

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)) EchoStar Satellite Operating Corporation)) Application to Construct, Launch, and Operate a) Direct Broadcast Satellite at the 86.5° W.L.) Orbital Location)) Spectrum Five, LLC)) Petition for Declaratory Ruling to Serve) the U.S. Market Using Broadcast Satellite Service) Spectrum from the 114.5° W.L. Orbital Location)))) File No. SAT-LOA-20030609-00113 Call Sign: S2454)))))) File Nos. SAT-LOI-20050312-00062, SAT-LOI-20050312-00063 Call Signs: S2667, S2668
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MEMORANDUM OPINION AND ORDER

Adopted: February 21, 2008

Released: February 25, 2008

By the Commission: Commissioners Copps and Adelstein, dissenting and issuing a joint statement.

I. INTRODUCTION

1. By this Order, we deny applications for review filed by DIRECTV Enterprises, LLC (DIRECTV), EchoStar Satellite L.L.C. (EchoStar), and Telesat Canada (Telesat) seeking review and reversal of two International Bureau licensing decisions. On November 29, 2006, the International Bureau granted Spectrum Five, LLC’s (Spectrum Five) requests to provide Direct Broadcast Satellite (DBS) service to U.S. consumers from two Netherlands-authorized satellites,¹ and granted EchoStar authority to construct a satellite to provide DBS service to U.S. consumers from the 86.5° W.L. orbital location.² For the reasons discussed below, we affirm the Bureau’s decision to grant the Spectrum Five and EchoStar requests.

II. BACKGROUND

2. EchoStar filed applications in June 2003 to construct, launch, and operate DBS space stations at the 86.5° W.L., 96.5° W.L., 114.5° W.L., and 123.5° W.L. orbital locations.³ EchoStar later withdrew

¹ Spectrum Five LLC, Petition for Declaratory Ruling to Serve the U.S. Market Using Broadcast Satellite Spectrum from the 114.5° W.L. Orbital Location, *Order and Authorization*, 21 FCC Rcd 14023 (2006) (*Spectrum Five Order*).

² EchoStar Satellite L.L.C., Application to Construct, Launch, and Operate a Direct Broadcast Satellite at the 86.5° W.L. Orbital Location, *Order and Authorization*, 21 FCC Rcd 14045 (2006) (*EchoStar 86.5 WL Order*).

³Application of EchoStar Satellite Corporation for Authority to Construct, Launch and Operate a Direct Broadcast Satellite in the 12.2-12.7 GHz and 17.3-17.8 GHz Frequency Bands at the 86.5° W.L. Orbital Location, File No. SAT-LOA-20030609-00113 (filed June 9, 2003); Application of EchoStar Satellite Corporation for Authority to Construct, Launch and Operate a Direct Broadcast Satellite in the 12.2-12.7 GHz and 17.3-17.8 GHz Frequency

(Continued...)

all applications except the one for the 86.5° W.L. orbital location.⁴ The Bureau placed that application on Public Notice on April 15, 2005.⁵ Comments were filed by SES Americom, and Telesat and Bell ExpressVu L.P. (Bell ExpressVu) filed oppositions. Telesat is the Canadian-licensed operator of DBS satellites at 91° W.L. and 82° W.L.

3. In March 2005, Spectrum Five filed two petitions for declaratory ruling seeking to provide DBS service to U.S. consumers from two Netherlands-authorized satellites to be located at the 114.5° W.L. orbital location. The petitions were placed on Public Notice on April 15, 2005.⁶ SES Americom, EchoStar, and DIRECTV filed comments and oppositions. Spectrum Five filed a reply. SES Americom, EchoStar, and DIRECTV filed responses to Spectrum Five's reply.

