Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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° W.L. Orbital Location	)	Call Signs: S2667, S2668

APPLICATION FOR REVIEW

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APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115, EchoStar Satellite L.L.C. ("EchoStar") hereby requests that the Federal Communications Commission ("Commission") review and reverse the International Bureau's ("Bureau") decision to authorize Spectrum Five, LLC ("Spectrum Five"), to operate two "tweener" satellites to serve the United States using the 12.2-12.7 GHz Direct Broadcast Satellite ("DBS") spectrum from the 114.5° W.L. orbital location – an orbital position just 4.5 degrees away from two core U.S. DBS slots at 110° and 119° W.L.[1]

I. INTRODUCTION AND SUMMARY

It is unclear what the Bureau's objective was in overreaching with this procedurally odd and rushed authorization. An unknown entity has been granted the first-of-its-kind authority to serve the United States from a tweener location. This was done at the cost of bedrock statutory

[1] *Spectrum Five, LLC*, DA 06-2439, Order and Authorization, File Nos. SAT-LOI-20050312-00062, SAT-LOI-20050312-00063, Call Signs S2667, S2668 (rel. Nov. 29, 2006) ("*Spectrum Five Order*"). As the operator of Commission-licensed DBS satellites at the 110° and 119° W.L. orbital locations affected by the *Spectrum Five Order*, EchoStar is a "person aggrieved" by the Bureau's decision. In addition, EchoStar filed an opposition and reply in the proceeding before the Bureau. It therefore has standing to submit this application for review. *See* 47 C.F.R. § 1.115(a).

and procedural requirements. The only certain result is that the ability of millions of households to receive robust and reliable DBS service is cast needlessly in doubt.

The *Spectrum Five Order* is "in conflict with statute, regulation, case precedent [and] established Commission policy," and should be reversed.[2] The Bureau's action is particularly problematic because the Commission has an open rulemaking proceeding to address the critical issues decided in the Bureau grant – whether tweener satellites such as the ones proposed by Spectrum Five can meaningfully operate without causing harmful interference to the neighboring U.S. DBS slots, and, if so, how applications for such satellites are to be processed – in a more comprehensive and judicious manner.[3] It was inappropriate for the Bureau to prejudge the outcome of the rulemaking process at this juncture.

In particular, the Bureau had no authority under administrative law to adopt a reduced orbital spacing policy by adjudication during the pendency of a rulemaking on the same subject. The Bureau further exceeded its authority and violated the law by adopting a first-come, first-served processing mechanism outside of a rulemaking proceeding. In doing so, the Bureau also violated the principles of *Ashbacker*[4] by establishing retroactively a processing mechanism without giving other users of the spectrum the opportunity to file competing applications. In addition, the Bureau violated the Communications Act by failing to review meaningfully the basic qualifications of Spectrum Five, a first-time licensee whose character and fitness is unknown to the Commission.

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[2] 47 C.F.R. § 1.115(b)(2)(i).

[3] *See Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service; Feasibility of Reduced Orbital Spacing for Provision of Direct Broadcast Satellite Service in the United States*, FCC 06-120, Notice of Proposed Rulemaking, 21 FCC Rcd 9443 (2006) ("*DBS NPRM*").

[4] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

Additionally, the Bureau has defied a recent Commission directive that a proposed system could be granted only if certain interference thresholds are not exceeded, or if the proposed system operator reached an agreement with existing DBS licensees. Yet the Bureau rushed to grant Spectrum Five's petitions, even while acknowledging that the system would exceed those thresholds and that no agreements had been reached. In granting Spectrum Five authority, the Bureau also abdicated its most important statutory responsibility to manage the use of spectrum by ensuring that a proposed system is compatible with those of other users.

In all, the Bureau has exceeded its own limited authority, superseded clear Commission directives, and ruled prematurely on critical policy determinations properly raised in the Commission's ongoing *DBS NPRM*. The Bureau's action is also at direct odds with core statutory obligations and administrative law canons. The Commission should, therefore, reverse the *Spectrum Five Order* and hold Spectrum Five's petitions in abeyance pending the completion of its rulemaking to determine the feasibility of tweener satellites and establish new rules for the licensing of DBS satellites, or pending the conclusion of coordination agreements with EchoStar and DIRECTV consistent with the Commission's guidance.

