

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

\_\_\_\_\_  
In the Matter of: )

**ECHOSTAR SATELLITE OPERATING L.L.C.** )

File Nos. SAT-LOA-20090518-00053  
SAT-AMD-20090604-00064

Application for Minor Modification of DBS )  
Authorization and Authority to Launch the )  
EchoStar 14 Satellite and to Operate it at )  
118.9° W.L. )

Call Sign S2790

**PETITION OF SPECTRUM FIVE LLC**  
**FOR IMPOSITION OF CONDITIONS**

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## SUMMARY

DISH Operating L.L.C., formerly known as “EchoStar Satellite Operating L.L.C.,” (“DISH”) has filed an application for authorization to launch and operate the EchoStar 14 satellite at the 118.9° W.L. orbit location. As proposed, EchoStar 14 would replace the currently-operating EchoStar 7 in less than four months. Despite styling its application as a “minor modification” of a Direct Broadcast Satellite (“DBS”) Authorization, DISH is, in fact, seeking authority to launch a satellite that would operate at power levels that are drastically higher than the power levels of EchoStar 7. EchoStar 14’s higher power levels and new coverage patterns deviate significantly from the parameters set forth in the International Telecommunication Union (“ITU”) Region 2 Broadcasting Satellite Service (“BSS”) Plan, would substantially interfere with the satellite network of Spectrum Five LLC (“Spectrum Five”), and requires modification of the Region 2 BSS Plan.

As the ITU rules make clear, and as DISH has not disputed, Spectrum Five’s satellite network at 114.5° W.L. has ITU date priority over EchoStar 14. Under ITU rules, an operator of a satellite that deviates from the Region 2 BSS Plan must request the modification of the Region 2 Plan, which is accomplished by coordinating with networks that have ITU priority. Further, under well-established Bureau precedent, when a new proposed modification to the Plan “affects” other satellite networks, the proposed satellite must be operated in accordance with technical parameters of the BSS Plan unless and until coordination has been completed. Accordingly, in numerous proceedings, the Bureau has imposed a condition requiring U.S. licensees to restrict their power levels to the *existing* Region 2 BSS Plan parameters subject to successful coordination.

Here, as noted above, DISH’s EchoStar 14 would deviate (significantly so) from the Region 2 BSS Plan and pose pronounced risks of harmful interference to Spectrum Five’s

higher-priority satellite network. Despite the lengthy process of modifying the Region 2 BSS Plan, which has not even begun, DISH requests to launch EchoStar 14 in a matter of months. DISH, however, has not coordinated, demonstrated that coordination is feasible, or timely started the coordination process. To the contrary, DISH has advanced the baseless claim that it need not coordinate with regard to Spectrum Five's network, because, according to DISH, Spectrum Five's authorization will expire before its satellites will launch. DISH has failed to cite any authority supporting this position, which is not surprising since the argument is rebutted by a long line of Bureau precedent. The Bureau must follow its own precedent and condition any approval of DISH's application upon a requirement that EchoStar 14 operate within the technical parameters of EchoStar 7 (the existing Region 2 BSS Plan parameters) unless and until DISH has achieved coordination.

## INTRODUCTION AND BACKGROUND

Spectrum Five LLC (“Spectrum Five”) is a Direct Broadcast Satellite (“DBS”) operator licensed by the Netherlands. On behalf of Spectrum Five, the Netherlands filed documentation for two satellites at the 114.5° W.L. orbit location with the International Telecommunication Union (“ITU”) on March 29, 2005. In 2006, Spectrum Five was permitted to enter the U.S. market for DBS services using those two satellites at 114.5° W.L., between neighboring DBS satellites at 110° W.L. and 119° W.L.<sup>1</sup>

DISH Operating L.L.C., formerly known as “EchoStar Satellite Operating L.L.C.,” (“DISH”) has filed an application styled “EchoStar Satellite Operating L.L.C. Application for Minor Modification of DBS Authorization and Authority to Launch the EchoStar 14 Satellite and to Operate it at 118.9 W.L.” (“Application”).<sup>2</sup> In the Application, DISH requests authority