4. In June 2005, the United States Court of Appeals for the D.C. Circuit held, in *Northpoint Technology, Ltd. v. Federal Communications Commission*, that Auction No. 52 for three DBS licenses was unauthorized.⁷ In light of this holding, the Commission adopted a freeze on all applications for new DBS authorizations to use the 12.2-12.7 GHz band and associated feeder links in the 17.3-17.8 GHz band, pending Commission consideration of the appropriate processing rules for applications to provide DBS in the United States. The DBS application freeze was limited to "applications for licenses for new space stations or new requests for market access by foreign-licensed space stations."⁸ In August 2006, the Commission adopted a Notice of Proposed Rulemaking seeking comment on licensing procedures and service rules for satellites providing DBS service.⁹

5. On November 29, 2006, the Bureau granted Spectrum Five's petitions, subject to certain conditions.¹⁰ On the same date, the Bureau partially granted EchoStar's application, subject to conditions, authorizing EchoStar to construct the satellite, but not to launch or operate this satellite, pending consideration of additional information regarding EchoStar's end-of-life disposal plans for the satellite.¹¹

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Bands at the 96.5° W.L. Orbital Location, File No. SAT-LOA-20030605-00109 (filed June 5, 2003); Application of EchoStar Satellite Corporation for Authority to Construct, Launch and Operate a Direct Broadcast Satellite in the 12.2-12.7 GHz and 17.3-17.8 GHz Frequency Bands at the 114.5° W.L. Orbital Location, File No. SAT-LOA-20030604-00108 (filed June 4, 2003); and Application of EchoStar Satellite Corporation for Authority to Construct, Launch and Operate a Direct Broadcast Satellite in the 12.2-12.7 GHz and 17.3-17.8 GHz Frequency Bands at the 123.5° W.L. Orbital Location, File No. SAT-LOA-20030606-00107 (filed June 6, 2003).

⁴ See Satellite Policy Branch Information, *Public Notice*, Report No. SAT-00171 (rel. October 10, 2003) (Int'l Bur. 2003), Satellite Policy Branch Information, *Public Notice*, Report No. SAT-00283 (rel. April 8, 2005) (Int'l Bur. 2003).

⁵ Policy Branch Information: Satellite Space Applications Accepted for Filing, *Public Notice*, Report No. SAT-00284 (rel. April 15, 2005).

⁶ Policy Branch Information: Satellite Space Applications Accepted for Filing, *Public Notice*, Report No. SAT-00284 (rel. April 15, 2005).

⁷ *Northpoint Technology, Ltd. v. Federal Communications Commission*, 412 F3d 145 (D.C. Cir. 2005).

⁸ See Direct Broadcast Satellite Service Auction Nullified: Commission Sets Forth Refund Procedures for Auction No. 52 Winning Bidders and Adopts a Freeze on All New DBS Service Applications, *Public Notice*, 20 FCC Rcd 20618 (2005) (*DBS Freeze Notice*).

⁹ Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service, *Notice of Proposed Rulemaking*, 21 FCC Rcd 9443 (2006) (*DBS Notice*).

¹⁰ *Spectrum Five Order*, 21 FCC Rcd at 140442-44, paras. 43-47.

¹¹ *EchoStar-86.5W Order*, 21 FCC Rcd at 14056-57, para. 21.

The Bureau imposed a number of conditions on the Spectrum Five and EchoStar grants, including a requirement that any operations of the proposed satellites in the United States would not impermissibly interfere with other DBS satellites operating in the United States, and would be consistent with International Telecommunication Union (ITU) Radio Regulations.¹² The grants for both Spectrum Five and EchoStar were also made subject to any rules adopted as a result of the *DBS Notice*.¹³