The specific questions presented for Commission review in this application for review are:

- whether the Bureau's adoption of a reduced orbital spacing policy by adjudication was permissible and legal
- whether the Bureau's adoption of a new DBS processing regime exceeded its authority and violated the law
- whether the Bureau failed to evaluate Spectrum Five's basic qualifications as required by statute
- whether the Bureau's grant of the Spectrum Five petitions violates the Commission's clear coordination directive.

- whether the Bureau has failed to fulfill its threshold spectrum management responsibility

II. THE BUREAU'S ANNOUNCEMENT OF A REDUCED ORBITAL SPACING POLICY BY ADJUDICATION IS IMPROPER

The licensing of tweener satellites has grave consequences for the U.S. DBS industry, which has come to rely on the existing 9-degree spacing policy. Indeed, EchoStar has recently made a costly investment in detrimental reliance on this policy – it has deployed triple feed dishes that are especially vulnerable to tweener operations. DIRECTV, too, has invested in triple-feed dishes. Equally important, both EchoStar and DIRECTV have deployed increasingly powerful DBS satellites to 110° and 119° W.L., and need to continue to be able to do so, because of the need to provide the additional programming options demanded by customers.

The Commission has rightly proceeded with significant caution in exploring the viability of tweener satellites. The first tweener application was filed in 2002.[5] In September 2003, DIRECTV filed a petition for rulemaking to consider the feasibility of reduced DBS spacing.[6] In early 2004, the Commission received extensive comments from numerous parties on whether a rulemaking proceeding was necessary and appropriate to resolve the technical and policy issues raised by such reduced spacing. The Spectrum Five petitions were re-filed in March 2005 and, again, many comments were submitted on whether they could be processed or whether a rulemaking should take place first. In June 2005, the D.C. Circuit vacated and remanded the DBS auction rules,[7] resulting in a Commission-imposed "freeze" on all new DBS applications

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[5] *See* SES Americom, Inc., Petition for Declaratory Ruling, File No. SAT-PDR-20020425-00071 (filed Apr. 25, 2002).

[6] *See* Petition of DIRECTV Enterprises, LLC for a Rulemaking on the Feasibility of Reduced Orbital Spacing in the U.S. Direct Broadcast Satellite Service (filed Sept. 5, 2003).

[7] *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145 (D.C. Cir. 2005).

"pending Commission consideration of the appropriate processing rules for applications to provide DBS in the United States . . . ."[8]

In August 2006, the Commission decided that a rulemaking was appropriate, and issued the *DBS NPRM* to (1) address the feasibility of tweener DBS satellites, and (2) establish new rules for the assignment of DBS licenses. This Notice offers a comprehensive forum for the Commission to consider the long-term consequences of tweener operations and to evaluate the most beneficial future course of action. In that Notice, the Commission is investigating precisely whether tweener satellites can meaningfully operate without causing harmful interference into operations from existing U.S. slots.[9]

In stark contrast with that history of caution, however, the *DBS NPRM* may be read as "jumping the gun" by stating that the Commission "may process the existing DBS applications provided that they are complete and consistent with the public interest, convenience and necessity."[10] It is unclear from the *Spectrum Five Order* to what extent the Bureau interpreted the Commission's statement as an invitation or directive to act in this proceeding.[11] Certainly, as will be seen below,[12] the Bureau exceeded the scope of the Commission's improper "go-ahead," if that is what it was. But in any event, both the grant by the Bureau and the apparent resolution

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[8] FCC, Public Notice, *Direct Broadcast Satellite (DBS) Service Auction Nullified: Commission Sets Forth Refund Procedures for Auction No. 52 Winning Bidders and Adopts a Freeze on All New DBS Service Applications*, FCC 05-213, at 1 (rel. Dec. 21, 2005).

[9] *DBS NPRM* at ¶¶ 28-50.

[10] *DBS NPRM* at ¶ 21.

[11] The Bureau includes a single reference to the paragraph in which the Commission made this statement at the very end of footnote without explanation or discussion. *Spectrum Five Order* at ¶ 30 n.5.

[12] *See* Section VI, *infra*.

by the Commission in the *DBS NPRM* of issues pending in that very rulemaking were improper and should be reversed.

Specifically, the decision to authorize tweener operations in the middle of this broader review is an unexplained and unacceptable departure from Commission precedent and is highly detrimental to existing operators. A decision of this magnitude should not be made in an adjudicatory proceeding, and certainly not when a rulemaking to decide these issues is pending.

