BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of:	)	
DISH OPERATING L.L.C.	)	File Nos.: SAT-MOD-20100329-00058 SAT-AMD-20100610-00127
Application for Minor Modification of Authority to Allow Operation of EchoStar 7 at 118.8° W.L.	)	
and	)	Call Sign: S2740
Amendment to Application for Minor Modification of Authority to Allow Operation of EchoStar 7 at 118.8° W.L.	)	

REPLY IN SUPPORT OF PETITION TO DISMISS OR DENY AMENDMENT TO APPLICATION AND APPLICATION

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SUMMARY

The Opposition offers no persuasive reason that DISH Operating L.L.C. ("DISH") should be permitted to amend its defective Application.[1] DISH principally contends that the Bureau's placing of its Application and Amendment on public notice means that they are presumptively complete. But that assertion is not based upon the Commission's regulations: "Neither the assignment of a file number . . . nor the listing of the application on public notice as received for filing indicates that the application has been found acceptable for filing or precludes the subsequent . . . dismissal of the application if it is found to be defective or not in accordance with the Commission's rules." 47 C.F.R. § 25.150. Defective space station applications cannot be amended, and must, instead, be dismissed.

In any event, DISH's Amendment neither satisfies the Commission's orbital debris mitigation requirements nor addresses the other concerns raised by Spectrum Five. If it were enough to assert that one would "drift the satellite" "[i]n the event" problems materialized (*see* Opposition, at 4-5), the orbital debris mitigation regulations would be a dead letter—every applicant could satisfy those requirements by parroting the same conclusory formula that DISH has recited here. DISH's Application and Amendment should be dismissed or denied.[2]

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[1] Opposition to Petition to Dismiss or Deny, *filed in*, File Nos. SAT-MOD-20100329-00058, SAT-AMD-20100610-00127, Call Sign S2740 (filed Aug. 12, 2010) ("Opposition").

[2] DISH asserts that Spectrum Five's petition is untimely. *See* Opposition, at 1. Spectrum Five's petition to deny the Application was timely filed on May 17, 2010, "within thirty (30) days after the date of public notice announcing the acceptance for filing of [DISH's] application." 47 C.F.R. § 25.154(a)(2); *see* Petition To Dismiss or Deny, *filed in*, File No. SAT-MOD-20100329-00058, Call Sign: S2740 (filed May 17, 2010) ("Petition"). The Bureau has not yet acted on that Petition. The instant petition to deny the Amendment and as-amended Application was timely filed on August 2, 2010, again, "within thirty (30) days after the date of public notice announcing the acceptance for filing of [DISH's] . . . major amendment." 47 C.F.R. §§ 1.4(j), 25.154(a)(2); *see* Petition To Dismiss or Deny Amendment to Application and

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I. DISH'S ORIGINAL APPLICATION WAS DEFECTIVE.

The Commission's regulations require space station applications to contain an orbital debris mitigation assessment. *See* 47 C.F.R. § 25.114(d)(14)(iii). DISH asserts without argument that an "orbital debris mitigation statement was not required" because of the "circumstances" of DISH's original Application. *See* Opposition, at 4. This contention is erroneous, as Spectrum Five has already explained: the orbital debris mitigation requirement applies to *all* applications filed after October 19, 2005, and there is no basis for a waiver here.[3]

Tellingly, DISH does not now assert that the original Application contained a complete orbital debris mitigation assessment. DISH instead contends that the Bureau should "*assume[]*" that the Application was complete, because if the Application "was defective, then the Bureau would have returned it stating as much." *See* Opposition, at 2. But the Commission's regulations *expressly reject* any such "assumption," providing that the placement of an application on public notice does *not* "indicate[] that the application has been found acceptable for filing or preclude[] the subsequent . . . dismissal of the application." 47 C.F.R. § 25.150. Thus, even after an application has been placed on public notice, "the Commission reserves the right to return any application if, upon further examination, it is determined the application is not in conformance with the Commission's rules or its policies."[4] "Conditional acceptance [for

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Application, *filed in*, SAT-MOD-20100329-00058, SAT-AMD-20100610-00127, Call Sign: S2740 (filed Aug. 2, 2010) ("August 2010 Petition").

[3] Petition, at 6-13; Reply in Support of Petition To Dismiss or Deny, *In re DISH Operating L.L.C. Application for Minor Modification of Authority To Allow Operation of EchoStar 7 at 118.8° W.L.*, File No. SAT-MOD-20100329-00058, Call Sign: S2740 (filed June 4, 2010) ("Reply"), at 3-5.