6. In its application for review of the Spectrum Five grant, DIRECTV argues that the Bureau did not have delegated authority to act on the new and novel questions presented by Spectrum Five's petitions. DIRECTV alleges that the Bureau's action is inconsistent with specific Commission statements in the *DBS Notice* concerning processing of "reduced spacing" proposals, i.e., those involving DBS space stations operating at orbital locations that are less than nine degrees away from other DBS space stations.¹⁴ Spectrum Five's satellites would operate approximately four and one half degrees away from adjacent DBS satellites. EchoStar's application for review of the Spectrum Five grant challenges the Bureau's action on the same grounds as DIRECTV, and argues that by acting on Spectrum Five's requests, the Bureau impermissibly chose to proceed through adjudication, and thereby improperly pre-judged issues raised in the *DBS Notice*.¹⁵ EchoStar further argues that the Bureau's action violated principles derived from the Supreme Court's *Ashbacker* decision,¹⁶ by not providing an adequate opportunity for the filing of proposals mutually exclusive with Spectrum Five's petitions. EchoStar also argues that the Bureau failed to evaluate Spectrum Five's basic qualifications, and failed to adequately evaluate the potential for interference that would result from Spectrum Five's operations. Spectrum Five filed a consolidated opposition to DIRECTV and EchoStar, and both then filed a reply to the opposition.¹⁷

7. In its application for review of the EchoStar grant, Telesat argues that the Bureau did not evaluate or account for the potential interference that EchoStar's satellite would cause to Telesat's system, which operates using satellites located four and one half degrees on either side of EchoStar's proposed orbital location.¹⁸ Telesat also argued that the Bureau should not have granted EchoStar's application until coordination with existing DBS operators had been completed.¹⁹ Telesat also claims that the Bureau decision wrongly afforded less interference protection to Canadian-licensed DBS satellites authorized to serve the United States than is afforded to U.S.-licensed DBS satellites.²⁰ EchoStar filed an

¹² *Spectrum Five Order*, 21 FCC Rcd at 14042-43 para. 43; *EchoStar-86.5W Order*, 21 FCC Rcd at 14059-60, para. 28. The frequencies and orbital locations involved are a part of a detailed plan for frequency use set forth in ITU regulations. For a complete description of this plan, see *DBS Notice*, 21 FCC Rcd at 9444-46, paras. 3-6.

¹³ *Spectrum Five Order*, 21 FCC Rcd at 14043, para. 44.; *EchoStar-86.5W Order*, 21 FCC Rcd at 14060, para. 29.

¹⁴ DIRECTV Application for Review at 3-5 (filed Dec. 29, 2006), citing *DBS Notice*, 21 FCC Rcd at 9461, paras. 40-41.

¹⁵ EchoStar Application for Review at 4 (filed Dec. 29, 2006).

¹⁶ EchoStar Application for Review at 9; see *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). The Court held in *Ashbacker* "that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Ashbacker*, 326 U.S. at 333.

¹⁷ Spectrum Five Consolidated Opposition to Applications for Review (filed Jan. 16, 2007); DIRECTV Reply in Support of Application for Review (filed Jan. 18, 2007); EchoStar Reply (filed Jan. 26, 2007).

¹⁸ Telesat Application for Review at 6.

¹⁹ Telesat Application for Review at 8.

²⁰ Telesat Application for Review at 11.

opposition to the Telesat application for review, asserting that Telesat's interference concerns "are fact specific" and can be resolved in the coordination process.²¹

III. DISCUSSION

8. We conclude that the Bureau properly acted within the scope of its delegated authority when it granted Spectrum Five's petitions for declaratory ruling, and EchoStar's application. The Bureau followed established procedures and its actions were consistent with Commission guidance, provided in the *DBS Notice*, for processing of applications. The Bureau conditioned the grants so that Spectrum Five and EchoStar may not operate in a manner that affects other DBS operators unless they first coordinate with affected operators. This condition is fully consistent with our obligations under ITU regulations, and is sufficient to provide all due interference protection to other DBS operations.

