

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
DIRECTV Enterprises, LLC)	
)	
Application for Authority to Launch)	
and Operate DIRECTV RB-2A, a)	File No. SAT-LOA-20090807-00085
a Satellite in the 17/24 GHz Broadcasting)	
Satellite Service at 103° W.L.)	Call Sign S2796
_____)	

**PETITION FOR RECONSIDERATION
of
SPECTRUM FIVE LLC**

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Spectrum Five LLC (“Spectrum Five”), by its attorneys and pursuant to Section 1.106 of the Commission’s Rules,¹ hereby seeks reconsideration of the International Bureau’s order granting authority to DIRECTV Enterprises, LLC (“DIRECTV”) to operate DIRECTV RB-2A—DIRECTV’s 17/24 GHz Broadcasting-Satellite Service (“BSS”) geostationary orbit space station at the 102.765° W.L. orbital location.² The order for which reconsideration is being sought was placed on Public Notice on January 15, 2010.³

The Bureau’s grant of operating authority for RB-2A is flawed in multiple respects. First, the Bureau should not have processed DIRECTV’s RB-2A Application before processing the higher-in-the-queue application filed by Spectrum Five.⁴ Second, in order for the Bureau not to violate the first-come, first-served processing rules, the Bureau erred in not limiting the RB-2A authorization to special temporary authority. And finally, the Bureau should have expressly conditioned the authorization to provide for the immediate cessation of RB-2A’s operations if

¹ 47 C.F.R. § 1.106.

² *See* Operating Authority, Grant, Subject to Conditions, DIRECTV Enterprises LLC, IBFS File No. SAT-LOA-20090807-00085, Call Sign S2796, Stamp Grant, dated January 8, 2010 (hereinafter, “RB-2A Grant”) (granting Application of DIRECTV Enterprises, LLC To Launch and Operate DIRECTV RB-2A, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 103° W.L., FCC File No. SAT-LOA-20090807-00085 (Aug. 7, 2009) (hereinafter “RB-2A Application”)).

³ *See* FCC, Public Notice: Policy Branch Information, Actions Taken, Report No. SAT-00660, DA No. 10-89, dated Jan. 15, 2010.

⁴ *See* Spectrum Five LLC, Petition for Declaratory Ruling to Serve the U.S. Market from the 103.15° W.L. Orbital Location in the 17/24 GHz Broadcasting Satellite Service Band, File No. SAT-LOI-20081119-00217, Call Sign S2778. Spectrum Five’s request in Call Sign S2778 was filed on November 19, 2008 (nearly nine months before DIRECTV submitted its RB-2A Application), and was placed on public notice on October 23, 2009 as acceptable for filing. *See* FCC, Public Notice: Policy Branch Information, Satellite Space Applications Accepted for Filing, Report No. SAT-00641, dated Oct. 23, 2009.

Spectrum Five prevails on its pending petition for reconsideration of the RB-2 grant of authority, or if DIRECTV's authorization is otherwise revoked.⁵

ARGUMENT

I. **THE BUREAU VIOLATED THE FIRST-COME, FIRST-SERVED LICENSING SCHEME APPLICABLE TO 17/24 GHz SPACE STATIONS**

In considering the RB-2A Application, the International Bureau ("Bureau") violated the first-come, first-served licensing framework for 17/24 GHz BSS space stations.⁶ The Commission's regulations are clear: "Applications for GSO-like satellite system licenses will be placed in a queue and considered in the order that they are filed"⁷

Here, the Bureau "considered" DIRECTV's lower-in-the-queue application without first considering Spectrum Five's prior-filed application. Accordingly, the Bureau violated the Commission's first-come, first-served processing framework, and the order should be rescinded.

This violation of the first-come, first-served rules cannot be justified on the grounds that the RB-2A Grant is merely a temporary or interim authorization. As we explain in further detail below, the RB-2A Grant is not actually a temporary or interim grant at all.

⁵ See Petition for Reconsideration of Spectrum Five LLC, *In re DIRECTV Enters., 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-AMD-20080114-00014, SAT-AMD-20080321-00077, Call Sign S2712 (Aug. 27, 2009) (hereinafter, "Petition for Reconsideration").

⁶ See generally Report & Order & Further Notice of Proposed Rulemaking, *In re Establishment of Policies & Service Rules for the Broadcasting-Satellite Service at the 17.3-17.7 GHz Frequency Band and at the 17.7-17.8 GHz Frequency Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-Directionally in the 17.3 -17.8 GHz Frequency Band*, IB 06-123, FCC 07-76, 22 FCC Rcd. 8842, 8844, 8849 (rel. May 4, 2007).

⁷ 47 C.F.R. § 25.158(b).

