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

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| 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 |) | |

CONSOLIDATED OPPOSITION TO APPLICATIONS FOR REVIEW

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CONSOLIDATED OPPOSITION TO APPLICATIONS FOR REVIEW

I. INTRODUCTION AND SUMMARY

Spectrum Five, LLC, by its attorneys, opposes the Applications for Review filed by EchoStar Satellite LLC (“EchoStar”)¹ and DIRECTV Enterprises, LLC (“DIRECTV”),² in which the two incumbent direct broadcast satellite (“DBS”) operators seek full Commission review and reversal of the International Bureau’s (“Bureau’s”) grant of authority for Spectrum Five to access the U.S. DBS market using two Netherlands-authorized “tweener” satellites.³

By way of background, Spectrum Five did not seek or receive an FCC license for the launch and operation of a DBS satellite system. Rather, Spectrum Five is authorized

¹ EchoStar Satellite LLC, Application for Review (filed Dec. 29, 2006) (“EchoStar Application for Review”).

² DIRECTV Enterprises, LLC, Application for Review (filed Dec. 29, 2006) (“DIRECTV Application for Review”).

³ *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, Order and Authorization, DA 06-2439 (Nov. 29, 2006) (“Spectrum Five Order”).*

by the Netherlands consistent with that foreign administration's ITU filing for the operation of two DBS satellites at 114.5° W.L. Spectrum Five's petition requested FCC authority to serve U.S. customers pursuant to the Commission's *DISCO II* market access procedure.⁴ The Bureau processed the petition in conformity with the *Tweener NPRM*, in which the Commission confirmed that it serves the public interest to proceed with requests from non-U.S. licensed DBS satellite operators in order to expedite service to the public.⁵

As a threshold matter, EchoStar's and DIRECTV's attempt to nullify Spectrum Five's operating authority rings hollow for several reasons and should be ignored by the Commission. First, both companies previously have availed themselves of precisely the same *DISCO II* procedures to secure the use of capacity on Canadian-licensed DBS and Ku-band satellites to provide DBS service to their own U.S. customers.⁶ Second, the Bureau's order prohibits Spectrum Five's operations from exceeding the trigger for

⁴ *Amendment of the Comm'n's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and Intl. Service in the United States*, Report and Order, 12 FCC Rcd 24094 (1997) ("*DISCO II*"); *Amendment of the Comm'n's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and Intl. Service in the United States*, First Order on Reconsideration, 15 FCC Rcd 7207 (1999) ("*DISCO II First Reconsideration*").

⁵ *Amendment of the Comm'n's Policies and Rules for Processing Applications in the Direct Broad. Satellite Service; Feasibility of Reduced Orbital Spacing for Provision of Direct Broad. Satellite Service in the United States*, Notice of Proposed Rulemaking, 21 FCC Rcd 9443 (2006) ("*Tweener NPRM*").

⁶ See *DirectTV Enterprises, LLC*, Order and Authorization, 19 FCC Rcd 15,529, 15,532-533 (Int'l Bur. 2004) (granting DIRECTV blanket authorization for one million receive only earth stations used to provide "local-into-local" signals to U.S. consumers using Telesat Canada's Canadian-authorized DIRECTV 5 satellite operating at 72.5° W.L.); *EchoStar Satellite LLC*, Order and Authorization, 20 FCC Rcd 20,083, 20,094-095 (Int'l Bur. 2005) (granting EchoStar blanket authorization for one million receive-only earth stations to receive Direct-to-Home ("DTH") Fixed Satellite Service ("FSS") programming from Ku-band capacity on Telesat Canada's Canadian-authorized Anik F3 satellite to be located at 118.7° W.L.).

international coordination, unless and until agreements are reached with EchoStar and DIRECTV. Surely, EchoStar, the nation's third largest multichannel programming distributor ("MVPD"), and DIRECTV, the nation's second largest MVPD, are perfectly capable of protecting their interests in the coordination process, which provides favorable protection to the incumbents.⁷ Third, at the same time the Bureau granted Spectrum Five's petition, it granted an application by EchoStar for a DBS "tweener" satellite at an orbital slot located 4.5° away from two Canadian DBS satellites. EchoStar has accepted the terms of its license, submitted technical information to comply with a condition of its license, and agreed to assume all responsibility for the cost recovery fees associated with the ITU filing for its licensed system. Thus, EchoStar's behavior — which clearly demonstrates a belief that its own license is alive and well — cannot be squared with EchoStar's words in this proceeding.