A. Appropriateness of Action on Delegated Authority

9. In the *DBS Notice*, we indicated that the pending reduced spacing DBS applications and petitions could be processed prior to adoption of final DBS rules, according to principles of general statutory authority and existing application filing requirements.²² Despite this, both EchoStar and DIRECTV point to the section of the *DBS Notice* regarding resolution of impasses in operator negotiations as support for their opposition to the Spectrum Five grant. This section described three scenarios by which an applicant could take actions that would result in favorable action on an application:

- i) the applicant has negotiated an operating arrangement with the other potentially-affected U.S. DBS service providers,
- ii) 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, or
- iii) 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.²³

10. We disagree with DIRECTV's contention that this language precluded the Bureau from following its normal practice of imposing conditions, as appropriate, in order to address interference concerns. Moreover, the conditions adopted by the Bureau were consistent with the intent of this language, because they provide that operations will not affect other systems except upon an agreed basis. To the extent that the Spectrum Five petitions raised interference concerns, the Bureau addressed those concerns with appropriate conditions on the grant.

11. We also do not agree with DIRECTV that the Spectrum Five grant is novel because it represents the first time the Commission has authorized U.S. market access from a foreign satellite that had not yet completed coordination with affected U.S. systems.²⁴ The Commission routinely grants

²¹ EchoStar Opposition at 4 (filed Jan. 16, 2007). Telesat filed a reply to EchoStar's Opposition on January 26, 2007.

²² *DBS Notice*, 21 FCC Rcd at 9453-54, para. 21.

²³ *DBS Notice*, 21 FCC Rcd at 9461, para. 40.

²⁴ DIRECTV Application for Review at 8.

applications subject to conditions concerning the subsequent completion of coordination,²⁵ including applications involving access to the U.S. market by foreign-licensed satellites.²⁶ Here, the Bureau appropriately conditioned Spectrum Five's access to the U.S. market such that it may operate only if it does not exceed the ITU trigger for coordination (*i.e.*, Spectrum Five may not "affect" U.S. DBS operators). Thus, Spectrum Five is under no obligation to coordinate with U.S. operators, provided the coordination trigger is not exceeded. However, if Spectrum Five were to exceed the ITU trigger, then, by the terms of the authorization, Spectrum Five would not be permitted to operate until it successfully coordinates with U.S. operators. To the extent that DIRECTV and Echostar believe that the ITU trigger for coordination does not provide adequate protection to incumbent operations, that issue is a subject under consideration in the DBS rulemaking proceeding, and the Spectrum Five and Echostar grants are subject to any further development of protection criteria in that proceeding²⁷

B. *Ashbacker* Principles

12. EchoStar's reliance on the Supreme Court decision in *Ashbacker*, in its application for review of the Spectrum Five grant, is misplaced. In *Ashbacker*, the Supreme Court held that Section 309 of the Communications Act required the Commission to consider in a comparative hearing two mutually exclusive applications, both of which had been accepted for filing, before granting one and denying the other.²⁸ That holding does not apply here. In *Reuters v. FCC*, the U.S. Court of Appeals for the D.C. Circuit held that *Ashbacker* "applies not to prospective applicants, but *only to parties whose applications have been declared mutually exclusive.*"²⁹ In this case, Spectrum Five's petitions sought access to the U.S. market from the 114.5° W.L. orbital location. No other applications or petitions for use of the 114.5° W.L. orbital location were pending at any time during the pendency of the Spectrum Five's petitions.³⁰ We agree with Spectrum Five that since no other proposals for use of the 114.5° W.L. orbital location were on file, mutual exclusivity was not established and therefore no *Ashbacker* rights were implicated.³¹ The facts surrounding the Spectrum Five grant are similar to *Bachow v. FCC*,³² in which the D.C. Circuit

²⁵ See, e.g., DIRECTV Enterprises, LLC, Applications for Authority to Launch and Operate the DBS and Ka-band Payloads on the DIRECTV 9S Satellite; Amendment to Change Orbital Location, *Order and Authorization*, 21 FCC Rcd 8028 (2006) (requiring DIRECTV to coordinate Ka-band operations with Federal fixed-satellite service systems and any future two-degree spacing compliant satellites). See also 47 C.F.R. § 25.111(a) (providing that the "Commission may request from any party at any time additional information concerning any application. . ."). Compare IBFS File Nos. SAT-LOA-20051221-00267, SAT-AMD-20060120-00007, and SAT-MOD-20060329-00031 (declining to authorize imminent operations above previously coordinated power levels in a case in which coordination for operation at higher power levels was not complete).

