

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

FILED/ACCEPTED

AUG 18 2008

Federal Communications Commission
Office of the Secretary

In the Matter of)	
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ECHOSTAR SATELLITE OPERATING L.L.C.)	File No. SAT-LOA-20070622-00085
)	Call Sign S2738
Application for Authority to Launch the)	
EchoStar 11 Satellite and to Operate that)	
Satellite at 110° W.L.)	
)	

OPPOSITION TO REQUEST FOR CLARIFICATION OF CONDITIONS

EchoStar Satellite Operating L.L.C. (“DISH Network”) opposes the “Emergency Request for Clarification of Conditions on the Operation of the EchoStar 11 DBS Satellite at 110° W.L.” filed by Spectrum Five, LLC (“Spectrum Five”) on August 8, 2008.¹ Spectrum Five is requesting a modification of the EchoStar 11 authorization, three weeks after the launch of that satellite, to prevent DISH Network subscribers from receiving a full range of high definition and other services from DISH Network’s newest state-of-the-art satellite. This unprecedented and far-reaching request to protect an unlaunched and uncoordinated Spectrum Five satellite should be rejected on multiple procedural and policy grounds.

First, the request should be dismissed as untimely filed: it comes ten months after the EchoStar 11 application was placed on public notice, eight months after the EchoStar 11 application was granted, seven months after the deadline for filing petitions for reconsideration, and three weeks after the satellite was actually launched. Spectrum Five offers no reason why this request is so late, or why it elected not to participate in the EchoStar 11 proceeding.

¹ Letter from Todd M. Stansbury, Counsel for Spectrum Five, LLC to Marlene H. Dortch, Secretary, FCC, *filed in* File No. SAT-LOA-20070622-00085 (filed Aug. 8, 2008) (“Request”).

Second, the requested relief is unnecessary to protect Spectrum Five's rights. Spectrum Five avoids the fact that the Commission has directed it to coordinate its planned tweener satellites with affected DBS operators, yet for two years it has apparently neglected to do so. Upon the successful coordination of a reconfigured Spectrum Five network with the DISH Network and DIRECTV ITU satellite filings that have priority over Spectrum Five, DISH Network is ready and willing to conduct coordination negotiations with Spectrum Five with respect to the EchoStar 11 satellite as required by ITU rules and its Commission authorization. DISH Network has demonstrated that the increased interference (if any) caused by EchoStar 11 to Spectrum Five – compared to that already caused by the EchoStar 10 and EchoStar 8 satellites operating at 110 W.L. – would be marginal. There is no “emergency” situation meriting further Commission action here, nor are the existing obligations imposed on DISH Network insufficient to protect Spectrum Five's future satellites.

Third, Spectrum Five's demand that available services be denied to U.S. consumers to protect an unlaunched and uncoordinated non-U.S. satellite has no basis in Commission policy or precedent. Spectrum Five's own cited *Star One C5* precedent – in which the lower ITU priority satellite was free to operate until a higher ITU priority satellite was operational – demonstrates that Spectrum Five's extraordinary request is misguided and counter to well-established satellite policy. Spectrum Five has failed to establish that there is a “substantial risk that service from EchoStar 11 to U.S. consumers may have to be terminated.” Request at 5. Denying services to U.S. consumers requires satisfaction of a high burden, one clearly not met here.

I. SPECTRUM FIVE'S LATE REQUEST IS PROCEDURALLY DEFICIENT

Spectrum Five had ample opportunity to raise any objections to the EchoStar 11 satellite by filing timely comments on DISH Network's application, which was placed on public notice ten months

ago.² But it did not do so. Spectrum Five had another potential opportunity to raise its objections eight months ago by filing a timely petition for reconsideration of the EchoStar 11 grant.³ Again, it did not do so. Instead, Spectrum Five has waited until three weeks after the launch of EchoStar 11 to request conditions that could severely limit the operations of the satellite. It has not sought a waiver of the Commission's rules for such late participation in a satellite licensing proceeding, nor has it offered any explanation for why it did not participate earlier.⁴

Spectrum Five's apparent disregard for the Commission's application processing and timing rules should not be excused, and its immediate request should be rejected as procedurally improper. It is well-established that "a person who has a right to participate in a proceeding before the Commission cannot delay exercising that right until after the Commission has acted and then expect to be allowed to participate by filing post-grant pleadings."⁵ Rather, "[i]nterested parties must timely file a petition to deny any application they oppose and record their opposition, and the reasons for that opposition"⁶ or

² Under the Commission's rules, interested parties have thirty days from the date of that public notice to file petitions to deny or other comments. *See* 47 C.F.R. § 25.154(a)(2). The EchoStar 11 application was placed on public notice on October 5, 2008. *See* Public Notice, *Policy Branch Information: Satellite Space Applications Accepted for Filing*, Rep. No. SAT-00475 (rel. Oct. 5, 2007).