It is true that the RB-2A Grant states that “when a 17/24 GHz BSS space station regularly authorized to provide service to the United States pursuant to the Commission’s first-come, first-served processing framework commences operations at the 103° W.L. location, or its offsets, DIRECTV must terminate operations on DIRECTV RB-2A space station . . . unless it has entered into a coordination agreement with the operator of the newly launched 17/24 GHz BSS space station.”⁸ Presumably, Spectrum Five’s application is next in the queue if the Bureau rescinds or otherwise revokes the RB-2 authorization, and Spectrum Five would be “regularly authorized to provide service . . . pursuant to the Commission’s first-come, first-served processing framework” when the Bureau grants Spectrum Five’s application. But such a contingency would not justify the consideration of the RB-2A Application before Spectrum Five’s application.

We anticipate that DIRECTV may argue that the Bureau did not violate the first-come, first-served licensing framework because, according to DIRECTV, Spectrum Five’s application should have been dismissed upon the grant of the RB-2 Application. However, if, as DIRECTV has asserted, Spectrum Five’s application should have been dismissed upon the authorization of RB-2, so, too, should the RB-2A Application, which clearly conflicts with the RB-2 application.⁹ Further, if the Bureau dismisses Spectrum Five’s application, and, as a result, Spectrum Five loses its place in the licensing queue, then the consideration of the RB-2A Application would represent an even greater abuse of the first-come, first-served processing framework. The

⁸ RB-2A Grant at para. 2.

⁹ A detailed technical analysis is not required to discern the conflict between the RB-2 and RB-2A applications. It suffices merely to note that DIRECTV sought authority to operate RB-2 at the 102.825° W.L. orbital location, whereas the RB-2A Application sought authority for the 102.765° W.L. orbital location, less than a tenth of a degree from each other. *See* Order and Authorization *In re DIRECTV Enters., 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*, 2009 WL 2244508 (rel. July 28, 2009); RB-2A Application.

Bureau should have resolved Spectrum Five's Petition for Reconsideration *before* considering any other applications for the 103° W.L. orbital location.

* * *

DIRECTV's motives in this matter are clear: DIRECTV wants to be the first satellite operator to provide 17/24 GHz BSS commercial service.¹⁰ But DIRECTV's desire to be first in the BSS band does not justify the violation of the first-come, first-served processing framework, and neither the Bureau nor DIRECTV has offered any rational basis for the blatant disregard of the first-come, first-served framework in this proceeding. The Bureau must now rectify its errors and rescind the RB-2A Grant.

II. THE BUREAU SHOULD HAVE LIMITED AN AUTHORIZATION FOR RB-2A TO A GRANT OF SPECIAL TEMPORARY AUTHORITY

The only possible scenario under which the Bureau could have granted authority for the operation of RB-2A without violating the first-come, first-served processing rules would be if the Bureau had granted only special temporary authority ("STA") for RB-2A—which DIRECTV neither requested nor the Bureau granted. An STA may be granted "for a period not to exceed 180 days, with additional periods not exceeding 180 days."¹¹ In contrast, the Bureau granted an

¹⁰ See RB-2A Application at p. 2 ("The resulting 17/24/ GHz BSS system will provide DIRECTV an early entry into the use and development of this newly authorized frequency band and maintain the company's position as a pioneer in delivering digital video entertainment to American consumers."); *id.* at p. 2 ("[RB-2A] enables immediate use of valuable orbital/spectrum resources."); *id.* at p. 4 ("At the same time, the payload will allow DIRECTV to begin providing commercial service in the 17/24 GHz BSS band before any other satellite operator in the world, making use of these valuable spectrum/orbital resources mere months after receiving its first license in the band."); *id.* at Exhibit B, p. 2 ("In this case, the payload DIRECTV proposes will allow it to begin providing commercial service in the 17/24 GHz BSS band before any other operator in the world.").

¹¹ 47 C.F.R. § 25.120(b)(2). A renewal or extension of an STA requires the same public interest showing that is required for an initial STA. See Order, *In re Intelsat N. Am., LLC Request for Extension of Special Temporary Authority*, 19 FCC Rcd. 14807, 14807 (rel. July 30, 2004) (stating that grant of extension is in the "public interest").

open-ended authorization that lacks the explicit temporal limitation of an STA, and deprives the Bureau of the ability to exercise careful scrutiny over the efficacy of permitting DIRECTV to continue to operate RB-2A.

