

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Spectrum Five LLC)	File No. SAT-LOI-20081119-00217
)	
Petition for Declaratory Ruling to)	
Serve the U.S. Market from the 103.15°)	Call Sign S2778
W.L. Orbital Location in the 17/24 GHz)	
Broadcasting Satellite Service Band)	
_____)	

OPPOSITION TO PETITION TO DENY

Spectrum Five LLC (“Spectrum Five”) hereby files this opposition to the Petition to Deny (“Petition”) filed by DIRECTV Enterprises, L.L.C. (“DIRECTV”). DIRECTV’s Petition is meritless and should be denied.

In the Petition, DIRECTV asks the International Bureau (“Bureau”) to deny the above-captioned application on the ground that the application conflicts with “a license already issued to DIRECTV.”¹ DIRECTV argues that Commission rules require the dismissal and return of applications that remain “in the queue” after a conflicting application has been granted.² Thus, despite DIRECTV’s acknowledgment that Spectrum Five has filed a pending request for reconsideration of the order granting DIRECTV’s license application,³ DIRECTV asserts that Spectrum Five’s conflicting application should be dismissed.

DIRECTV’s interpretation of the applicable Commission rule is inaccurate, and its policy arguments are unfounded. Contrary to DIRECTV’s assertions, sound considerations of public

¹ Petition to Deny (“Petition”) at p. 1.

² *Id.* at p. 3.

³ *See id.* at p. 3 n.8.

policy *support* the retention of Spectrum Five's application pending the resolution of Spectrum Five's Petition for Reconsideration. Accordingly, DIRECTV's petition should be denied.

BACKGROUND

By Order and Authorization released on July 28, 2009, the Bureau granted DIRECTV's application for authority to construct, launch, and operate a 17/24 GHz Broadcasting Satellite Service ("BSS") space station at the 102.825° W.L. orbital location.⁴ On August 27, 2009, Spectrum Five filed a timely Petition for Reconsideration of the July 28, 2009 Order and Authorization, seeking the dismissal or denial of DIRECTV's application⁵

In the Petition for Reconsideration, Spectrum Five argued, among other things, that DIRECTV's proposed BSS Satellite exceeds the Commission's power flux density ("PFD") limits, and that DIRECTV's assertion of compliance with the PFD limits was based on a profoundly defective methodology. Specifically, DIRECTV inappropriately substituted link budget values to determine its PFD levels, resulting in a gross understatement of the PFD levels of the proposed satellite. Spectrum Five also showed that, in including an adjustment for clouds in its PFD methodology, DIRECTV failed to demonstrate compliance for all conditions, including clear-sky conditions, as required by Commission regulations.⁶ As a result, DIRECTV's application was defective, void *ab initio*, and should have been dismissed. The

⁴ Order and Authorization *In re DIRECTV Enters., LLC, Application for Authorization to Launch and Operate DIRECTV RB-2, a Satellite in the 17/24 GHz Broadcasting Satellite Service at the 102.85° W.L. Orbital location*, File Nos. SAT-LOA-20060908-00100, SAT-AMD-20080114-00014, SAT-AMD-20080321-00077, Call Sign S2712, 2009 WL 2244508 (rel. July 28, 2009).

⁵ Petition for Reconsideration of Spectrum Five LLC, *In re DIRECTV Enters., LLC, Application for Authorization to Launch and Operate DIRECTV RB-2, a Satellite in the 17/24 GHz Broadcasting Satellite Service at the 102.85° W.L. Orbital location*, File Nos. SAT-LOA-20060908-00100, SAT-AMD-20080114-00014, SAT-AMD-20080321-00077, Call Sign S2712 (Aug. 27, 2009).

⁶ See 47 C.F.R. § 25.208(w).

