

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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)	
In the Matter of:)	
)	
DISH OPERATING L.L.C.)	File No.: SAT-MOD-20100329-00058
)	
Application for Minor Modification of)	Call Sign: S2740
Authority to Allow Operation of EchoStar 7)	
at 118.8° W.L.)	
)	
)	
)	

PETITION TO DISMISS OR DENY

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SUMMARY

DISH Operating L.L.C. (“DISH”) has filed an application to provide Direct Broadcast Satellite (“DBS”) service from EchoStar 7 at the 118.8° W.L. orbital location. The application leaves the reader in the dark regarding DISH’s plans for EchoStar 7 going forward. DISH asserts that the proposed move will “accommodate” and make “room” for DISH’s EchoStar 14 satellite, which has been licensed to operate at the 118.9° W.L. orbital location where EchoStar 7 is presently located, though DISH originally asserted that EchoStar 14 would “replace” EchoStar 7.¹ DISH also vaguely claims that EchoStar 7 will “supplement[]” the service to be provided by EchoStar 14, but supplies no elaboration regarding the manner in which EchoStar 7 will be operated in the future. The application is defective, and should therefore be dismissed, or, in the alternative, denied, because it does not comply with the Commission’s regulations regarding the information that must be provided in an application for a modification to a space station authorization.

In particular, the application does not contain the orbital debris mitigation assessment required by 47 C.F.R. § 25.114(d)(14)(iii), which mandates that all applications include a statement of the “measures that will be taken to prevent collisions” with “any known satellites located at, *or reasonably expected to be located at*, the requested orbital location.” (emphasis added). DISH’s application conspicuously fails even to mention the pending application of

¹ *EchoStar Satellite Operating L.L.C. Application for Minor Modification of DBS Authorization and Authority to Launch the EchoStar 14 Satellite and to Operate it at 118.9° W.L.*, File Nos. SAT-LOA-20090518-00053, SAT-AMD-20090604-00064, Call Sign S2790 (filed May 18, 2009) (“*EchoStar 14 Application*”), at 1.

Spectrum Five LLC (“Spectrum Five”) to operate a 17/24 GHz Broadcasting Satellite Service (“BSS”) satellite from the very same 118.8° W.L. orbital location.²

The application is also fatally defective for other, independent reasons. First, even with no other changes to the operation of EchoStar 7, the relocation of the satellite to the 118.8° W.L. orbital location would result in an increase in interference to Spectrum Five’s authorized DBS network at the 114.5° W.L. orbital location. DISH’s refusal to provide any analysis of this interference or to demonstrate how it can be accommodated renders its application defective.³ Moreover, as a condition of its authorization, Spectrum Five was obligated to coordinate its DBS satellite network at 114.5° W.L. with EchoStar 7 at 119° W.L.⁴ Now that EchoStar 7 would be moved closer to Spectrum Five’s satellite network at 114.5° W.L., the Commission must, at the very least, ensure that DISH is entitled to no greater interference protection at 118.8° W.L. than it would have been afforded at 119° W.L., and that EchoStar 7 may not cause any more interference to Spectrum Five than it would otherwise cause under normal operation at 119°

² *Petition for Declaratory Ruling to Serve the U.S. Market from the 118.8° W.L. Orbital Location in the 17/24 Broadcasting Satellite Service Band*, File No. SAT-LOI-20080910-00178 (filed Nov. 13, 2008) (“*Spectrum Five 118.8° W.L. Application*”). See also Public Notice, DA 08-2699, Report No. SAT-00569, available at 2009 WL 1576567 (rel. June 5, 2009).

³ See 47 C.F.R. § 25.114(d)(13) (requiring applicants to provide an analysis of the interference that the proposed system would generate with respect to limits set forth in Annex 1 to Appendices 30 and 30A of the International Telecommunication Union Radio Regulations).

