

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

In the Matter of

SPECTRUM FIVE, LLC

Petition for Declaratory Ruling to Serve
the U.S. Market Using Broadcast Satellite
Service (BSS) Spectrum from the 114.5°
W.L. Orbital Location

File Nos. SAT-LOI-20050312-00062
SAT-LOI-20050312-00063

Call Signs: S2667, S2668

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Federal Communications Commission
Office of the Secretary

APPLICATION FOR REVIEW

DIRECTV, Enterprises, LLC (“DIRECTV”) hereby requests, pursuant to Section 1.115 of the Commission’s rules, full Commission review and reversal of the International Bureau’s recent grant of authority to Spectrum Five, LLC (“Spectrum Five”) to serve the U.S. market from a foreign-licensed “tweener” Broadcast Satellite Service (“BSS”) satellite at the 114.5° W.L. orbital location.¹ The Bureau acted here in a manner specifically foreclosed by the full Commission’s construction of the applicable processing rules issued just three months earlier – without even acknowledging that this binding directive existed. By doing so, it addressed novel questions of law and policy that should have been left to the full Commission. Because the Bureau lacks the authority to do any of these things, and because this tweener system presents a significant risk of harmful interference to millions of U.S. DBS subscribers, the full Commission should review the order and reverse it.

¹ *Spectrum Five, LLC*, Order and Authorization, DA 06-2439 (rel. Nov. 29, 2006) (“*Spectrum Five Order*”).

BACKGROUND

In March 2005, Spectrum Five requested authority to provide BSS service in the United States from two satellites licensed by the Netherlands to operate at the 114.5° W.L. slot. As the materials in Spectrum Five's request reveal, its proposed operations would "affect" existing operations (as defined in Annex 1 of Appendices 30 and 30A of the ITU Radio Regulations) of U.S. DBS operators, including DIRECTV. Yet Spectrum Five has not completed coordination with those systems – in fact, even today, it has yet to *initiate* the coordination process with the technical personnel at DIRECTV.

DIRECTV opposed Spectrum Five's application.² Among other things, DIRECTV incorporated by reference several analyses submitted in other proceedings demonstrating that proposals for such "tweener" satellites were substantively unworkable, gravely detrimental to the operations and growth of U.S. DBS providers, and contrary to the public interest.³ It also responded to Spectrum Five's specific proposal by demonstrating, among other things, that (1) the proposed tweener would cause unacceptable levels of interference to DIRECTV's system and subscribers, and (2) the Commission could not grant market access before Spectrum Five completed coordination with affected U.S. DBS systems – a process that Spectrum Five had not yet even initiated.⁴

² Opposition of DIRECTV Enterprises, LLC, File Nos. SAT-LOI-20050312-00062 and -00063 (filed May 16, 2005) ("*DIRECTV Opp.*"). See also Reply of DIRECTV Enterprises, LLC, File Nos. SAT-LOI-20050312-00062 and -00063 (filed June 8, 2005) ("*DIRECTV Reply*"). DIRECTV's participation below establishes that it has standing to submit this Application for Review. See 47 C.F.R. § 1.115(a).

³ DIRECTV Opp. at 2 (incorporating materials submitted by DIRECTV in two other tweener-related proceedings – Rep. No. SPB-196 and FCC File No. SAT-PDR-20020425-00071).

⁴ See DIRECTV Opp. at 2-4; DIRECTV Reply at 2-6.

While Spectrum Five's petition was pending, the Commission issued the *Tweener NPRM*, in which it sought comment on a variety of issues related to processing of tweener applications.⁵ With respect to its ability to process pending applications prior to completion of the rulemaking, the Commission stated that, where a proposed tweener system does not affect U.S. DBS systems (as determined under Annex 1) or has successfully completed coordination, the application could be processed to completion. However, in the absence of compliance with Annex 1 or successful coordination, the Commission could "proceed with public notice and review [on an application], **although it could not take action on the application until [coordination] agreements are reached.**"⁶ DIRECTV submitted an *ex parte* filing noting the Commission's construction of its own processing rules – including a specific argument as to the Bureau's inability to act on the pending Spectrum Five application in the absence of coordination.⁷

Notwithstanding the Commission's statements and DIRECTV's reinforcing filings, the Bureau granted Spectrum Five's application less than two weeks before comments responding to the *Tweener NPRM* were due. While acknowledging that the proposed tweener would "affect" U.S. DBS systems by exceeding ITU coordination triggers and that the satellite had not yet been coordinated, the Bureau nonetheless found that it could process the application because Spectrum Five had "shown a willingness to modify the technical characteristics of its system to achieve a coordination agreement

⁵ *Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service*, 21 FCC Rcd. 9443 (2006) ("*Tweener NPRM*").

⁶ *Id.*, ¶ 41 (emphasis added). The Commission also stated that it could not grant an incomplete tweener application. *Id.*, ¶ 21.