³ Under the Commission's rules, petitions for reconsideration of a license grant may be filed within thirty days of public notice of the grant. *See* 47 C.F.R. § 1.106(f). The EchoStar 11 application was granted on January 11, 2008, and public notice of the grant was issued on January 18, 2008. *See* Public Notice, *Policy Branch Information: Actions Taken*, DA 08-120, Rep. No. SAT-00495 (rel. Jan. 18, 2008).

⁴ The *Star One C5* decision referenced by Spectrum Five actually undercuts its request for post-grant "clarification." In that case, the Andean Satellites Association filed its request in a timely manner, *i.e.* within thirty days of public notice of the Star One C5 grant. *See Star One S.A., Order on Reconsideration*, DA 08-1645 (rel. July 14, 2008) ("*Star One C5*"). Spectrum Five's failure to do the same here procedurally should be dispositive.

⁵ *Concord Telephone Exchange, Inc.*, 56 Rad. Reg. 2d (P & F) 653, at ¶ 9 (1984).

⁶ *Press Broadcasting Co. and Silver King Broadcasting of Vineland, Inc.*, 3 FCC Rcd 6640, at ¶ 5 (1988).

risk being unable to participate later. If interested parties were to be allowed to intervene in licensing proceedings for the first time months after a satellite has been launched, then “the Commission’s – and indeed the public’s – interest in finality of licensing decisions would be eviscerated.”⁷ Had Spectrum Five raised its concerns earlier, as required by the Commission’s rules, DISH Network would have had an opportunity to address them before licensing.

II. SPECTRUM FIVE MISCASTS THE COORDINATION RESPONSIBILITIES AND RELATIVE CHALLENGES FACED BY ITS PROPOSED TWEENER OPERATIONS AT 114.5° W.L.

The International Bureau almost two years ago ruled that Spectrum Five will have to “conduct coordination negotiations with the affected DBS operators at the 110° W.L. and 119° W.L. orbital locations,” namely DISH Network and DIRECTV. *See Spectrum Five Authorization* at ¶ 18. The Bureau noted that Spectrum Five would need to redesign its network, as a result of those negotiations, to avoid interference into the existing higher-priority operational networks of DISH Network and DIRECTV.⁸ Spectrum Five itself has conceded that it is “expressly prohibited ... from ‘affecting’ other systems until coordination is achieved,”⁹ and that “[i]t is Spectrum Five’s responsibility to coordinate with the operators of existing systems.”¹⁰ Yet, to date, Spectrum Five has not initiated coordination

⁷ *Committee for Community Access v. FCC*, 737 F.2d 74, 84 (D.C. Cir. 1984). *Cf. Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married By America” on April 7, 2003*, 23 FCC Rcd 5699 (2008) (returning without consideration petition for reconsideration filed in excess of page limits).

⁸ *See id.* (noting “that the characteristics of [Spectrum Five’s] downlink antenna beams may change in order to achieve agreement with those operators. Therefore, we condition grant of Spectrum Five’s Petitions on its supplying, within 30 days of completing critical design review, the final characteristics of its beams”).

⁹ Consolidated Opposition to Applications for Review, File No. SAT-LOI-20050312-00062, 9 (Jan. 16, 2007)

¹⁰ Reply Comments of Spectrum Five, IB Docket No. 06-160, Technical Annex at 5 (Jan. 25, 2006).

talks, at least with DISH Network.¹¹ Similarly, Spectrum Five has not approached DISH Network with any suggestion that it has completed a satellite redesign to avoid the need to coordinate, nor does it claim so in its request. As such, Spectrum Five’s system is a moving target that will surely be superseded by the expected redesign.

Faced with an unknown and ill-defined Spectrum Five operation, the EchoStar 11 satellite application noted clearly that “[a]s filed the proposed tweener satellites are incompatible with the current U.S. DBS satellite environment,” and, therefore, both Spectrum Five satellites are “subject to significant modifications if [they are] to achieve the required compatibility with the neighboring satellites.” Annex at 9. As a result, “[i]n the absence of any specific technical information as to these needed design changes, it is not possible for EchoStar to demonstrate now that the EchoStar-11 satellite is compatible with these tweener satellites.” *Id.* Neither DISH Network nor Spectrum Five is able to quantify the impact of the EchoStar 11 satellite on Spectrum Five because the Spectrum Five network – in a form that could ultimately be coordinated and implemented – is not defined well enough to permit DISH Network to perform such a calculation.¹²

