

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)

Call Sign S2790

EchoStar 14 Satellite and to Operate it at)

118.9° W.L.)

**REPLY IN SUPPORT OF
PETITION OF SPECTRUM FIVE LLC
FOR IMPOSITION OF CONDITIONS**

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Spectrum Five LLC (“Spectrum Five”) hereby files this reply in support of the Petition of Spectrum Five for the Imposition of Conditions (“Petition”).¹ In its Petition, Spectrum Five requested the imposition of a condition, consistent with International Telecommunication Union (“ITU”) Rules and Regulations, upon the application filed by DISH Operating L.L.C., formerly known as “EchoStar Satellite Operating L.L.C.,” (“DISH”), for authorization to launch and operate EchoStar 14 (“Application”).² EchoStar 14 is not a carbon-copy replacement of EchoStar 7, but rather is a radical redesign that dramatically increases power and coverage patterns. Accordingly, Spectrum Five requested that the Bureau follow its well-established precedent and condition any approval of DISH’s Application upon a requirement that EchoStar 14 operate within the parameters of the current Region 2 BSS Plan (“Plan”)—that is, within the technical specifications of EchoStar 7, the current satellite under the Plan—until such time as the Plan is modified in accordance with applicable procedures.³ DISH has filed an opposition to the Petition, styled “Opposition to Petition for Imposition of Conditions” (“Opposition”).⁴

In the Opposition, DISH labels Spectrum Five’s request “anti-consumer,”⁵ and argues that EchoStar 14 should be subject to the same condition as the one imposed on EchoStar 11.⁶ Although DISH does not dispute that Spectrum Five’s satellite network at 114.5° W.L. has ITU

¹ See Petition of Spectrum Five LLC for Imposition of Conditions, Files Nos. SAT-LOA-200905018-00053, SAT-AMD-20090604-00064, Call Sign S2790 (filed Oct. 5, 2009).

² 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).

³ See Petition at p. 14.

⁴ See Opposition to Petition for Conditions, Files Nos. SAT-LOA-200905018-00053, SAT-AMD-20090604-00064, Call Sign S2790 (filed Oct. 15, 2009).

⁵ See *id.* at p. 1.

⁶ See *id.* at pp. 2-6. The EchoStar 11 Order referred to by DISH was entered in Order, *In re Spectrum Five, LLC Petition for Clarification of Condition in EchoStar 11 License*, DA 08-1955, 23 FCC Rcd. 12786, 12788-89 (para. 8) (rel. Aug. 26, 2008) (“*EchoStar 11 Order*”).

date priority over EchoStar 14, DISH argues that it is not under an obligation to coordinate with Spectrum Five until Spectrum Five completes coordination with DISH's own EchoStar 7 satellite,⁷ a contention that is clearly contrary to the Bureau precedent (and ITU rules) prohibiting operations outside the parameters of the existing Region 2 BSS Plan unless and until coordination has been successfully completed and the Plan modified to incorporate the new technical parameters.⁸ Finally, DISH argues that EchoStar 14 "will not substantially increase the amount of interference from 119° W.L. compared to the current operation of EchoStar 7."⁹

As Spectrum Five now shows, each of these arguments is erroneous.

ARGUMENT

EchoStar 14 is a radical redesign of EchoStar 7, with dramatically increased power and coverage patterns that would pose substantial coordination problems with Spectrum Five's satellite network located only 4.5 degrees away at the 114.5° W.L. orbital location. DISH has made no effort to begin the coordination process with regard to EchoStar 11, even though it would be faced with the need to instantly power down EchoStar 11 (and EchoStar 14 if the Bureau grants its request) if Spectrum Five were to launch on the kind of short notice that DISH routinely provides. And notwithstanding its representations to the contrary, DISH has shown no willingness to coordinate EchoStar 14 with Spectrum Five. Rather, DISH once again raises the utterly false allegation that Spectrum Five has not begun the agreement seeking process for coordination with DISH's higher-priority EchoStar 7.

⁷ Opposition at pp. 4-6.

⁸ See Petition at pp. 8-13.

⁹ Opposition. at p. 6.