²⁶ See, e.g., Telesat Canada, Petition for Declaratory Ruling For Inclusion of ANIK F1 on the Permitted Space Station List, *Order*, 15 FCC Rcd 24828 (2000) (finding it not necessary to complete international coordination before an FSS satellite system can be authorized to provide service in the United States).

²⁷ See EchoStar Application for Review at 16.

²⁸ *Ashbacker v. FCC*, 326 U.S. 327, 330-31 (1945) (*Ashbacker*). The Commission had granted one application and relied on that grant as the basis for dismissal of the second.

²⁹ *Reuters Limited v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986) (emphasis in original).

³⁰ As noted by Spectrum Five, the only other DBS application for the 114.5° W.L. orbital location was filed by EchoStar in 2003, and withdrawn that same year (before Spectrum Five filed). See Spectrum Five Consolidated Opposition at 8.

³¹ Spectrum Five Consolidated Opposition at 8.

³² *Bachow Communications, Inc. v. Federal Communications Commission*, 237 F.3d 683 (D.C. Cir. 2001) (*Bachow v. FCC*).

held that the Commission properly granted applications that were filed consistent with Section 309's "ripeness period" (*i.e.*, the applications had been on file for the requisite period of time before the Commission could act) and were not mutually exclusive with any other pending applications, even though it would still have been possible to file mutually exclusive applications had the Commission not imposed a filing freeze (once the pending applications had ripened).³³

13. EchoStar's reliance on the unpublished *Hilding v. FCC* opinion³⁴ to establish that the *Spectrum Five Order* violated *Ashbacker* is also misplaced.³⁵ In that 1987 decision, the Ninth Circuit U.S. Court of Appeals refused to set aside a Commission decision to establish a general filing window for new FM channels. Hilding wanted the Commission to adopt his proposal to preclude all parties from filing, except the party who initially requested that the FCC amend its rules to allot the FM channel to a particular community. The Court stated that "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."³⁶ Here, there was an approximately nine-month period during which competing applications could have been filed for the 114.5° W.L. orbital location. Thus, in contrast to what Hilding had proposed, there was no limit on the number of applicants. Further, we do not consider it a reasonable reading of *Ashbacker* or the *Hilding* case to require the Commission to delay action on an application until a competing application emerges. Indeed, the *Bachow* case squarely holds that such delay is not required under the circumstances present here.

14. The DBS freeze does not alter our analysis. The *DBS Freeze Notice* did not announce a halt in the processing of previously filed applications. EchoStar effectively seeks this result by arguing that "until the freeze is lifted at the completion of the *DBS NPRM*," there is "no reasonable means by which to determine if mutually exclusive applications would exist if th[e] freeze were lifted."³⁷ *Ashbacker*, however, does not require the Commission to create opportunities for filing mutually exclusive applications. As indicated above, the D.C. Circuit made this clear in *Bachow*,³⁸ where the court upheld the Commission's use of a freeze imposed without notice and comment -- even though the freeze foreclosed the filing of new applications that could potentially be mutually exclusive with pending applications -- which resulted in the non-competitive processing of previously filed applications that were ripe for agency action. Here, the Spectrum Five petitions were ripe for agency action on May 16, 2005, following the expiration of a comment cycle established by the Bureau's April 15, 2005, Public Notice,³⁹ consistent with Section 25.154 of the Commission's rules.⁴⁰ The Spectrum Five petitions are therefore analogous to the applications that the Commission granted in *Bachow v. FCC*. Like the Spectrum Five petitions, the applications that the Commission granted in *Bachow v. FCC* were considered ripe for agency action, and no other parties had filed mutually exclusive applications in conflict with them prior to a freeze that cut off such opportunity.

³³ 237 F.3d at 689.