⁷ See Letter from William M. Wiltshire to Marlene H. Dortch, IB Docket No. 06-160 (filed Nov. 28, 2006) (also submitted in File Nos. SAT-LOI-20050312-00062; SAT-LOI-20050312-00063) ("*Wiltshire Nov. 28 Letter*"). DIRECTV also filed an *ex parte* demonstrating the incompleteness of Spectrum Five's application. See Letter from William M. Wiltshire to Marlene H. Dortch, File Nos. SAT-LOI-20050312-00062; SAT-LOI-20050312-00063 (filed Aug. 24, 2006) ("*Wiltshire Aug. 24 Letter*").

with the existing DBS operators.”⁸ In doing so, the Bureau mentioned neither the Commission’s statements in the *Tweener NPRM* nor DIRECTV’s filings pointing out the Bureau’s lack of authority to act on Spectrum Five’s application at this time.

DISCUSSION

The Commission has delegated authority to its bureaus to “act on matters which are minor or routine or settled in nature.”⁹ A Bureau may not take action that conflicts with established precedent.¹⁰ It may not take any action without adequately explaining itself.¹¹ And it may not decide novel questions of law or policy on delegated authority.¹² Because the *Spectrum Five Order* impermissibly does each of these things, the full Commission should review and reverse it.

I. The Bureau’s *Spectrum Five Order* Conflicts with Established Commission Precedent

The Commission recently made an authoritative pronouncement on its current ability to process various types of tweener applications. Its construction of the applicable rules explicitly precludes granting Spectrum Five’s application. For this reason, the Bureau’s *Spectrum Five Order* conflicts with established Commission precedent.¹³

In its *Tweener NPRM*, the Commission described three possible postures of tweener applications: (1) where the applicant has demonstrated that its satellite would

⁸ *Spectrum Five Order*, ¶ 29.

⁹ 47 C.F.R. § 0.5(c). *See also id.* § 0.261(b) (authority delegated to Chief, International Bureau, does not include acting on application that presents new or novel arguments not previously considered by the Commission or that cannot be resolved under outstanding precedents and guidelines).

¹⁰ 47 C.F.R. § 1.115(b)(2)(i).

¹¹ *See, e.g., Motor Vehicle Manuf’s. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (“*State Farm*”).

¹² 47 C.F.R. § 1.115(b)(2)(ii).

¹³ 47 C.F.R. § 1.115(b)(2)(i).

not affect the systems of U.S. DBS operators as defined by Annex 1; (2) where the application has successfully coordinated with U.S. operators; and (3) where the applicant seeks authorization *without* meeting Annex 1 or completing coordination with affected U.S. operators. With respect to applicants in the first two scenarios, the Commission stated that it “could proceed with public notice and review, and, taking any comments into account, could take action on the application.”¹⁴ But with respect applicants in the third scenario – that in which Spectrum Five finds itself – the Commission reached the opposite conclusion. In such a case, “the Commission could also proceed with public notice and review [on an application], ***although it could not take action on the application until [coordination] agreements are reached.***”¹⁵ Yet despite the absence of such coordination agreements, the Bureau took action on Spectrum Five’s application.¹⁶

Thus, with its *Spectrum Five Order*, the Bureau took action on an application that the Commission recently and authoritatively said could not be acted upon. Because the Bureau lacked authority to disregard these clear statements, the Commission should review and reverse the *Spectrum Five Order*.

¹⁴ *Tweener NPRM*, ¶ 41.

¹⁵ *Id.* (emphasis added).

¹⁶ The Commission also stated that it “may process the existing DBS applications *provided that they are complete* and consistent with the public interest, convenience, and necessity.” *Id.* ¶ 21 (emphasis added). Yet as DIRECTV pointed out in an *ex parte* filing, unless and until the Commission promulgates new tweener service rules, a tweener application that exceeds the coordination triggers established in Annex 1 but has not yet been successfully coordinated cannot be considered “complete.” See Wiltshire Aug. 24 Letter at 2-3. Spectrum Five’s vague offer to revise its application if coordination talks were successful (talks which Spectrum Five never even saw fit to commence) cannot render its application “complete” under existing rules.

II. The Bureau's *Spectrum Five Order* Fails to Adequately Explain Itself

DIRECTV submitted materials for the record explaining why, given the circumstances described above, the International Bureau lacked authority to process Spectrum Five's application.¹⁷ The Bureau, however, never meaningfully discussed the issue. In particular, it never once mentioned the *Tweener NPRM's* admonition that, where a tweener applicant's proposal exceeds the Annex 1 triggers and coordination has not been completed, the Bureau "could not take action on [a tweener] application until [coordination] agreements are reached."

Instead of implementing this clear construction of the Commission's rules, the Bureau relied on a more general statement from a prior rulemaking in which the Commission declined to adopt DBS receive antenna specifications based on its belief that "existing rules should provide adequate protection of U.S. DBS systems, while still preserving options for future entrants."¹⁸ The Bureau concluded that this precedent did not foreclose its ability to grant tweener market access subject to coordination.¹⁹ Yet the Bureau's interpretation of this precedent is foreclosed by the Commission's more recent and authoritative construction of its rules, which explained that existing processes "provide adequate protection" precisely because they require an applicant to (1) meet Annex 1, or (2) complete coordination before the Commission may act upon the application.

