

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

FILED/ACCEPTED

JAN 18 2007

Federal Communications Commission  
Office of the Secretary

*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

**REPLY IN SUPPORT OF APPLICATION FOR REVIEW**

DIRECTV, Enterprises, LLC (“DIRECTV”) has requested 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.<sup>1</sup> In support of that request, DIRECTV made a straightforward argument: the Bureau acted 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 – and also addressed novel questions of law and policy that should have been left to the full Commission.

In its Opposition,<sup>2</sup> Spectrum Five does not dispute the existence of the directive cited by DIRECTV or its binding effect upon the Bureau. Spectrum Five instead takes

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

<sup>2</sup> Consolidated Opposition to Applications for Review (dated Jan. 16, 2007) (“Opposition”).

the novel position that, by conditioning its grant, the Bureau somehow transmuted Spectrum Five's application from a category that could *not* be processed to one that could.<sup>3</sup> Of course, the Bureau did not take this position in its order, nor could it have done so given the Commission's binding interpretation of the applicable rules. Moreover, Spectrum Five's approach would deprive both the Commission and interested parties of any opportunity to review and comment upon the actual operating parameters at which tweener systems would operate. This after-the-fact rationalization does not justify the Bureau's action in derogation of its delegated authority.

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As discussed in DIRECTV's Application for Review, the Commission recently issued the *Tweener NPRM*, in which it sought comment on a variety of issues related to processing of tweener applications such as Spectrum Five's.<sup>4</sup> That order included a clear statement of the categories of applications that could be processed and those that could not. Specifically, the Commission stated that it could "foresee three possible scenarios in which interference issues could be presented" in a tweener application, namely:

**Category 1:** "the applicant has demonstrated that the proposed DBS system would not affect the systems of other U.S. DBS service providers as defined by the ITU in Annex 1 of Appendix 30 and 30A, and has not negotiated operating arrangements,"

**Category 2:** "the applicant has negotiated an operating arrangement with the other potentially-affected U.S. DBS service providers," or

**Category 3:** "the applicant has conducted interference analyses, the results of which the applicant considers should be acceptable to other

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<sup>3</sup> *Id.* at 9.

<sup>4</sup> *Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service*, 21 FCC Rcd. 9443 (2006) ("*Tweener NPRM*").

U.S. DBS service providers, but one or more of the U.S. DBS service providers disagrees.”<sup>5</sup>

The Commission stated that it could take action on a tweener application that fell into either Category 1 or Category 2. However, for applications in Category 3, 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.***”<sup>6</sup>

Spectrum Five does not contend that its application fell into anything other than the third category. Nonetheless, it argues that the Bureau acted consistent with the Commission’s directive because it granted the application “only *in part* and expressly prohibited Spectrum Five from ‘affecting’ other systems until coordination is achieved.”<sup>7</sup> That is, by conditioning the authorization granted to Spectrum Five, the Bureau somehow transformed it from a Category 3 application (for a system that will exceed ITU coordination triggers and has not yet been coordinated) to a Category 1 application (for a system that will not exceed ITU coordination triggers). Yet this argument overlooks the plain terms of the Commission’s construction of the applicable rules as allowing a grant only where “***the applicant has demonstrated*** that the proposed DBS system would not affect the systems of other U.S. DBS service providers.”<sup>8</sup> Spectrum Five has made no such demonstration, nor does its application purport to do so.

This is an important distinction. Spectrum Five may *say* that “as a matter of law, [its] operations must not reach or exceed the Region 2 trigger for coordination” – and in

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<sup>5</sup> *Id.*, ¶ 40.

<sup>6</sup> *Id.*, ¶ 41 (emphasis added).

<sup>7</sup> Opposition at 9 (emphasis in original).

<sup>8</sup> *Tweener NPRM*, ¶ 40 (emphasis added).

this, it is surely right.<sup>9</sup> But if Spectrum Five had actually submitted an application on that basis, both the Commission and other interested parties would have been given the opportunity to see *how* Spectrum Five proposed to operate its tweener system without exceeding applicable ITU coordination triggers. Because Spectrum Five never sought Category 1 authorization, it never submitted this analysis, and thus it deprived the Commission (and everyone else) of the chance to evaluate it. This, indeed, is the very point of submitting a Category 1 application. Under any other interpretation of the rules, Spectrum Five and Spectrum Five alone would be empowered to determine that its operations meet ITU coordination triggers. Surely this is not what the Commission intended.

It is also important to recognize Spectrum Five's argument for what it is: an attempt by its counsel to provide an after-the-fact justification for an order that conflicts with a Commission directive and exceeds the Bureau's delegated authority. Although DIRECTV had brought the Commission's construction of the rules to the Bureau's attention and specifically noted that Spectrum Five's application therefore could not be granted on delegated authority,<sup>10</sup> the *Spectrum Five Order* never discusses the directive in the *Tweener NPRM* – and certainly never characterizes its action in the way that Spectrum Five would. Agency action can only be upheld, if at all, on the basis articulated by the agency itself, and not in reliance upon the *post hoc* rationalization

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<sup>9</sup> Opposition at 11.


<sup>10</sup> 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. 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).

supplied by a party's counsel.<sup>11</sup> For this reason as well, Spectrum Five's argument must be rejected.

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

Respectfully submitted,

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January 18, 2007

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<sup>11</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), and *SEC v. Chenery*, 332 U.S. 194, 196 (1947)).

CERTIFICATE OF SERVICE

I, Alexander Reynolds, certify that on this 18<sup>th</sup> day of January 2007, I have caused a true and correct copy of this Reply in Support of Application for Review to be served by electronic mail upon the following:

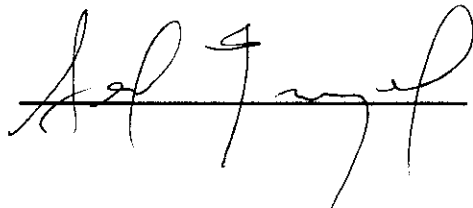
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A handwritten signature in black ink, appearing to read "Alex Reynolds", is written over a horizontal line.