On the merits, EchoStar's and DIRECTV's overarching allegation is that the Bureau's grant to Spectrum Five ignored a direct Commission order and charted a new course for licensing never before seen satellite proposals. In reality, however, their principal objection is to *DISCO II* and the determination by the *full Commission* to process pending requests by "tweener" proponents. Thus, as a practical matter, they are improperly seeking reconsideration of the FCC's policy determination to process Spectrum Five's petition, rather than review of the Bureau's order implementing the Commission's directive.

⁷ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2538-2544 (¶¶ 70-78) (2006) (describing subscribership of DIRECTV and EchoStar).

None of EchoStar's or DIRECTV's claims support reversal of the Bureau. Contrary to the incumbents' allegations, the Bureau's order granting Spectrum Five's petition was procedurally proper and, in fact, expressly condoned by the Commission. As well, action on Spectrum Five's petition pursuant to the existing *DISCO II* process does not prejudice or predetermine the outcome of any issue raised in the FCC's pending tweener rulemaking.⁸ Such adjudicative action pursuant to established Commission precedent is plainly permitted. This is particularly true where, as here, ample notice and opportunity for comment was afforded all interested parties. The absence of mutually exclusive applications following such public process, moreover, vitiates any *Ashbacker*⁹ due process concerns raised by EchoStar. In addition, the Commission's adherence to the existing—albeit out-dated and over-protective—international threshold for initiation of coordination ensures that grant of Spectrum Five's petition poses no risk of harm to existing customers. Finally, Spectrum Five is wholly qualified to serve the U.S. market and its service will benefit the public with increased competition, consumer choice and technological innovation. As such, the Commission should uphold the Bureau's decision to grant Spectrum Five's petition.

II. THE BUREAU DID NOT VIOLATE THE ADMINISTRATIVE PROCEDURE ACT OR PRINCIPLES OF *ASHBACKER*.

EchoStar's contention that the Bureau violated the Administrative Procedure Act ("APA") by adopting a first-come, first-serve approach in advance of the *Tweener NPRM*¹⁰ is entirely misplaced.¹¹ Contrary to EchoStar's assertion, the market access

⁸ See *Tweener NPRM*.

⁹ See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) ("*Ashbacker*").

¹⁰ See *Tweener NPRM*.

¹¹ See EchoStar Application for Review at 6-9.

granted to Spectrum Five neither prejudiced nor predetermined the issues before the Commission in the *Tweener NPRM* because the grant is not dependent on the outcome of the *Tweener NPRM*. Rather, the Spectrum Five petition for market access was granted according to *DISCO II*, the existing process applicable to non-U.S.-licensed space stations seeking to provide satellite service in the United States.¹² Indeed, the Commission consistently has employed just such an approach in processing other requests for DBS market access.¹³ Of course, EchoStar does not suggest that *DISCO II* is not the operative regime for the processing of Spectrum Five's request for DBS market access.

Furthermore, EchoStar's contention that the Bureau circumvented the APA's rulemaking procedures through adjudication is incorrect.¹⁴ The Supreme Court has made clear that agencies have broad discretion to proceed through either adjudication or rulemaking.¹⁵ As the D.C. Circuit has explained, "[i]t is well established that an agency

¹² See *DISCO II* and *DISCO II First Reconsideration*.

¹³ See *Digital Broadband Applications Corp., Consol. Application for Authority to Operate U.S. Earth Stations with a U.S.-Licensed Ku-Band FSS Satellite and Canadian-Licensed Nimiq and Nimiq 2 Satellites to Offer Integrated Two-Way Broadband Video and Data Service Throughout the United States* (Call Sign E020010), Order, 18 FCC Rcd 9455 (2003) ("DBAC Order"); *Pegasus Development Corp., Consol. Applications for Authority to Operate one U.S. Transmit/Receive Fixed Earth Station (Call Sign E01320) and 1,000,000 Receive-Only Earth Stations (Call Sign E020022) with the Canadian-Licensed Nimiq 1 and Nimiq 2 Satellites to Offer Direct Broadcast Satellite Service Throughout the United States*, Order, 19 FCC Rcd 6080 (2004) ("Pegasus Order").