Bureau, however, not only failed to dismiss the application, but allowed DIRECTV to implicitly amend the application by means of an *ex parte* filing nearly eleven months after the date for amendments to such applications were due to be filed. As a result of these and other errors (as set forth in Spectrum Five's Petition for Reconsideration), the Bureau authorized DIRECTV to launch and operate a grossly over-powered satellite that, if launched, would create harmful interference with other satellites and afford DIRECTV grossly unfair advantages in the marketplace. As of this date, Spectrum Five's Petition for Reconsideration is pending before the Bureau.

On October 23, 2009, the Bureau accepted the above-captioned Spectrum Five application for filing.⁷ On October 28, 2009, DIRECTV filed the Petition at issue here.

ARGUMENT

As noted above, DIRECTV predicates its argument on a Commission rule mandating the denial of space station license applications that conflict with previously-granted applications. The rule is set forth in paragraph 113 of the *Amendment of the Commission's Space Station Licensing Rules and Policies* (hereinafter "*First Space Station Reform Order*").⁸ According to DIRECTV, under the Commission's rule "[o]nce a license is granted, conflicting applications remaining in the queue are to be denied. DIRECTV has been granted the license to use the 17/24 GHz BSS band from the nominal 103° W.L. orbital location, and Spectrum Five's application to use the same band from the same nominal orbital location to serve the U.S. clearly conflicts with

⁷ See FCC, Public Notice, Policy Branch Information: Satellite Space Applications Accepted for Filing, Report No. SAT-00641, at p. 2 (Oct. 23, 2009).

⁸ *In re Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd. 10760, para. 113 (rel. May 19, 2003) ("*First Space Station Reform Order*").

that license.”⁹ Therefore, according to DIRECTV, Spectrum Five’s application must be denied.¹⁰

In support of this argument, DIRECTV quotes from the *First Space Station Reform Order*, which explained that the denial and return of applications that conflict with a previously-granted application will “more likely result in faster service, and it will not disadvantage any party that may wish to apply for that orbit location if it becomes available.”¹¹ Acknowledging that Spectrum Five’s Petition for Reconsideration of the July 28, 2009 Order and Authorization (as described in the Background section, above) remains pending, DIRECTV argues that “there is no indication in the *First Space Station Reform Order* that dismissal of later-filed applications should be delayed pending resolution of such petitions.”¹² DIRECTV speculates that “if the simple filing of such a petition were sufficient to override the Commission’s directive, such petitions would become a matter of course—adding to the burden on Commission’s resources and undermining the processing efficiency that the Commission’s dismissal policy was designed to achieve.”¹³

DIRECTV’s speculation is unfounded, and the Bureau should reject this transparent and self-serving attempt to eliminate the queue *before* the Bureau has considered Spectrum Five’s compelling arguments that DIRECTV’s nominal 102.85° W.L. application was fatally defective and should have been dismissed from the outset or denied. Although the dismissal of Spectrum Five’s application might be convenient for *DIRECTV* in the event that Spectrum Five’s Petition

⁹ Petition at p. 3.

¹⁰ *Id.*

¹¹ *First Space Station Reform Order*, para. 113, *quoted in* Petition at p. 3.

¹² Petition at p. 3 n.8.

¹³ *Id.*

for Reconsideration is ultimately granted, the rule invoked by DIRECTV does not support the denial of Spectrum Five's application, and, if Spectrum Five's petition for reconsideration is granted, requiring Spectrum Five to re-file its application would further delay the use of the nominal 103° W.L. orbital location to the detriment of consumers.

A. The Rule Cited By DIRECTV Does Not Apply When Petitions For Reconsideration Are Pending.

DIRECTV misconstrues the scope of the rule set forth in paragraph 113 of the *First Space Station Reform Order*. In arguing that “there is no indication in the [*First Space Station Reform*] *Order* that dismissal of later-filed applications should be delayed pending resolution of [reconsideration] petitions,”¹⁴ DIRECTV focuses solely on paragraph 113, conveniently ignoring the immediately preceding two paragraphs that describe the context of the rule set forth in paragraph 113.

