the 119.0° W.L. orbital location with respect to the frequencies and services specified in the ITU filings. The duration of the authorization is for the lifetime of Spectrum Five's first operational satellite, and the lifetime of

²³ Letter Agreement between the State of the Netherlands, the Government of the Netherlands Antilles, Spectrum Five LLC and Spectrum Five BV (effective as of August 7, 2007) ("Agreement"). The Netherlands recently enacted a Space Activities Act, with which Spectrum Five must comply, but Spectrum Five's rights in respect of the 119° W.L. orbital slot for 17/24 BSS service derive from the Agreement.

²⁴ *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S Licensed Space Stations to Provide Domestic and International Satellite Service in the United States and Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations*, Report and Order, 12 FCC Rcd 24094, 24177-78 (¶ 196) (1997) ("DISCO II Order").

any additional or replacement satellites placed at this location and launched within five years from the launch of the first operational satellite. The Agreement also provides that Spectrum Five may apply for renewal of the exclusive use rights, and that such renewal will not be unreasonably withheld.

Under the Agreement with the Netherlands and Netherlands Antilles, Spectrum Five is required to perform TT&C operations from a control center in the Netherlands Antilles, which requires a license for use of frequencies for transmit/ receive earth stations. The Netherlands Antilles has agreed to provide all necessary licenses for Spectrum Five's TT&C operations.

VII. GRANT OF THIS PETITION IS IN THE PUBLIC INTEREST

In the *DISCO II Order*, the Commission stated that providing opportunities for foreign-licensed satellites to deliver services in the U.S. could benefit U.S. consumers.²⁵ Grant of Spectrum Five's Petition will serve the public interest in a variety of ways.

A. Grant of the Petition Will Strengthen Competition in the Provision of DTH Services to the Public.

Spectrum Five plans to use the 119° W.L. orbital location for the provision of direct-to-home ("DTH") services. Grant of this application will thus serve the public interest by ensuring greater competition in the delivery of DTH services to the public. In 2006, the Commission authorized Spectrum Five to provide direct broadcast satellite services to the U.S. from the 114.5° W.L. orbital location.²⁶ The Commission found that grant of that petition would "offer an opportunity for increased competition in the U.S. DBS market" and that "[i]ncreased competition could provide consumers more satellite programming choices, more alternatives in subscription video providers and services at reduced prices for those services, and further technological

²⁵ *DISCO II Order*, 12 FCC Rcd at 24097 (¶ 4).

²⁶ Spectrum Five 2006 Authorization, *supra* note 20.

innovation.”²⁷ Grant of the instant Petition will provide Spectrum Five with additional capacity and spectrum and will consequently strengthen the ability of Spectrum Five to provide increased competition in the DTH marketplace.

Currently, only four space station operators have applied to provide services using the 17/24 GHz BSS spectrum. Grant of the instant application will allow a new entrant into this market, and benefit the public through increased competition.

B. The ECO-Sat Test is Satisfied.

The FCC has previously found that Spectrum Five’s use of a Netherlands-authorized satellite to provide DTH services to the U.S. satisfies the ECO-Sat test.²⁸ Grant of this Petition also satisfies the Commission’s ECO-Sat test, under which the agency examines opportunities for U.S.-licensed satellites to serve the home market of the non-U.S. satellite seeking access to the United States. In particular, the Commission examines whether there are any *de jure* or *de facto* barriers to entry for the provision of analogous services in the non-U.S. satellite’s home market.²⁹ The relevant foreign markets are (1) the market of the authority licensing the satellite and (2) the markets in which communications with the U.S. earth stations will originate or terminate.³⁰ In this case, the relevant markets are the Netherlands, the authorizing Administration, and the Netherlands Antilles, from which one channel of TV service on Spectrum Five’s satellites will originate. The relevant service is Direct-to-Home (“DTH”).³¹

²⁷ *Id.* at ¶ 1.

²⁸ Spectrum Five 2006 Authorization at 14030-31 (¶¶ 10-13).

²⁹ *DISCO II Order*, 12 FCC Rcd at 24137 (¶ 99).

³⁰ *Id.* at 24129-133 (¶¶ 76-88).

³¹ *Id.* at 24136-137 (¶ 98).

There are no *de jure* or *de facto* barriers to entry for an entity proposing to use a U.S.-licensed satellite to deliver DTH services to the Netherlands or Netherlands Antilles markets. Several foreign satellite operators already provide DTH services in the Netherlands. The only Dutch regulation applicable to the provision of satellite services requires that a license be obtained from the Radiocommunications Agency Netherlands for the use of frequencies for a satellite earth station.³² There are no restrictions regarding the nationality of the applicant for a license, and in practice, licenses are generally issued within eight weeks, for a (renewable) period of five years. U.S. operators would receive the same treatment as any other operator in this respect.

In the Netherlands Antilles, a distinction is made between (i) a satellite operator who sends a signal to a satellite earth station in the Netherlands Antilles; and (ii) a satellite operator who sends a satellite signal directly to consumers. In the first case, a license is to be obtained for the use of frequencies. There are no restrictions regarding the nationality of the applicant for a license; U.S. operators would receive the same treatment as any other operator in this respect. In the second case, where an operator sends a satellite signal directly to consumers, no license is required.

VIII. WAIVER PURSUANT TO SECTION 304 OF THE ACT

In accordance with Section 304 of the Communications Act of 1934, as amended, 47 U.S.C. § 304, the party to this application hereby waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

IX. CONCLUSION

For the foregoing reasons, Spectrum Five respectfully requests that the Commission

³² No license is required for receive-only terminals.

promptly approve this Petition as in the public interest, convenience and necessity.

Respectfully submitted,

Spectrum Five LLC

By: /s/ David Wilson

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Dated: September 10, 2008

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

In the Matter of)	
Spectrum Five LLC)	File No. _____
Petition for Declaratory Ruling to Serve the)	S2777 SAT-LOI-20081113-00216
U.S. Market from the 118.8° W.L. Orbital)	Spectrum Five LLC
Location in the 17/24 Broadcasting Satellite)	BSSNET119W
Service Band)	IB2008002700

PETITION FOR DECLARATORY RULING

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TABLE OF CONTENTS

	Page
I. BACKGROUND	4
II. DIRECTV’S APPLICATION IS PROCEDURALLY AND TECHNICALLY DEFECTIVE AND MUST BE DISMISSED.....	6
A. DIRECTV’s Request to Operate at Full Power at the Offset 118.4° W.L. Slot Fails to Protect Pegasus’ Adjacent Full Power On-Grid Operations In Violation of the Commission’s Rules.....	6
B. DIRECTV’s Attempt to Modify Its Offset System to Protect Pegasus’ On-Grid Network Was Filed More than Half a Year After the Deadline.....	7
C. Even as Amended, DIRECTV’s Proposed System Would Exceed Applicable Power Limits by 43 Percent and Cause Substantially More Interference to Adjacent Systems than Permitted under the Commission’s Rules.....	8
1. DIRECTV Seeks to Boost Its Operating Power 43 Percent by Ignoring the Existence of Clear Sky Conditions, Contrary to the Commission’s Technical Rules, Industry Practice, and DIRECTV’s Own Prior Satellite Applications.....	10
2. DIRECTV Miscalculates the Amount of Power It Must Reduce to Protect Pegasus’ Full-power On-grid Network.....	12
III. DESCRIPTION OF PROPOSED SYSTEM	13
IV. LEGAL, FINANCIAL, AND TECHNICAL QUALIFICATIONS	13
A. Legal Qualifications.....	13
B. Financial Qualifications.....	14
C. Technical Qualifications	14
V. TYPE OF OPERATIONS.....	14
VI. GEOGRAPHIC SERVICE REQUIREMENTS	14
VII. NETHERLANDS AUTHORIZATION.....	14
VIII. GRANT OF THIS PETITION IS IN THE PUBLIC INTEREST	16
A. Grant of the Petition Will Strengthen Competition in the Provision of DTH Services to the Public.....	16
B. The ECO-Sat Test is Satisfied.....	17
IX. WAIVER PURSUANT TO SECTION 304 OF THE ACT	18
X. CONCLUSION.....	19

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

In the Matter of)
)
Spectrum Five LLC) File No. _____
)
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)

PETITION FOR DECLARATORY RULING

Pursuant to Section 1.2 and 25.137 of the Commission’s rules¹ and the Public Notices issued by the International Bureau on August 11, 2008 and August 13, 2008,² Spectrum Five LLC (“Spectrum Five”) hereby requests a declaratory ruling that its provision of service to the U.S. market through a Netherlands-authorized satellite from the 118.8° W.L. orbital location using the 17/24 GHz Broadcast-Satellite Service (“BSS”) band is in the public interest. This petition for declaratory ruling (“Petition”) complies with the Commission’s procedural and substantive requirements for market entry by a foreign-authorized satellite. Grant of this Petition is in the public interest because Spectrum Five’s provision of BSS from the 118.8° W.L. orbital location will benefit consumers by providing the next generation of DBS services, including video and audio broadcasting, local-into-local TV, Broadband, and fixed and mobile networks.