¹⁴ See EchoStar Application for Review at 8 & n. 22 (citing *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1981)).

¹⁵ See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (explaining that the "choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency") (citing *Columbia Broad. Sys. v. United States*, 316 U.S. 407 (1942)); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."); see also *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990) ("[A]gency discretion is at its peak in deciding such matters as whether to address an issue by rulemaking or adjudication.").

may interpret its enabling statute on a case-by-case basis through the exercise of its adjudicatory function.”¹⁶ Indeed, the Commission did just that in the *Tweener NPRM*, in which it determined to process pending requests for market access on an *ad hoc* basis.¹⁷ EchoStar presents no reasoned basis for departing from this firmly established rule permitting agencies the discretion to act through either adjudication or rulemaking.¹⁸

The choice between enacting policy through an adjudicatory proceeding or a formal rulemaking proceeding is even less noteworthy where interested parties have been afforded the opportunity to participate in the adjudicatory proceeding.¹⁹ Here, interested

¹⁶ *ANR Pipeline Co. v. FERC*, 870 F.2d 717, 722 (D.C. Cir. 1989) (rejecting “ANR’s contention that FERC improperly converted its decision in *Mobil* into a substantive rule because it was not promulgated pursuant to the APA’s notice-and-comment procedures”) (citing 5 U.S.C. § 553); see, e.g., *In re Requests of 25 Large Oceangoing Cargo Ships for Exemption from Radiotelegraph Requirements*, Memorandum Opinion and Order, 5 FCC Rcd 594, 595 (1990) (“*Cargo Ships Exemption Order*”) (“Our choice to proceed by considering individual exemption requests on a case-by-case basis, rather than adopting a general rule is a reasonable exercise of our discretion.”).

¹⁷ *Tweener NPRM*, 21 FCC Rcd at 9453-54 (¶ 21).

¹⁸ *SBC Comm’ns Inc. v. FCC*, 138 F.3d 410, 421 (D.C. Cir. 1998) (“Inherent in an agency’s ability to choose adjudication rather than rulemaking is the option to make policy choices in small steps, and only as a case obliges it to.”) (internal citation omitted); *N.Y. State Comm’n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) (explaining that “[t]he decision whether to proceed by rulemaking or adjudication lies within the Commission’s discretion” and that “[t]his is true ‘regardless of whether the decision may affect agency policy and have general prospective application.’”) (quoting *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976)) (other citations omitted); *Cargo Ships Exemption Order*, 5 FCC Rcd at 595 (“The APA requires notice and comment procedures for rules, not with adjudications with policy implications.”). Indeed, policy decisions have been routinely announced through adjudicatory proceedings. See *id.* (“It has been estimated that less than half of policy making with substantial impact is done through notice and comment procedures”) (citing 2 K. Davis, *Administrative Law Treatise* § 7.20 (2d ed. 1979)).

¹⁹ See, e.g., *N.Y. State Comm’n on Cable Television*, 749 F.2d at 815 (“[T]o remand solely because the Commission labeled the action a declaratory ruling would be to engage in an empty formality: the Commission gave adequate notice and received comments from over 25 interested parties.”); *N.Y. State Comm’n on Cable Television v. FCC*, 669 F.2d 58, 62 (2d Cir. 1982) (“The FCC’s choice of a declaratory ruling in this case, after notice and an opportunity for comments by interested parties, was not an abuse of discretion.”); see also *N.C. Util. Comm’n v. FCC*, 537 F.2d 787, 791 & n.2 (4th Cir. 1976).

parties were given ample opportunity to comment on the Spectrum Five petition and, indeed, several interested parties—including EchoStar and DIRECTV—fully participated in the proceeding.²⁰ In sum, EchoStar’s argument that the Bureau violated the APA by failing to proceed through a formal rulemaking proceeding is unsustainable.²¹ The APA simply does not require the rigid formalism that EchoStar demands.²²