Courts have held that the choice of adjudication over rulemaking would be improper if the new policy announced through adjudication inflicts "serious," "adverse consequences" on parties that have relied in good faith on the agency's past policies or practices, *e.g.*, if the new policy imposes some new liability or if it disturbs long-standing assumptions and settled expectations as to what is permissible under the agency's past policies and practices.[13] This is clearly the case in this instance, and neither the Bureau nor the Commission should make these policy decisions outside of a rulemaking setting.

III. THE BUREAU VIOLATED THE ADMINISTRATIVE PROCEDURE ACT AND EXCEEDED ITS AUTHORITY BY EFFECTIVELY ADOPTING A NEW DBS PROCESSING REGIME

The Bureau's grant of the Spectrum Five petitions decides prematurely at least one more issue that is the subject of the *DBS NPRM*: the processing mechanism for DBS applications. This decision was arbitrary and capricious and unsupported by the record. In doing so, the

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[13] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) ("The possible reliance of industry on the Board's past decisions with respect to buyers does not require a different result. It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Furthermore, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements. Nor are fines or damages involved here."); *Patel v. INS*, 638 F.2d 1199, 1205 (9th Cir. 1980) (reversing INS's decision to apply new criterion to immigrant in adjudication rather than rulemaking because of hardship to immigrant).

Bureau has contravened established principles of administrative law, including the notice-and-comment requirement of the Administrative Procedure Act ("APA"),[14] and exceeded its own limited delegated authority.[15]

Within the *DBS NPRM*, the Commission is examining the proper processing mechanism for DBS applicants to replace the auction rules vacated by the D.C. Circuit in *Northpoint Technology, Ltd v. FCC*.[16] A number of alternatives are under Commission consideration, *i.e.*, a first-come-first-served, competitive bidding, and processing round mechanism.[17] Serious questions exist as to the legality and appropriateness of a competitive bidding licensing system as well as a first-come-first-served licensing system for DBS spectrum.[18]

Yet all of these unresolved issues have now been preempted by the Bureau's imprudent decision. The Bureau adopted a first-come, first-serve approach on its own authority. It is not an answer for the Bureau to simply make the grant of Spectrum Five's authorization "subject to any rules adopted in the [*DBS NPRM*]."[19] The Commission cannot now reach contrary conclusions – *e.g.* that DBS licenses should be assigned by auction or a processing round – without cancelling Spectrum Five's authorizations long after their grant. The Bureau has improperly prejudiced, if not predetermined, the Commission's final action in this proceeding.[20]

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[14] 5 U.S.C. § 553.

[15] 47 C.F.R. §§ 1.115(b)(2)(i-ii).

[16] *Northpoint Technology Ltd. v. FCC*, 412 F.3d 145 (D.C. Cir. 2005). *See also DBS NPRM* at ¶¶ 22-27.

[17] *DBS NPRM* at ¶¶ 22-26.

[18] *See Northpoint, infra. See also* Section IV, *infra.*

[19] *Spectrum Five Order* at ¶ 44.

[20] In this regard, the Bureau cannot have it both ways. In one instance, they suggest that this decision is of minimal import since it is conditioned on final action in the rulemaking

The Bureau's grant also clearly contravenes established principles of administrative law by deciding that "the pendency of [the *DBS NPRM*] proceeding does not prevent us from acting on the Spectrum Five Petitions."[21] Courts have held that an agency cannot "supplant" or "bypass" a pending rulemaking through adjudication and "in effect enact the precise rule [it] has proposed, but not yet promulgated."[22] In this instance, the Bureau (not even the full Commission) has done just that by granting Spectrum Five's tweener petitions while a rulemaking is still pending.

The Bureau's action also exceeds its limited authority to act on any application or petition that "presents new or novel arguments not previously considered by the Commission"[23] The adoption of a new processing mechanism is clearly action that involves "new or novel

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process. Yet, at the same time the Bureau justifies its action so "the public might benefit from expeditious processing and delivery of new or expanded service offerings." *Spectrum Five Order* at ¶ 7. To the extent, this authorization is truly contingent upon the completion of the rulemaking, Spectrum Five could not reasonably rely on this authorization in any material respect because it may be null and void in the near future. There could not then be any public benefit warranting this rushed action. For instance, nothing precluded Spectrum Five from negotiating agreements with DBS operators prior to obtaining a conditional license. Such negotiations do not in any way necessitate the grant of authority by the Bureau.

[21] *Spectrum Five Order* at ¶ 5.