⁴ Order and Authorization, *In re Spectrum Five, LLC Petition for Declaratory Ruling to Serve the U.S. Market Using Broadcast Satellite Service (BSS) Spectrum from the 114.5° Orbital Location*, File Nos. SAT-LOI-20050312-00062, SAT-LOI-20050312-00063, Call Signs S2667, S2668, DA 06-2439, 21 FCC Rcd. 14023, ¶ 30 (rel. Nov. 29, 2006) (“*Spectrum Five ‘Tweener’ Order*”), upheld on application for review in Memorandum Opinion and Order, *In re EchoStar Satellite Operating Corporation Application to Construct, Launch, and Operate a Direct Broadcast Satellite at the 86.5° W.L. Orbital Location*, File No. SAT-LOA-20030609-00113, Call Sign S2454, *Spectrum Five, LLC, Petition for Declaratory Ruling to Serve the U.S. Market Using Broadcast Satellite Service Spectrum from the 114.5° Orbital Location*, File Nos. SAT-LOI-20050312-00062, SAT-LOI-20050312-00063, Call Signs S2667, S2668, FCC 08-64, 23 FCC Rcd. 3252 (rel. Feb. 25, 2008).

W.L. Yet the application does not contain the technical information required in order to assess these issues.

Contrary to DISH's blithe and untenable assertion—without a trace of supporting evidence—that its purportedly “slight” change in orbital location would not affect EchoStar 7's operational characteristics, there are myriad implications of DISH's proposed change that absolutely have to be addressed by DISH before its application can be considered by the Commission. DISH's failure to provide the requisite showings necessitates that its application be dismissed or denied.

INTRODUCTION AND BACKGROUND

On behalf of Spectrum Five, the Netherlands filed documentation for two DBS satellites at the 114.5° W.L. orbital location with the International Telecommunication Union (“ITU”) on March 29, 2005. On November 29, 2006, the International Bureau (“the Bureau”) granted Spectrum Five authorization to enter the U.S. market for DBS services using those two satellites at 114.5° W.L.⁵ On November 13, 2008, Spectrum Five filed a petition for declaratory ruling to serve the market in the United States through a 17/24 GHz BSS Netherlands-authorized satellite from the 118.8° W.L. orbital location. This application was accepted for filing on June 5, 2009 and remains pending as of this date.⁶

Meanwhile, on January 15, 2002, DISH received authorization to operate EchoStar 7 at the 119° W.L. orbital location.⁷ On May 18, 2009, DISH requested authority to launch and

⁵ Order, *In re Spectrum Five, LLC Petition for Clarification of Condition in EchoStar 11 License*, DA 08-1955, 23 FCC Rcd. 12786, 12786 ¶ 2 (rel. Aug. 26, 2008) (“*EchoStar 11 Order*”); see also *Spectrum Five ‘Tweener’ Order*, 21 FCC Rcd. 14023, ¶ 43.

⁶ See *supra* note 4 (citing *Spectrum Five 118.8° W.L. Application*).

⁷ *In re EchoStar Satellite Corporation Application for Minor Modification of Direct Broadcast Satellite Authorization, Launch and Operating Authority for EchoStar 7*, File Nos.

(continued)

operate a new DBS satellite, EchoStar 14, at the 118.9° W.L. orbital location.⁸ DISH represented that EchoStar 14 would “replace” EchoStar 7, and that EchoStar 7 would initially be deployed as an “in-orbit spare” for EchoStar 14.⁹ EchoStar 14 would “operate only on the 21 DBS channels” already in use by DISH at that orbital location.¹⁰ DISH also asserted that approval of EchoStar 14 would “free up” EchoStar 7 for “in-orbit backup missions” or “more efficient deployment at a different orbital location.”¹¹ The Bureau granted DISH’s EchoStar 14 application on March 10, 2010.¹²

DISH has now applied for approval to operate EchoStar 7 from the 118.8° W.L. orbital location, concurrently with EchoStar 14 at 118.9°.¹³ DISH provides no description of how EchoStar 7 would be operated or what changes would be made to the operation of the virtually co-located EchoStar 14 satellite to accommodate EchoStar 7.¹⁴

SAT-MOD-20010810-00071, SAT-A/O-20010810-00073, Call Sign DBS8801, DA02-118, 17 FCC Rcd. 894 (rel. Jan. 16, 2002) (“*EchoStar 7 Order*”).

⁸ *EchoStar 14 Application*, at 1.

⁹ *Id.* at 1-2.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 4.

¹² Order and Authorization, *In re DISH Operating L.L.C. Application for Modification of Authority to Operate at the 118.9° W.L. orbital location and Authority to Launch and Operate the EchoStar-14 Satellite*, File Nos. SAT-LOA-20090518-00053 SAT-AMD-20090604-00064 SAT-AMD-20100212-00027, Call Sign S2790, DA 10-407, 2010 WL 8349 (rel. Mar. 10, 2010).