Last, the FCC’s decision to grant Spectrum Five market access did not deprive other interested applicants the right to a hearing in violation of *Ashbacker*.²³ Under *Ashbacker*, “where two *bona fide* applications are mutually exclusive the grant of one

²⁰ See EchoStar Opposition to Spectrum Five LLC Petition For Declaratory Ruling, File Nos. SAT-LOI-20050312-0062/63 (filed May 16, 2005); DIRECTV Opposition to Spectrum Five LLC Petition For Declaratory Ruling, File Nos. SAT-LOI-20050312-0062/63 (filed May 16, 2005); SES Americom Comments on Spectrum Five LLC Petition For Declaratory Ruling, File Nos. SAT-LOI-20050312-0062/63 (filed May 16, 2005); Letter of Gibraltar Regulatory Authority, File Nos. SAT-LOI-20050312-0062/63 (filed May 12, 2005).

²¹ EchoStar’s entire APA argument is premised on a Ninth Circuit decision that, according to EchoStar, precludes an agency from making policy through adjudication where the adjudication is used as an end-run around a pending rulemaking. See EchoStar Application for Review at 8 (relying on *Ford Motor Corp. v. FTC*, 673 F.2d 1008 (9th Cir. 1981)). Here, however, the Spectrum Five Order in no way undermines the pending *Tweener NPRM*. And, the Spectrum Five proceeding is a far cry from the type of wide ranging decision that would fall within the Ninth Circuit’s rule. See *Cargo Ships Exemption Order*, 5 FCC Rcd at 595-96 (explaining that in *Ford Motor Corporation* the agency “sought to adopt, in adjudicatory proceedings, new requirements that dramatically changed existing agency requirements and resulted in a new, broad general requirement that would prospectively apply to everyone in the industry, even though some were not a party to the proceeding”). Moreover, the adjudication provided interested parties the opportunity to comment and participate fully in the proceeding. The Ninth Circuit’s reasoning, which is of limited applicability in any case, simply has no application in this particular proceeding. See *Cities of Anaheim, Riverside, Banning, Colton and Azusa, Cal. v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984) (concluding that *Ford Motor Company* did not apply where the agency’s “clarification of its suspension policy . . . was a minor adjustment, a fine tuning of doctrine that [did] not require rulemaking” because it did not “impose[] severe hardship or circumvent[] existing rules”).

²² See *City of Chicago, Ill. v. Federal Power Comm’n*, 458 F.2d 731, 739 (D.C. Cir. 1972) (“In many cases, it is unnecessary, and even unwise, to classify a given proceeding as either adjudicatory or rule-making. The line between the two is frequently a thin one and resolution of a given problem will rarely turn wholly on whether the proceeding is placed in one category or the other.”).

²³ See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

without a hearing to both deprives the loser of the opportunity which Congress chose to give him.”²⁴ Here, despite the parties’ longstanding knowledge of the *DISCO II* regime, their active participation in this proceeding, the nearly two years since the issuance of the public notice seeking comment on Spectrum Five’s petition, and the Commission’s 2002 acknowledgment that petitions proposing less than 9° of separation may be filed,²⁵ no other proposals to operate at the 114.5° W.L. orbital location were pending before the Commission.²⁶ In fact, EchoStar itself previously took advantage of the opportunity to seek authority to operate a DBS satellite at the 114.5° W.L. orbital location, but then voluntarily withdrew its application.²⁷

The absence of two mutually exclusive applications is determinative of the *Ashbacker* question.²⁸ Therefore, the Bureau’s grant of market access to Spectrum Five did not violate *Ashbacker*.

²⁴ *Id.* at 333.

²⁵ *Policies and Rules for the Direct Broadcast Satellite Service*, Report and Order, 17 FCC Rcd 11,331, 11,391 (2002) (“*DBS Order*”).

²⁶ *See Spectrum Five Order*, ¶ 7 (explaining that “mutual exclusivity [was] not present among pending applications”) (footnote omitted).

²⁷ EchoStar Satellite Corp., File No. SAT-LOA-20030604-00108 (filed June 4, 2003; dismissed at applicant’s request Sept. 29, 2003).