While ready to negotiate in good faith with Spectrum Five, DISH Network remains doubtful that the robust satellite service currently proposed by Spectrum Five can be successfully coordinated with affected higher-priority operators. For that reason, DISH Network expects that a substantial redesign of Spectrum Five’s proposed satellite will be necessary for the successful completion of Spectrum Five’s coordination with the higher ITU priority filings of both DIRECTV and DISH Network at 110 W.L. and

¹¹ For this reason, Spectrum Five’s repeated assertions that DISH Network has failed to coordinate the EchoStar 11 satellite is puzzling. *See* Request at 1, 4. A successful resolution of Spectrum Five’s initial coordination with DIRECTV and DISH Network is a condition precedent of a successful coordination between DISH Network’s EchoStar 11 and a reconfigured Spectrum Five system.

¹² *See Spectrum Five Authorization* at ¶¶ 18, 43 b.

119 W.L. Spectrum Five's exclusive focus on the second-order coordination with EchoStar 11 – and failure to recognize the initial coordination and its probable impact on its satellite design – undercuts the limited technical analysis provided for in the Request.

Nonetheless, as detailed in the EchoStar 11 application's technical annex, the future coordination of a reconfigured Spectrum Five satellite and the EchoStar 11 satellite would be technically feasible, and would raise far less serious operational and technical concerns than the initial coordination that Spectrum Five must undertake with DIRECTV and DISH Network. Annex at 2-3. DISH Network has demonstrated that EchoStar 11 (a CONUS-only satellite) will not substantially increase the amount of interference from DISH Network at 110° W.L. compared to the current operation of EchoStar 8 and EchoStar 10, which Spectrum Five is obligated to accept. EchoStar 11 will deploy higher power than EchoStar 8, but that higher power does not translate into a corresponding significant increase in interference to Spectrum Five.¹³ For instance, some of EchoStar 11's additional power is consumed by providing better coverage of Hawaii and Puerto Rico. In addition, EchoStar 11 uses its available power to provide better overall CONUS coverage without significantly impacting the maximum EIRP level within CONUS, and hence without increasing the maximum interference levels into Spectrum Five's proposed system. Spectrum Five fails to account for any of these considerations in its analysis. Further, Spectrum Five's criticism of the comparison drawn by DISH Network with EchoStar 8's spot beams largely misses the mark – that comparison is relevant as it illustrates EchoStar 8's worst case interference levels. *See* Request at 3. The increase in interference resulting from the EchoStar 11 satellite is marginal and could be coordinated with a reconfigured and properly coordinated Spectrum Five satellite network.

¹³ Request at 2 (suggesting that DISH Network contradicts itself by “boasting that ‘EchoStar 11 satellite will improve CONUS service at 110° W.L. . . .,’” while also claiming that it will not cause significant interference to Spectrum Five.).

III. SPECTRUM FIVE’S REQUESTED RELIEF IS UNPRECEDENTED AND HARMFUL TO U.S. CONSUMERS.

Having neglected to either coordinate or reconfigure its intended operations to protect the millions of DBS subscribers receiving service from the 110° W.L. and 119° W.L. orbital locations, Spectrum Five’s suggestion that there is an “emergency” need to condition the operation of an already launched satellite strains credibility. The nature of the requested relief is equally problematic. Spectrum Five does not ask the Commission to rule that DISH Network must coordinate with higher priority operational Region 2 BSS satellites, or cease operations upon the launch and operation of a higher priority co-frequency ITU network absent a coordination agreement. Rather, Spectrum Five seeks much more: it asks the Commission to prohibit DISH Network from utilizing fully an approved and launched EchoStar 11 satellite in order to protect an unconstructed and uncoordinated satellite that may or may not be built by ITU and Commission deadlines and milestones. This extraordinary demand has no basis in Commission rules or ITU precedent.

The Commission’s policy is to allow DBS licensees to operate at power levels in excess of existing Region 2 BSS plan parameters, pending the completion of plan modification and international coordination procedures. Indeed, the Commission in 2002 specifically deleted a requirement not to operate in excess of plan parameters, pending the plan modification and international coordination process.¹⁴ Accordingly, pending modification of the Region 2 BSS plan, the Commission has required DBS licensees to “not cause greater interference than that which would occur from the current U.S. assignments in the Region 2 BSS Plan” to protect satellites actually “operating in accordance with ITU

¹⁴ See *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, at ¶¶ 107-108 (2002) (adopting proposal to “revise our rules to consider systems that exceed the technical limits contained in these Annexes if there are reasonable assurances that the agreement of the affected Administration(s) can be obtained.”).