¹ 47 C.F.R. §§ 1.2, 25.137.

² See Public Notice, *International Bureau Lifts Freeze on Filing 17/24 GHz BSS Applications*, DA 08-1887 (rel. Aug. 11, 2008); Public Notice, *International Bureau Reschedules Date That Freeze on Filing of 17/24 GHz BSS Applications is Lifted*, DA 08-1900 (rel. Aug. 13, 2008).

Additionally, service by Spectrum Five, a U.S.-based company, will increase competition in overall DBS services, which will lower costs and stimulate service innovation to the benefit of consumers.

The nominal 119.0° W.L. orbital location is one of the orbital locations designated by the Commission for use by satellite operators in the 17/24 GHz BSS band. Spectrum Five seeks to operate at the 118.8° W.L. offset location.³ To protect the operations of Pegasus Development DBS Corporation (“Pegasus”), which has a previously filed application for a 17/24 GHz BSS authorization at the 115.0° W.L. Appendix F location,⁴ Spectrum Five will operate at 118.8° W.L. with reduced power and reduced interference protection as described in the attached Technical Narrative.⁵ The attached Technical Narrative demonstrates that operations from the offset 118.8° W.L. orbital location have been calculated to provide quality service to customers in the United States without harmful interference to or interference from other satellite operators.

³ Spectrum Five currently has two pending petitions for declaratory ruling to use the 119.0° W.L. orbital location. *See Spectrum Five LLC, Petition for Declaratory Ruling to Serve the U.S. Market from the 119.0° W.L. Orbital Location in the 17/24 Broadcasting Satellite Service Band*, File Nos. SAT-LOI-20080910-00178 and SAT-LOI-20080910-00183 (filed Sept. 10, 2008). (Spectrum Five filed two duplicate applications as a result of IBFS filing error messages.)

⁴ *See Pegasus Development DBS Corporation, Application for Authority to Construct, Launch, and Operate a System of Broadcasting Satellite Service Satellites*, File No. SAT-AMD-20080114-00023 (Call Sign S2700) (filed Jan. 14, 2008) (“Pegasus 115.0° W.L. Application”).

⁵ *See 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*, Order on Reconsideration, 22 FCC Rcd 17951 (2007) (“Order on Reconsideration”) (requiring satellites operating at offset orbital locations that are less than four degrees away from proposed operations at an Appendix F location to operate with reduced power and reduced interference protection); 47 C.F.R. § 25.262(d).

DIRECTV Enterprises, LLC (“DIRECTV”) currently has a pending application, twice amended, for the nominal 119.0° W.L. orbital location.⁶ However, as explained below, this application must be dismissed or denied.

DIRECTV’s application, as initially amended in January 2008, violates the Commission’s interference criteria and must be dismissed.⁷ Moreover, DIRECTV’s second amendment filed September 8, 2008, was untimely—it was filed more than half a year after the February 13, 2008 deadline specified by the FCC for amendments to reduce power at offset locations to comply with the Commission’s interference rules. It was also filed before the FCC lifted the freeze on new applications effective September 10, 2008 and, thus, it cannot be processed as a new application.

Moreover, even as amended, DIRECTV’s proposed off-grid system must be denied because it would exceed the Commission’s power limits by *43 percent* and cause substantially more interference into adjacent systems than the rules permit. DIRECTV improperly relies on weather and atmospheric conditions to justify its radical power levels. This unauthorized methodology is a clear violation of the Commission’s rule requiring power limits to apply in “clear sky” conditions, and contradicts longstanding industry practice as well as to DIRECTV’s own applications for Ka-band satellite systems. Consequently, DIRECTV’s application, as twice

⁶ *DIRECTV Enterprises, LLC, Application for Authorization to Construct, Launch and Operate an Expansion System of Direct Broadcast Satellites*, File No. SAT-LOA-19970605-00051 (filed June 5, 1997) (“DIRECTV Original Application”); *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV RB-5, a Satellite in the 17/24 GHz Broadcasting Satellite Service*, File No. SAT-AMD-20080114-00017 (filed Jan. 14, 2008) (“DIRECTV January 2008 Amendment”); *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV RB-5, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 118.4° W.L.*, File No. SAT-AMD-20080908-00166 (filed Sept. 8, 2008) (“DIRECTV September 2008 Amendment”).

⁷ DIRECTV September 2008 Amendment at 3.

amended, is patently defective and should be returned as unacceptable for filing or denied.

Upon dismissal of DIRECTV's defective application, Spectrum Five will be first in the queue for 17/24 GHz frequencies at the nominal 119.0° W.L. orbital location.⁸

Pursuant to Section 25.137(b) of the Commission's rules,⁹ this Petition is being filed electronically via the International Bureau Filing System as an attachment to FCC Form 312 and Schedule S.

I. BACKGROUND

In May 2007, the FCC issued a Report and Order adopting a first-come, first-served framework to authorize 17/24 GHz BSS satellites to operate at four degree intervals at precise orbital locations specified in Appendix F to the Report and Order.¹⁰ 119.0° W.L. was one of the specified Appendix F orbital locations. The Commission also decided to treat the then pending applications filed by DIRECTV, Pegasus, EchoStar Satellite Operating L.L.C. ("EchoStar") and Intelsat North America LLC ("Intelsat") as simultaneously filed with priority over any later filed applications.¹¹ Simultaneously, the FCC imposed a freeze on the ability of new applicants to file

⁸ See Public Notice, *International Bureau Lifts Freeze on Filing 17/24 GHz BSS Applications*, DA 08-1887 (rel. Aug. 11, 2008) ("If a 17/24 GHz BSS application is not acceptable for filing, it will be returned and 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.") Even after an application has been placed on public notice, the Commission reserves the right to ultimately dismiss applications that are not filed in conformance with the Commission's rules. See Order on Reconsideration at ¶ 37, n. 69.

⁹ 47 C.F.R. § 25.137(b).

¹⁰ *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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8842 (2007) ("Report and Order").

¹¹ *Id.* at ¶ 143.

for 17/24 GHz BSS orbital slots.

In September 2007, the FCC issued an Order on Reconsideration to provide additional flexibility to 17/24 GHz BSS space station operators by allowing them to operate at locations other than those specified in Appendix F.¹² Pending applicants were permitted to amend their applications as a result of this new flexibility.¹³ Applicants could request authority to operate in locations offset from Appendix F orbital slots at full power and with full interference protection. However, if a simultaneously filed amendment requested full power and interference protection from an adjacent on-grid Appendix F location, the applicant for an offset location was required to submit a second amendment to either “change the orbital location to the Appendix F orbital location from which it was offset or [] remain at the offset location at reduced power and with reduced interference protection.”¹⁴ These second amendments were required to be filed within thirty days after submission of the initial round of conforming amendments.¹⁵ The Commission also explicitly directed the International Bureau “[o]nce the *two deadlines* for filing have passed” to “dismiss as defective any amended applications that are not substantially complete.”¹⁶

¹² See *supra* note 5.

¹³ Order on Reconsideration at ¶¶ 33-37.

¹⁴ *Id.* at ¶ 34.

¹⁵ *Id.* at ¶ 36.

¹⁶ *Id.* at ¶ 37 (emphasis added). In response to the Commission's Order, the International Bureau issued a public notice establishing a deadline for amendments to the pending applications. Public Notice, *International Bureau Establishes Deadline for Amendments to Pending 17/24 GHz BSS Applications*, DA 07-4895 (rel. Dec. 5, 2007). The public notice clearly states that if second amendments were not timely filed, the Bureau would continue to process the application as initially amended.

II. DIRECTV'S APPLICATION IS PROCEDURALLY AND TECHNICALLY DEFECTIVE AND MUST BE DISMISSED.

A. DIRECTV's Request to Operate at Full Power at the Offset 118.4° W.L. Slot Fails to Protect Pegasus' Adjacent Full Power On-Grid Operations In Violation of the Commission's Rules.

On January 14, 2008, DIRECTV amended its original application¹⁷ and sought to operate the DIRECTV RB-5 satellite at the offset 118.4° W.L. orbital location¹⁸ “at full power and with full interference protection.”¹⁹ As noted above, at the same time, Pegasus amended its application and sought to operate at the adjacent 115.0° W.L. Appendix F location at full power and interference protection.²⁰ DIRECTV's proposed full-power operations at 118.4° W.L. would cause unacceptable interference to Pegasus' adjacent on-grid operations at 115.0° W.L. Even DIRECTV admits that its application as amended on January 14, 2008 fails to protect Pegasus as required under the rules, and as a result, “the Commission cannot grant both the Pegasus application and the DIRECTV application in its current form.”²¹ Accordingly, DIRECTV was obligated to amend its application no later than February 13, 2008 to demonstrate how it would

¹⁷ DIRECTV Original Application.

¹⁸ DIRECTV January 2008 Amendment at 9.

¹⁹ *Id.* at 5.