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<sup>1</sup> Order, *In re Spectrum Five, LLC Petition for Clarification of Condition in EchoStar 11 License*, DA 08-1955, 23 FCC Rcd. 12786, 12786 (para. 2) (rel. Aug. 26, 2008) (“*EchoStar 11 Order*”). See also Order and Authorization, *In re Spectrum Five, LLC Petition for Declaratory Ruling to Serve the U.S. Market Using Broadcast Satellite Service (BSS) Spectrum from the 114.5° Orbital Location*, File Nos. SAT-LOI-20050312-00062, SAT-LOI-20050312-00063, Call Signs S2667, S2668, DA 06-2439, 21 FCC Rcd. 14023 (rel. Nov. 29, 2006) (“*Spectrum Five ‘Tweener’ Order*”), upheld on application for review in Memorandum Opinion and Order, *In re EchoStar Satellite Operating Corporation Application to Construct, Launch, and Operate a Direct Broadcast Satellite at the 86.5° W.L. Orbital Location*, File No. SAT-LOA-20030609-00113, Call Sign S2454, *Spectrum Five, LLC, Petition for Declaratory Ruling to Serve the U.S. Market Using Broadcast Satellite Service Spectrum from the 114.5° Orbital Location*, File Nos. SAT-LOI-20050312-00062, SAT-LOI-20050312-00063, Call Signs S2667, S2668, FCC 08-64, 23 FCC Rcd. 3252 (rel. Feb. 25, 2008).

<sup>2</sup> See *EchoStar Satellite Operating L.L.C. Application for Minor Modification of DBS Authorization and Authority to Launch the EchoStar 14 Satellite and to Operate it at 118.9° W.L.*, File Nos. SAT-LOA-20090518-00053, SAT-AMD-20090604-00064 (Call Sign S2790). On August 21, 2009, DISH submitted a letter to the Commission stating that, in an enclosed computer disk, it was submitting all of the information required to modify the ITU’s Appendix 30 BSS Plans and the associated Appendix 30 feeder link Plans to incorporate the characteristics of EchoStar 14. See Letter, dated Aug. 21, 2009, to Marlene H. Dortch, Secretary, FCC, from Pantelis Michalopoulos, counsel to DISH (accepted for filing in the instant docket on Aug. 21, 2009). By letter, dated September 9, 2009, counsel for DISH informed the Commission that, effective August 11, 2009, EchoStar Satellite Operating L.L.C. was renamed DISH Operating

to launch the EchoStar 14 satellite and to operate it on the 21 Direct Broadcast Satellite (“DBS”) channels licensed to DISH at the 119° W.L. nominal orbital location.<sup>3</sup> In particular, DISH’s application seeks to replace the EchoStar 7 satellite with EchoStar 14, a DBS CONUS/spot beam satellite that is capable of operating in the 12.2-12.7 GHz downlink and 17.3-17.8 GHz uplink frequency bands.<sup>4</sup>

EchoStar 14 substantially exceeds the power levels of EchoStar 7, thereby deviating from the Region 2 Broadcasting Satellite Service (“BSS”) Plan, and DISH has neither coordinated nor demonstrated that coordination is technically feasible, let alone filed any paperwork to begin the process for modifying the Region 2 BSS Plan. Thus, DISH intends to launch in a matter of months, but is nowhere near taking the steps necessary to modify the Plan.

As a result, any grant of the Application should be conditioned (as further described below) upon a requirement that EchoStar 14 be operated within the technical specifications of EchoStar 7 unless and until DISH completes coordination with Spectrum Five.

### **ARGUMENT**

EchoStar 14 drastically exceeds the power levels of EchoStar 7, which EchoStar 14 is intended to replace. In doing so, EchoStar 14 deviates from the Region 2 BSS Plan. In addition, EchoStar 14 will substantially interfere with Spectrum Five’s satellite network at the 114.5° W.L. orbital location. As the ITU rules make clear, EchoStar 14, unlike EchoStar 7, does not have

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L.L.C. That letter appears in the instant docket. *See* Letter, dated Sept. 9, 2009, to Marlene H. Dortch, Secretary, FCC, from Pantelis Michalopoulos, counsel to DISH.

<sup>3</sup> DISH’s current license at 119° DISH was granted in Order and Authorization, *In re EchoStar Satellite Corporation Application for Minor Modification of Direct Broadcast Satellite Authorization, Launch and Operating Authority for EchoStar 7*, File Nos. SAT-MOD-20010810-00071, SAT-A/O-20010810-00073, Call Sign DBS8801, DA02-118, 17 FCC Rcd. 894 (rel. Jan. 16, 2002) (“*EchoStar 7 Order*”).