A. **EchoStar 14 Must Be Required To Operate Within The Parameters Of The Current Region 2 BSS Plan--Specifically, Within the Technical Specifications of EchoStar 7—Until The Plan Is Modified In Accordance With Applicable Procedures**

As Spectrum Five demonstrated in the Petition, the Bureau’s well-established precedent provides that satellites that would deviate from the Region 2 BSS Plan and interfere with higher-priority networks are required to operate within the parameters of the existing Region 2 BSS Plan until coordination has been completed and the Plan modified. Thus, because EchoStar 14 clearly would deviate significantly from the Plan and interfere materially with Spectrum Five’s higher-priority satellite network, Spectrum Five requested that EchoStar 14 be required to operate within the technical parameters of EchoStar 7 unless and until coordination is completed.¹⁰

DISH, however, argues that the *EchoStar 11 Order* provides a proper template for any condition imposed in this proceeding. In the *EchoStar 11 Order*, the Bureau permitted EchoStar 11 to be operated outside the Region 2 BSS Plan parameters until a satellite having ITU date priority “is brought into use at its assigned location and receives harmful interference.”¹¹

DISH is incorrect in contending that the Bureau typically allows operators to deviate from the Region 2 BSS Plan until the launch and operation of a higher-priority satellite that is threatened with interference. Such a practice would be inconsistent with ITU rules. Article 3.1 of Appendix 30 to the ITU Radio Regulations states that “Member States shall not change the characteristics specified in the . . . Region 2 Plan, *or bring into use* assignments to broadcasting-satellite space stations . . . except as provided for in the Radio Regulations and the appropriate Articles and Annexes of this Appendix.”¹² Article 4 of Appendix 30, in turn, requires

¹⁰ See Petition at pp. 10-13.

¹¹ *EchoStar 11 Order*, 23 FCC Rcd. at 12788-89 (para. 8).

¹² ITU Radio Regulations, App. 30, art. 3.2 (emphasis added).

coordination for changes in the Region 2 BSS Plan.¹³ “The United States is under a treaty obligation, in connection with its membership in the ITU, to adhere to the ITU procedures regarding coordination and notification of space station systems licensed by the United States.”¹⁴ Accordingly, Commission precedent clearly favors the condition proposed by Spectrum Five in this proceeding.

DISH’s argument to the contrary rests entirely on its arbitrary italicization of a single word in *EchoStar 8* and other orders that Spectrum Five cited.¹⁵ In so arguing, DISH ignores its own concession that “an operator may not exceed the ITU trigger for coordination until agreement with prior-filed networks is reached.”¹⁶ It also ignores the condition in the EchoStar 86.5° W.L. Order in which the Bureau stated:

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.¹⁷

¹³ See generally *id.* at App. 30, art. 4.2.

¹⁴ *In re Intelsat North America LLC*, File Nos. SAT-LOA-20050210-00030, SAT-AMD-20051118-00239, SAT-AMD-20080114-00009, SAT-AMD-20080617-00124, SAT-AMD-20080701-00137, Call Sign S2661, DA 09-1132, 24 FCC Rcd. 7058, 7066 (para. 18) (rel. May 26, 2009) (footnote omitted).

¹⁵ See Opposition at 3 (italicizing the word “operating” in 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, 11329 (para. 12) (rel. June 20, 2002) (“*EchoStar 8*”).

¹⁶ Letter, dated June 30, 2009, to Marlene H. Dortch, Secretary, FCC, from Pantelis Michalopoulos, counsel to DISH, at page 3.

¹⁷ 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-

The Commission upheld the Bureau's 86.5° W.L. Order, approving the "Bureau's condition that, in the absence of agreement, EchoStar's operations may not exceed the ITU trigger for coordination."¹⁸ As noted in the Petition, virtually identical language to that of the EchoStar 86.5° W.L. Order also appears in the Bureau's grant of Spectrum Five's 114.5° W.L. application:

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.¹⁹

DISH's argument also ignores the fact that the non-interference conditions in *EchoStar 8* and *DIRECTV 7S*²⁰ were entered at the behest of SES Americom, which raised concerns about potential interference with its proposed, but as yet *unlaunched*, U.K.-filed BSS satellite network at 105.5° W.L.²¹

LOA-20030609-00113, Call Sign S2454, DA 06-2440, 21 FCC Rcd. 14045, 14059 (para. 28(a)) (rel. Nov. 29, 2006) (footnotes omitted) ("86.5° W.L. Order").

¹⁸ 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).

¹⁹ 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, 14042-43 (para. 43(d)) (rel. Nov. 29, 2006) (footnotes omitted).

²⁰ 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").