It is not enough that the Bureau stated in the RB-2A Grant that DIRECTV must terminate the operation of RB-2A when “a ... space station regularly authorized to provide service to the United States pursuant to the Commission’s first-come, first-served processing framework commences operations at the 103° W.L. location, or its offsets”¹² This is a condition of the grant, not a limited-duration grant, and it fails to protect Spectrum Five’s rights as a by-passed filer in the queue. Under such a rubric, RB-2A could potentially operate for a decade or more. The last of the milestones imposed for RB-2 is set for July 27, 2014. If the RB-2A Grant is ultimately upheld and DIRECTV fails to meet that RB-2 milestone, the Bureau will reopen the slot for applications at that time. A new authorization for the slot would not likely be granted before early 2015—if even then. Under Section 25.164(a) of the Commission’s Rules, the new space station licensee would not have to commence operations until early in 2020.¹³ If that is what is intended by the Bureau, the RB-2A authorization is neither “interim” nor “temporary.”

Nor can the waiver of the obligation for RB-2A to provide service to Hawaii support the conclusion that the Bureau granted only an interim or temporary authorization. For one thing, that waiver was wholly inappropriate. Commission regulations unequivocally require 17/24 GHz BSS licensees who provide service to the contiguous United States to provide “comparable service to Alaska and Hawaii unless such service is not technically feasible or not economically reasonable from the authorized orbital location.”¹⁴ DIRECTV did not even assert, much less

¹² RB-2A Grant at para. 2.

¹³ 47 C.F.R. § 25.164(a)(4).

¹⁴ 47 C.F.R. § 25.225(a).

demonstrate, that service to Hawaii is not “technically feasible” or “economically reasonable” from the 103° W.L. orbital location.¹⁵ In fact, in the application that it filed for RB-2, DIRECTV expressed its intent to provide such service from the 103° W.L. orbital location.¹⁶ Importantly, there is nothing in the RB-2A Grant to indicate how the waiver is either not inconsistent with the coverage/service requirement of Section 25.225 or is required in the public interest.

The Commission may waive a rule “only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest. The agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.”¹⁷ Additionally, waivers must be founded upon an “appropriate general standard,” and must be based on a pleading that states “with particularity the facts and circumstances which warrant such action.”¹⁸ The waiver here fails to satisfy these requirements.

Moreover, nothing in the waiver of the service requirement for Hawaii in the RB-2A Grant provides any temporal limits on the operations of RB-2A. The RB-2A Grant states that “we will waive this rule to permit short-term operation of DIRECTV RB-2A until the 17/24 GHz

¹⁵ See RB-2A Application at Exhibit B (waiver requests) (not discussing technical feasibility or economic reasonableness of serving Hawaii from the 103° W.L. orbital location).

¹⁶ See Application of DIRECTV Enterprises, LLC To Amend its Application for Authorization to Launch and Operate DIRECTV RB-2, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 103° W.L., FCC File No. SAT-AMD-20080014-00014, at p. A-4 (Jan. 14, 2008) (showing Link Budget downlink to Honolulu).

¹⁷ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁸ *WAIT Radio v. FCC.*, 418 F.2d 1153, 1157, 1159 (D.C. Cir. 1969) (internal quotation marks omitted). See also *Northeast Cellular*, 879 F.2d at 1166. In addition, a grant of operating authority for RB-2A with a waiver of the Hawaii service rules was wholly inappropriate here because the demonstration and development purposes described in paragraph 4 of the RB-2A Grant could have been fulfilled *without violating the first-come, first-served rules* by an application for an experimental license, which also would have provided for reasonable temporal limits on the operations of RB-2A. See 47 C.F.R. § 5.71.

BSS space station regularly assigned to this location is launched and brought into operation.”¹⁹

However, as discussed above, this “short-term operation” of RB-2A could last for a decade. An STA is “short-term.” The authorization granted to RB-2A could last almost an entire life cycle of a space station.

III. THE BUREAU FAILED TO ADEQUATELY CONDITION THE RB-2A AUTHORIZATION ON THE DISPOSITION OF THE RB-2 AUTHORIZATION

Although DIRECTV predicated its application for authorization to operate RB-2A on its already granted RB-2 authorization, the Bureau nevertheless failed to condition the RB-2A Grant on the RB-2 authorization. DIRECTV clearly purported to predicate the RB-2A Application upon the RB-2 authorization. In the first paragraph of the RB-2A Application, DIRECTV states that “DIRECTV recently received authority to launch and operate another 17/24 GHz BSS satellite, DIRECTV RB-2, at this orbital location. Accordingly, this request does not seek authority to use any additional orbital locations or additional spectrum beyond that for which DIRECTV is already authorized.”²⁰ Similarly, DIRECTV states that it “intends to proceed with the DIRECTV RB-2a [sic] satellite under [the RB-2] authorization.”²¹

As a threshold matter, DIRECTV’s representation that the RB-2A Application should be considered under the RB-2 authorization conceals the material differences between RB-2A and RB-2 with regard to coverage and power levels. RB-2A, unlike RB-2, does not provide service to Hawaii, and has a maximum EIRP of 61.6 dBW in the Alaskan spot beam, compared to a maximum EIRP for RB-2 of approximately 55 dBW in the Alaskan coverage area. At some

¹⁹ RB-2A Grant at para. 4.