<sup>4</sup> Application at 1.

priority with regard to Spectrum Five’s satellite network at the 114.5° W.L. orbital location. As a result, DISH is responsible for coordination with Spectrum Five and other satellite operators who would be affected by EchoStar 14. DISH, however, has made no attempt to coordinate with Spectrum Five (or the Netherlands) and, in fact, is not close to being in a position to do so, having not filed the required documentation with the ITU, including the ITU regulatory filing that should be made two years before the proposed launch date.

The International Bureau (“Bureau”) is no doubt familiar with the elaborate ITU modification procedures. The procedures for modification of the BSS plan service links are spelled out in Article 4 of Appendix 30 of the Radio Regulations. There are corresponding procedures in Article 4 of Appendix 30A for feeder links. Under Article 4.2.6 of Appendix 30, “an administration, or one acting on behalf of a group of named administrations, intending to make a modification to the Region 2 Plan shall send to the [Radiocommunication] Bureau, not earlier than eight years but preferably not later than two years before the date on which the assignment is to be *brought into use*, the relevant information listed in Appendix 4.”<sup>5</sup> The established procedure set forth in Article 4 explains why the two-year notice period set forth in Article 4.2.6 is necessary.

First, the ITU must assure that the information submitted is complete, and seek any clarification or information not provided. Next, the ITU must determine which administrations are affected by the proposed changes. The ITU then notifies affected administrations. Any administrations considered affected, and others showing cause, then have a four-month period to comment on the proposed changes. The administration seeking to modify the plan must seek the agreement of all administrations commenting during that period.

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<sup>5</sup> ITU Radio Regulations, Appendix 30, article 4.2.6 (emphasis added; footnote omitted).

Thus, the process for modifying the Region 2 BSS Plan is elaborate and necessarily lengthy. Accordingly, DISH is far from having completed the necessary steps at the ITU to achieve coordination with Spectrum Five and other affected satellite networks. As required by the FCC's own precedent, the Bureau must thus condition any approval of the launch of EchoStar 14 on a requirement that DISH operate EchoStar 14 within the technical parameters of EchoStar 7, unless and until DISH has achieved coordination.

**I. ALTHOUGH ECHOSTAR 14 DEVIATES FROM THE REGION 2 BSS PLAN AND WILL INTERFERE WITH SPECTRUM FIVE'S SATELLITE NETWORK, DISH HAS MADE NO EFFORTS TO COORDINATE WITH SPECTRUM FIVE OR THE NETHERLANDS AND HAS NOT SHOWN THAT COORDINATION IS TECHNICALLY FEASIBLE**

**A. EchoStar 14 Deviates From The Region 2 BSS Plan.**

As the Bureau has explained:

DBS satellites serving the United States are governed by Commission policies and rules. Their operation is also governed by international regulations administered by the International Telecommunication Union ("ITU"). The ITU Radio Regulations apportion spectrum and orbit locations for the Broadcasting Satellite Service ("BSS") among all nations in various geographic regions in certain planned frequency bands on a regional basis through agreements reached at Regional and World Radiocommunications Conferences. . . . In the early 1980's, ITU members reached agreement on assigning BSS spectrum at specific orbit locations among the ITU's Region 2 member countries. Under the terms of the Region 2 BSS and feeder link Plans, the United States is assigned eight orbital locations for providing broadcasting-satellite service.<sup>6</sup>

The Bureau also stated that the "provisions of Appendices 30 and 30A of the International Radio Regulations are applicable to the BSS in the frequency bands . . . 12.2-12.7 GHz (Region 2), and to their associated feeder links in the bands . . . 17.3-17.8 GHz (Region 2)" and that "[t]he ITU

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<sup>6</sup> *Spectrum Five "Tweener" Order*, 21 FCC Rcd. at 14023-24 (para. 2) (footnotes omitted). The Bureau further explained that Region 2 encompasses "North, Central, and South America and Greenland." *Id.* at 14024 n.6.