²⁸ *See Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986) (“*Ashbacker’s* teaching applies not to prospective applicants, *but only to parties whose applications have been declared mutually exclusive.*”); *Comm. for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1320 (D.C. Cir. 1995) (explaining that “*Ashbacker* rights are not triggered where, as here, no mutually exclusive applications are pending”). EchoStar’s contention that the application freeze somehow terminated the rights of potential applicants is unsustainable. More than eight months passed after the Commission placed Spectrum Five’s petition on public notice before the freeze was announced.

III. THE BUREAU ACTED WELL WITHIN ITS DELEGATED AUTHORITY TO GRANT SPECTRUM FIVE'S PETITION

EchoStar and DIRECTV incorrectly claim that the Bureau exceeded its delegation of authority in granting Spectrum Five's Petition by deciding a "novel" question of law and policy and by defying an order of the Commission.²⁹ The Bureau did not decide a "novel" question of law and policy; it simply followed the *DISCO II* procedures established by the Commission for processing and approving pending petitions for market access.³⁰

In addition, the Bureau did not overstep the bounds of the Commission's directive to grant certain applications prior to completion of the *Tweener* rulemaking. In the *Tweener NPRM*, the Commission concluded that petitions could be processed during the pendency of the rulemaking prior to completion of coordination where 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."³¹ Consistent with this directive, the Bureau granted Spectrum Five's Petition only *in part* and expressly prohibited Spectrum Five from "affecting" other systems until coordination is achieved.³²

Notwithstanding the express authority to process requests that do not "affect" other systems, EchoStar and DIRECTV insist that coordination must be a pre-requisite to the grant of market access. Certainly, the Commission did not intend to provide incumbent DBS providers with the unilateral power to thwart entry by all competitive

²⁹ DIRECTV Application for Review at 4-5; EchoStar Application for Review at 13-15.

³⁰ *Tweener NPRM*, 21 FCC Rcd at 9453-54 (¶ 21).

³¹ *Tweener NPRM*, 21 FCC Rcd at 9453-54, 9461 (¶¶ 21, 40-41).

³² *Spectrum Five Order*, ¶ 43(d) (requiring Spectrum Five to operate "in a manner that does not exceed the interference limits in Annex 1 to Appendices 30 and 30A of the ITU Radio Regulations.").

systems, even when under Commission rules and ITU regulations, no coordination would even be required. Instead, the Commission appropriately determined that completion of coordination was necessary prior to grant only where the new DBS operation would “affect” U.S. DBS systems, *i.e.*, cause a greater than 0.25 dB OEPM degradation. The Bureau faithfully applied this standard by requiring Spectrum Five’s operations to remain below this internationally-recognized trigger for coordination. Additionally, Spectrum Five’s grant conforms to long-standing policy and precedent, pursuant to which the Commission routinely authorizes U.S. entities to provide service prior to completion of coordination and modification of the ITU Region 2 BSS Plan.³³ By granting in part Spectrum Five’s petition, limiting its operating authority, and subjecting Spectrum Five to rules applicable to operating a DBS system pending modification of the Region 2 BSS Plan, the Bureau simply did the same thing here. Therefore, the Bureau acted well within its delegated authority.

IV. THE GRANT OF SPECTRUM FIVE’S PETITION POSES NO THREAT WHATSOEVER TO EXISTING SERVICES.

EchoStar asserts that the Bureau’s action literally throws into “doubt” existing service to millions of subscribers.³⁴ The claim is as baseless as it is hyperbolic.

³³ See, e.g., *DIRECTV Enterprises, LLC, Application for Authorization to Operate DIRECTV 5, a Direct Broadcast Satellite, at the 109.8° W.L. Orbital Location*, Order and Authorization, 20 FCC Rcd 15778 (Sat. Div., Int’l Bur. 2005); *DIRECTV Enterprises, LLC, Application for Authority to Launch and Operate DIRECTV 7S (USABSS-18)*, Order and Authorization, 19 FCC Rcd 7754 (Sat. Div., Int’l Bur. 2004); *EchoStar Satellite Corporation, Application for Minor Modification of Direct Broadcast Satellite Authorization*, Order and Authorization, 17 FCC Rcd 11326 (Sat. Div., Int’l Bur. 2002); *MCI Telecomms. Corp. For Modification of Direct Broadcast Satellite Authorization*, Memorandum Opinion and Order, 14 FCC Rcd 9966 (Int’l Bur. 1999).