¹³ *In re DISH Operating L.L.C. Application for Minor Modification of Authority To Allow Operation of EchoStar 7 at 118.8° W.L.*, File No. SAT-MOD-20100329-00058, Call Sign S2740 (filed Mar. 29, 2010) (the “Application”).

¹⁴ Clearly, EchoStar 7’s operations under the modification application are going to be different from its operations prior to the implementation of EchoStar 14. DISH’s failure to provide any meaningful description of its operations violates its obligation to provide a “[g]eneral description of overall system facilities, operations, and services.” 47 C.F.R. § 25.114 (d)(1).

In addition, although the Application states that EchoStar 7 is now operating from the 118.9° W.L. orbital location, the Commission's 2002 order does not appear to specifically authorize EchoStar 7's operation at that orbital location.¹⁵ To be sure, DBS licensees have flexibility under Commission policy to adjust their satellite locations within 0.2° of a nominal orbital location in the Region 2 BSS Plan to accommodate other DBS operators.¹⁶ But nothing in the Commission's regulations or underlying policy allows a licensee to move its satellite *without Commission authorization*. Here, however, it appears that DISH's requested move is really one from 119.0° W.L. to 118.8° W.L., rather than from 118.9° W.L. to 118.8° W.L. As a result, the Application has significance in terms of the impact the proposed move has on Spectrum Five's Commission-authorized satellite network and pending application.

Nonetheless, whether the Application is construed as seeking to change EchoStar 7's orbital location by a *tenth* of a degree (*i.e.*, from 118.9° W.L. to 118.8° W.L.) or by *two-tenths* of a degree (*i.e.*, from 119.0° W.L. to 118.8° W.L.), it should be dismissed or, alternatively, denied for the reasons explained herein. The Application contains no orbital debris mitigation assessment with respect to Spectrum Five's pending application—of which DISH undoubtedly has notice¹⁷—to serve the U.S. market from a BSS satellite at that very same orbital location. The Application also contains no analysis of the increased interference to Spectrum Five's DBS satellite network at 114.5° W.L. that would result from DISH's operation of EchoStar 7 at 118.8°

¹⁵ Cf. *EchoStar 7 Order*, 17 FCC Rcd. 894, ¶ 8 (“EchoStar Satellite Corporation IS AUTHORIZED to launch and operate its satellite, EchoStar 7, using channels 1-21 at the 119° W.L. orbit location.”) (emphasis added); see Region 2 Appendix 30 BSS Plan, USABSS-14, SNS No. 102555001, WIF/IFIC Nos. 2521, 2534 (received Mar. 7, 2002).

¹⁶ See Report and Order, *In re: Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11386-88 (¶¶ 119-121) (rel. June 13, 2002).

¹⁷ In its *EchoStar 14 Application*, DISH acknowledged that “[i]n a new application, Spectrum Five has proposed to adjust the orbital location [of its BSS satellite] to 118.8° W.L.” See *EchoStar 14 Application*, Appendix 1, at 10.

W.L. The Application simply does not provide enough information about EchoStar 7's proposed operations at 118.8° W.L. (presumably alongside EchoStar 14's operations at 118.9° W.L.) to make an intelligible evaluation of the potential for interference even possible.

ARGUMENT

I. THE APPLICATION IS DEFECTIVE, AND MUST BE DISMISSED OR, IN THE ALTERNATIVE, DENIED, BECAUSE IT DOES NOT CONTAIN THE COMPLETE ORBITAL DEBRIS MITIGATION ASSESSMENT REQUIRED BY 47 C.F.R. § 25.114(D)(14)(III).

All DBS applications must “follow Section 25.114 of the Commission’s rules, which governs applications for space station applications.”¹⁸ That section “of the Commission’s rules explicitly requires all space station applicants, including DBS applicants, to submit certain specified information,”¹⁹ which must be “complete in all pertinent details.” 47 C.F.R. § 25.114(b). An application that “is defective with respect to completeness of answers to questions” or that otherwise “does not substantially comply with the Commission’s rules [or] regulations” is “defective” and “unacceptable for filing.” *Id.* § 25.112(a)(1)-(2). “[A]ny relaxation of the requirement that satellite applicants submit substantially complete applications could encourage speculative applications,” unfairly aimed at securing an earlier place in line in the Commission’s “first-come, first-served” licensing process.²⁰ Thus, the Commission has

¹⁸ Public Notice, *International Bureau Clarifies Direct Broadcast Satellite Space Station Application Processing Rules*, DA 04-195, 19 FCC Rcd. 1346, 1346 (rel. Jan. 28, 2004) (“*DBS Public Notice*”).