²⁰ *See* Pegasus 115.0° W.L. Application at 20 (“Pegasus requests authority to operate the proposed satellites at full power with full interference protection (*i.e.*, a full-power Appendix F space station) at the following orbital locations: 91.0°W, 107.0°W, and 115.0°W.”); *see also* Letter from Bruce D. Jacobs, Counsel for Pegasus Development DBS Corporation, to Marlene H. Dortch, FCC at 1-2 (filed Aug. 1, 2008) (stating that “[b]ecause the pending applications for adjacent satellites are considered simultaneously filed and Pegasus has proposed to locate its satellite at an Appendix F location, while DIRECTV has not, the Commission's rules prohibit DIRECTV's proposed full power, full protect operations at 118.4° W.”).

²¹ *Id.* at 3.

properly protect Pegasus.²² As shown below, DIRECTV failed to do so by the deadline.²³

Since DIRECTV's application as amended in January 2008 violates the Commission's interference rules,²⁴ it must be dismissed.

B. DIRECTV's Attempt to Modify Its Offset System to Protect Pegasus' On-Grid Network Was Filed More than Half a Year After the Deadline.

Almost seven months after the deadline for filing curative amendments, on September 8, 2008, DIRECTV filed an amendment, purporting to amend its January 2008 Amendment "to comply with the Commission's rules governing how off-grid systems must operate in the presence of another system at the adjacent on-grid slot."²⁵ The amendment, however, falls well outside the Commission's clear instructions regarding when and how second amendments to applications must be filed. The Order on Reconsideration explicitly states that "[a]ny applicant proposing a full-power offset space station that conflicts with an application for an adjacent

²² See Public Notice, *International Bureau Establishes Deadlines for Amendments to Pending 17/24 GHz BSS Applications*, DA 07-4895 (rel. Dec. 5, 2007); Order on Reconsideration at ¶ 34.

²³ In contrast, EchoStar availed itself of the opportunity to file amendments by the specified February 13, 2008 deadline.

²⁴ 47 C.F.R. § 25.262(d) ("[a]ny U.S. licensee or permittee using a 17/24 GHz BSS space station that is located less than four degrees away from a prior-authorized 17/24 GHz BSS space station that is authorized to operate in accordance with paragraph (b) of this section ... may not cause any more interference to the adjacent satellite network than would be caused if the adjacent 17/24 GHz BSS space station were located four degrees away from the proposed space station.").

²⁵ DIRECTV September 2008 Amendment at 1. DIRECTV claims that this amendment is a minor amendment that affects only DIRECTV and is not subject to the filing freeze. *Id.* at 3-4. However, as explained herein, the September 2008 Amendment is inappropriately filed because the Commission expressly directed off-grid applicants, such as DIRECTV, to file second amendments to protect on-grid applicants within 30 days, or by February 13, 2008. Rather than complying with this obligation, DIRECTV its filed its required second amendment almost seven months after the February 2008 deadline. After failing to file this amendment as expressly directed by the Commission, DIRECTV could not violate the filing freeze to amend its pending defective amendment application.

Appendix F space station will have thirty days after the deadline for amended applications . . . to amend its application,” which was February 13, 2008.²⁶ Because DIRECTV’s second amendment was not timely filed, contrary to the Commission’s express directions, it must be dismissed and the Commission must process DIRECTV’s application based on its January 2008 Amendment.²⁷ Moreover, DIRECTV’s September 8, 2008 application cannot be processed as a new application because it was filed before the FCC lifted the freeze on new applications effective September 10, 2008. Accordingly, DIRECTV’s twice amended application for the nominal 119° W.L. orbital location is fatally flawed and must be dismissed without further processing.

C. Even as Amended, DIRECTV’s Proposed System Would Exceed Applicable Power Limits by 43 Percent and Cause Substantially More Interference to Adjacent Systems than Permitted under the Commission’s Rules.

If not dismissed, DIRECTV’s application, as twice amended, should be denied because it does not comply with the Commission’s prescribed power limits designed to avoid interference to adjacent satellites. Specifically, in violation of the Commission’s mandate to demonstrate compliance with PFD limits under clear sky conditions, DIRECTV creates enormous excess power margins by relying upon so-called atmospheric attenuation (including highly variable effects due to moisture and clouds in the atmosphere), to bring its proposed PFD within prescribed limits. Excluding these effects - as the rules require - DIRECTV proposes to operate

²⁶ Order on Reconsideration at ¶ 36. DIRECTV, relying on the International Bureau’s public notice, claims the February 13, 2008 date is not applicable to its amendment. DIRECTV September 2008 Amendment at 4. However, the Commission’s Order on Reconsideration made clear that second amendments were to include those that either requested a change of orbital location *or* those that requested to remain at the offset location, but with reduced power and with reduced interference protection as required to protect the on-grid proposal. Order on Reconsideration at ¶ 34.

²⁷ *See supra* note 16.

at power levels that are 43 percent in excess of the limits allowed by the Commission. If permitted, these inflated power measurements would unfairly advantage DIRECTV by causing greater interference to DIRECTV's competitors, who propose to operate at power levels that comply with the Commission's rules.

The below table summarizes the PFD limit calculations used by DIRECTV in its September 8, 2008 amendment, and demonstrates how DIRECTV's measurements radically depart from PFD limits properly calculated pursuant to the Commission's rules.

PFD ANALYSIS		
"On-Grid" Satellite Long, degs E	-119.000	
Offset Satellite Long, degs E	-118.400	
Offset, degs	0.600	
		Comments
**** DirecTV Analysis ****	MAX ERP	
Max FCC Satellite ERP, dBW	63.0	No offset
DTV Power Reduction Req'd, dB	-0.1	
Reduced Sat ERP, dBW	62.9	DTV Reduced ERP for 0.6deg offset
Bandwidth Factor, dB-MHz	15.56	
Spreading Loss, dB	-162.4	Correct Value -162.6
Max PFD, dBW/MHz/m ²	-115.06	
Add Reduction for Atmos Loss, Gaseous, dB	-0.8	DTV value for "99.7% availability"
Add Reduction for Atmos Loss, Clouds, dB	-0.8	
Total Atmos Loss Reduction, dB	-1.6	
Sat PFD, dBW/MHz/m ² - w/atmos loss	-116.66	
FCC PFD Reduction due to offset, dBW/MHz/m ²	-1.70	
Max FCC PFD, dBW/MHz/m ²	-116.7	
DTV Calc Margin, dB	-0.04	Slightly negative margin using DTV's figure
**** FCC Analysis ****	MAX ERP	
Max FCC PFD, dBW/MHz/m ²	-115.00	
FCC Power Reduction Req'd, dB	-1.81	Corrected value for req'd offset reduction
Offset Max PFD, dBW/MHz/m ²	-116.81	
Bandwidth Factor, dB-MHz	15.56	
Spreading Loss, dB	-162.59	Corrected value for Spreading Loss
Max Satellite PFD, dBW/MHz/m ²	-115.25	
**** PFD Margin (Sat Max PFD-FCC Max PFD) ****	-1.55	Further reduction req'd to meet FCC limit
**** % Overage relative to FCC Limit ****	43.1%	

1. DIRECTV Seeks to Boost Its Operating Power 43 Percent by Ignoring the Existence of Clear Sky Conditions, Contrary to the Commission's Technical Rules, Industry Practice, and DIRECTV's Own Prior Satellite Applications.

DIRECTV impermissibly relies on atmospheric losses to bring its proposed PFD within prescribed limits. In determining PFD levels, DIRECTV first calculates a “free-space” PFD value, and then subtracts a term which accounts for “atmospheric loss,” a technique defended by DIRECTV as a “methodology used by DIRECTV [which] reflects the industry standard used in countless applications before the Commission.”²⁸ This atmospheric loss term includes a component for gaseous effects and a second term for cloud effects,²⁹ but in actuality is intended to allow operation at higher powers than permitted by Commission rules. As explained below, DIRECTV's novel reliance on atmospheric losses to satisfy prescribed power limits runs counter to the FCC's rules, all other 17/24 GHz applications and DIRECTV's previously filed applications in other bands subject to an analogous power limit.

Section 25.208(w) of the Commission's rules requires PFD limits to apply in “clear sky” conditions.³⁰ Clear sky conditions, without doubt, do not include weather variable effects due to cloud cover and increased humidity levels in the atmosphere. From an interference standpoint, clouds over Miami have nothing to do with the interference level experienced by a subscriber in sunny Los Angeles receiving a signal from an adjacent satellite. DIRECTV's proposed concept of margin “availability” does not exist in the Commission's rules for interference protection.³¹

²⁸ See Letter from William Wiltshire to Marlene H. Dortch, FCC, File No. SAT-AMD-20080908-00166 at 1 (filed October 6, 2008) (“DIRECTV October 2008 Letter”).

²⁹ DIRECTV September 2008 Amendment at A-1.

³⁰ 47 C.F.R. § 25.208(w).

³¹ DIRECTV September 2008 Amendment.

Applying PFD limits with atmospheric loss presumes that clouds and other moisture effects in the atmosphere will limit interference in all places at all times. However, these atmospheric effects are weather related and will vary significantly over time and location. Thus, DIRECTV's consideration of atmospheric loss in calculating PFD limits is directly contrary to FCC rules and, if permitted, would result in substantial interference to adjacent systems.