¹⁷ See generally Wiltshire Nov. 28 Letter; Wiltshire Aug. 24 Letter.

¹⁸ *Tweener NPRM*, ¶ 31 (quoting *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd. 11331, 11391-92 (2002)).

¹⁹ *Id.*

One of the most basic requirements of administrative law is that agencies (and their subdivisions) must provide a reasoned explanation for their actions.²⁰ Here, the Bureau concluded that it had authority to grant Spectrum Five's application in the face of a Commission order and other material in the public record directly to the contrary. The Bureau's failure to even acknowledge these materials, much less explain its basis for disregarding them, provides a second, independent reason for the Commission to review and reverse the *Spectrum Five Order*.

III. The Bureau's *Spectrum Five Order* Decided a Novel Question of Law and Policy

The *Spectrum Five Order* marks the first-ever grant of market access to a foreign-licensed DBS system operating with less than nine degree spacing from existing U.S. operators. This can hardly be characterized as "minor or routine," especially given evidence submitted by DIRECTV in this proceeding to document the potential harm that tweener operations could cause to existing U.S. DBS systems and millions of their subscribers across the country. Moreover, as discussed above, Spectrum Five's application does *not* fall within either of the two avenues for processing currently available under the Commission's rules, but would have to be considered pursuant to a "third way" that the Commission has neither created nor yet determined is worth creating. This is the very definition of "a question of law or policy which has not previously been resolved by the Commission."²¹ Even had the Commission remained silent in the

²⁰ See, e.g., *State Farm*, 463 U.S. at 41-42.

²¹ 47 C.F.R. § 115(b)(2)(ii).

Tweener NPRM, therefore, grant of Spectrum Five's application would have required action by the full Commission.²²

Indeed, the novelty of the law and policy issues at stake here is evident from the Commission's course of dealing for tweener applications to date. The Commission has sought comment not only on various tweener applications from Spectrum Five, SES, and EchoStar,²³ but also solicited more overarching comments on tweener policy issues.²⁴ And it is now in the process of considering yet another round of comments on policy issues – including the appropriate way to handle applications that have not yet been coordinated, such as Spectrum Five's – in the *Tweener NPRM*. Were granting Spectrum Five's application "minor or routine," there would have been no need for such extensive briefing.

Moreover, this would appear to be the first time that the Commission has ever authorized U.S. market access from a foreign-licensed satellite that had not yet completed coordination with affected U.S. systems. This is a significant departure from past Commission practice, as well as a significant expansion of Commission precedent for

²² See, e.g., *Tully-Warwick Corp.*, 95 FCC 2d 1427, 1430 (1983) ("As the ALJ aptly pointed out in certifying this matter to us, there is no Commission precedent -- one way or the other -- on the appropriateness of waiver of Section 73.37(e)(1)(ii) under circumstances similar to those presented in this case. Hence, a novel question of law, fact and policy was and is presented which warrants consideration by the full Commission.").

²³ See FCC File No. SAT-PDR-20020425-00071 ("*SES Application*"), dismissed by Letter from Robert G. Nelson, FCC Satellite Division, to Nancy J. Eskenazi, SES AMERICOM, Inc. (Nov. 29, 2006); FCC File NO. SAT-LOA20030605-00109.

²⁴ See Rep. No. SPB-196, 18 FCC Rcd. 25683 (Int'l Bur. 2003) (comments available at http://www.fcc.gov/ib/sd/dbs_spacing/).

market entry by foreign systems.²⁵ Such a step must be left to the full Commission in the first instance, and cannot be undertaken on delegated authority.


* * *

In this proceeding, the International Bureau granted a “tweener” application despite the fact that the Commission had stated that such an application could not be granted and without an adequate explanation for its actions. In doing so, the Bureau impermissibly resolved a number of novel legal and policy questions, contrary to the explicit limitations imposed on the exercise of delegated authority in the Commission’s rules, and thereby placed DBS service at risk for millions of U.S. subscribers.

DIRECTV thus respectfully requests that the full Commission review the Bureau’s order and reverse it.

Respectfully submitted,

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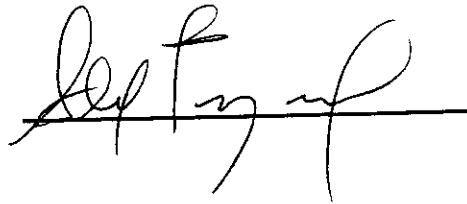
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²⁵ By contrast, the Commission has granted market access where U.S. coordination was complete but international coordination was still pending. Compare, e.g., *Telesat Canada*, 15 FCC Rcd. 24828, 24833 (Int’l Bur. 2000); *Televisa Int’l, LLC*, 13 FCC Rcd. 10074, 10078 (Int’l Bur. 1997).

CERTIFICATE OF SERVICE

I, Alexander Reynolds, certify that on this 29th day of December 2006, I have caused a true and correct copy of this Application for Review to be served by hand upon:

Todd M. Stansbury
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A handwritten signature in black ink, appearing to read "Todd M. Stansbury", is written over a solid horizontal line.