¹⁹ *Id.* at 1347.

²⁰ *In re Amendment of the Commission’s Space Station Licensing Rules and Policies*, IB Docket No. 02-34, 18 FCC Rcd. 10760, ¶ 244 (rel. May 19, 2003) (“*First Space Station Licensing Reform Order*”), modified by Erratum, DA 03-2861 (rel. June 26, 2003) and Second Erratum (rel. Sept. 10, 2003).

“strictly enforced its Part 25 rules,” and routinely “dismiss[es] applications that do not contain information that is clearly required by the Commission’s rules.”²¹

Of special relevance here, Section 25.114(d)(14) explicitly requires all applicants—whether for a “new or modified” satellite authorization (*id.* § 25.114(b))—to submit a “statement that the space station operator has assessed and limited the probability of the space station becoming a source of debris by collisions” in orbit. When, as here, the application “requests the assignment of a geostationary-Earth orbit location, it *must* assess whether there are any known satellites located at, *or reasonably expected to be located at*, the requested orbital location, or assigned in the vicinity of that location, such that the station keeping volumes of the respective satellites might overlap. If so, the statement *must* include a statement as to the identities of those parties and the measures that will be taken to prevent collisions.” *Id.* (emphases added). DISH did not submit this information in the Application, which contains nary a mention of Spectrum Five’s pending application to provide service from the same orbital location. Because the Application “fail[ed] to include . . . the required information” set forth in the Commission’s regulations, it was not substantially complete when filed, and must be dismissed.²²

²¹ Order on Reconsideration, *In re EchoStar Satellite LLC Application for Authority to Construct, Launch and Operate a Geostationary Satellite in the Fixed Satellite Service Using the Extended Ku-Band Frequencies at the 101° W.L. Orbital Location*, 19 FCC Rcd. 24953, ¶ 14 (rel. Dec. 27, 2004) (“*EchoStar Reconsideration Order*”) (collecting cases).

²² *DBS Public Notice*, 19 FCC Rcd. at 1347; *First Space Station Licensing Reform Order* 18 FCC Rcd. 10760, ¶ 244; *see also* 47 C.F.R. § 25.112(a)(2). Even after an application is placed on Public Notice, “the Commission reserves the right to return any application if, upon further examination, it is determined the application is not in conformance with the Commission’s rules or its policies.” Order and Authorization, *In re DIRECTV Enterprises, LLC Application for Authorization to Launch and Operate DIRECTV RB-2, a Satellite in the 17/24 GHz Broadcasting Satellite Service at the 102.825° W.L. Orbital Location*, File Nos. SAT-LOA-20060908-00100 SAT-AMD-20080114-00014 SAT-AMD-20080321-00077, Call Sign S2712, DA 09-1624, 24 FCC Rcd. 9393, ¶ 7 n.23 (rel. July 28, 2009). “Neither the assignment of a file number and/or other identifier nor the listing of the application on public notice as received for filing indicates that the application has been found acceptable for filing or precludes the subsequent return or

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A. The Application Is Incomplete Because It Does Not Consider Spectrum Five’s Already-Filed Petition For A Declaratory Ruling To Operate A BSS Satellite At The 118.8° W.L. Orbital Location.

Section 25.114(d)(14)(iii) requires an orbital debris mitigation assessment to consider *both* satellites *presently* located at the requested geostationary orbital location, as well as satellites “reasonably expected to be located at” that location. The Commission routinely dismisses applications that are “missing technical information concerning . . . orbital debris mitigation.”²³ In this case, the Application wholly ignores Spectrum Five’s petition to operate a satellite at the same 118.8° W.L. orbital location requested for EchoStar 7.²⁴

dismissal of the application if it is found to be defective or not in accordance with the Commission’s rules.” 47 C.F.R. § 25.150.