[22] *See Ford Motor Company v. Federal Trade Commission*, 673 F.2d 1008, 1010 (9th Cir. 1981), *cert. denied, FTC v. Francis Ford, Inc.*, 459 U.S. 999 (1982). *See also Cities of Anaheim, Riverside, Banning, Colton & Azusa v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984) (upholding agency's use of adjudication to announce new policy because it did not "supplant a pending rule-making proceeding" (interpreting *Ford*)); *Union Flights*, 957 F.2d 685, 688 (9th Cir. 1992) (upholding agency's use of adjudication because it did not "bypass a pending rulemaking proceeding" (interpreting *Ford*)). *But see Commuter Organizations v. Thomas*, 799 F.2d 879 882 n.1 (2nd Cir. 1986) (allowing EPA to use proposed policy to assess New York's SIP); *St. George's University v. Bell*, 514 F. Supp. 205, 210 (D.D.C. 1981) (allowing defendants to use proposed rule as a guideline because there was no prior rule). Neither decision governs here – the Second Circuit's comments in *Commuter Organizations* consisted of *dicta* in a footnote on an issue not raised by either party, and *St. George's University* was a district court decision decided before *Ford* that did not involve the overturning of a long-standing policy.

[23] 47 C.F.R. § 0.261(b)(1)(i).

arguments" beyond the Bureau's authority. Even if the Commission did mean that tweener applicants can be licensed prior to the promulgation of licensing rules,[24] that is not a delegation of authority to the Bureau to do this. Such licensing could only have proceeded, if at all, at the Commission level. For these reasons, the Bureau's grant of the Spectrum Five petitions is premature and should be reversed, pending the Commission's full consideration of these issues in the *DBS NPRM*.

IV. THE BUREAU'S GRANT VIOLATES THE PRINCIPLES OF *ASHBACKER*

The Bureau did worse than to establish a first-come-first-served processing system: it did so retroactively. This violated the principles of *Ashbacker*[25] and its progeny by preempting any potential emergences of mutual exclusivity.[26] For that reason, the Bureau's justification for the grant to Spectrum Five – that "no other applications or petitions for a DBS satellite at 114.5° W.L. were received by the Commission" – does not withstand scrutiny.[27] As a threshold matter, the Bureau fails to acknowledge that Spectrum Five is the sole applicant only because of the continued imposition of the DBS freeze.[28] The Bureau has no reasonable means by which to determine if mutually exclusive applications would exist if that freeze were lifted. Thus, until the freeze is lifted at the completion of the *DBS NPRM*, the Bureau can not fairly make this evaluation. But equally important, the retroactive adoption of a first-come-first-served

[24] *See DBS NPRM* at ¶ 21.

[25] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

[26] The Ninth Circuit has held in an unpublished opinion that 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). A copy of this unpublished opinion is attached as Exhibit 1.

[27] *Spectrum Five Order* at ¶ 7 ("Mutual exclusivity is not present among pending applications").

[28] *Spectrum Five Order* at ¶ 5 n.29.

system has deprived other interested applicants of a reasonable opportunity to apply for the same spectrum.[29]

V. THE BUREAU FAILED TO EVALUATE SPECTRUM FIVE'S BASIC QUALIFICATIONS AS REQUIRED BY STATUTE.

The Bureau's grant of Spectrum Five's petitions without a proper evaluation of Spectrum Five's basic qualifications violates the Communications Act, and exceeds the Bureau's delegated authority.[30] The Bureau recognizes by law that it could only grant Spectrum Five's petitions if a determination is made that "the applicant is legally, technically, and financially qualified and the public interest will be served."[31] These threshold determinations were, however, not made, nor could they be made legally until the completion of the pending rulemaking proceeding.

First, the Bureau failed to evaluate Spectrum Five's financial qualifications at all. The Commission in *DISCO II* explained that "we must apply our financial rules to all systems serving the United States, including those involving non-U.S. space stations."[32] Spectrum Five, however, offered no evidence of its financial qualifications in its petitions, or even its ability to

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[29] *See Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19936, at ¶ 17 (1985) ("any regulations limiting the right to a hearing must give fair notice to the public of what is being cut-off. Therefore, although the Commission can be flexible in establishing 'housekeeping' rules, applicants must be treated equally and fairly by giving them notice of the due dates for their applications.").

[30] 47 C.F.R. § 1.115(b)(2)(i-ii).

[31] *Spectrum Five Order* at ¶ 5.