²¹ See Petition at p. 13.

Because the *EchoStar 11 Order* is, in fact, the exception and not the rule, there is no reason to follow its approach here. The unusual relief in *EchoStar 11* was rationalized in the context of a request for clarification that was not submitted until *after* the launch of the satellite. Here, by contrast, realizing that, once again, DISH's timing of its planned launch would foreclose Spectrum Five from availing itself of the ITU coordination process to protect its rights, Spectrum Five has filed a petition prior to EchoStar 14's launch, seeking the conditions that the Bureau has routinely imposed in other proceedings. The Bureau should adhere to the approach that it has taken in proceeding after proceeding, that is, by requiring that EchoStar 14 be operated so that it "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."²²

B. Spectrum Five's Inability To Complete Coordination Does Not Excuse DISH's Failure To Coordinate

DISH seeks to excuse its failure to coordinate with Spectrum Five by alleging that Spectrum Five has failed to satisfy its own coordination obligations. Spectrum Five's inability to complete coordination, however, is a direct result of DISH's inaction in the face of Spectrum Five's attempts to open the coordination process—a fact that DISH and the Bureau well know. As Spectrum Five explained in an August 21, 2008 letter in the *EchoStar 11* proceeding, Spectrum Five has attempted to coordinate with DISH by requesting the technical information required for coordination, yet DISH failed to respond to the request.²³ Having stymied Spectrum Five's efforts to coordinate, and having had proof of the falsity of its claims presented to the

²² 86.5° W.L. Order, 21 FCC Rcd. at 14059 (para. 28(a)).

²³ See Letter, dated Aug. 21, 2008, to Marlene H. Dortch, Secretary, FCC, from Todd M. Stansbury, outside counsel to Spectrum Five (accepted for filing on Aug. 21, 2008, in *EchoStar 11* docket) (attaching Feb. 9, 2007 letter from John D. Kiesling, Consultant to Spectrum Five, to Richard Blair, EchoStar Communications Corp.).

Bureau in the *EchoStar 11* proceeding, DISH should not be heard now to complain of Spectrum Five's inability to complete coordination.

C. DISH Has Not Demonstrated The Feasibility Of Coordinating EchoStar 14

Arguing that EchoStar 14 would deviate only a little from EchoStar 7's parameters and from the existing parameters in the Region 2 BSS Plan, DISH seeks to ignore the significantly higher technical characteristics of EchoStar 14, and the impediments that such characteristics present to the coordination of EchoStar 14 with higher ITU priority satellites. As an initial matter, DISH does not appear to recognize that its substantially higher-powered satellite must be coordinated with satellites that are separated by only 4.5 degrees, rather than nine degrees, as was the case in the past.

DISH also seeks to downplay the significance of the extent to which EchoStar 14's power levels would deviate from those of EchoStar 7 by focusing only on the one area in which EchoStar 7 produces a maximum EIRP level of 58.9 dBW. But as Spectrum Five showed in the table on page 7 of its Petition, for numerous other areas, EchoStar 7's EIRP levels are much lower than 58.9 dBW. Thus, even if EchoStar 14 "can be configured to produce a maximum EIRP level of 59 dBW when operating its CONUS-plus beam over two phase-combined TWTAs per channel"²⁴ (a claim for which all DISH offers is its *ipse dixit*²⁵), the actual EIRP levels of EchoStar 14 would greatly exceed the levels of EchoStar 7 in numerous geographic areas. Moreover, DISH's focus on the one peak EIRP level of EchoStar 7 ignores the fact that, at other points, the differentials between the EIRP levels of EchoStar 7 and EchoStar 14 are significant – as much as 6.8 dB in Hawaii, and over 6 dB in Texas, Maine, and Montana.²⁶

²⁴ Opp. at p. 7.

²⁵ Certainly, the Technical Annex at 1 cited by DISH does not support this assertion.

²⁶ See Petition at pp. 6-7.