²³ Letter from Robert G. Nelson, Chief, Satellite Division, International Bureau, to Donald M. Jansky, Jansky-Barmat Telecommunications, Inc., *Re: HISPAMAR SATÉLITES, S.A., Petition for Declaratory Ruling to add the AMAZONAS-2 Satellite at 61° W.L. to the Commission’s Permitted Space Station List, IBFS File No. SAT-PPL-20081203-00219 (Call Sign: S2779)*, DA 09-761, 24 FCC Rcd. 3970, 3970-71 (Apr. 2, 2009) (“HISPAMAR’s petition does not provide certain information required by Section 25.114(d) of the Commission’s rules, which renders the petition unacceptable for filing and subject to dismissal. . . . HISPAMAR’s petition is missing technical information concerning the orbital debris mitigation plans for the AMAZONAS-2 satellite, which is required by Section 25.114(d)(14) of the Commission’s rules.). *See also* Letter from Robert G. Nelson, Chief, Satellite Division, International Bureau, to Stephen D. Baruch, Leventhal Senter & Lerman PL, *Re: Applications of DG Consents Sub, Inc. to Modify the Orbital Parameters of the WorldView 60 Satellite and to Authorize the WorldView 110 Satellite IBFS File No. SAT-MOD-20070223-00038 and SAT-AMD-20070504-00066. Call Sign: S2129*, DA 07-3418, 22 FCC Rcd. 13709, 13709 (July 27, 2007) (dismissing “the application and its amendment as defective” because they “d[id] not satisfy the express requirement of Section 25.114(d)(14)(iii)”; Letter from Robert G. Nelson, Chief, Satellite Division, International Bureau, to David M. Drucker, Manager, ATCONTACT Communications, LLC, *Re: ATCONTACT Communications, LLC, Amendment to Application for Modification of Assigned Orbital Location from 83° W.L. to 87° W.L. and for the Addition of Ka-band Frequencies, File Nos. SAT-AMD-20060626-00068 and SAT-AMD-20060905-00098 (Call Sign S2680)*, DA 07-1095, 22 FCC Rcd. 4624, 4624 (Mar. 8, 2007) (“[T]he debris mitigation statement is incomplete . . . Accordingly, ATCONTACT’s applications . . . are dismissed”); Letter from Robert G. Nelson, Chief, Satellite Division, International Bureau, to David K. Moskowitz, Executive Vice President and General Counsel, EchoStar Satellite Operating Corporation, *Re: EchoStar Satellite Operating Corporation File No. SAT-MOD-20061218-00154 Call Sign: S2636*, DA 07-1096, 22 FCC Rcd. 4626, 4626 (Mar. 8, 2007) (“EchoStar did

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It is immaterial that Spectrum Five's application has not yet been approved. A system counts as "reasonably expected to be located" at a given location once there is a pending application under consideration by the Commission that seeks approval to operate at that location. As the Commission explained in the course of promulgating Section 25.114(d)(14)(iii), the orbital debris mitigation assessment "should address any licensed FCC systems, *or any systems applied for and under consideration.*" Second Report and Order, *In re Mitigation of Orbital Debris*, 19 FCC Rcd. 11567, ¶ 51 n.140 (rel. June 21, 2004) (emphasis added) ("*Orbital Debris Report and Order*"). The Commission amplified this requirement in a subsequent public notice:

For space stations that are to operate in geostationary-Earth orbit (GEO), the statement *must* assess whether there are any known satellites located at, or reasonably expected to be located at, the requested orbital location, or assigned in the vicinity of that location, such that the station-keeping volumes of the respective satellites might overlap. If so, the statement must include a statement as to the identities of those parties and the measures that will be taken to prevent collisions. The statement should address any licensed FCC systems, or *any systems applied for and under consideration.*

Public Notice, *Disclosure of Orbital Debris Mitigation Plans, Including Amendment of Pending Applications*, 20 FCC Rcd. 16278, 16280 (Oct. 13, 2006) ("*Orbital Debris Mitigation Plans Notice*") (emphasis added).

Indeed, in the past, DISH *itself* has recognized the need to "review[] the lists of FCC licensed satellite networks, as well as those that are *currently under consideration* by the FCC" when considering "current and *planned* satellites" that might have an overlapping stationkeeping

not submit this information for its proposed operations at 112.85° W.L. Consequently, the modification application is incomplete and therefore unacceptable for filing.").