No other 17/24 GHz BSS band applicant invoked similar atmospheric loss terms in its PFD calculation. For example, in its Second Amendment, EchoStar, reduces the EIRP by 1.81 dB because of the 0.6 degrees offset at 110.4° W.L., and calculates the resulting PFD value without atmospheric loss.³²

Additionally, DIRECTV's methodology for determining PFD limits in the January 2008 and September 2008 Amendments departs from the one it used in prior filings to demonstrate compliance with an analogous rule. Section 25.138(a)(6) of the Commission's rules, outlining PFD limits for Ka-band satellites, is exactly the same form as that cited above in 47 C.F.R. § 25.208(w) for Reverse Band satellites. According to Section 25.138, PFD at the Earth's surface produced by emissions from a space station for all conditions, *including clear sky*, and for all methods of modulation shall not exceed a level of $-118 \text{ dBW/m}^2/\text{MHz}$.³³ In the Ka-band filings for the DIRECTV 10 and DIRECTV 11 satellites,³⁴ DIRECTV calculated the PFD according to

³² See *EchoStar Corporation, Second Amendment to Application for Authority to Construct, Launch and Operate a Satellite in the 17/24 GHz Broadcasting-Satellite Service*, File No. SAT-AMD-20080213-00042 (filed Feb. 13, 2008) at Attachment A, page 3.

³³ 47 C.F.R. § 25.138(a)(6) (emphasis added).

³⁴ *The DIRECTV Group, Inc., Application for Authorization to Launch and Operate DIRECTV 10, a Partial Replacement Ka-band Satellite, at 103° WL*, File No. SAT-LOA-20040909-00169 (filed Sept. 9, 2004) ("DIRECTV 10 Application"); *The DIRECTV Group, Inc., Application for Authorization to Launch and Operate DIRECTV 11, a Partial Replacement Ka-band Satellite, at 99° WL*, File No. SAT-LOA-20040909-00168 (filed Sept. 9, 2004)

conventional methods:

The national and spot downlink beams of DIRECTV 10 will be operated so as to generate a maximum downlink EIRP of 58.3 and 59.5 dBW per 36 MHz channel, respectively, and to thereby comply with the Ka-Band blanket licensing coordination threshold of $-118 \text{ dBW/m}^2/\text{MHz}$. Operation with this EIRP complies with the Commission's requirements as is demonstrated by virtue of the fact that, for a 36 MHz digital carrier, a satellite downlink EIRP of 59.5 dBW results in a maximum PFD of $-118 \text{ dBW/m}^2/\text{MHz}$ on the surface of the Earth (i.e., $59.5 \text{ dBW} - 162 \text{ dBm}^2 - 10 \cdot \log(36) \text{ dB MHz}$). In all cases the upper bound on system and individual link availability is determined by $-118 \text{ dBW/m}^2/\text{MHz}$, i.e. the downlink PFD coordination threshold established in Section 25.138 of the Commission's rules.³⁵

In sum, DIRECTV's Reverse Band application proposes a system that exceeds the Commission's prescribed power limits by 43 percent. Therefore, the application is legally, as well as technically flawed, and must be denied.

2. DIRECTV Miscalculates the Amount of Power It Must Reduce to Protect Pegasus' Full-power On-grid Network.

Additionally, DIRECTV's interference calculation has two other computational errors. First, according to the Commission's rules, the required reduction for a 0.6° offset is 1.81 dB as noted earlier in connection with EchoStar's Second Amendment.³⁶ In contrast, DIRECTV calculates a PFD reduction of 1.7 dB—and then deems all but 0.1 dB satisfied by a cloudy forecast.³⁷ Second, DIRECTV compounds its error because it does not use the correct

(Continued . . .)
("DIRECTV 11 Application").

³⁵ DIRECTV 10 Application at 20; *see also* DIRECTV 11 Application at 19-20.

³⁶ *See EchoStar Corporation, Second Amendment to Application for Authority to Construct, Launch and Operate a Satellite in the 17/24 GHz Broadcasting-Satellite Service*, File No. SAT-AMD-20080213-00042 (filed Feb. 13, 2008) at Attachment A, page 3.

³⁷ DIRECTV September 2008 Amendment at 3, n. 8.

spreading loss for the 118.4° W.L. location (it should actually be -162.6 dB rather than the -162.4 dB value used—a figure apparently copied from another filing and not representative of the spreading loss to the maximum PFD point).³⁸

Because DIRECTV's application to provide service from the nominal 119° W.L. is procedurally and technically defective, by Commission order it must be dismissed without further consideration or denied.³⁹ Upon dismissal or denial, the nominal 119° W.L. orbital location will be available for Spectrum Five.

III. DESCRIPTION OF PROPOSED SYSTEM

A full description of the technical system proposed by Spectrum Five is included in the Technical Narrative attached at Exhibit A.

IV. LEGAL, FINANCIAL, AND TECHNICAL QUALIFICATIONS

A. Legal Qualifications

Spectrum Five is legally qualified to provide the service requested in this application. The information provided in the attached Form 312, and the attached ownership exhibit responding to question 40 of Form 312, demonstrate Spectrum Five's compliance with the Commission's basic legal qualifications. In addition, Spectrum Five has previously been authorized to provide service to U.S. customers using Netherlands-authorized satellites.⁴⁰

³⁸ See *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV RB-2, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 103° W.L.*, File No. SAT-AMD-20080114-00014 at 12 (filed Jan. 14, 2008) ("DIRECTV 103° W.L. Amendment Application").

³⁹ See 47 C.F.R. § 25.112(a)(2) (requiring the FCC to return as defective applications that do "not substantially comply with the Commissions' rules, regulations specific requests for information, or other requirements.")

⁴⁰ *Spectrum Five LLC, Petition for Declaratory Ruling to Serve the U.S. Market Using Broadcast Satellite Spectrum from the 114.5° W.L. Orbital Location*, Order and Authorization, 21 FCC Rcd 14023 (2006) ("Spectrum Five 2006 Authorization").

B. Financial Qualifications

Spectrum Five will meet the milestone schedule set forth in Section 25.164 of the Commission's rules (*i.e.*, contract in one year, complete critical design review in two years, begin construction in three years, and launch and operate in five years)⁴¹ and the bond posting requirement set forth in Section 25.165 of the Commission's rules.⁴²

C. Technical Qualifications

In the attached Form 312, Schedule S, and Technical Narrative, Spectrum Five demonstrates that it is technically qualified to hold the authorization requested herein. Specifically, Spectrum Five provides the information currently required by Section 25.114 of the Commission's rules. In addition, Spectrum Five's Technical Exhibit provides information on its compliance with the orbital debris mitigation rules.

V. TYPE OF OPERATIONS

Spectrum Five intends to use its proposed satellite on a non-broadcast, non-common carrier basis.

VI. GEOGRAPHIC SERVICE REQUIREMENTS

Spectrum Five will provide service to Alaska and Hawaii in compliance with Section 25.225 of the Commission's rules, 47 C.F.R. § 25.225.

VII. NETHERLANDS AUTHORIZATION

The Netherlands and the Netherlands Antilles have granted Spectrum Five the right to use the nominal 119.0° W.L. orbital location and associated frequencies in the 17/24 GHz BSS

⁴¹ 47 C.F.R. § 25.164.

⁴² 47 C.F.R. § 25.165.

band through an agreement.⁴³ The foreign license requirement of Section 25.137 of the Commission's Rules is therefore satisfied.⁴⁴

Under the Agreement, the Netherlands will act as the sponsoring administration for notification, coordination, examination, and registration of Spectrum Five's networks to the ITU. The Netherlands Radio Communications Agency has made the ITU filings necessary to advance publish, coordinate and notify the frequencies to be used by the Spectrum Five network. The Agreement authorizes Spectrum Five to make exclusive use of the nominal 119.0° W.L. orbital location with respect to the frequencies and services specified in the ITU filings. The duration of the authorization is for the lifetime of Spectrum Five's first operational satellite, and the lifetime of any additional or replacement satellites placed at this location and launched within five years from the launch of the first operational satellite. The Agreement also provides that Spectrum Five may apply for renewal of the exclusive use rights, and that such renewal will not be unreasonably withheld.

Under the Agreement with the Netherlands and Netherlands Antilles, Spectrum Five is required to perform TT&C operations from a control center in the Netherlands Antilles, which requires a license for use of frequencies for transmit/ receive earth stations. The Netherlands Antilles has agreed to provide all necessary licenses for Spectrum Five's TT&C operations.

⁴³ Letter Agreement between the State of the Netherlands, the Government of the Netherlands Antilles, Spectrum Five LLC and Spectrum Five BV (effective as of August 7, 2007) ("Agreement"). The Netherlands recently enacted a Space Activities Act, with which Spectrum Five must comply, but Spectrum Five's rights in respect of the 118.8° W.L. orbital slot for 17/24 BSS service derive from the Agreement.

⁴⁴ *See Amendment of the Commission's Regulatory Policies to Allow Non-US Licensed Space Stations to Provide Domestic and International Satellite Service in the United States and Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations*, Report and Order, 12 FCC Rcd 24094, 24177-78 (¶ 196) (1997) ("DISCO II Order").