³⁴ EchoStar Application for Review at 2.

Even EchoStar acknowledges that the Bureau's Order prohibits Spectrum Five from "affecting" EchoStar's system.³⁵ Accordingly, as a matter of law Spectrum Five's operations must not reach or exceed the Region 2 trigger for coordination. Indeed, as previously stated in this proceeding, this standard provides EchoStar and DIRECTV extraordinary protection from objectionable interference because it relies on obsolete technical criteria that grossly overestimate the potential for interference.³⁶ As the record conclusively illustrates, the Region 2 trigger for DBS coordination was set in the early-1980s and was based on technologies—including FM/TV analog emissions – that even then were decades old.³⁷ Indeed, Region 2 is the only ITU region that has not updated its standard for coordination to account for the real-world operating environment, even though all systems today employ state-of-the-art digital technologies. As a result, this standard grossly exaggerates the potential for one system to impact another system. Yet, even this is not enough for EchoStar, which complains that the over-protective coordination trigger "suffers from a significant flaw" and is actually not strict enough.³⁸ Thus, EchoStar's objection is not to the Bureau's decision conditioning Spectrum Five's operations, but to the obsolete, decades' old internationally-recognized standard to determine when, as merely a threshold matter, a Region 2 DBS system must *initiate* coordination. Therefore, the Bureau properly considered the applicable law and policy in its evaluation of Spectrum Five's technical proposal, with the result that Spectrum Five's grant poses no threat to existing services.

³⁵ *Id.* at 16.

³⁶ Spectrum Five, LLC, Consolidated Response at 9-12 (filed June 1, 2005).

³⁷ *Id.*

³⁸ EchoStar Application for Review at 16.

V. SPECTRUM FIVE MEETS ALL QUALIFICATIONS UNDER FCC RULES FOR MARKET ACCESS.

EchoStar asserts that the Bureau failed to evaluate Spectrum Five's basic qualifications as specifically required under the Communications Act.³⁹ EchoStar does not cite to any provision of the Act in support of this claim. Indeed, although Section 308(b) of the Act *enables* the FCC to impose technical, financial, and other qualification requirements upon license applicants, that provision does not *compel* the agency make a finding with respect to any particular qualification.⁴⁰ In any event, the Bureau properly found that the agency was “*not* taking action directly under Sections 308 and 309” of the Act.⁴¹

Rather, as the Bureau explained, Spectrum Five has been granted “market access rights pursuant to the procedure adopted in *DISCO II*.”⁴² *DISCO II* requires non-U.S. licensees seeking access to the U.S. market to satisfy the same general qualification standards to which applicants for U.S. licenses are subject.⁴³ Those qualification requirements are embodied in the agency's regulations, and Spectrum Five fully complies with each rule-based obligation applicable to the grant of its petition.

³⁹ *Id.* at 10-13.

⁴⁰ 47 USC 308(b) (providing that “[a]ll applications for station licenses . . . shall set forth such facts as the Commission *may* prescribe as to the . . . financial, technical, and other qualifications of the applicant to operate the station”) (emphasis added); *see also Spectrum Five Order* at ¶ 5 n. 30 (noting that Section 308(b) “does *not* requir[e] the Commission to prescribe” specific license qualification regulations) (emphasis added). Under EchoStar's interpretation, the agency would somehow be required, as a matter of statutory law, to adopt specific rules with respect to, and to find affirmatively that an applicant satisfies, “other qualifications.”

⁴¹ *See Spectrum Five Order*, ¶ 7 n. 41.

⁴² *Id.*

⁴³ *DISCO II Order*, 12 FCC Rcd at 24,157-172 (¶¶ 146-82, 207); *DISCO II First Reconsideration*, 15 FCC Rcd at 7212 (¶¶ 11-12).