Region 2 BSS plan is comprised of the Plan for BSS in the band 12.2-12.7 GHz in Region 2, as contained in Appendix 30 of the ITU Regulations, and the associated Plan for the feeder-links in the frequency band 17.3-17.8 GHz for the broadcasting-satellite service in Region 2, as contained in Appendix 30A of the ITU Radio Regulation.”<sup>7</sup>

DISH has styled its Application as seeking only a “minor modification” of its DBS authorization. There is nothing “minor” about the modification. Rather, DISH has proposed a satellite that deviates significantly from the Region 2 BSS Plan and thereby requires modification of the Plan. As proposed, EchoStar 14 would operate at power levels that are drastically higher than EchoStar 7 (DISH’s current entry at the 119° W.L. orbital location in the Region 2 BSS Plan). EchoStar 14’s higher power levels and new coverage patterns deviate from the parameters set forth for the U.S. assignment in the Region 2 BSS Plan at 119° W.L., and, therefore, would necessitate modification of the Region 2 BSS Plan by the ITU. Indeed, DISH acknowledges that the operation of EchoStar 14 exceeds the limits of Annex 1 to Appendix 30 of the ITU Radio Regulations with respect to Spectrum Five’s satellite network, which triggers the coordination requirement.<sup>8</sup> It should be noted that if DISH were replacing EchoStar 7 with a satellite that possessed the same technical parameters, there would be no need to modify the Plan.

As shown in the tables below, the differences between EchoStar 14 and EchoStar 7 are striking. EchoStar 7 operates in one basic operational mode with 16 transponders dedicated to the CONUS beam and 5 transponders dedicated to spot beams. In contrast, EchoStar 14 has multiple modes, including one “all-CONUS” mode using all 21 transponders.

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<sup>7</sup> *Id.* at 14024 nn.4, 6.

<sup>8</sup> *See* Application, Attachment 1, at 7; Application, Appendix 1 to Attachment A, Section 2 at A1-2.

EchoStar-7			
CONUS 16		SPOTS 5	
RCP Transps	LCP Transps	RCP Transps	LCP Transps
1	2 x	1 x	2
3	4 x	3 x	4
5	6 x	5 x	6
7	8 x	7 x	8
9	10 x	9 x	10
11	x 12 x	11	12
13	x 14 x	13	14
15	x 16 x	15	16
17	x 18 x	17	18
19	x 20 x	19	20
21	x 22	21	22
23	24	23	24
25	26	25	26
27	28	27	28
29	30	29	30
31	32	31	32

EchoStar-14 (ALL CONUS)			
CONUS 21		SPOTS 0	
RCP Transps	LCP Transps	RCP Transps	LCP Transps
1	x 2 x	1	2
3	x 4 x	3	4
5	x 6 x	5	6
7	x 8 x	7	8
9	x 10 x	9	10
11	x 12 x	11	12
13	x 14 x	13	14
15	x 16 x	15	16
17	x 18 x	17	18
19	x 20 x	19	20
21	x 22	21	22
23	24	23	24
25	26	25	26
27	28	27	28
29	30	29	30
31	32	31	32

**Transponder Assignments for EchoStar 7 and EchoStar 14 (“all-CONUS” mode)**

In the “all-CONUS” mode, EchoStar 14 generates a peak EIRP of 60.7 dBW, compared to the peak EIRP of 58.9 dBW for EchoStar 7. EchoStar 14’s peak EIRP is therefore greater by 1.9 dB, or ~55%.<sup>9</sup> However, it is also inappropriate to assume that the maximum power differential between EchoStar 14 and EchoStar 7 is only 1.9 dB, because the shape of the EIRP contours is very different. In fact, the maximum EIRP differential reaches over 6 dB in Texas, Maine, Montana, and Hawaii. This represents an increase in excess of 300% in the EIRP.

<sup>9</sup> Despite the intent of the Application to substantially increase the operating power of the new satellite, DISH claims that “it should be noted that the highest peak EIRP of the ECHOSTAR-14 satellite is approximately 61 dBW which is comparable to or less than existing operational DISH satellites at the 119° W.L. orbital cluster.” Application, Attachment 1, at 7. But this assessment is misleading. The highest downlink EIRP of EchoStar 7 is produced at the peak of a *spot beam* that, as the name suggests, covers only a very limited area in CONUS. The EchoStar 14 maximum EIRP, by contrast, refers to a full-CONUS beam which covers the entire country. As a result, the peak EIRP of EchoStar 7’s limited spot beams is of little relevance in determining the potential for EchoStar 14 to interfere with other networks in the vast majority of the country.