VIII. GRANT OF THIS PETITION IS IN THE PUBLIC INTEREST

In the *DISCO II Order*, the Commission stated that providing opportunities for foreign-licensed satellites to deliver services in the U.S. could benefit U.S. consumers.⁴⁵ Grant of Spectrum Five's Petition will serve the public interest in a variety of ways.

A. Grant of the Petition Will Strengthen Competition in the Provision of DTH Services to the Public.

Spectrum Five plans to use the nominal 119.0° W.L. orbital location for the provision of direct-to-home ("DTH") services. Grant of this application will thus serve the public interest by ensuring greater competition in the delivery of DTH services to the public. In 2006, the Commission authorized Spectrum Five to provide direct broadcast satellite services to the U.S. from the 114.5° W.L. orbital location.⁴⁶ The Commission found that grant of that petition would "offer an opportunity for increased competition in the U.S. DBS market" and that "[i]ncreased competition could provide consumers more satellite programming choices, more alternatives in subscription video providers and services at reduced prices for those services, and further technological innovation."⁴⁷ Grant of the instant Petition will provide Spectrum Five with additional capacity and spectrum and will consequently strengthen the ability of Spectrum Five to provide increased competition in the DTH marketplace.

In addition, the BSS Report and Order establishes the purpose of the rules that follow: "to facilitate the introduction of new and innovative services to consumers in the United States and promote increased competition among satellite and terrestrial services."⁴⁸ Similarly, when the

⁴⁵ *DISCO II Order*, 12 FCC Rcd at ¶ 4.

⁴⁶ Spectrum Five 2006 Authorization, *supra* note 20.

⁴⁷ *Id.* at ¶ 1.

⁴⁸ Report and Order at ¶ 1.

Commission injected more flexibility into the orbital spacing regime in the BSS Order on Reconsideration, the Commission intended an allocation system that would produce the infrastructure needed to provide consumers with “the most competitive service options.”⁴⁹ The Commission’s intended benefits of increased competition are clear: “reduced prices” for the services at issue and “further technological innovation.”⁵⁰ Granting Spectrum Five’s Petition will enable the Commission to achieve these objectives.

B. The ECO-Sat Test is Satisfied.

The FCC has previously found that Spectrum Five’s use of a Netherlands-authorized satellite to provide DTH services to the U.S. satisfies the ECO-Sat test.⁵¹ Grant of this Petition also satisfies the Commission’s ECO-Sat test, under which the agency examines opportunities for U.S.-licensed satellites to serve the home market of the non-U.S. satellite seeking access to the United States. In particular, the Commission examines whether there are any *de jure* or *de facto* barriers to entry for the provision of analogous services in the non-U.S. satellite’s home market.⁵² The relevant foreign markets are (1) the market of the authority licensing the satellite and (2) the markets in which communications with the U.S. earth stations will originate or terminate.⁵³ In this case, the relevant markets are the Netherlands, the authorizing

⁴⁹ Order on Reconsideration at ¶ 17.

⁵⁰ *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*, Notice of Proposed Rulemaking, 21 FCC Rcd 7426 at ¶ 1 (2006) (“BSS NPRM”).

⁵¹ Spectrum Five 2006 Authorization at ¶¶ 10-13.

⁵² *DISCO II Order*, 12 FCC Rcd at ¶ 99.

⁵³ *Id.* at ¶¶ 76-88.

Administration, and the Netherlands Antilles. The relevant service is Direct-to-Home (“DTH”).⁵⁴

There are no *de jure* or *de facto* barriers to entry for an entity proposing to use a U.S.-licensed satellite to deliver DTH services to the Netherlands or Netherlands Antilles markets. Several foreign satellite operators already provide DTH services in the Netherlands. The only Dutch regulation applicable to the provision of satellite services requires that a license be obtained from the Radiocommunications Agency Netherlands for the use of frequencies for a satellite earth station.⁵⁵ There are no restrictions regarding the nationality of the applicant for a license, and in practice, licenses are generally issued within eight weeks, for a (renewable) period of five years. U.S. operators would receive the same treatment as any other operator in this respect.

In the Netherlands Antilles, a distinction is made between (i) a satellite operator who sends a signal to a satellite earth station in the Netherlands Antilles; and (ii) a satellite operator who sends a satellite signal directly to consumers. In the first case, a license is to be obtained for the use of frequencies. There are no restrictions regarding the nationality of the applicant for a license; U.S. operators would receive the same treatment as any other operator in this respect. In the second case, where an operator sends a satellite signal directly to consumers, no license is required.

IX. WAIVER PURSUANT TO SECTION 304 OF THE ACT

In accordance with Section 304 of the Communications Act of 1934, as amended, 47 U.S.C. § 304, the party to this application hereby waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United

⁵⁴ *Id.* at ¶ 98.

⁵⁵ No license is required for receive-only terminals.

States because of the previous use of the same, whether by license or otherwise.

X. CONCLUSION

For the foregoing reasons, Spectrum Five respectfully requests that the Commission promptly approve this Petition as in the public interest, convenience and necessity.

Respectfully submitted,

Spectrum Five LLC

By: /s/ David Wilson

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Dated: November 13, 2008

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

In the Matter of)			
)			
Spectrum Five LLC	)	File No. _____		
)			
Petition for Declaratory Ruling to Serve the	)	S2778	SAT-LOI-20081119-00217	IB2008002735
U.S. Market from the 103.15° W.L. Orbital	)	Spectrum Five LLC		
Location in the 17/24 Broadcasting Satellite)	BSSNET103W		
Service Band)			

PETITION FOR DECLARATORY RULING

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TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. BACKGROUND	4
III. DIRECTV'S PENDING APPLICATION FOR THE NOMINAL 103.0° W.L. ORBITAL LOCATION IS TECHNICALLY DEFECTIVE AND MUST BE DISMISSED OR DENIED	6
IV. DESCRIPTION OF SPECTRUM FIVE'S PROPOSED SYSTEM.....	11
V. LEGAL, FINANCIAL, AND TECHNICAL QUALIFICATIONS	12
A. Legal Qualifications.....	12
B. Financial Qualifications	12
C. Technical Qualifications	12
VI. TYPE OF OPERATIONS.....	13
VII. GEOGRAPHIC SERVICE REQUIREMENTS	13
VIII. NETHERLANDS AUTHORIZATION.....	13
IX. GRANT OF THIS PETITION IS IN THE PUBLIC INTEREST	14
A. Grant of the Petition Will Strengthen Competition in the Provision of DTH Services to the Public.....	14
B. The ECO-Sat Test is Satisfied	15
X. WAIVER PURSUANT TO SECTION 304 OF THE ACT	17
XI. CONCLUSION.....	18

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

In the Matter of)
)
Spectrum Five LLC) File No. _____
)
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)

PETITION FOR DECLARATORY RULING

I. INTRODUCTION AND SUMMARY

Pursuant to Sections 1.2 and 25.137 of the Commission’s rules¹ and the Public Notices issued by the International Bureau on August 11, 2008 and August 13, 2008,² Spectrum Five LLC (“Spectrum Five”) hereby requests a declaratory ruling that its provision of service to the U.S. market through a Netherlands-authorized satellite from the 103.15° W.L. orbital location using the 17/24 GHz Broadcast-Satellite Service (“BSS”) band is in the public interest. This petition for declaratory ruling (“Petition”) complies with the Commission’s procedural and substantive requirements for market entry by a foreign-authorized satellite. Grant of this Petition is in the public interest because Spectrum Five’s provision of BSS from the 103.15° W.L. orbital location will benefit consumers by providing the next generation of DBS services, including video and audio broadcasting, local-into-local TV, Broadband, and fixed and mobile networks.

¹ 47 C.F.R. §§ 1.2, 25.137.

² See Public Notice, *International Bureau Lifts Freeze on Filing 17/24 GHz BSS Applications*, DA 08-1887 (rel. Aug. 11, 2008); Public Notice, *International Bureau Reschedules Date That Freeze on Filing of 17/24 GHz BSS Applications is Lifted*, DA 08-1900 (rel. Aug. 13, 2008).

Additionally, service by Spectrum Five, a U.S.-based company, will increase competition in overall DBS services, which will lower costs and stimulate service innovation to the benefit of consumers.

