

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

FILED/ACCEPTED

JAN 26 2007

Federal Communications Commission
Office of the Secretary

In the Matter of)		
)		
SPECTRUM FIVE, LLC)	File Nos.	SAT-LOI-20050312-00062
)		SAT-LOI-20050312-00063
Petition for Declaratory Ruling to Serve)		
The U.S. Market Using Broadcast Satellite)		
Service (BSS) Spectrum from the 114.5°)	Call Signs:	S2667, S2668
W.L. Orbital Location)		

REPLY

EchoStar Satellite L.L.C. (“EchoStar”) hereby replies to the Consolidated Opposition to Applications for Review filed by Spectrum Five, LLC (“Spectrum Five”). Spectrum Five has failed to provide a legal or policy basis for the Commission to uphold the International Bureau’s (“Bureau”) decision.

The Bureau abused its discretion. The administrative law principle at issue is narrow – whether the Bureau has abused its discretion by proceeding by adjudication when a rulemaking into the same subject is pending. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“there may be situations where [an agency’s] reliance on adjudication would amount to an abuse of discretion or a violation of the Act”). Spectrum Five misses the point when it focuses on an agency’s broad discretion to announce new policy by adjudication or rulemaking when the agency proceeds from a blank slate. Opposition at 5-7. But an agency may not “bypass” or “supplant” the Administrative Procedure Act’s rulemaking procedures by “in effect enact[ing] the precise rule [it] has proposed, but not yet promulgated.”¹ The Bureau’s grant of Spectrum Five’s tweener petitions while the *DBS NPRM* is pending falls squarely within this precedent. The cases that Spectrum Five cites simply do not apply when the Commission has

¹ See *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1981), cert. denied, *FTC v. Francis Ford, Inc.*, 459 U.S. 999 (1982); *Cities of Anaheim, Riverside, Banning, Colton & Azusa v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984) (interpreting *Ford*); *Union Flights*, 957 F.2d 685, 688 (9th Cir. 1992) (interpreting *Ford*).

already chosen to proceed by rulemaking.

Spectrum Five also asserts that *Ford* permits an agency to make new policy through adjudication while a rulemaking is pending when the new policy is merely a “minor adjustment” or “fine tuning” that does not “dramatically change[] existing agency requirements.” Opposition at 7 n.21. Even if this reading of *Ford* in subsequent decisions is correct, there is nothing minor about a shift from 9-degree to 4.5-degree spacing and the retroactive adoption of a first-come, first-served licensing system. Such changes put at risk the service received by millions of U.S. DBS consumers. Moreover, even if the Commission were to have authority to proceed by adjudication, the Bureau did not under its limited delegated authority.

Past grants of DBS authority are distinguishable. Spectrum Five relies on a number of past Bureau authorizations. In each of the instances cited, however, the orbital location in question had already been allotted, and the modification process had either been completed, *id.* at 5 n.13, or concerned only the parameters of operation from the already allotted slot, *id.* at 2 n.6 and 10 n.33.² In contrast, the slot in this case has not yet been allotted to the Netherlands, and in fact may never be: the United Kingdom has filed an earlier plan modification for the same slot. *See* USAT-S2 (April 25, 2003); SF_BSS5 (March 29, 2005).

In granting DIRECTV authority to provide DBS service from the 72.5° W.L. orbital location, the Commission noted another key difference between the slots authorized in the past grants and Spectrum Five’s 114.5° W.L. location, which makes Spectrum Five’s attempted reliance unavailing: “There are no co-frequency U.S. BSS assignments within 9 degrees of the 72.5° W.L. orbital location, and no current BSS operations by any country within 9 degrees of the 72.5° W.L. orbital location.” *Application of DIRECTV Enterprises, Inc.*, Order and Authorization, 19 FCC Rcd 15529, ¶ 18 (2004).

² Also, the reference to EchoStar’s Anik F3 authorization is irrelevant because it does not involve the DBS band.

Spectrum Five is also silent on a third difference between its case and these past authorizations. The Netherlands itself is not a Region 2 country, and the Dutch Antilles, with a population of 221,736, *see* CIA, The World Factbook, at <https://www.cia.gov/cia/publications/factbook/print/nt.html>, surely cannot justify an entire Region 2 DBS slot. The procedures for modifying the allotment plan were intended to accommodate Region 2 countries, not to allow the parachuting-in of entire slots by administrations with only a “toe-hold” in the region.

The proposed system “affects” other U.S. DBS satellites. Spectrum Five’s proposal, which would exceed the ITU degradation threshold, cannot simply be converted into one that does not “affect” U.S. DBS satellites through a requirement that the threshold not be exceeded. The Bureau is obliged to follow the Commission’s clear directive that, when a proposal would exceed the threshold, successful coordination with such satellites is required *prior* to grant.³

The Bureau violated Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

Spectrum Five attempts to distinguish *Ashbacker* by confining it to situations where two mutually exclusive applications are pending. Opposition at 7-8. *Ashbacker* is not concerned with form, however, but with practical effect. *See Ashbacker*, 326 U.S. at 334 (“While the statutory right...to a hearing...has in form been preserved, it has as a practical matter been substantially nullified....”). A system that “limits to one the number of applicants” would “undermine the FCC’s mandate to select the best qualified applicant pursuant to Ashbacker.” *Hilding v. FCC*, No. 86-7226, slip op. at 5 (9th Cir. Dec. 7, 1987). While the Commission can limit mutual exclusivity by setting cut-off dates, “any regulations limiting the right to a hearing must give fair notice to the public of what is being cut-off.”⁴ Here, the Commission has cut off other prospec-

³ *See DBS NPRM* at ¶¶ 40-41. It is, moreover, not true that a degradation of less than 0.25 dB is never harmful to U.S. DBS satellites.