[4] Order and Authorization, *In re DIRECTV Enterprises, LLC Application for Authorization to Launch and Operate DIRECTV RB-2, a Satellite in the 17/24 GHz Broadcasting Satellite Service at the 102.825° W.L. Orbital Location*, File Nos. SAT-LOA-20060908-00100 SAT-

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filing (*i.e.*, public notice)] does not preclude further Commission action on an application, including its dismissal, if the application is not in accordance with Commission rules."[5] Indeed, the very Public Notices that listed DISH's Application and Amendment stated that the "Commission reserve[d] the right to return any of the applications if, *upon further examination*, it is determined the application is not in conformance with the Commission's rules or its policies."[6] A "further examination" of DISH's original Application reveals that it is materially defective for the reasons given in Spectrum Five's Petition and Reply, which are incorporated by reference herein.

II. DISH'S DEFECTIVE APPLICATION CANNOT BE CURED BY ITS FILING OF AN AMENDMENT.

Because DISH's original Application was defective, and "[a]mendments to 'defective' space station applications . . . will not be considered," the Amendment must be rejected. *See* 47 C.F.R. §§ 25.112(a), 25.116(b)(5); *see* Reply at 5-6. DISH argues that the Amendment merely contains "clarifying information" requested by the Bureau. *See* Opposition at 2-3. But although the regulations do allow the Commission to "request . . . additional information concerning any application" (47 C.F.R. § 25.111(a)), Section 25.111(a) does not trump Section 25.116(b)(5)'s express prohibition on amendments to defective space station applications. *See* Reply at 6-10. Such "additional information" might be considered when the application *was already complete* when filed or at least "substantially complete," but nothing in Section 25.112 suggests that

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AMD-20080114-00014 SAT-AMD-20080321-00077, Call Sign S2712, DA 09-1624, 24 FCC Rcd. 9393, ¶ 7 n.23 (rel. July 28, 2009).

5 Order, *In re: Application of Leosat Corporation for Authority to Construct a Low-Earth Orbit Domestic Satellite System*, File No. 12-DSS-P-91(2), 7 FCC Rcd. 2469, at *1 n.4 (rel. Apr. 20, 1992).

6 Public Notice, Report No. SAT-00703, 2010 WL 2641638 (rel. July 2, 2010) (emphasis added); Public Notice, Report No. SAT-00681, 2010 WL 1514217 (rel. April 16, 2010).

"additional information" can be used to amend or cure a *defective* application, in contravention of Section 25.116(b)(5). Here, of course, DISH's original Application did not even attempt to satisfy the unambiguous orbital debris mitigation assessment requirements with respect to Spectrum Five's application to operate a satellite at 118.8° W.L., and was thus materially defective when filed. *See* Reply, at 8-9. The Bureau has uniformly and consistently explained that it is "not the Commission's duty to perfect a materially deficient application" by requesting additional information before denying a defective space station application.[7] The same rule should apply here.

DISH's reliance on the Bureau's treatment of a modification application filed by Loral Skynet Network Services, Inc. ("Loral") is misplaced—indeed, all the more so because the Bureau already considered and rejected the same argument when DISH advanced the argument six years ago in the *2004 EchoStar Reconsideration Order* proceeding.[8] As the *2004 EchoStar Reconsideration Order* explained, "Loral's application was substantially complete when filed, in that Loral provided all the information required by the Commission's rules. The staff did not provide Loral an opportunity to supply additional information that was omitted from its

[7] Memorandum Opinion and Order, *In re: EchoStar Satellite LLC Petition for Reconsideration—Application for Authority to Construct, Launch and Operate Geostationary Satellites In the Fixed-Satellite Service Using the Ka And/or extended Ku-bands at the 83° W.L., 105° W.L., 113° W.L. and 121° W.L. Orbital Locations*, File Nos. SAT-LOA-20030827-00180 SAT-LOA-20030827-00182, SAT-LOA-20030827-00185, SAT-LOA-20030827-00187, Call Signs: S2493, S2495, S2498, S2500, 21 FCC Rcd. 4060, ¶ 13 (rel. Apr. 14, 2006) ("*2006 EchoStar Reconsideration Order*"); *see also* Reply, at 7 (collecting decisions).

[8] Order on Reconsideration, *In re EchoStar Satellite LLC Application for Authority to Construct, Launch and Operate a Geostationary Satellite in the Fixed Satellite Service Using the Extended Ku-Band Frequencies at the 101° W.L. Orbital Location*, 19 FCC Rcd. 24953, ¶ 16 & n.50 (rel. Dec. 27, 2004) ("*2004 EchoStar Reconsideration Order*") (distinguishing Letter from William Howden, Chief, Systems Analysis Branch, Satellite Division to Stan Edinger, Manager-Government Relations, Loral Skynet Network Services, Inc. (dated Oct. 16, 2004) ("*October 16th Loral Letter*").

application, but rather asked Loral to clarify and to reformat certain information contained in the application."[9] Only when the original application already is "substantially complete" should the applicant be "asked . . . to provide additional information."[10] Loral's application was substantially complete when filed and, therefore, not subject to dismissal as defective. Here, by contrast, DISH's original Application *was* materially defective: it "did not contain all of the information required by the Commission's rules and thus was not substantially complete when filed."[11] The Amendment does not merely "reformat" (*cf.* Opposition, at 3) existing information; rather, it purports to add an orbital debris mitigation assessment that was nowhere to be found in the original Application.