²⁴ The Application mentions only DIRECTV 7S, at the 119.05° W.L. orbital location, and Anik F3, located at 118.7° W.L. See Application, at 2-3.

volume.²⁵ When DISH filed the EchoStar 14 application, in which DISH specifically acknowledged Spectrum Five’s application to operate a satellite at 118.8° W.L., DISH reassured the Commission that no further orbital debris mitigation analysis was necessary because Spectrum Five’s “orbital location [at] 118.8° W.L.[.] . . . would result in no overlapping station-keeping volume with ECHOSTAR-14,” which would be located at 118.9° W.L.²⁶ DISH’s recognition in the EchoStar 14 application that Section 25.114(d)(14)(iii) requires it to take into account Spectrum Five’s pending 118.8° W.L. application makes the omission of a complete orbital degree mitigation analysis in the present Application all the more glaring and inexcusable.

Unlike in the EchoStar 14 proceeding, the “station keeping volumes of the respective satellites” in this case would certainly overlap. 47 C.F.R. § 25.114(d)(14)(iii). The proposed location for EchoStar 7 is exactly the same one for which Spectrum Five has a pending (and earlier in line) petition.²⁷ Yet the Application fails to acknowledge this stationkeeping overlap, much less “include a statement as to . . . the measures that will be taken to prevent collisions” with Spectrum Five’s satellite. *Id.* The Application plainly is thus incomplete and defective.²⁸

²⁵ *EchoStar 14 Application*, Attachment A, at A.10.3 (emphasis added).

²⁶ *Id.*

²⁷ If the Application is approved and EchoStar 7 is allowed to occupy the 118.8° W.L. orbital location, Spectrum Five would be forced to substantially alter the parameters of its 17/24 GHz BSS satellite. The nearest available location where physical coordination could be achieved would be 118.6° W.L.—because 118.7° W.L. is occupied by the Anik-3 satellite (*see* Application at 3)—where, due to the Commission’s “offset power” rules for 17/24 GHz BSS satellites, it might be required to further reduce its power by 13%. *See* 47 C.F.R. § 24.262.

²⁸ It bears noting that DISH could continue operating EchoStar 7 at its present 118.9° W.L. orbital location alongside EchoStar 14. *See generally* Public Notice, Report No. SAT-00646, Report No. SAT-00646, 2009 WL 3802600 (rel. Nov. 13, 2009) (noting that DIRECTV has requested authorization to co-locate multiple satellites at the same orbital location “with a reduced station keeping tolerance of $\pm 0.025^\circ$ ”). It would be much less feasible to locate EchoStar 7 at the same location as Spectrum Five’s proposed satellite. “Where the satellites *are not operated by a single company*, such [real-time] coordination may present logistical or cost

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B. There Is No Basis For A Waiver Of The Section 25.114(d)(14)(iii) Orbital Debris Mitigation Assessment Requirement.

As a fallback position, DISH requests a waiver of Section 25.114(d)(14)(iii)'s requirement that applicants perform a complete orbital debris mitigation assessment. *See* Application, at 4-5. An application that is defective under § 25.112(a)(2) will be accepted for filing only if (1) the application is accompanied by a request for a waiver *and* (2) the FCC grants such a waiver. *Id.* § 25.112(b). There is no basis for a waiver here. We address each of DISH's arguments in turn.

DISH first asserts that a 0.1° relocation in orbital location does not “change the operating parameters” approved by the Commission, and so does not “change the overall orbital debris risk environment.” Application, at 4. The discussion in Section I.A above demonstrates both that this assertion is patently false, and that DISH knew otherwise.

DISH quite evidently is seeking a modification of its authorization, and “applications for modifications of space station authorizations shall be filed in accordance with § 25.114.” 47 C.F.R. § 25.117(d)(1). Under § 25.114(b), “[e]ach application for a new or modified space station authorization must constitute a concrete proposal for Commission evaluation,” which contains the “technical information” specified in § 25.114(d), including a complete orbital debris mitigation assessment that complies with § 25.114(d)(14)(iii). The Commission's regulations contain no exception for purportedly “small” or “minor” changes in orbital location—a change is a change, particularly when there is already a pending, higher-priority application for a satellite at the proposed orbital location. To the contrary, when “existing operators seek authority for . . . modified authorizations, and information under Section 25.114 is required by our rules in

considerations that render it undesirable as a first choice for preventing collisions.” *Orbital Debris Report and Order*, 19 FCC Rcd. 11567, ¶ 51 (emphasis added).