³⁴ Eric R. Hilding v. Federal Communications Commission, No. 86-7226, slip op. (9th Cir. Dec. 7, 1987).

³⁵ EchoStar Application for Review at 8, n. 26 and EchoStar Reply at 3.

³⁶ Hilding v. FCC, No. 86-7226, slip op. at 5.

³⁷ Echostar Application for Review at 9.

³⁸ See *Bachow v. FCC*, 237 F.3d at 690.

³⁹ Policy Branch Information: Satellite Space Applications Accepted for Filing, *Public Notice*, Report No. SAT-00284 (rel. April 15, 2005).

⁴⁰ 47 C.F.R. § 25.154. This rule section ensures processing consistent with the requirements of Section 309(b) of the Communications Act, 47 U.S.C. § 309(b).

C. Relationship Between Rule Making and Adjudicatory Proceedings

15. We conclude that the Bureau properly chose to take adjudicatory action concerning Spectrum Five's petitions for declaratory ruling. The Commission has a significant degree of discretion in deciding whether to take action by rulemaking or adjudication.⁴¹ As the D.C. Circuit Court held in *SBC Communications, Inc. v. FCC*, "[i]nherent 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."⁴² Here, the Bureau chose to address issues of particular applicability to an individual applicant.

16. We disagree with EchoStar's arguments that the Bureau's action impermissibly prejudiced the separate DBS rulemaking. We also disagree with EchoStar's characterization of the Spectrum Five grant as the adoption of first-come, first-served licensing for DBS.⁴³ No other applications or petitions to provide DBS in the U.S. from the 114.5° W.L. orbital location were filed during the approximately nine-months between the time Spectrum Five's petitions for declaratory ruling were filed and the date on which the DBS application freeze went into effect.⁴⁴ Had there been any such filings (thereby resulting in mutual exclusivity), only then could the Bureau's grant of the Spectrum Five petitions be fairly characterized as *de facto* implementation of first-come, first-served processing. EchoStar also alleges that the grant of Spectrum Five's petitions irrevocably commits the Commission to adopting first-come, first-served licensing, since any other licensing scheme would require that the Spectrum Five grant would have to be canceled.⁴⁵ This argument is also unpersuasive. To the extent any further consideration of the ruling is warranted in the public interest, including conditions on or modification of prior decisions, those options remain available in a report and order in the DBS rulemaking proceeding. As the Commission pointed out in the *DBS Notice*, requests such as Spectrum Five's can be processed "on an *ad hoc* basis, pursuant to our existing statutory authority."⁴⁶ The Spectrum Five petitions for declaratory ruling had been on file for more than 20 months at the time of their grant, and any further delay in disposing of them was unwarranted.

17. EchoStar's reliance on the *Ford Motor Co. v. Federal Trade Commission* case is also misplaced.⁴⁷ That case involved an FTC ruling concerning the proper methods for calculating the value of, and assessing charges related to, repossessed automobiles. Among the issues was whether the FTC properly interpreted state laws on the matter. The Ninth Circuit Court of Appeals found that an FTC ruling on the matter, in an adjudication, would have general application, well beyond the scope of the

⁴¹ See *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he 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.")

⁴² *SBC Communications, Inc. v. FCC*, 138 F.3d 410, 421 (D.C. Cir. 1998).

⁴³ EchoStar Application for Review at 7.

⁴⁴ Spectrum Five's petitions were on Public Notice on April 15, 2005, roughly eight months prior to the *DBS Freeze Notice*. See Satellite Policy Branch Information: Applications Accepted for Filing, *Public Notice*, Report No. SAT-00284 (rel. April 15, 1005); Direct Broadcast Satellite Service Auction Nullified: Commission Sets Forth Refund Procedures for Auction No. 52 Winning Bidders and Adopts a Freeze on All New DBS Service Applications, *Public Notice*, 20 FCC Rcd 20618 (rel. Dec. 21, 2005).