⁴ *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19,936, ¶ 17 (rel. May 13, 1985). The Commission subsequently rejected a petition for reconsideration to adopt a true

tive applicants by failing to warn them that they risked being cut off and has, in effect, limited the number of potential applicants to one.

The Bureau's public interest finding cannot be supported. Contrary to Spectrum Five's assertions, the Bureau was required to consider Spectrum Five's financial qualifications as part of its public interest analysis.⁵ Spectrum Five mischaracterizes the Commission's prior statements to suggest that financial standards are somehow unnecessary.⁶ The Commission did not eliminate the Fixed-Satellite Service ("FSS") financial qualifications because it thought that implementation milestones were sufficient to protect against spectrum warehousing. Opposition at 13. Rather, it "adopt[ed] a new financial qualification requirement..., posting bonds." *First Space Station Report and Order* at ¶ 165. Similarly, in the *Part 100 Order* proceeding, the Commission ruled that FSS-style financial qualifications were unnecessary only because "[t]he competitive bidding process we use to resolve mutually exclusive DBS applications achieves the same goal as the financial qualifications requirements." *Policies and Rules for the Direct Broadcast Satellite Service*, 13 FCC Rcd 6907, at ¶ 22 (1998). The fact that the DBS auction

first-come, first-served review process without providing notice of a filing cut-off. *Processing of FM and TV Broadcast Applications*, 20 Fed. Reg. 43157, at ¶ 4 (Oct. 24, 1985), *aff'd Hilding v. FCC*, No. 86-7226.

⁵ Spectrum Five also attempts to save its grant based on *DISCO II*, but neglects to explain how that limited decision supports altering bedrock requirements of U.S. spectrum policy, or providing a foreign entity superior rights than a U.S. applicant. Spectrum Five cannot plausibly assert that *DISCO II* is an independent source of licensing authority. Rather, *DISCO II* requires parity amongst U.S. and foreign applicants. In instances in which no U.S. applicant should be granted a licensee – such as the instant case – *DISCO II* requires the same treatment of foreign applicants. Similarly, while the Bureau noted that its action does not fall directly under Section 308 and 309, it stated that it "appl[ied] the procedural framework of Sections 308 and 309, bearing in mind [its] World Trade Organization (WTO) commitments to treat satellite operators licensed in the Netherlands...no less favorably than [it] treat[s] U.S.-licensed satellite operators." Order at ¶ 7 n.41. The pending *DBS NPRM* also clearly extends to "applications for DBS service from space stations located at orbital locations not assigned to the United States in the ITU Region 2 BSS and feeder-link Plans." *Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service, etc.*, FCC 06-120, Notice of Proposed Rulemaking, 21 FCC Rcd 9443, at ¶ 19 (2006).

⁶ *Policies and Rules for the Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, 17 FCC Rcd 11331, at ¶ 36 (2002), *Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd 10760 (2003).

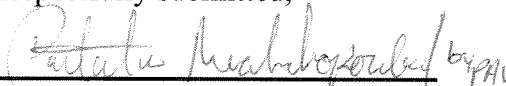
rules have now been vacated by *Northpoint Technology Ltd. v. FCC*, 412 F.3d 145 (D.C. Cir. 2005), simply creates an unintended vacuum, which only further demonstrates that the Commission's threshold qualification findings could not be made legally by the Bureau until the completion of the ongoing rulemaking proceeding.⁷

Nor does, Spectrum Five persuasively defend the Bureau's finding that the grant of Spectrum Five's petitions would enhance competition in the U.S. DBS market. The Bureau is required explicitly to determine whether the grant of Spectrum Five's petitions is in the public interest. Yet in that respect Spectrum Five asserts only that its system "will employ innovative spot-beam technology that, through frequency reuse, will give the satellites substantial effective capacity." Opposition at 14. Spot beams are hardly innovative in 2007 -- EchoStar launched the first spot beam DBS satellite in 2002 -- and Spectrum Five has made no effort to demonstrate how these techniques could be used to preserve adequate capacity on its satellites to serve as a viable stand-alone DBS competitor.

For the reasons stated herein, EchoStar respectfully requests that the Commission reverse the Bureau's grant of the Spectrum Five petitions.

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⁷ Indeed, the Commission has in practice evaluated an applicant's financial qualifications as part of its public interest analysis, even in the absence of formal financial qualification rules. See *CBS, Inc., et al.*, 92 F.C.C.2d 64, at ¶¶ 108-117 (1982).

CERTIFICATE OF SERVICE

I, Petra A. Vorwig, an attorney with the law firm of Steptoe & Johnson

LLP, hereby certify that on this 26th day of January, 2007, I served a true copy of the foregoing

“Reply,” by first class mail upon the following:

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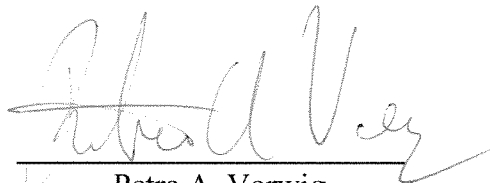
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