connection with requests for such authorizations”—as is the case here—“disclosure of orbital debris mitigation plans is *required* as part of the request for additional authority.”²⁹

DISH also seeks a waiver on the ground that EchoStar 7 was launched in 2002, before the Commission promulgated the requirement that applicants submit orbital debris mitigation assessments. *See* Application, at 4-5. The date on which EchoStar 7 was launched is irrelevant: the rule is based upon when the application for a modification of approval is filed, not when the satellite is launched. “All applications filed after October 19, 2005, that require submission of Section 25.114 information *must include an orbital mitigation disclosure as part of the application or will be dismissed as incomplete.*”³⁰ The Commission knows full well how to apply its rules only prospectively when it so desires; thus, it grandfathered from the *disposal* rules all geostationary satellites that were already launched as of the Notice of Proposed Rulemaking.³¹ Tellingly, the Commission did not do the same with respect to the *orbital debris mitigation assessment* rules. In fact, the Commission even required applications that were already pending when the rules came into effect to promptly be amended to “include disclosure of the system’s orbital debris mitigation plans.”³²

In sum, “[t]he Commission’s rules regarding the disclosure of orbital debris mitigation plans have been effective since October 19, 2005.”³³ DISH “has failed to explain why a general

²⁹ *Orbital Debris Mitigation Plans Notice*, 20 FCC Rcd. at 16279 (emphasis added).

³⁰ *Id.* (emphasis added).

³¹ Second Report and Order, *In re Mitigation of Orbital Debris*, IB Docket No. 02-54, 19 FCC Rcd. 11567, ¶¶ 77, 81 (rel. June 21, 2004).

³² *Orbital Debris Mitigation Plans Notice*, 20 FCC Rcd. at 16278.

³³ Letter from Robert G. Nelson, Chief, Satellite Division, International Bureau, to Stephen D. Baruch, Leventhal Senter & Lerman PL, *Re: Applications of DG Consents Sub, Inc. to Modify the Orbital Parameters of the WorldView 60 Satellite and to Authorize the WorldView 110 Satellite IBFS File No. SAT-MOD-20070223-00038 and SAT-AMD-20070504-00066. Call Sign: S2129, DA 07-3418*, 22 FCC Rcd. 13709, 13710 (July 27, 2007) (emphasis added).

request to waive unspecified provisions of Section 25.114(d)(14) ‘to the extent necessary’ serves the public interest or comports with the requirement that *each application* for a new or *modified* space station authorization constitute a concrete proposal for Commission evaluation” that fully complies with Section 25.114(d)(14)’s requirements.³⁴ A waiver under these circumstances, where the proposed relocation would directly overlap the station-keeping volume of Spectrum Five’s 17/24 GHz BSS satellite but DISH provides no indication of how coordination would be effected, also cannot be found consistent with the underlying purpose of Section 25.114(d)(14) and the orbital debris mitigation policy.

* * *

DISH’s application to relocate EchoStar 7 to the 118.8° W.L. orbital position is defective within the clear and unambiguous meaning of Section 25.112(a): it is “defective with respect to completeness” and does not “substantially comply with the Commission’s” rules requiring an orbital debris mitigation assessment. Because the Application is defective, it must be dismissed.³⁵ Moreover, DISH cannot now cure the defect in the Application because Commission rules would deem any such amendment to be null and void. Section 25.116(b)(5)—a crucial feature of the Commission’s “hard look” approach to enforcing first-come, first-served processing rules—unambiguously states that “[a]mendments to ‘defective’ space station applications . . . will not be considered.”³⁶

³⁴ Second Report and Order, *In re Mitigation of Orbital Debris*, IB Docket No. 02-54, 19 FCC Rcd. 11567, ¶¶ 77, 81 (rel. June 21, 2004).

³⁵ *Orbital Debris Mitigation Plans Notice*, 20 FCC Rcd. at 16279 (“All applications filed after October 19, 2005, that require submission of Section 25.114 information must include an orbital mitigation disclosure as part of the application or will be dismissed as incomplete.”).