⁴⁵ EchoStar Application for Review at 7.

⁴⁶ *DBS Notice*, 21 FCC Rcd at 9453-54, para. 21. Furthermore, "[g]iven our ... application filing requirements and rules regarding non-interference showings, we may process the existing DBS applications provided that they are complete and consistent with the public interest, convenience, and necessity." *Id.*

⁴⁷ EchoStar Application for Review at 8.

particular parties to the litigation. The Court said that if an “adjudication changes existing law, and has widespread application,” then “the matter should be addressed by rulemaking.”⁴⁸ By contrast, the grant of Spectrum Five’s petition for declaratory ruling addressed the particular facts and circumstances raised by Spectrum Five’s proposal, and does not change existing law.⁴⁹

D. Evaluation of Spectrum Five’s Qualifications

18. We disagree with EchoStar’s contention that the Bureau failed to adequately evaluate Spectrum Five’s basic qualifications. In its application, Spectrum Five provided all information concerning qualifications routinely required of applicants. The Bureau reviewed this evidence and found Spectrum Five qualified. We affirm this determination. EchoStar has provided no specific allegations of fact that would call into question Spectrum Five’s qualifications.⁵⁰

E. Evaluation of Interference Environment

19. We disagree with EchoStar’s contention that the Bureau neglected to evaluate the potential interference posed by Spectrum Five’s proposed operations.⁵¹ The Bureau’s recognition of the potential interference prompted it to condition Spectrum Five’s access such that absent an agreement, Spectrum Five’s operations may not exceed the ITU trigger for coordination (*i.e.*, Spectrum Five may not “affect” U.S. DBS operators).⁵² Furthermore, the Bureau conditioned Spectrum Five’s authorization to require that within 30 days of completion of critical design review, Spectrum Five must provide all the technical characteristics of its satellite modified as a result of the coordination process, regardless of whether coordination is successful. Therefore, in the event that Spectrum Five is unable to negotiate operational parameters in excess of the ITU coordination trigger and this leads Spectrum Five to change its proposed space station operations, Spectrum Five must file a modification application that specifies the modified operations and a technical analysis showing how the modified operations will not exceed the ITU trigger for coordination. Thus, the Bureau ensured that any issues that may arise as a result of the coordination process will be adequately reviewed prior to the commencement of operations.

20. Similarly, we disagree with Telesat’s contention that the Bureau’s action on EchoStar’s application was improperly “based upon the hypothetical operation of EchoStar’s satellite at unstated power reductions and without any submission by EchoStar... as to how its satellite would—or could—operate under such conditions.”⁵³ The Bureau reviewed EchoStar’s application and found that it was complete in that all information requirements were met. To the extent that the application raised interference concerns, the Bureau addressed them with appropriate conditions on the grant. We find that Telesat’s argument that EchoStar’s application was not substantially complete is unsupported. Furthermore, and on our own motion, we add a condition to EchoStar’s authorization requiring that within 30 days of completion of critical design review, EchoStar must provide all the technical characteristics of its satellite modified as a result of the coordination process, regardless of whether coordination is successful. Therefore, in the event that EchoStar is unable to negotiate operational

⁴⁸ *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1981).

⁴⁹ The Bureau did not have DBS-specific application processing rules at its disposal post-*Northpoint* (and thus no DBS-specific rules to change), but it did have general statutory authority to act.

⁵⁰ EchoStar Application for Review at 10-13.

⁵¹ See EchoStar Application for Review at 15-16.

⁵² See also *supra* discussion in para. 9.