The nominal 103° W.L. orbital location is one of the orbital locations designated by the Commission for use by satellite operators in the 17/24 GHz BSS band. Spectrum Five seeks to operate at the 103.15° W.L. offset location. DIRECTV Enterprises, LLC (“DIRECTV”), EchoStar Satellite Operating L.L.C. (“EchoStar”) and Pegasus Development DBS Corporation (“Pegasus”) have previously filed pending applications to operate at the adjacent 107° W.L. Appendix F orbital location.³ To protect these proposed on-grid operations, Spectrum Five will operate at the 103.15° W.L. with reduced power and reduced interference protection as described in the attached Technical Narrative.⁴ The attached Technical Narrative demonstrates that

³ *EchoStar Corporation, Second Amendment to Application for Authority to Construct, Launch and Operate a Satellite in the 17/24 GHz Broadcasting-Satellite Service*, File No. SAT-AMD-20080213-00043 (filed Feb. 13, 2008) (“EchoStar 107.0° W.L. Application”); *Pegasus Development DBS Corporation, Application for Authority to Construct, Launch, and Operate a System of Broadcasting Satellite Service Satellites*, File No. SAT-AMD-20080114-00024 (filed Jan. 14, 2008) (“Pegasus 107.0° W.L. Application”). DIRECTV also previously filed an application to provide service from the 107° W.L. orbital location. *DIRECTV Enterprises, LLC, Application 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.*, File No. SAT-AMD-20080114-00015 (filed Jan. 14, 2008). However, DIRECTV subsequently filed an amendment application to substitute Pegasus as the applicant at this orbital location. *See DIRECTV Enterprises, LLC, Application to Amend its Pending Application for a 17/24 GHz BSS Authorization at the Nominal 107° W.L. Orbital Location*, File No. SAT-AMD-20080916-00188 (filed Sept. 16, 2008).

⁴ *See 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*, Order on Reconsideration, 22 FCC Rcd 17951 (2007) (“Order on Reconsideration”) (requiring satellites operating at offset orbital locations that are less than four degrees away from proposed operations at an Appendix F location to operate with reduced power and reduced interference protection).

Spectrum Five's proposed operations from the offset 103.15° W.L. orbital location have been calculated to provide quality service to customers in the United States without harmful interference to or interference from other satellite operators.

DIRECTV currently has an amended application pending for the 102.825° W.L. offset orbital location.⁵ Intelsat North America LLC ("Intelsat") and DIRECTV both have pending applications for the adjacent nominal 99.0° W.L. orbital location.⁶ As explained below, DIRECTV's application, as amended, for the 102.825° W.L. orbital location, is defective, and, pursuant to the Commission's rules, must be dismissed or denied because it exceeds the Commission's power limits by 13 percent and will cause substantially more interference into adjacent systems than the Commission's rules permit. Specifically, DIRECTV improperly relies on weather and atmospheric conditions to radically boost power levels. This unauthorized methodology for calculating power is a clear violation of the Commission's rule requiring power

⁵ *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV BSS-103W, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 103° W.L.*, File No. SAT-LOA-20060908-00100 (filed Sept. 8, 2006) ("DIRECTV 103° W.L. Original Application"); *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV RB-2, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 103° W.L.*, File No. SAT-AMD-20080114-00014 (filed Jan. 14, 2008) ("DIRECTV 103° W.L. Amendment Application").

⁶ *Intelsat North America LLC, Amendment to Pending 17/24 GHz Application*, File No. SAT-AMD-20080114-00012 (filed Jan. 14, 2008) (Intelsat 99° W.L. Amendment Application") (proposing to operate at 99.1° W.L.); *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV RB-1, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 99° W.L.*, File No. SAT-AMD-20080114-00013 (filed Jan. 14, 2008) ("DIRECTV 99° W.L. Amendment Application") (proposing to operate at 99.175° W.L.). Also pending is a "Rationalization Agreement" in which, under certain circumstances, Intelsat would withdraw its pending application or assign any license for the nominal 99° W.L. orbital location to DIRECTV. *DIRECTV Enterprises, LLC, Application to Amend its Pending Application for a 17/24 GHz BSS Authorization at the Nominal 107° W.L.*, File No. SAT-AMD-20080916-00188 at 1-3 (filed Sept. 16, 2008). This "Rationalization Agreement" has no effect on, and does not cure, DIRECTV's proposed excessive power at the nominal 103° W.L. orbital location.

limits to apply in “clear sky” conditions, and contradicts longstanding industry practice as well as to DIRECTV’s own applications for Ka-band satellite systems. DIRECTV’s application, as amended, in fact seeks to operate full power in an offset location.⁷ Since DIRECTV’s application, as amended, violates the Commission’s interference rules, it must be dismissed or denied. Spectrum Five will then be first in the queue for the 17/24 GHz frequencies at the nominal 103.0° W.L. orbital location.⁸

Pursuant to Section 25.137(b) of the Commission’s rules,⁹ this Petition is being filed electronically via the International Bureau Filing System as an attachment to FCC Form 312 and Schedule S.

II. BACKGROUND

In May 2007, the Federal Communications Commission (“the Commission”) issued a Report and Order adopting service rules and a process to authorize 17/24 GHz BSS satellites to operate at four degree intervals at precise orbital locations specified in Appendix F to the Report

⁷ See DIRECTV 103° W.L. Amendment Application at 12-13. The Commission directed applicants with full power offset proposals to amend their applications by February 13, 2008 to reduce power as required to protect adjacent systems. Public Notice, *International Bureau Establishes Deadline for Amendments to Pending 17/24 GHz BSS Applications*, DA 07-4895 (rel. Dec. 5, 2007). DIRECTV did not file any such amendment.

⁸ See Public Notice, *International Bureau Lifts Freeze on Filing 17/24 GHz BSS Applications*, DA 08-1887 (rel. Aug. 11, 2008) (“If a 17/24 GHz BSS application is not acceptable for filing, it will be returned and 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.”) Even after an application has been placed on public notice, the Commission reserves the right to ultimately dismiss applications that are not filed in conformance with the Commission’s rules. See Order on Reconsideration at ¶ 37, n. 69.

⁹ 47 C.F.R. § 25.137(b).

and Order.¹⁰ 103.0° W.L. was one of the specified Appendix F orbital locations. The Commission also decided to treat the then pending applications filed by DIRECTV, Pegasus, EchoStar, and Intelsat as simultaneously filed with priority over any later filed applications.¹¹ Simultaneously, the FCC imposed a freeze on the ability of new applicants to file for 17/24 GHz BSS orbital slots.

In September 2007, the Commission issued an Order on Reconsideration to provide additional flexibility to 17/24 GHz BSS space station operators by allowing them to operate at locations other than those specified in Appendix F.¹² Pending applicants were permitted to amend their applications to take advantage of this new flexibility.¹³ Applicants could request authority to operate in locations offset from Appendix F orbital slots at full power and with full interference protection. However, if a simultaneously filed amendment application requested full power and interference protection from an adjacent on-grid Appendix F location, the applicant for an offset location was required to submit a second amendment to demonstrate that operations would not cause harmful interference to applicants for adjacent on-grid orbital locations.¹⁴ The Commission also explicitly directed the International Bureau to “dismiss as

¹⁰ *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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8842 (2007) (“Report and Order”).

¹¹ *Id.* at ¶ 143.

¹² *See supra* note 4.

¹³ *Id.* at ¶¶ 33-37.

¹⁴ *Id.* at ¶ 34 (requiring off-grid applicants either to “change the orbital location to the Appendix F orbital location from which it was offset or [to] remain at the offset location at

defective any amended applications that are not substantially complete.”¹⁵

As demonstrated herein, the application, as amended, submitted by DIRECTV for the nominal 103.0° W.L. orbital location is not substantially complete because it fails to protect the adjacent operations of applicants at the nominal 99.0° W.L. orbital location. Because DIRECTV’s application violates the Commission’s interference rules, it must be dismissed without further consideration or denied.¹⁶ Upon dismissal or denial, this Spectrum Five application for the nominal 103.0° W.L. orbital location will be next in the queue. Grant of Spectrum Five’s petition is in the public interest because it will allow Spectrum Five to provide the next generation of DBS services and will increase competition in overall DBS services, which will lower costs and stimulate service innovation to the benefit of consumers.

III. DIRECTV’S PENDING APPLICATION FOR THE NOMINAL 103.0° W.L. ORBITAL LOCATION IS TECHNICALLY DEFECTIVE AND MUST BE DISMISSED OR DENIED.

DIRECTV’s application, as amended, should be dismissed or denied because it uses an unauthorized formula to boost its power levels and thereby violates the Commission’s prescribed power limits designed to avoid interference to adjacent satellites. Specifically, in violation of the Commission’s mandate to demonstrate compliance with PFD limits under clear sky conditions, DIRECTV creates substantial excess power margins by relying upon so-called atmospheric attenuation (including highly variable effects due to moisture and clouds in the atmosphere) to

(Continued . . .)

reduced power and with reduced interference protection.”)

¹⁵ *Id.* at ¶ 37 (emphasis added).

¹⁶ *See* 47 C.F.R. § 25.112(a)(2) (requiring the FCC to return as defective applications that do “not substantially comply with the Commissions’ rules, regulations specific requests for information, or other requirements.”).

bring its proposed PFD within prescribed limits.¹⁷ Excluding these effects - as the rules require - DIRECTV proposes to operate at power levels that are 13 percent in excess of the limits allowed by the Commission. If permitted, these inflated power measurements would unfairly advantage DIRECTV by causing greater interference to DIRECTV's competitors, who propose to operate at power levels that comply with the Commission's rules.

The below table summarizes the PFD limit calculations used by DIRECTV, and demonstrates how DIRECTV's measurements radically depart from PFD limits properly calculated pursuant to the Commission's rules.