Lat (°E)	Long (°N)	Location	USABSS -14 EIRP (dBW)	Echostar-14 EIRP (dBW)	Increase (dB)	Increase (%)
-73.6	41.7	MA	58.9	58.7	-0.2	-4.5%
-90.3	33.4	AR	56.9	59.0	2.1	63.7%
-80.8	28.5	FL	56.9	60.3	3.4	116.3%
-100.1	28.0	TX	52.9	56.7	3.8	139.9%
-103.3	29.0	TX	50.5	56.7	6.2	315.0%
-90.3	47.8	MN	52.9	56.8	3.9	145.5%
-98.5	42.0	NE	52.9	56.8	3.9	145.5%
-121.7	37.8	CA	52.9	54.9	2.0	58.9%
-69.2	47.3	ME	51.3	57.7	6.4	334.5%
-106.5	47.3	MT	48.9	55.1	6.2	313.0%
		ALS	43.9	48.1	4.2	160.0%
		HWA	43.9	50.7	6.8	378.6%

#### EIRP Comparison between EchoStar 7 and EchoStar 14 by Location

The higher EIRP of EchoStar 14 compared to its predecessor means that the new ITU filing for EchoStar 14 (DISH indicates in its Application that the new ITU filing will be designated “USABSS-31” even though it has not been published) does not have date-of-receipt priority compared to Spectrum Five’s satellite network at 114.5° W.L.<sup>10</sup> As noted below, DISH is therefore required to coordinate its new satellite with Spectrum Five, though DISH has made no attempt to do so.

<sup>10</sup> Cf. *EchoStar 11 Order*, 23 FCC Rcd. at 12788 (para. 8) (characterizing EchoStar 11 as having lower priority than Spectrum Five’s satellites at 114.5° W.L.). DISH itself at least tacitly acknowledges that EchoStar does not have priority with regard to Spectrum Five’s 114.5° W.L. satellite network. See Application, Appendix 1 to Attachment A, at A1-2.

**B. EchoStar 14 Will Substantially Interfere With Spectrum Five’s Satellite Network.**

DISH acknowledges that its MSPACE analysis indicates that EchoStar 14 will “affect[]” Spectrum Five’s satellite network.<sup>11</sup> The Bureau has succinctly explained the principles governing interference analyses under the ITU Region 2 BSS Plan:

The MSPACE software calculates a metric called overall equivalent protection margin (“OEPM”). The OEPMs for all channels and test points of all the beams of a particular satellite network defines the “reference situation” for that network. When a plan modification request is submitted to the ITU, the ITU uses the MSPACE software to calculate the effect of the proposed new network on the OEPMs of all the networks already in the plan or pending. If the effect of the proposed network is to reduce the OEPM of any channel and test point of any network in the plan or pending by 0.25 dB or more, that network is considered to be “affected” and the new network can only be added to the plan with the agreement of all the administrations whose networks are affected.<sup>12</sup>

With regard to certain aspects of Spectrum Five’s satellite network at 114.5° W.L., EchoStar 14 exceeds this 0.25 dB trigger by multiple orders of magnitude. DISH’s own MSPACE analysis shows a range of equivalent protection margin degradations from a low of 0.261 to a high of 5.232 dB, which is well in excess of the 0.25 dB coordination trigger in the ITU Radio Regulations.<sup>13</sup>

**C. DISH Is Responsible For Coordination, But Has Neither Attempted To Coordinate Nor Demonstrated That Coordination Is Technically Feasible.**

It is clear that when a satellite that is ostensibly intended to replace or co-locate with an existing satellite and has higher power levels than the incumbent satellite, or otherwise deviates from technical specifications set forth in the Region 2 BSS Plan, the replacement satellite does

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<sup>11</sup> See Application, Appendix 1 to Attachment A, at A1-1 to A1-2.

<sup>12</sup> *Spectrum Five “Tweener” Order*, 21 FCC Rcd. at 14034 (para. 23).

<sup>13</sup> See Application, Annex 1 to Appendix 1.

not enjoy the same the priority as the previous satellite, and the operator of the replacement satellite is responsible for coordination with satellites with higher ITU priority.<sup>14</sup>