⁵³ Telesat Application for Review at 6.

parameters in excess of the ITU coordination trigger and this leads EchoStar to change its proposed space station operations, EchoStar must file a modification application that specifies the modified operations and a technical analysis showing how the modified operations will not exceed the ITU trigger for coordination. This condition is consistent with the coordination condition in Spectrum Five's authorization.⁵⁴

21. We also reject Telesat's contention that completion of international coordination was necessary prior to grant of EchoStar's application. Coordination with other administrations is not a prerequisite to grant of U.S. DBS space station licenses to U.S. operators. Were the opposite true, any administration raising an interference objection to U.S. operator proposals would be able to block Commission licensing of DBS systems. As Telesat itself points out, our general policy in such circumstances has been to grant DBS authorizations even though coordination with other administrations remains pending. No agreement is necessary, however, if the new operation does not affect other operators or ITU filings with date priority. We are satisfied that the Bureau's condition that, in the absence of agreement, EchoStar's operations may not exceed the ITU trigger for coordination, appropriately addresses Telesat's concerns.⁵⁵

F. Equivalent Treatment of Foreign-Licensed Satellites

22. Finally, we find no basis for Telesat's claim that the Bureau provided Canadian DBS satellites less interference protection than U.S.-licensed DBS satellites. In fact, the Bureau appropriately conditioned EchoStar's authorization in precisely the same way it conditioned the grant to Spectrum Five. The relevant condition does not distinguish between affected operators based upon nationality.

IV. CONCLUSION

23. After reviewing the record, we affirm the Bureau's decisions. We find no reason to reverse the Bureau's grant of Spectrum Five's petitions for declaratory ruling the 114.5° W.L. orbital location, or the Bureau's decision to grant, in part, EchoStar's application to launch and operate a DBS satellite at the 86.5° W.L. orbital location. Consequently, we deny the applications for review of the Spectrum Five grant, filed by DIRECTV and EchoStar, and the application for review of the EchoStar grant, filed by Telesat.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that the applications for review filed on December 29, 2006 by DIRECTV Enterprises, LLC, EchoStar Satellite L.L.C., and Telesat Canada ARE DENIED.

⁵⁴ See *Spectrum Five Order*, 21 FCC Rcd at 14042-43, para. 43(c).

⁵⁵ We emphasize that the grant was made subject to the outcome of the rule making proceeding initiated by the *DBS Notice*. To the extent Telesat maintains that ITU coordination triggers do not provide adequate protection, this contention can be addressed in that proceeding.

25. EchoStar's authorization to construct the EchoStar-86.5W satellite, DA 06-2440, IS MODIFIED at paragraph 28 to include this condition:

- h. Within 30 days of completion of critical design review, EchoStar must supply updated service area information for each of its antenna beams. EchoStar must also provide all the technical characteristics of the satellites modified as a result of the coordination process.

26. This *Memorandum Opinion and Order* is issued pursuant to Sections 4(i) and 5(c)(5) and (6) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c)(5) and (6), and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**DISSENTING JOINT STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN**

Re: EchoStar Satellite Operating Corporation, Application to Construct, Launch, and Operate a Direct Broadcast Satellite at the 86.5° W.L. Orbital Location; Spectrum Five, L.L.C., Petition for Declaratory Ruling to Serve the U.S. Market Using Broadcast Satellite Service Spectrum from the 114.5° W.L. Orbital Location

We respectfully dissent to today's decision, which affirms the Bureau's grant of authorization for two so-called 'tweener satellites. As we have stated before, without prejudging the merits of these applications, we do not believe the FCC has any business approving 'tweener applications at the same time that the agency is conducting a general rulemaking into the technical feasibility of operating such satellites.

**DISSENTING JOINT STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN**

Re: EchoStar Satellite Operating Corporation, Application to Construct, Launch, and Operate a Direct Broadcast Satellite at the 86.5° W.L. Orbital Location; Spectrum Five, L.L.C., Petition for Declaratory Ruling to Serve the U.S. Market Using Broadcast Satellite Service Spectrum from the 114.5° W.L. Orbital Location

We respectfully dissent to today's decision, which affirms the Bureau's grant of authorization for two so-called 'tweener satellites. As we have stated before, without prejudging the merits of these applications, we do not believe the FCC has any business approving 'tweener applications at the same time that the agency is conducting a general rulemaking into the technical feasibility of operating such satellites.