[32] *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States; Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations*, Report and Order, 12 FCC Rcd 24094, at ¶ 157 (1997) ("*DISCO II*").

post a bond of any size.[33] This is striking considering it is not a known public or private enterprise, has never controlled or launched a satellite system, and does not even – according to press reports – have a working telephone.[34]

The Bureau neglected to evaluate Spectrum Five's financial qualifications, because it found that there are no Commission rules governing the proper means to evaluate the financial qualifications of DBS licensees in light of the *Northpoint* decision.[35] The Bureau then conceded that this issue is addressed explicitly in the *DBS NPRM*.[36] Without rules in place, the Bureau cannot legally satisfy its statutory obligation to evaluate Spectrum Five's financial qualifications. The Bureau nevertheless granted the license without the statutorily required finding.[37] Granting these applications in this manner is also bad public policy: a potent recipe for trafficking and spectrum warehousing.[38]

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[33] *See* Spectrum Five, LLC, Petition for Declaratory Ruling at 8, *in* File Nos. SAT-LOI-20050312-00062 and SAT-LOI-20050312-00063 (filed Mar. 12, 2005) ("*Petition*").

[34] Adrianne Kroepsch, *Tweener DBS Authorizations Raise Industry Eyebrows,* COMM. DAILY 3-5 (Dec. 7, 2006).

[35] The Bureau explains that the Commission has two means by which to evaluate financial qualifications of satellite applicants: (1) auction procedures for DBS and DARS services; and (2) bond requirements for all other satellite services. *Spectrum Five Order* at ¶¶ 32-33. The court has rejected the Commission's auction procedures, but the Commission has never adopted new rules for DBS licensees. *See Northpoint*, 412 F.3d 145 (D.C. Cir. 2005).

[36] *Spectrum Five Order* at ¶ 33.

[37] Again, conditioning the grant on the rules ultimately adopted does not cure the Bureau's overreaching. *See Spectrum Five Order* at ¶ 33. The Bureau's Order prejudges what type of financial qualification may be appropriate (a bond requirement) and effectively forecloses the possibility that the Commission might take a different path in the *DBS Notice* that would render this authorization null and void. Dictating the results of a rulemaking proceeding through an adjudicatory finding is improper and beyond the Bureau's limited authority.

[38] The Commission has repeatedly found that financial qualifications requirements are critical to "help deter speculative satellite applications, and help expedite provision of service to the public." *Amendment of the Commission's Space Station Licensing Rules and Policies;*

Second, the Bureau granted the Spectrum Five petitions without evaluating the legal qualifications or the character of Spectrum Five. The qualifications of Spectrum Five and its principals are not a matter of record before the Commission, as none of them appears to have ever held a Commission license. The Bureau found nonetheless that "nothing in Spectrum Five's petitions ... suggest[s] that it is not legally qualified to provide service to the United States."[39] Such cursory findings may be appropriate in instances in which a known entity seeks access, but it is clearly a deficient basis to conclude that an unknown applicant is legally qualified.[40]

Third, the public interest finding of the Bureau is lacking. The Bureau made the unsupported conclusion that that grant of the Spectrum Five petitions is in the public interest because it "will offer an opportunity for increased competition in the U.S. DBS market."[41] This finding is not supported by the record in this proceeding. The Bureau's failure to scrutinize Spectrum Five's business plan is contrary to its statutory obligation. Spectrum Five endeavors to do as much, if not more, with two satellites operating in a constrained orbital location as the two national DBS providers do with multiple satellites from multiple orbital locations: *e.g.*, television and distant learning services in the Netherland Antilles, an alternative DBS service in

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Mitigation of Orbital Debris, 18 FCC Rcd 10760, at ¶ 167 (2003). *See also DBS NPRM* at ¶ 26; *DISCO II* at ¶ 157 ("Reserving orbit locations or spectrum for future non-U.S. satellites without examining whether the operator is financially qualified to build the system could block entry by other U.S. or foreign companies that have the financial capability to proceed, ultimately delaying service to the public.").

[39] *Spectrum Five Order* at ¶ 14.

[40] *See Digital Broadband Applications Corp.*, 18 FCC Rcd 9455, at ¶ 22 (2003) ("*DBAC Order*") (finding that "[w]e have previously ... found that Telesat Canada is legally qualified to provide satellite services in the United States.").