Under the *2004 EchoStar Reconsideration Order* (and the other decisional precedent identified by Spectrum Five in its Reply, at 7-9), the Amendment must be rejected.[12]

III. THE AMENDMENT DOES NOT CURE THE DEFECTS IN DISH'S ORIGINAL APPLICATION.

Even if the Amendment could be considered, the Application in its amended form would still be materially incomplete and defective. The Amendment does not contain a complete orbital debris mitigation assessment as required by 47 C.F.R. § 25.114(d)(14)(iii). *See* August 2010 Petition, at 2. DISH argues that it is sufficient for a satellite operator merely to assert that it "expects to be able to coordinate" and to commit to "drift[ing]" the satellite to another location

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[9] *Id.* ¶ 16.

[10] *Id.* ¶ 16 n.50.

[11] *Id.*

[12] DISH asserts that this outcome would "lead to absurd results," in that it might be "barred" from making subsequent modification requests with respect to EchoStar 7. Opposition, at 4. DISH's fears are unfounded. After the Application and Amendment are dismissed or denied, nothing prevents DISH from submitting a new application for modification of EchoStar 7's operating authority that complies with all of the Bureau's requirements.

"[i]n the event coordination is unsuccessful." *See* Opposition, at 4-5. DISH's vague assurance hardly amounts to a concrete proposal or "measure[] . . . to prevent collision." 47 C.F.R. § 25.114(d)(14)(iii). And the Amendment certainly does not "provide an assessment of feasibility"[13] of the possibility of moving EchoStar 7 to "another portion of the 119° orbital cluster." *See* Opposition, at 4-5. If "drifting" EchoStar 7 will be feasible in the *future*,[14] it is puzzling why DISH is not seeking authority to "drift" to a non-conflicting location *now* or why DISH does not simply continue locating EchoStar 7 at 118.9° W.L. alongside EchoStar 14.[15]

Finally, as the August 2010 Petition pointed out—and as the Opposition does not dispute—the Amendment is not responsive to the other defects in the underlying Application. *See* August 2010 Petition, at 2; Petition, at 15-20; Reply, at 10-13. For these reasons as well, even the Application in its amended form would be materially incomplete and defective.

CONCLUSION

For the reasons stated above, the Application and Amendment should be dismissed or denied.

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[13] Letter from Robert G. Nelson, Associate Chief, Satellite Division, International Bureau, to Bruce D. Jacobs and Tony Lin, Pillsbury Winthrop Shaw Pitman LLP, *filed in In re: Pegasus Development DBS Corp. Authority to Construct, Launch, and Operate a Broadcasting-Satellite Service System*, File No. SAT-LOA-20090807-00084, Call Sign S2795 (dated Apr. 15, 2010).

[14] DISH's stated desire to "facilitate . . . its co-existence with DIRECTV at the 119° W.L. cluster" gives rise to doubt whether DISH would "drift" EchoStar 7 in the direction of DIRECTV's DTV-7S satellite at 119.05° W.L. *See* Opposition, at 1.

[15] DISH could readily co-locate EchoStar 7 and EchoStar 14. *See* Petition, at 10 n.28. *See generally* Public Notice, Report No. SAT-00646, Report No. SAT-00646, 2009 WL 3802600 (rel. Nov. 13, 2009) (noting that DIRECTV has requested authorization to co-locate multiple satellites at the same orbital location "with a reduced station keeping tolerance of ± 0.025°"). Real-time coordination poses fewer "logistical or cost considerations" when all the satellites are "operated by a single company." Second Report and Order, *In re: Mitigation of Orbital Debris*, 19 FCC Rcd. 11567, ¶ 51 (rel. June 21, 2004).

Respectfully submitted,

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August 19, 2010

CERTIFICATE OF SERVICE

I, Howard W. Waltzman, hereby certify that on this 19th day of August, 2010, I caused to be hand-delivered a true copy of the foregoing upon the following:

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DECLARATION OF TOM SHARON

I, Tom Sharon, hereby declare under penalty of perjury under the laws of the United States that the foregoing REPLY IN SUPPORT OF PETITION TO DISMISS OR DENY AMENDMENT TO APPLICATION AND APPLICATION is true and correct and that I have personal knowledge of such allegations of fact as contained therein (except for those matters of which official notice may be taken). *See* 47 C.F.R. § 25.154(a)(4).

Executed on August 18, 2010, in Duluth, GA.

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