Finally, the fact that the original ITU Region 2 BSS Plan assignments for the United States already had peak EIRP levels in excess of 62 dBW is irrelevant. These levels were not for a full-CONUS beam, but for beams which covered only sections of the United States. To incorporate those power levels into a single beam requires a modification of the Region 2 BSS Plan, which has not occurred. As DISH itself concedes, EchoStar 14 *will* increase the amount of interference currently produced at the 119° W.L. orbital location. Additionally, regardless of what was in the “original ITU Region 2 BSS Plan assignments for the U.S.,”²⁷ the satellite that EchoStar 14 is replacing does not operate at 62.6 dBW.²⁸

Moreover, DISH has offered nothing to show that coordination in these circumstances is feasible. All DISH offers is a conclusory statement that “EchoStar 14 is operationally flexible, and can be configured to produce a maximum EIRP level of 59 dBW when operating its CONUS-plus beam over two phase-combined TWTAs per channel.”²⁹ This does not adequately address the coordination issues. For one thing, as noted above, a 59 dBW EIRP level in CONUS mode would greatly exceed the EIRP levels of EchoStar 7 in many locations. In addition, beyond DISH’s assurance that such a reconfiguration of EchoStar 14 is possible, DISH fails to address the technical difficulties involved in such a reconfiguration (and neither does the “Technical Appendix” that DISH cites).³⁰

Compared to the limited coverage area of EchoStar 7’s 15 spot beams, EchoStar 14 will use a much more extensive network of 51 spot beams that blanket the United States and create

²⁷ Opposition at p. 7.

²⁸ In the *EchoStar 11* decision, the Bureau’s conditioning order focused on modifications “to not exceed” the Plan as “it would be modified by the pending EchoStar 8 plan modification proposal.” See *EchoStar 11 Order*, 23 FCC Rcd. at 12788-89 (para. 8).

²⁹ Opposition at p. 7.

³⁰ See *id.* at p. 7 n.17.

coverage in areas in which EchoStar 7 had virtually no power. Because Transponders 1 and 3 of EchoStar 14 are reused more extensively than were Transponders 1 and 3 of EchoStar 7, EchoStar 14's beams will create interference in the former "quiet areas" of the EchoStar 7 coverage. DISH fails to explain how the additional interference created by EchoStar 14 could be eliminated and returned to the EchoStar 7 levels merely by turning down EchoStar's power by a small amount. In fact, EchoStar 14's new spot beam transponders would have to be shut down entirely to return to EchoStar 7's interference levels.

D. The Interests Of Consumers Do Not Support DISH's Argument

DISH labels Spectrum Five's requested relief in this proceeding as "anti-consumer" and argues that its Application should be conditioned on the same terms as were imposed in the *EchoStar 11 Order*—that is, that EchoStar 14 should be allowed to operate outside the parameters of the Region 2 BSS Plan until a higher-priority satellite with which it interferes becomes operational.³¹

As a threshold matter, it is unclear how consumers are *harmed* by requiring operators to conform to the parameters of the existing Region 2 BSS Plan until that Plan is duly modified. Spectrum Five also already has explained the unique circumstances that resulted in the unusual order in the *EchoStar 11* proceeding.³² In addition, to permit satellites to operate outside the parameters of the Region 2 BSS Plan until higher-priority satellites become operational would be highly disruptive to the regime of international cooperation and coordination administered by the ITU, and would be extremely harmful to consumers. A consumer could not make an informed choice of DBS provider if, in the ordinary course, service and channel offerings were subject to elimination whenever a higher priority satellite is launched. And a consumer backlash against

³¹ *See id.* at pp. 1, 4.

³² *See supra* at p. 5.

the entire international cooperative process might result if consumers, who have enjoyed a given array of services and channels, are repeatedly subjected to the loss of those services and channels when their chosen providers must power down pursuant to the ITU rules.

Thus, consumer interests would not be served by allowing DISH to operate EchoStar 14 at power levels that would have to be terminated if it proves impossible to modify the Region 2 BSS Plan to permit EchoStar 14 to operate at its proposed excessive power levels. Far from being well served if DISH is permitted to operate outside of the Plan, consumers would, in fact, be frustrated and confused if DISH was subsequently required to reduce EchoStar 14's power levels, and therefore remove channels from service. Rather than create such a problem, the Bureau should require EchoStar 14 to adhere to the limits of the Plan until coordination is achieved. Such an outcome would avoid unnecessary consumer frustration and confusion.

CONCLUSION

DISH's arguments are without merit. Thus, for the foregoing reasons, and the reasons set forth in Spectrum Five's Petition, 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.

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CERTIFICATE OF SERVICE

I, Howard W. Waltzman, hereby certify that on this 22nd day of October, 2009, I caused the foregoing to be served by United States Mail, postage pre-paid, upon the following:

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