[41] *Spectrum Five Order* at ¶ 1.

the United States, as well as additional channel capacity for incumbent DBS providers. It is unclear if any of these business plans as presented are viable, let alone all.[42]

The failure to satisfy these threshold qualification issues is further basis to reverse the Bureau's decision. The Commission should demand a more searching examination of Spectrum Five's qualifications informed by the Commission's final DBS rules and findings.

VI. THE BUREAU'S GRANT OF THE SPECTRUM FIVE PETITIONS VIOLATES THE COMMISSION'S CLEAR COORDINATION DIRECTIVE.

The Bureau's grant of the Spectrum Five petitions is inconsistent with the Commission's statements in the *DBS NPRM* regarding the licensing of tweener DBS satellites. In the *DBS NPRM*, the Commission foresaw "three possible scenarios in which interference issues could be presented with respect to an application seeking to provide DBS service from an orbital location spaced less than nine-degrees from an existing DBS space station":[43]

> (1) the applicant has negotiated an operating arrangement with the other potentially affected U.S. DBS service providers;
>
> (2) the applicant has demonstrated that the proposed DBS system would not "affect" the systems of other U.S. DBS service providers (*i.e.* would not cause a greater than 0.25 dB OEPM degradation to such systems) and has not negotiated operating arrangements; and
>
> (3) the applicant has conducted interference analyses, the results of which the applicant considers should be acceptable to other U.S. DBS service providers, but one or more of the U.S. DBS service providers disagree.[44]

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[42] In its description of its "Company and Proposed System," the component of the business plan that the Bureau highlights (an alternative DBS provider) is described in only two sentences. *Petition* at 7-8. Moreover, it is unclear if Spectrum Five proposes only a local-into-local service or a true MVPD offering. From its filing, it would appear to be the former, but neither the Bureau nor Spectrum Five explains how such a niche offering could realistically increase DBS competition. *Petition* at 12-13. The Bureau also fails to consider the adverse effects of tweener satellites on current and future operations of existing DBS operators.

[43] *DBS NPRM* at ¶ 40.

[44] *Id.*

The Commission stated that in the first two scenarios, it could "proceed with public notice and review . . . and could take action on the application."[45] In the third scenario, however, the Commission ruled that "it could not take action on the application until agreements [with the U.S. DBS service providers] are reached."[46]

It is uncontested that the Spectrum Five petitions fall under the third scenario: both the Bureau and Spectrum Five explicitly acknowledged that other U.S. DBS operators are affected, and that no operator agreements have been reached.[47] Spectrum Five relies only on technical analyses purporting to demonstrate that actual interference levels from its proposed tweener satellites *could* be acceptable.[48] The Bureau's decision to authorize Spectrum Five regardless is in direct contradiction of the Commission's directive, and is reversible error.[49]

Nonetheless, the Bureau attempts unpersuasively to justify its decision based on prior grants of foreign entry to provide DBS service to the U.S. from slots allotted to Canada.[50] An analysis of those grants, however, only demonstrates further the clear defects of the Spectrum

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[45] *Id.* at ¶ 41.

[46] *Id.*

[47] *Spectrum Five Order* at ¶ 24 ("Spectrum Five's analysis showed that many U.S. Region 2 BSS Plan entries and proposed modifications to the Region 2 Plans at the 110° W.L. and 119° W.L. nominal orbital locations would be affected by substantially more than the 0.25 dB change in OEPM criterion used by the ITU to identify networks as being affected by a proposed modification to the Region 2 plans."). *See also Petition* at 6.

[48] *Spectrum Five Order* at ¶¶ 25-29.

[49] Again, the Bureau attempts to legitimize its overreaching by imposing a condition limiting Spectrum Five's operations cannot cure the broader noncompliance. The Bureau was never given the authority by the Commission to create in effect a fourth category of applicants. Nor can the Bureau do so on its own accord.

[50] *Spectrum Five Order* at ¶ 7 (citing *DBAC Order* and *Pegasus Development Corp*, 19 FCC Rcd 6080 (2004) ("*Pegasus Order*")).

Five decision. In stark contrast to Spectrum Five, DBAC and Pegasus sought to provide broadband data and video services to the United States using two existing and fully coordinated Canadian satellites. In both the *DBAC Order* and the *Pegasus Order*, the Bureau affirmatively found that both "satellites now fall within the parameters defined by the ITU in Appendices 30 and 30A of the International Radio Regulations as not affecting U.S. DBS satellites."[51] Accordingly, those *Orders* fit within category two described above, and is clearly distinguishable from Spectrum Five's category three uncoordinated non-existent satellite that exceeds those same ITU parameters.