Unlike the general satellite coordination process that “places some burden on both parties involved to reach a mutually acceptable solution . . . the agreement-seeking process [for modifying the BSS Plan] puts the regulatory burden on the party seeking agreement.”<sup>15</sup> As a result, the Commission has “stress[ed] that the burden shall be on the applicant to show that the agreement of the affected Administration(s) can be obtained.”<sup>16</sup> Thus, although the Commission will “consider systems that exceed the technical limits contained in [the] Annexes” to Appendices 30 and 30A of the ITU Radio Regulations, it will *only* do so “if there are reasonable assurances that the agreement of the affected Administration(s) can be obtained.”<sup>17</sup> An operator may satisfy this burden by presenting “evidence that coordination with the potentially affected Administration(s) has been successfully completed or extensive technical analyses demonstrating that the impact on the services of the affected Administration is negligible.”<sup>18</sup> The Commission has admonished that “DBS applicants or licensees . . . assume the risk that agreement with other Administrations may not be obtained. If the necessary agreements are not obtained, the system

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<sup>14</sup> See, e.g., *EchoStar 11 Order*, 23 FCC Rcd. at 12788 (para. 8); Order and Authorization, *In re DIRECTV Enterprises, LLC Application for Authority to Launch and Operate DIRECTV 7S (USABSS-18)*, File Nos. SAT-LOA-20030611-00115, SAT-AMD-20031126-00341, SAT-AMD-20031201-00344, Call Sign S2455, DA 04-1145, 19 FCC Rcd. 7754, 7757-58 (paras. 8-10) (rel. Apr. 28, 2004) (“*DIRECTV 7S*”); Order and Authorization, *In re EchoStar Satellite Corporation Application for Minor Modification of Direct Broadcast Satellite Authorization, Launch and Operating Authority for EchoStar VIII*, File Nos. SAT-MOD-20020329-00041, SAT-LOA-20020329-00042, SAT-AMD-20020430-00086, Call Signs DBS8802, S2439, DA 02-1455, 17 FCC Rcd. 11326, 11328 (paras. 5-7) (rel. June 20, 2002) (“*EchoStar 8*”).

<sup>15</sup> See Report and Order, *In re Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd. 11331, 11381 (para. 108) (rel. June 13, 2002) (“*Policies and Rules for DBS*”).

<sup>16</sup> *Id.* (footnote omitted).

<sup>17</sup> *Id.* (para. 107) (describing proposal adopted by the Commission).

<sup>18</sup> *Id.* (para. 108).

will not become a part of the Plans and will not receive protection internationally from other radiocommunication systems.”<sup>19</sup>

DISH, however, has not commenced coordination with Spectrum Five, which has a priority date of March 29, 2005, and has held an authorization from the Commission to provide DBS service in the United States since 2006.<sup>20</sup> Nor has DISH provided the Commission with any information providing “reasonable assurances that the agreement of the affected Administration(s) can be obtained.”<sup>21</sup> Quite to the contrary, DISH actually asserts in its application that DISH has no intention to coordinate with Spectrum Five (or the Netherlands), implying that it has no obligation to do so because, it claims, Spectrum Five’s and other “tweener” networks “will expire within their eight-year regulatory time period if they are not successfully coordinated.”<sup>22</sup>

## **II. ANY AUTHORIZATION TO LAUNCH ECHOSTAR 14 SHOULD BE CONDITIONED ON ECHOSTAR 14 OPERATING WITHIN THE EXISTING REGION 2 BSS PLAN ABSENT COORDINATION**

As demonstrated above, EchoStar 14, which would substantially exceed the power levels of EchoStar 7, deviates from the Region 2 BSS Plan. EchoStar 14 also would materially interfere with Spectrum Five’s satellite network. Thus, if the Bureau grants the Application, DISH should be required to operate within the current Region 2 BSS Plan—that is, in accordance with the technical parameters of EchoStar 7—unless and until coordination is completed.

“The Commission’s Part 25 rules refer to and incorporate provisions of the ITU Radio Regulations for purposes of analyzing applications for DBS with technical parameters that differ

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<sup>19</sup> *Id.* See also 47 C.F.R. § 25.111(b).

<sup>20</sup> See *Spectrum Five “Tweener” Order*.

<sup>21</sup> *Policies and Rules for DBS*, 17 FCC Rcd at 11381 (para. 107).

<sup>22</sup> Application, Appendix 1 to Attachment A, at A1-2.

from those in the Region 2 Plan.”<sup>23</sup> Section 25.148(f) expressly precludes the “[o]peration of systems using different technical characteristics [than those contained in Appendices 30 and 30A of the ITU’s Radio Regulations]” unless the operator—unlike DISH here—has made an “adequate technical showing” and “a request has been *made* to the ITU to modify the appropriate Plans to include the system’s technical parameters.”<sup>24</sup> DISH has not made the technical showing required by Section 25.148(f), nor has any request for modification of the Region 2 BSS Plan been made. Accordingly, at a minimum, the Bureau must require DISH to operate EchoStar 14 within the parameters of the existing Region 2 BSS Plan.