Regulations.”¹⁵ These restrictions are based on protecting existing satellite operations providing service to consumers, not planned services.

This policy makes good sense as it enables services to be delivered to United States consumers more quickly, all without causing any actual interference with any higher priority satellites entitled to protection. Consistent with this policy, DISH Network should not be prevented from providing better and improved DBS service to millions of U.S. consumers today, because of interference that might be caused at some point in the future to Spectrum Five’s as yet unlaunched, uncoordinated and technically undefined DBS satellites.¹⁶

Spectrum Five cites *Star One C5* as support for conditions to protect higher ITU-priority satellites, yet that decision only underscores the Commission’s disfavor of conditions that would restrict the operations of a lower ITU priority satellite when higher ITU-priority satellites that could be affected are not yet in operation. Unlike the condition being requested by Spectrum Five here, the condition actually imposed in *Star One C5* did not restrict the immediate operations of the lower ITU-priority satellite network. Instead, the *Star One C5* condition simply required the lower priority satellite to cease operations in the future in the event that the higher priority network is brought into operation and

¹⁵ See *EchoStar Satellite Corp.*, 17 FCC Rcd 894, at ¶ 9 (2002) (“*EchoStar 7*”); *EchoStar Satellite Corp.*, 17 FCC Rcd 11326, at ¶ 12 (2002) (“*EchoStar 8*”); *DIRECTV Enterprises LLC*, 19 FCC Rcd 7754, at ¶ 28 (2004) (“*DIRECTV 7S*”). In the *EchoStar 8* and *DIRECTV 7S* decisions, the Bureau imposed this condition in response to concerns raised by SES Americom for potential interference into its proposed (but as yet unlaunched) U.K.-filed BSS satellite network at 105.5° W.L.

¹⁶ Ironically, Spectrum Five is requesting that a more onerous condition be imposed on DISH Network to protect a non-existent satellite than the Commission has imposed on Spectrum Five to protect existing satellites. The condition on Spectrum Five’s authorization allows Spectrum Five to cause up to a 0.25 dB degradation to the overall equivalent protection margins (“OEPMs”) of existing DBS satellites’ networks without coordination. See *Spectrum Five Authorization* at ¶ 43 n.137. In contrast, the condition sought to be imposed on DISH Network would prevent DISH Network from operating in excess of existing Region 2 BSS plan parameters, even if those operations would not cause more than a theoretical 0.25 dB degradation to the OEPMs of Spectrum Five’s yet-to-be-launched network.

coordination proves impossible.¹⁷ Spectrum Five's radical request has no basis in ITU or FCC rules or precedent, and should be rejected. If and when Spectrum Five successfully initiates service, the existing conditions of the EchoStar 11 satellite authorization and generally applicable ITU procedures provide Spectrum Five with all necessary and appropriate protections.

Spectrum Five's effort to deny services to millions of subscribers is particularly troubling from the consumers' perspective. Spectrum Five's attempt to thwart DISH Network's investment in a state-of-the-art satellite and its ability to marshal higher power into more robust high definition services, as well as improved modulation and compression technologies, raises broader competition considerations as well. In espousing the benefits of tweener satellites, Spectrum Five has highlighted that the Commission's DBS policies have "allow[ed] operators to provide ever-increasing, innovative services to subscribers."¹⁸ The effect of granting Spectrum Five's request, however, would be to put at risk the continued evolution of improved services and offerings. As such, this "emergency" request should be a cautionary note to the Commission as it continues its broader examination of the proper means to balance tweener operations with traditional DBS services. Freezing the level of service and satellite capabilities from legacy providers and traditional DBS orbital locations would have long-term consequences for video competition and the competitive viability of satellite television providers.

IV. CONCLUSION

For the foregoing reasons, Spectrum Five's request should either be dismissed as untimely, or otherwise denied as being inconsistent with Commission policy and precedent, and against the public interest.

¹⁷ *Star One C5* at ¶ 6.

¹⁸ Comments of Spectrum Five at 2, *filed in* IB Docket No. 06-160 (filed Dec. 12, 2006).

Respectfully submitted,

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CERTIFICATION OF ENGINEERING INFORMATION

I hereby certify that I am the technically qualified person responsible for the engineering information submitted in this application, and that it is complete and accurate to the best of my knowledge and belief.



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CERTIFICATE OF SERVICE

I, Chung Hsiang Mah, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 18th day of August, 2008, served a true copy of the foregoing by first class mail and electronic mail upon the following:

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Chung Hsiang Mah