VII. THE BUREAU HAS FAILED TO FULFILL ITS THRESHOLD SPECTRUM MANAGEMENT RESPONSIBILITY TO EVALUATE THE RISKS OF HARMFUL INTERFERENCE PRIOR TO LICENSING

The Bureau also failed to fulfill the Commission's most important spectrum management duty under Title III of the Communications Act – to evaluate whether an application causes harmful interference into other licensees *before* granting a license. As the Commission's Spectrum Policy Task Force observed in its 2002 report:

> Ensuring adequate interference protection has been a key responsibility of the Commission since inception and continues to be one of its core functions. Section 303(f) of the Communications Act of 1934, as amended, directs the Commission to make regulations "it may deem necessary to prevent interference between stations" as the public interest requires. Sufficient interference protection is a necessary and fundamental building block in any spectrum policy. Indeed, without adequate interference management, new spectrum-based services could be prematurely thwarted and, correspondingly, mature services might not be able to reach their full potential.[52]

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[51] *DBAC Order* at ¶ 21; *Pegasus Order* at ¶ 17.

[52] FCC, Spectrum Policy Task Force Report, ET Docket 02-135, at 25 (rel. Nov. 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.doc (last visited Dec. 29, 2006). *See also Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-*

While the Bureau has appropriately conditioned Spectrum Five's authorization on coordination with the U.S. DBS licensees if Spectrum Five wishes to cause a greater than 0.25 dB degradation in their overall equivalent protection margins ("OEPM"s), this requirement is neither an appropriate relegation of this threshold duty nor a panacea. The 0.25 dB degradation criterion suffers from a significant flaw – the lower the OEPMs to begin with, the more actual interference the DBS operators must tolerate before the coordination requirement is triggered.

As EchoStar has pointed out in its comments on the *DBS NPRM*, where this question should be decided, the sharing of the same spectrum by operators at existing DBS slots and new tweener operators is only possible with additional constraints on the tweener operations to preserve DBS service to millions of consumers.[53] By not imposing any additional constraints, however, the Bureau could not have reasonably determined that Spectrum Five's proposed system would not cause harmful interference to other U.S. DBS licensees and its grant of the Spectrum Five petitions should therefore be reversed.

Band Frequency Range, etc., 17 FCC Rcd 9614, 9817 (2002) (Statement of Commissioner Martin (dissenting in part): "One of the Commission's most important responsibilities related to spectrum management is to define the interference parameters under which licensees may operate.").

[53] Comments of EchoStar Satellite L.L.C. at 9-11, Exhibit 1, *filed in* IB Docket No. 06-160 (filed Dec. 12, 2006).

VIII. CONCLUSION

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

Respectfully submitted,

/s/
Counsel for EchoStar Satellite L.L.C.

December 29, 2006

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EXHIBIT 1

HILDING v. FCC

ORIGINAL

DOCKET

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DEC 10 1987

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DEC 7 1987

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC R. HILDING,	)	
	)	No. 86-7726
Petitioner,	)	F.C.C. No. 85-555
	)	
v.	)	MEMORANDUM*
	)	
FEDERAL COMMUNICATIONS COMMISSION,	)	
	)	
Respondent.	)	

On Appeal from Petition for Review of Orders of the Federal Communications Commission

Argued and Submitted October 7, 1987
San Francisco, California

Before: GOODWIN, ALARCON, and LEAVY, Circuit Judges

Pro se petitioner Eric R. Hilding seeks review of the Federal Communications Commission's (FCC) new rules which govern the process of applying for licenses to operate new commercial FM radio stations. On September 18, 1984, the FCC published a general notice of proposed rule making with respect to the application process in 49 Fed. Reg. 36,523, pursuant to Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553. Section 4 requires the agency to give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments. 5 U.S.C. § 553(c).

Hilding filed comments in response to the notice. He proposed rules very different from those of the FCC. On May 6,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

1985, however, the FCC formally adopted rules similar to those it had originally proposed.

Hilding filed a petition for reconsideration on June 4, 1985. In it he referred to a separate petition he filed with the FCC on May 8, 1985. Part of that petition requested the FCC to initiate another rule making proceeding to amend its policy giving preferences to women and minorities in the comparative hearing process. The FCC is required to use a comparative hearing process to select the best qualified applicant from all competitors for a new FM channel. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945) (mutually exclusive bona fide applicants are entitled to a hearing for station licenses).