Those preceding two paragraphs show that the question being considered by the Commission was whether later-in-queue applications should be retained until the licensee places its satellite in *operation* (which, as the Bureau knows, may occur years after the license has been granted), and whether such applications should be considered if the licensee “loses its license.”¹⁵ In fact, paragraph 111 of the *First Space Station Reform Order*, which bears the heading “*Background*,” states

After we issue a license, we proposed keeping subsequently filed applications on file. If at any time the licensee loses its license for failure to meet the first milestone or for any other reason, the next application in the queue would be considered. We also proposed returning the later-filed applications to those applicants if and when the licensee places its satellite or satellites in operation, and

¹⁴ *Id.* at p. 3 & n.8.

¹⁵ *First Space Station Reform Order*, para. 111.

to return the associated application fee at that time upon the applicant's request.¹⁶

The Commission went on to note that “[a]ll of the parties commenting on this issue oppose keeping subsequent applications on file to be considered *in the event that a licensee loses its license*. Teledesic claims that keeping subsequent applications on file would encourage speculative or ‘place holder’ applications and discourage applications by parties with innovative methods for using or sharing spectrum.”¹⁷

The question whether to keep subsequently-filed applications in the queue “in the event that a licensee loses its license”¹⁸ clearly is addressed to the retention of applications during the often years-long periods when milestones must be met and the grantee of a license must launch and operate its satellite or face the loss of its license. By the same token, concerns about “speculative or ‘place-holder applications” and discouraging innovation clearly are addressed to the effects of maintaining queues for protracted periods of time, not the minimal periods that it takes to resolve petitions for reconsideration. Thus, it is clear from the paragraphs leading up to paragraph 113 of the *First Space Station Reform Order* that the issue with which the Commission was grappling was whether applications—and the queue in which they are placed—should be preserved for the typically years-long period between the grant of a license and the launch and operation of a satellite. The issue was not whether applications should be retained for the weeks or few months required to resolve petitions for reconsideration of licensing decisions.¹⁹

¹⁶ *Id.*

¹⁷ *Id.*, para. 112 (emphasis added).

¹⁸ *Id.*

¹⁹ Because DIRECTV is seeking to dismiss Spectrum Five's application while Spectrum Five's Petition for Reconsideration is pending, Spectrum Five's argument here focuses on the retention

In deciding whether to keep applications on file until launch and operation, it makes sense to be concerned about “speculative or ‘place holder applications” and to take steps to avoid “discourag[ing] applications by parties with innovative methods for using or sharing spectrum.”²⁰ It may also be appropriate to conclude that, years after a license has been granted, “we could reassign the orbit location just as quickly, or perhaps more quickly, if we accept new applications at the time the location becomes available.”²¹ These conclusions and concerns, however, are not relevant to the question at issue here: which is whether to retain applications for the traditionally short period necessary to resolve petitions for reconsideration.

The period during which applications would remain on file while petitions for reconsideration are pending will not invite attempts to “game” the system by filing “speculative or ‘place holder’ applications” and will not “discourage applications by parties with innovative methods for using or sharing spectrum.”²² Concerns about the filing of “speculative or ‘place holder’ applications” and about discouraging innovative operators are realistic when considering whether to maintain queues for the lengthy periods of time that often pass between the grant of a license and the ultimate launch and operation of a space station. In the relatively brief periods required for the disposition of administrative appeals of license grant decisions, however, there is no cause for concern that preserving the queue will stifle innovation (because innovations are highly unlikely to be developed over such short periods). Similarly, there is no cause for concern that applicants will file speculative applications to hold their places for the weeks or few months

of later-in-the-queue applications while petitions for reconsideration are pending. Spectrum Five, however, believes that the same considerations also support the retention of later-in-the-queue applications while Applications for Review to the Commission are pending.

²⁰ *Id.*

²¹ *Id.*, para. 113.