The requirement that DISH operate EchoStar 14 within the confines of the existing Region 2 BSS Plan is well established in Bureau and Commission rules and precedent. The Bureau imposed the following condition on the grant of the application for EchoStar-86.5W:

Any operations of EchoStar-86.5W shall be conducted in a manner that does not exceed the interference limits in Annex 1 to Appendices 30 and 30A of the ITU Radio Regulations within the service areas of any affected operators. Upon a showing to the Commission of successful coordination with any such affected operator (pursuant to Article 4.2 of Appendices 30 and 30A of the Radio Regulations), EchoStar may operate in a manner consistent with such coordination.<sup>25</sup>

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<sup>23</sup> *Spectrum Five “Tweeners” Order*, 21 FCC Rcd. at 14027 (para. 6).

<sup>24</sup> 47 C.F.R. § 25.148(f) (emphasis added). In *Policies and Rules for DBS*, the Commission explained that the showing required by Section 25.148(f) relates to the prospects for coordination. *See supra* text at notes 15-18. The burden on the applicant is to show that agreement with the affected administration can be obtained by, for instance, demonstrating that coordination has been completed or providing “extensive technical analyses demonstrating that the impact on the services of the affected Administration is negligible.” *Id.* DISH has not made either showing with regard to Spectrum Five’s network.

<sup>25</sup> Order and Authorization, *In re EchoStar Satellite L.L.C. Application to Construct, Launch, and Operate a Direct Broadcast Satellite at the 86.5° W.L. Orbital Location*, File No. SAT-LOA-20030609-00113, Call Sign S2454, DA 06-2440, 21 FCC Rcd. 14045, 14059 (para. 28(a)) (rel. Nov. 29, 2006) (footnotes omitted).

The Bureau's Order was upheld by the Commission, which expressed its approval of the "Bureau's condition that, in the absence of agreement, EchoStar's operations may not exceed the ITU trigger for coordination."<sup>26</sup>

Similarly, the Bureau conditioned the grant of Spectrum Five's 114.5° W.L. application, stating that

Spectrum Five may operate feeder links and service links originating or terminating in the United States on its Spectrum 1A and Spectrum 1B satellites in a manner that does not exceed the interference limits in Annex 1 to Appendices 30 and 30A of the ITU Radio Regulations at any location within the U.S. service areas of any affected operators. Upon a showing to the Commission of successful coordination with any affected operator (pursuant to Article 4.2 of Appendices 30 and 30A of the Radio Regulations), Spectrum Five may operate in a manner consistent with such coordination.<sup>27</sup>

The Bureau has imposed similar conditions in numerous other proceedings.<sup>28</sup> And DISH itself has acknowledged that "an operator may not exceed the ITU trigger for coordination until agreement with prior-filed networks is reached."<sup>29</sup>

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<sup>26</sup> Memorandum Opinion and Order, *In re EchoStar Satellite Operating Corporation Application to Construct, Launch, and Operate a Direct Broadcast Satellite at the 86.5° W.L. Orbital Location*, File No. SAT-LOA-20030609-00113, Call Sign S2454, 23 FCC Rcd. 3252, 3260 (para. 21) (rel. Feb. 25, 2008).

<sup>27</sup> *Spectrum Five "Tweener" Order*, 21 FCC Rcd. at 14042-43 (para. 43(d)) (footnotes omitted).

<sup>28</sup> See, e.g., *DIRECTV 7S*, 19 FCC Rcd. at 7761-62 (para. 28); Memorandum Opinion and Order, *In re EchoStar Satellite L.L.C. Application for Authority to Modify its Direct Broadcast Satellite Authorization to Make Minor Modification; Request for Authority for Renewals of Special Temporary Authority*, File Nos. DBS-88-01, SAT-MOD-20031219-00372, SAT-MOD-19980817-00065, SAT-STA-19991006-00102, SAT-STA-20000217-00060, SAT-STA-20010104-00003, SAT-STA-20010626-00060, SAT-STA-20011221-00144, SAT-STA-20020617-00096, SAT-STA-20021223-00243, Call Sign S2621, DA04-908, 19 FCC Rcd. 6075, 6078-79 (para. 16) (rel. Mar. 31, 2004); Order and Authorization, *In re R/L DBS Company, LLC. Application for Minor Modification to Direct Broadcast Satellite Authorization, for Issuance of Authority to Launch, and for Authority to Operate Rainbow 1 (USABBS-17)*, File No. SAT-MOD-20020408-00062, DA 03-1185, 18 FCC Rcd. 7694, 7701 (para. 21) (rel. Apr. 22, 2003); *EchoStar 8*, 17 FCC Rcd. at 11330 (para. 12); Order and Authorization, *EchoStar 7 Order*, 17 FCC Rcd. at 898 (para. 9); *In re DIRECTV Enterprises, Inc. For Authority to Launch and*