The FCC unanimously denied Hilding's petition for reconsideration. It considered the parts of his May 8, 1985 petition which were relevant to the process of applying for licenses for new FM channels, but ignored the request to amend the comparative hearing process, because that issue was outside the scope of the proceedings before it. The FCC dismissed yet another petition for reconsideration which Hilding filed on November 15, 1985, because it was factually repetitious.

Standard of Review

This court will set aside an agency action only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); Western Oil & Gas Ass'n v. E.P.A., 767 F.2d 603, 605-06 (9th Cir. 1985); Montana Power Co. v. E.P.A., 608 F.2d 334, 344 (9th Cir. 1979).

Under this standard, a court must engage in a "substantial inquiry," Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971), but should not substitute its judgment for that of the agency. Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins., 463 U.S. 29, 43 (1983). The court's role is to ensure that the agency considered all of the relevant factors and that its decision contained no "clear error of judgment." Motor Vehicles, 463 U.S. at 43; Overton Park, 401 U.S. at 416.

Judgments concerning the application process for radio channels are peculiarly within the FCC's competence. See FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 780-83 (1978). Considerable deference is granted to the FCC when it issues an order based upon its expertise. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

DISCUSSION

Under the new rules, a "window" system is used for applications for licenses to operate new FM channels. 47 C.F.R. § 73.3573 (1985). These rules specify a one-time, fixed filing period, or "window," during which applications from all interested parties are accepted.

This system replaced a "cut-off" system in which a notice was published that the FCC had received an application for a new channel. The notice established a "cut-off" date for additional applications. Under the new system, no notice is published when the first application is received. The "window" system was to

remedy the abuses of the "cut-off" system, which triggered competitive applications and allowed later applicants to copy data which the first applicant had compiled.

Hilding argues that the FCC should establish a true "first come/first serve" system when an individual petitions the FCC for rule making for the allotment of a new channel. He contends that only that individual should be allowed to apply during the "window" period, rather than all interested parties. He argues that individuals who discover and petition for new channels are penalized by the competition allowed under the new rules. Hilding claims his suggestion of a "leadership window" is a means of rewarding initiative, providing incentives for allotment of new channels, reducing the administrative processing burden, and thereby expediting and expanding service to the public.

The FCC may allot new channels only after consideration of a "fair, efficient, and equitable distribution of radio service" pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(b). The FCC did not think that, on balance, Hilding's proposal served the public interest under this mandate. In denying Hilding's petition for reconsideration, it stated that his proposal did not serve the FCC's goal of striking "a balance between the dual and sometimes divergent goals of selecting the best possible applicant and the commitment to bring new service to the public as expeditiously as possible." The FCC found Hilding's approach unacceptable because it "does not accord

adequate attention to the full range of policy concerns at issue in devising appropriate processing standards."

In light of its policies and its expertise in this area, the FCC reasonably rejected Hilding's proposed rules. It did not act arbitrarily or capriciously, abuse its discretion, or commit a clear error of judgment when it determined that Hilding's proposal would not serve the public interest. Hilding's self-serving proposal undermines the FCC's mandate to select the best qualified applicant pursuant to Ashbacker because it limits to one the number of applicants. We will not substitute Hilding's judgment for that of the FCC. His request to order the FCC to substitute his rules for those it adopted is denied.

Hilding claims the FCC rejected his May 8, 1985 petition for rule making to amend their policy on preferences given to women and minorities. However, the parts of this petition which dealt with the application process were considered in adopting the new rules. The remaining parts exceeded the scope of the rules under consideration, because they dealt with comparative hearings, an entirely separate process.

No final agency action has taken place with respect to Hilding's May 8, 1985 petition. The FCC represents to this court that it is still pending before the agency, since the FCC presently is inquiring into preferences for women and minorities in the comparative hearing process. See Notice of Inquiry, Reexamination of the Commission's Comparative Licensing, Distress Sale and Tax Certificate Policies Premised on Racial, Ethnic or

Gender Classifications, 1 FCC Rcd 1315 (1986); Order Granting Motion for Extension of Time for Filing Comments, DA 87-545, released May 6, 1987.

Consequently, Hilding does not state a claim for which federal judicial relief is available. This court does not have jurisdiction to review the FCC's alleged inaction on Hilding's pending petition for rule making to amend the FCC's comparative hearing process.

We affirm the FCC's denial of Hilding's motions to reconsider the adoption of its new rules.