²⁰ RB-2A Application at p.1 (footnote omitted) .

²¹ *Id.* at p.2.

points in the Alaskan coverage area, the difference can be as high as 8.5 dB.²² The Bureau did not note these differences between RB-2 and RB-2A. Nonetheless, the Bureau logically should have imposed a condition requiring that RB-2A immediately cease operations if the RB-2 authorization is rescinded. The Bureau failed to impose such a condition, however, rendering the grant erroneous and defective.

Although the Bureau noted that nothing in the RB-2A Grant “nor any operations of [RB-2A] in any way satisfies any of the milestone conditions” applicable to RB-2,²³ the Bureau failed to include a condition requiring RB-2A to *immediately* cease operations if DIRECTV fails to adhere to the conditions imposed on the RB-2 authorization. In addition, although the RB-2A Grant states that the authorization “is without prejudice to any action relating to the pending petition for reconsideration,”²⁴ this statement merely leaves open the possibility that the Bureau may grant the Petition for Reconsideration notwithstanding the RB-2A Grant. It says nothing about the consequences *for RB-2A* if such petition is granted.

The Bureau’s failure to impose a condition requiring RB-2A to cease operations *immediately* if the RB-2 authorization is rescinded is all the more remarkable because Spectrum Five filed a petition to condition any grant of the RB-2A Application on the outcome of the RB-2

²² Compare *id.* at pp. 7; *id.* at Exhibit B, pp. 1-2, with Application of DIRECTV Enters., LLC to Amend its Application for Authorization to Launch and Operate DIRECTV RB-2, a Satellite in the 17/24 GHz Broadcasting Satellite Service at 103° W.L., FCC File No. SAT-AMD-20080014-00014, at p. A-4 (Jan. 14, 2008) and USABSN-12 International Telecommunication Union filing (filed Oct. 2, 2006).

The power flux density (“PFD”) demonstration in the RB-2A Application also differs materially from the demonstration in the application for RB-2. Despite DIRECTV’s protests in the RB-2 proceeding that its RB-2 PFD demonstration was correct, DIRECTV altered the PFD methodology in the RB-2A Application to eliminate the use of atmospheric attenuation. See Spectrum Five Petition for Reconsideration of RB-2 Grant at p. 10.

²³ RB-2A Grant at para. 3.

²⁴ *Id.* at para. 2.

proceeding,²⁵ and DIRECTV did *not* oppose that petition. In the absence of this condition, as well as a condition requiring RB-2A to cease operations if the RB-2 authorization is revoked, it appears that RB-2A would continue to operate even if the RB-2 authorization is rescinded or revoked.

These errors are particularly troubling because, as discussed above, DIRECTV is seeking to have Spectrum Five's 103° W.L. orbital location application dismissed on the basis of the grant of the authorization for RB-2.²⁶ Spectrum Five has sought reconsideration of the RB-2 authorization based on the manifest errors in the RB-2 application. If the Bureau grants the Petition for Reconsideration, Spectrum Five's application will be ripe for consideration as there are no intervening applications or submissions for the same rights in the queue for the 103° W.L. orbital location. Thus, the Bureau's failure to condition the RB-2A Grant on the immediate cessation of the operation of RB-2A upon the rescission or revocation of the RB-2 authorization constitutes further error.

CONCLUSION

The RB-2A Grant violated the Commission's first-come, first-served licensing framework. Moreover, even if it were appropriate to consider and grant DIRECTV the authority to operate RB-2A, such authorization should have been limited to an STA. Finally, any authorization for RB-2A should have included a condition that RB-2A cease operations immediately if DIRECTV's RB-2 authorization is rescinded or otherwise revoked.

²⁵ See Petition of Spectrum Five LLC to Condition Any Approval of DIRECTV's Application on Spectrum Five's Related Pending Petition for Reconsideration (dated Oct. 28, 2009 and filed in File No. SAT-LOA-20090807-00085, Call Sign S2796).

²⁶ See Petition to Deny, File No. SAT-LOI-20081119-00217, Call Sign S 2778 (filed by DIRECTV Oct. 28, 2009).

Thus, for the foregoing reasons, the grant of operating authority for RB-2A should be rescinded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Howard W. Waltzman, hereby certify that on this 16th day of February, 2010, I caused to be delivered a true copy of the foregoing by electronic mail, upon the following:

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