Moreover, in the *DIRECTV 7S* and *EchoStar 8* decisions, the Bureau imposed substantially identical conditions in response to concerns raised by SES Americom about potential interference into its proposed, but as yet unlaunched, U.K.-filed BSS satellite network at 105.5° W.L. In light of this precedent, EchoStar cannot credibly argue that an identical condition should not be imposed here simply because Spectrum Five's network at 114.5° W.L. is not yet operational.<sup>30</sup>

A condition consistent with the ones quoted and cited above is required in this case. Under fundamental principles of administrative law, the failure to follow established precedent and impose such a condition here (or provide an adequate explanation for a contrary decision) would be arbitrary and capricious.<sup>31</sup> Such a condition would require EchoStar 14 to operate within the parameters of the current Region 2 BSS Plan (USABSS-14—EchoStar 7), or complete coordination in accordance with ITU regulations (pending fulfillment of the conditions in the Order).<sup>32</sup>

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*Operate A Direct Broadcast Satellite Service Space Station*, File No. SAT-LOA-20000505-00086, DA 00-2381, 15 FCC Rcd. 23630, 23635 (para. 16) (rel. Nov. 27, 2000); Order and Authorization, *In re DIRECTV Enterprises, Inc. Application for Authority to Launch and Operate a Replacement Direct Broadcast Satellite Service Space Station*, File No. SAT-LOA-19990331-00035, DA-99-1524, 14 FCC Rcd. 13159,13162-63 (para. 10) (rel. Aug. 2, 1999).

<sup>29</sup> Letter, dated June 30, 2009, to Marlene H. Dortch, Secretary, FCC, from Pantelis Michalopoulos, counsel to DISH, at page 3.

<sup>30</sup> Indeed, the case for conditions here is even stronger than in *DIRECTV 7S* and *EchoStar 8*, because, unlike SES American, Spectrum Five has been granted entry to the U.S. market.

<sup>31</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983); *Nat'l Cable & Telecomm. v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009); *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

<sup>32</sup> Unlike the orders cited above, the *EchoStar 11 Order* does *not* provide an appropriate framework for the conditions that should be imposed on EchoStar 14. The conditions in the *EchoStar 11 Order* were imposed in response to a late-filed petition for clarification that was submitted not only after the EchoStar 11 application had been granted, but after EchoStar 11 had been launched. See *EchoStar 11 Order*, 23 FCC Rcd. 12786; see also DISH's Opposition to

## CONCLUSION

For the foregoing reasons, the Bureau must condition any grant of the Application upon a requirement that EchoStar 14 operate within the parameters of the current Region 2 BSS Plan—specifically, within the technical specifications of EchoStar 7—until such time as that Plan is modified in accordance with applicable procedures.

Respectfully submitted,

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October 5, 2009

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Request for Clarification of Conditions at 1 (filed August 18, 2008) (stating that the satellite had been launched three weeks prior to the filing of the petition for clarification). Thus, the conditions fashioned in the *EchoStar 11 Order* were necessarily limited in scope. Here, by contrast, Spectrum Five's filing is timely, and there has been no Order and Authorization for the launch and operation of EchoStar 14, and, of course, EchoStar 14 has not launched. Thus, the constraints at play in the *EchoStar 11 Order* are not applicable here, and it would be arbitrary and capricious for the Bureau to impose an order modeled on the *EchoStar 11 Order*, rather than the more typical conditions imposed in the numerous proceedings cited above.

**CERTIFICATE OF SERVICE**

I, Howard W. Waltzman, hereby certify that on this 5th day of October, 2009, I caused to be hand-delivered a true copy of the foregoing, upon the following:

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