¹⁷ This improper use of atmospheric loss in determining PFD limits was also used by DIRECTV in its pending application, twice amended, for the nominal 119.0° W.L. orbital location. See *DIRECTV Enterprises, LLC, Application for Authorization to Construct, Launch and Operate an Expansion System of Direct Broadcast Satellites*, File No. SAT-LOA-19970605-00051 (filed June 5, 1997) ("DIRECTV 119.0° W.L. Original Application"); *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV RB-5, a Satellite in the 17/24 GHz Broadcasting Satellite Service*, File No. SAT-AMD-20080114-00017 (filed Jan. 14, 2008) ("DIRECTV 119.0° W.L. January 2008 Amendment"); *DIRECTV Enterprises, LLC, Amendment to Application for Authorization to Launch and Operate DIRECTV RB-5, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 118.4° W.L.*, File No. SAT-AMD-20080908-00166 (filed Sept. 8, 2008) ("DIRECTV 119.0° W.L. September 2008 Amendment").

PFD ANALYSIS

"On-Grid" Satellite Long, degs E	-103.000
Offset Satellite Long, degs E	-102.825
Offset, degs	0.175

Comments

*** DirectTV Analysis ***	MAX ERP
---------------------------	---------

Max FCC Satellite ERP, dBW	63.0
DTV Power Reduction Req'd, dB	0.0
Reduced Sat ERP, dBW	63.0
Bandwidth Factor, dB-MHz	15.56
Spreading Loss, dB	-162.4
Max PFD, dBW/MHz/m ²	-114.96

No offset
DTV Reduced ERP for 0.175 deg offset for operation at 102.825° WL nominal

Add Reduction for Atmos Loss, Gaseous, dB	-0.4
Add Reduction for Atmos Loss, Clouds, dB	-0.6
Total Atmos Loss Reduction, dB	-1.0

DTV value for "99.7% availability"

Sat PFD, dBW/MHz/m ² - w/atmos loss	-115.99
--	---------

FCC PFD Reduction due to offset, dBW/MHz/m ²	-0.50
---	-------

Max FCC PFD, dBW/MHz/m ²	-115.5
-------------------------------------	--------

DTV Calc Margin, dB	0.49
---------------------	------

*** FCC Analysis ***	MAX ERP
----------------------	---------

Max FCC PFD, dBW/MHz/m ²	-115.00
FCC Power Reduction Req'd, dB	-0.50
Offset Max PFD, dBW/MHz/m ²	-115.50
Bandwidth Factor, dB-MHz	15.56
Spreading Loss, dB	-162.36

Max Satellite PFD, dBW/MHz/m ²	-114.96
---	---------

*** PFD Margin (Sat Max PFD-FCC Max PFD) **	-0.53
---	-------

Further reduction req'd to meet FCC limit

*** % Overage relative to FCC Limit ***	13.1%
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The discrepancies in PFD limits calculated by DIRECTV and those calculated in compliance with the Commission's rules result from DIRECTV's impermissible reliance on atmospheric losses to bring its proposed PFD within prescribed limits. In determining PFD levels, DIRECTV first calculates a "free-space" PFD value, and then subtracts a term which

accounts for “atmospheric loss,” a technique defended by DIRECTV as a “methodology used by DIRECTV [which] reflects the industry standard used in countless applications before the Commission.”¹⁸ This atmospheric loss term includes a component for gaseous effects and a second term for cloud effects,¹⁹ but, in actuality, is intended to allow operation at higher powers than permitted by Commission rules. As explained below, DIRECTV’s novel reliance on atmospheric losses to satisfy prescribed power limits operates outside of the Commission’s rules, all other 17/24 GHz applications, and DIRECTV’s previously filed applications in other bands subject to an analogous power limit.

Section 25.208(w) of the Commission’s rules requires PFD limits to apply in “clear sky” conditions.²⁰ Clear sky conditions, without doubt, do not include weather variable effects due to cloud cover and increased humidity levels in the atmosphere. From an interference standpoint, clouds over Miami have nothing to do with the interference level experienced by a subscriber in sunny Los Angeles receiving a signal from an adjacent satellite. DIRECTV’s proposed concept of margin “availability” does not exist in the Commission’s rules for interference protection. Applying PFD limits with atmospheric loss presumes that clouds and other moisture effects in the atmosphere will limit interference in all places at all times. However, these atmospheric effects are weather related and will vary significantly over time and location. Thus, DIRECTV’s consideration of atmospheric loss in calculating PFD limits is directly contrary to Commission rules and, if permitted, would result in substantial interference to adjacent systems.

¹⁸ See Letter from William Wiltshire to Marlene H. Dortch, FCC, File No. SAT-AMD-20080908-00166 at 1 (filed October 6, 2008) (“DIRECTV October 2008 Letter”).

¹⁹ See DIRECTV 103° W.L. Amendment Application at A-1 to A-4.

²⁰ 47 C.F.R. § 25.208(w).

No other 17/24 GHz BSS band applicant invoked similar atmospheric loss terms in its PFD calculation. In particular, Intelsat, who proposes to operate at the adjacent nominal 99.0° W.L. orbital location, calculated PFD limits under clear sky conditions as required by Section 25.208(w) of the Commission's rules.²¹

Additionally, DIRECTV's methodology for determining PFD limits in its application to operate at the nominal 103.0° W.L. orbital location departs from the one it used in prior filings to demonstrate compliance with an analogous rule. Section 25.138(a)(6) of the Commission's rules, outlining PFD limits for Ka-band satellites, is exactly the same form as that cited above in 47 C.F.R. § 25.208(w) for Reverse Band satellites. According to Section 25.138, PFD at the Earth's surface produced by emissions from a space station for all conditions, *including clear sky*, and for all methods of modulation shall not exceed a level of $-118 \text{ dBW/m}^2/\text{MHz}$.²² In the Ka-band filings for the DIRECTV 10 and DIRECTV 11 satellites,²³ DIRECTV calculated the PFD according to conventional methods:

The national and spot downlink beams of DIRECTV 10 will be operated so as to generate a maximum downlink EIRP of 58.3 and 59.5 dBW per 36 MHz channel, respectively, and to thereby comply with the Ka-Band blanket licensing coordination threshold of $-118 \text{ dBW/m}^2/\text{MHz}$. Operation with this EIRP complies with the Commission's requirements as is demonstrated by virtue of the fact that, for a 36 MHz digital carrier, a satellite downlink EIRP of 59.5 dBW results in a maximum PFD of $-118 \text{ dBW/m}^2/\text{MHz}$ on the surface of the Earth (i.e., $59.5 \text{ dBW} - 162 \text{ dBm}^2 -$

²¹ Intelsat 99° W.L. Amendment Application at Technical Description, pp. 55-57.

²² 47 C.F.R. § 25.138(a)(6) (emphasis added).

²³ *The DIRECTV Group, Inc., Application for Authorization to Launch and Operate DIRECTV 10, a Partial Replacement Ka-band Satellite, at 103° WL*, File No. SAT-LOA-20040909-00169 (filed Sept. 9, 2004) ("DIRECTV 10 Application"); *The DIRECTV Group, Inc., Application for Authorization to Launch and Operate DIRECTV 11, a Partial Replacement Ka-band Satellite, at 99° WL*, File No. SAT-LOA-20040909-00168 (filed Sept. 9, 2004) ("DIRECTV 11 Application").

$10 \cdot \log(36)$ dB MHz). In all cases the upper bound on system and individual link availability is determined by -118 dBW/m²/MHz, i.e. the downlink PFD coordination threshold established in Section 25.138 of the Commission's rules.²⁴

In sum, DIRECTV's Reverse Band application proposes a system that exceeds the Commission's prescribed power limits by 13 percent. DIRECTV's application, as amended, in fact seeks to operate full power in an offset location.²⁵ Since DIRECTV's application, as amended, violates the Commission's interference rules,²⁶ it must be dismissed without further consideration or denied.²⁷ Upon dismissal or denial of DIRECTV's application, as amended, Spectrum Five's application is next in the queue for the nominal 103.0° W.L. orbital location.

IV. DESCRIPTION OF SPECTRUM FIVE'S PROPOSED SYSTEM

A full description of the technical system proposed by Spectrum Five is included in the Technical Narrative attached at Exhibit A.

²⁴ DIRECTV 10 Application at 20; *see also* DIRECTV 11 Application at 19-20.

²⁵ *See* DIRECTV 103° W.L. Amendment Application at 12-13. The Commission directed applicants with full power offset proposals to amend their applications by February 13, 2008 to reduce power as required to protect adjacent systems. Public Notice, *International Bureau Establishes Deadline for Amendments to Pending 17/24 GHz BSS Applications*, DA 07-4895 (rel. Dec. 5, 2007). DIRECTV did not file any such amendment.

²⁶ 47 C.F.R. § 25.262(d) (“[a]ny U.S. licensee or permittee using a 17/24 GHz BSS space station that is located less than four degrees away from a prior-authorized 17/24 GHz BSS space station that is authorized to operate in accordance with paragraph (b) of this section ... may not cause any more interference to the adjacent satellite network than would be caused if the adjacent 17/24 GHz BSS space station were located four degrees away from the proposed space station.”).