As the Bureau correctly noted in its order, there are no specific financial qualification rules for DBS applicants.⁴⁴ Indeed, in 2002 the Commission reaffirmed that DBS financial standards were inappropriate: “[w]e find that it is in the public interest not to apply financial qualifications to DBS applicants.”⁴⁵ Shortly thereafter, in 2003, the FCC even eliminated its rule obligating non-DBS applicants to demonstrate sufficient financial resources for construction and launch.⁴⁶ In so doing, the agency emphasized that its then-existing financial qualification requirements were largely duplicative of milestone obligations,⁴⁷ to which Spectrum Five is subject.⁴⁸ The Commission properly determined that “strictly enforcing [its] milestone schedule provides more certainty that systems will be timely built” and enables it to “reclaim unused spectrum in a timely manner.”⁴⁹ The application of such milestones obviates EchoStar’s concern that the grant of DBS authorizations absent strict financial qualifications will lead to “warehousing.”⁵⁰

⁴⁴ See *Spectrum Five Order*, ¶¶ 32-33. Moreover, bond requirements are not currently applicable to DBS applicants. 47 C.F.R. §25.165; *Amendment of the Commission’s Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10,760, 10,764-765, n. 4 (¶ 3) (2003) (“*First Space Station Report and Order*”). To the extent the Commission adopts such a requirement in the *Tweener NPRM*, the Bureau made clear that Spectrum Five will be expected to comply.

⁴⁵ See also, *DBS Order*, 17 FCC Rcd at 11,350 (¶ 36) (“We also adopt our proposal in the Notice not to apply the financial requirements of Section 25.140 that apply to other Part 25 satellite services... We find that it is in the public interest not to apply financial qualifications to DBS applicants.”).

⁴⁶ See *First Space Station Report and Order*, 18 FCC Rcd at 10,822-824 (¶¶ 161-165).

⁴⁷ *Id.*, 18 FCC Rcd at 10,822-823, 10,824 (¶¶ 161, 164) (noting that FCC’s financial qualification requirement “and its milestone requirements serve very similar purposes”).

⁴⁸ See *Spectrum Five Order*, ¶ 45.

⁴⁹ *First Space Station Report and Order* 18 FCC Rcd at 10,824 (¶ 164).

⁵⁰ EchoStar Application For Review at 11.

Further, EchoStar incorrectly claims that the Bureau granted the Spectrum Five petition without properly evaluating its legal qualifications.⁵¹ Spectrum Five documented its legal qualifications in the record in this proceeding, which no interested party challenged. Even in its Application for Review, EchoStar points to no defect in Spectrum Five's qualifications. Accordingly, there is no basis to overturn the Bureau's conclusion that Spectrum Five is legally qualified under the Commission's *DISCO II* procedures.⁵²

Finally, EchoStar finds fault with the Bureau's determination that grant of the Spectrum Five petition would serve the public interest.⁵³ In particular, EchoStar complains that the Bureau's finding that the grant would offer an opportunity for increased competition was "unsupported," because the Bureau inadequately fulfilled its "statutory obligation" to "scrutinize Spectrum Five's business plan."⁵⁴ Again, these claims miss the mark. The Commission certainly is not under any "statutory obligation" to pass judgment upon Spectrum Five's business plan, and it is not the province of the agency to second guess purely business decisions of industry. The Bureau's finding that grant of the application would enhance competition was solidly based on Spectrum Five's showing that it will employ innovative spot-beam technology that, through frequency reuse, will give the satellites substantial effective capacity.⁵⁵ Thus, it is perhaps not unexpected that only the incumbent DBS providers—two of the largest competitors in the

⁵¹ *Id.* at 12.

⁵² *Spectrum Five Order*, ¶ 14.

⁵³ *See* EchoStar Application For Review at 12.

⁵⁴ *Id.*

⁵⁵ *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*, SAT-LOI-20050312-00062/63 at 7-8, Technical Appendix.

video distribution marketplace, and beneficiaries of generous interference protection under international law—seek reversal of Spectrum Five’s grant.

In sum, the Bureau properly found that Spectrum Five is qualified under *DISCO II*, and that grant of its petition serves the public interest.

VI. CONCLUSION

For the reasons stated herein, Spectrum Five respectfully requests that the Commission deny the applications for review and uphold the Bureau’s grant of the Spectrum Five petition.

Respectfully submitted,

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January 16, 2007

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I, Kim Riddick, of Wiley Rein & Fielding LLP, certify that on this 16th day of January, 2007, I have served by hand a true and correct copy of this Consolidated Opposition to Applications for Review on the following:

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