²² *Id.*

that it takes to resolve requests for reconsideration. In the latter context, once the period for filing a petition for reconsideration has expired, or once administrative appeals have been exhausted, the space station applications in the queue would be dismissed. Thus, the concerns that animated the decision in paragraph 113 of the *First Space Station Reform Order* to deny and return conflicting applications after a license has been granted are not relevant in this context.

Indeed, even in those situations in which an operator is prepared to put its satellite into operation very soon after the grant of a license, there is no need to deny and return applications while petitions for reconsideration are pending. As noted above, paragraph 113 was drafted to address the problems that could be anticipated if queues are maintained for years between the grant of a license and the launch and operation of the satellite. It was not drafted to address the disposition of applications while petitions for reconsideration are pending. That an operator may be able to launch and operate its satellite within weeks or months of the grant of a license is not a reason for *expanding* the scope of paragraph 113 to address an issue that paragraph 113 plainly was not intended to address—namely, what to do with later-filed applications while petitions for *reconsideration* are pending. Regardless of whether an applicant is able to launch immediately or, as in the typical case, will require years to prepare for and meet milestones prior to launch, there is no basis in paragraph 113 of the *First Space Station Reform Order* for dismissing subsequently-filed applications while reconsideration requests are pending.

This point is particularly relevant here, because Spectrum Five anticipates that DIRECTV will argue that Spectrum Five's application should be denied immediately because, unlike in the typical case, DIRECTV is prepared to launch its *RB-2A* space station within months of a grant of its application for authority to do so. Such an argument should be rejected because, as noted above, the fact that an operator is prepared to launch quickly is no reason to *expand* the scope of

paragraph 113 to require the dismissal of later-filed applications while *reconsideration* requests are pending. The argument also would be misguided because DIRECTV has not predicated its Petition to Deny on the grant of authority to launch and operate its RB-2A satellite. Such an authorization has not even been issued yet. Rather, DIRECTV has predicated the petition on the July 28, 2009 Order, which addressed DIRECTV's RB-2 satellite.

As noted above, in a footnote, DIRECTV also argues that permitting applications to remain on file would encourage the filing of groundless applications for reconsideration.²³ But if an applicant has no valid grounds to petition for reconsideration, the fact that a reconsideration request would delay the (inevitable) dismissal and return of its application for some weeks or a few months would hardly provide an incentive for filing a groundless reconsideration request.

There *is*, however, a compelling reason for concluding that the dismissal of later-filed applications while reconsideration petitions are pending would have unfortunate consequences. If later-filed space station applications were dismissed and returned while petitions for reconsideration are pending, the Bureau would have to restart the application process weeks or months after returning conflicting applications if the Bureau or Commission later granted the reconsideration petitions. Such a process would unnecessarily delay licensing procedures, impeding the public's access to valuable new services.

Thus, the policy arguments invoked by DIRECTV do not apply in the context of petitions for reconsideration. Rather, the public interest in the expeditious provision of new services supports the practice of keeping later-filed space station applications in the queue while petitions for reconsideration are pending.²⁴

²³ Petition at p. 3 n.8.

²⁴ If, however, the Bureau grants DIRECTV's petition, and accordingly denies and returns Spectrum Five's application, then fairness requires the denial and/or return of all other

CONCLUSION

For the foregoing reasons, DIRECTV's Petition to Dismiss should be denied.

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Respectfully submitted,

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November 9, 2009

applications that may have been submitted for authority to serve the United States market from a 17/24 GHz BSS space station at the nominal 103° W.L. orbital location, including any such applications that have not yet been accepted for filing. To allow any such applications to remain eligible for later acceptance after the denial and return of Spectrum Five's application would unfairly disadvantage Spectrum Five (as against those other applicants) merely because the Bureau chose to accept Spectrum Five's application for filing.

CERTIFICATE OF SERVICE

I, Howard W. Waltzman, hereby certify that on this 9th day of November, 2009, I caused a true copy of the foregoing to be hand delivered, upon the following:

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