²⁷ *See* 47 C.F.R. § 25.112(a)(2) (requiring the FCC to return as defective applications that do “not substantially comply with the Commission's rules, regulations specific requests for information, or other requirements”).

V. LEGAL, FINANCIAL, AND TECHNICAL QUALIFICATIONS

A. Legal Qualifications

Spectrum Five is legally qualified to provide the service requested in this application. The information provided in the attached Form 312, and the attached ownership exhibit responding to question 40 of Form 312, demonstrate Spectrum Five's compliance with the Commission's basic legal qualifications. In addition, Spectrum Five has previously been authorized to provide service to U.S. customers using Netherlands-authorized satellites.²⁸

B. Financial Qualifications

Spectrum Five will meet the milestone schedule set forth in Section 25.164 of the Commission's rules (*i.e.*, contract in one year, complete critical design review in two years, begin construction in three years, and launch and operate in five years)²⁹ and the bond posting requirement set forth in Section 25.165 of the Commission's rules.³⁰

C. Technical Qualifications

In the attached Form 312, Schedule S, and Technical Narrative, Spectrum Five demonstrates that it is technically qualified to hold the authorization requested herein. Specifically, Spectrum Five provides the information currently required by Section 25.114 of the Commission's rules, including compliance with the orbital debris mitigation rules. In addition, Spectrum Five's Technical Narrative demonstrates compliance with the FCC's technical rules specific to the 17/24 GHz frequency band.

²⁸ *Spectrum Five LLC, Petition for Declaratory Ruling to Serve the U.S. Market Using Broadcast Satellite Spectrum from the 114.5° W.L. Orbital Location*, Order and Authorization, 21 FCC Rcd 14023 (2006) ("Spectrum Five 2006 Authorization").

²⁹ 47 C.F.R. § 25.164.

³⁰ 47 C.F.R. § 25.165.

VI. TYPE OF OPERATIONS

Spectrum Five intends to use its proposed satellite on a non-broadcast, non-common carrier basis.

VII. GEOGRAPHIC SERVICE REQUIREMENTS

Spectrum Five will provide service to Alaska and Hawaii in compliance with Section 25.225 of the Commission's rules, 47 C.F.R. § 25.225.

VIII. NETHERLANDS AUTHORIZATION

The Netherlands and the Netherlands Antilles have granted Spectrum Five the right to use the nominal 103.0° W.L. orbital location and associated frequencies in the 17/24 GHz BSS band through an agreement.³¹ The foreign license requirement of Section 25.137 of the Commission's Rules is therefore satisfied.³²

Under the Agreement, the Netherlands will act as the sponsoring administration for notification, coordination, examination, and registration of Spectrum Five's networks to the ITU. The Netherlands Radio Communications Agency has made the ITU filings necessary to advance publish, coordinate and notify the frequencies to be used by the Spectrum Five network. The Agreement authorizes Spectrum Five to make exclusive use of the nominal 103.0° W.L. orbital location with respect to the frequencies and services specified in the ITU filings. The duration of

³¹ Letter Agreement between the State of the Netherlands, the Government of the Netherlands Antilles, Spectrum Five LLC and Spectrum Five BV (effective as of August 7, 2007) ("Agreement"). The Netherlands recently enacted a Space Activities Act, with which Spectrum Five must comply, but Spectrum Five's rights in respect of the nominal 103.0° W.L. orbital slot for 17/24 BSS service derive from the Agreement.

³² See *Amendment of the Commission's Regulatory Policies to Allow Non-U.S Licensed Space Stations to Provide Domestic and International Satellite Service in the United States and Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations*, Report and Order, 12 FCC Rcd 24094, 24177-78 (¶ 196) (1997) ("*DISCO II Order*").

the authorization is for the lifetime of Spectrum Five's first operational satellite, and the lifetime of any additional or replacement satellites placed at this location and launched within five years from the launch of the first operational satellite. The Agreement also provides that Spectrum Five may apply for renewal of the exclusive use rights, and that such renewal will not be unreasonably withheld.

Under the Agreement with the Netherlands and Netherlands Antilles, Spectrum Five is required to perform TT&C operations from a control center in the Netherlands Antilles, which requires a license for use of frequencies for transmit/ receive earth stations. The Netherlands Antilles has agreed to provide all necessary licenses for Spectrum Five's TT&C operations.

IX. GRANT OF THIS PETITION IS IN THE PUBLIC INTEREST

In the *DISCO II Order*, the Commission stated that providing opportunities for foreign-licensed satellites to deliver services in the U.S. could benefit U.S. consumers.³³ Grant of Spectrum Five's Petition will serve the public interest in a variety of ways.

A. Grant of the Petition Will Strengthen Competition in the Provision of DTH Services to the Public.

Spectrum Five plans to use the nominal 103.0° W.L. orbital location for the provision of direct-to-home ("DTH") services. Grant of this application will thus serve the public interest by ensuring greater competition in the delivery of DTH services to the public. In 2006, the Commission authorized Spectrum Five to provide direct broadcast satellite services to the U.S. from the 114.5° W.L. orbital location.³⁴ The Commission found that grant of that petition would "offer an opportunity for increased competition in the U.S. DBS market" and that "[i]ncreased

³³ *DISCO II Order*, 12 FCC Rcd at 24097 (¶ 4).

³⁴ Spectrum Five 2006 Authorization, *supra* note 28.

competition could provide consumers more satellite programming choices, more alternatives in subscription video providers and services at reduced prices for those services, and further technological innovation.”³⁵ Grant of the instant Petition will provide Spectrum Five with additional capacity and spectrum and will consequently strengthen the ability of Spectrum Five to provide increased competition in the DTH marketplace.

In addition, the BSS Report and Order establishes the purpose of the rules that follow: “to facilitate the introduction of new and innovative services to consumers in the United States and promote increased competition among satellite and terrestrial services.”³⁶ Similarly, when the Commission injected more flexibility into the orbital spacing regime in the BSS Order on Reconsideration, the Commission intended an allocation system that would produce the infrastructure needed to provide consumers with “the most competitive service options.”³⁷ The Commission’s intended benefits of increased competition are clear: “reduced prices” for the services at issue and “further technological innovation.”³⁸ Granting Spectrum Five’s Petition will enable the Commission to achieve these objectives.

B. The ECO-Sat Test is Satisfied.

The FCC has previously found that Spectrum Five’s use of a Netherlands-authorized

³⁵ *Id.* at ¶ 1.

³⁶ Report and Order at ¶ 1.

³⁷ Order on Reconsideration at ¶ 17.

³⁸ *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*, Notice of Proposed Rulemaking, 21 FCC Rcd 7426 at ¶ 1 (2006) (“BSS NPRM”).

satellite to provide DTH services to the U.S. satisfies the ECO-Sat test.³⁹ Grant of this Petition also satisfies the Commission's ECO-Sat test, under which the agency examines opportunities for U.S.-licensed satellites to serve the home market of the non-U.S. satellite seeking access to the United States. In particular, the Commission examines whether there are any *de jure* or *de facto* barriers to entry for the provision of analogous services in the non-U.S. satellite's home market.⁴⁰ The relevant foreign markets are (1) the market of the authority licensing the satellite and (2) the markets in which communications with the U.S. earth stations will originate or terminate.⁴¹ In this case, the relevant markets are the Netherlands, the authorizing Administration, and the Netherlands Antilles. The relevant service is Direct-to-Home ("DTH").⁴²

There are no *de jure* or *de facto* barriers to entry for an entity proposing to use a U.S.-licensed satellite to deliver DTH services to the Netherlands or Netherlands Antilles markets. Several foreign satellite operators already provide DTH services in the Netherlands. The only Dutch regulation applicable to the provision of satellite services requires that a license be obtained from the Radiocommunications Agency Netherlands for the use of frequencies for a satellite earth station.⁴³ There are no restrictions regarding the nationality of the applicant for a license, and in practice, licenses are generally issued within eight weeks, for a (renewable) period of five years. U.S. operators would receive the same treatment as any other operator in

³⁹ Spectrum Five 2006 Authorization at 14030-31 (¶¶ 10-13).

⁴⁰ *DISCO II Order*, 12 FCC Rcd at 24137 (¶ 99).

⁴¹ *Id.* at 24129-133 (¶¶ 76-88).

⁴² *Id.* at 24136-137 (¶ 98).

⁴³ No license is required for receive-only terminals.

this respect.

In the Netherlands Antilles, a distinction is made between (i) a satellite operator who sends a signal to a satellite earth station in the Netherlands Antilles; and (ii) a satellite operator who sends a satellite signal directly to consumers. In the first case, a license is to be obtained for the use of frequencies. There are no restrictions regarding the nationality of the applicant for a license; U.S. operators would receive the same treatment as any other operator in this respect. In the second case, where an operator sends a satellite signal directly to consumers, no license is required.

X. WAIVER PURSUANT TO SECTION 304 OF THE ACT

In accordance with Section 304 of the Communications Act of 1934, as amended, 47 U.S.C. § 304, the party to this application hereby waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

XI. CONCLUSION

For the foregoing reasons, Spectrum Five respectfully requests that the Commission promptly approve this Petition as in the public interest, convenience and necessity.

Respectfully submitted,

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