³⁶ See also *PanAmSat Reconsideration Order*, 18 FCC Rcd. 23916, ¶ 7 (explaining that newly provided information that purports to “correct a prior deficiency in a dismissed application cannot be used to reinstate an initial application or maintain a previous position in the queue”);

(continued)

Even if the Commission does not dismiss the Application as incomplete and defective, it should nonetheless deny the Application on the merits. The Commission grants applications for modification of an authorization only if the “Commission finds that the applicant is legally, technically, and otherwise qualified, that the proposed facilities and operations *comply with all applicable rules, regulations, and policies*, and that grant of the application will serve the *public interest, convenience and necessity*.” 47 C.F.R. § 25.156(a) (emphasis added). For the same reasons that the Application is incomplete and defective—*i.e.*, it contains no technical analysis of how EchoStar 7 would effect stationkeeping coordination with Spectrum Five’s pending satellite application at the 118.8° W.L. orbital location—the Application fails to make the showings required to warrant approval of the Application. “[O]rbital debris and related mitigation issues are relevant in determining whether the *public interest* would be served by authorization of any particular satellite system.”³⁷ Yet the public interest can hardly be served by permitting DISH to operate EchoStar 7 at 118.8° W.L. without *any* assurance that DISH has in mind adequate “measures . . . to prevent collisions” with systems – such as Spectrum Five’s – that may “reasonably expected to be located” at the same orbital location. 47 C.F.R. § 114.14(d)(14)(iii).

EchoStar Reconsideration Order, 19 FCC Rcd. 24953, ¶ 13 (“Allowing applicants to cure applications after they are filed could adversely impact other applicants filing complete applications that are ‘second-in-line’ to the first application. Moreover, allowing applicants to “cure” defects . . . after filing could encourage applicants to file incomplete, internally inconsistent, or otherwise defective applications to receive ‘first-in-line’ status. This is patently inconsistent with the rationale underlying the ‘first-come, first-served’ procedure . . .”).

³⁷ Second Report and Order, *In re: Mitigation of Orbital Debris*, 19 FCC Rcd. 11567, ¶ 14 & n.55 (rel. June 21, 2004). Planning is essential to avoid collisions between satellites in geostationary orbit, as the recent troubles of Intelsat’s Galaxy 15 illustrate. *See generally* Roger Cheng, *Satellite Drifts, But Firms Play Down TV Risk*, Wall St. J. (May 13, 2010), *available at* <http://online.wsj.com/article/SB1000142405274870339304575240502936517596.html> (noting that Galaxy 15 was “drifting dangerously close to another satellite,” but that Intelsat was in “frequent communications” with other satellite companies).

DISH's failure to make a requisite showing on this point is an independent ground for denying the Application on the merits.³⁸

II. THE APPLICATION SHOULD BE ALSO BE DISMISSED OR, ALTERNATIVELY, DENIED BECAUSE THE APPLICATION DOES NOT PROVIDE THE ANALYSES NECESSARY TO EVALUATE ECHOSTAR 7'S PROPOSED OPERATIONS AT 118.8° W.L.

DISH has styled its Application as seeking only a “minor modification” of its authorization. But make no mistake: DISH proposes operating EchoStar 7 from the 118.8° W.L. orbital location, which represents a departure from the “technical characteristics” set forth in its corresponding Region 2 Plan filing.³⁹ The Plan modification sought by the United States in connection with EchoStar 7's original application presented its orbital location as 119.0° W.L., *not* 118.8° W.L.

As an initial matter, even if the relocation to 118.8° W.L. were the only change to the operation of EchoStar 7—and that is not the case, as explained further *infra*—the Application is “defective” and subject to dismissal (*see* § 25.112(a)(1)-(2)) because it does not contain the “complete” and detailed technical showings required by Section 25.114(d)(13) of the Commission's rules. In this case, at a bare minimum, the proposed system's “technical

³⁸ See, e.g., Memorandum Opinion and Order, *In re: EchoStar Satellite LLC, Petition for Reconsideration of Order Denying Application for Authority to Construct, Launch and Operate Geostationary Satellites In the Fixed-Satellite Service Using the Ka And/or extended Ku-bands at the 83° W.L., 105° W.L., 113° W.L. and 121° W.L. Orbital Locations*, File Nos. SAT-LOA-20030827-00180, SAT-LOA-20030827-00182, SAT-LOA-20030827-00185, SAT-LOA-20030827-00187, Call Signs: S2493, S2495, S2498, S2500, DA 06-865, 21 FCC Rcd. 4060, ¶ 15 (rel. Apr. 14, 2006) (explaining that even if accepted, an application properly is denied on the merits if it is “not consistent with the Commission's rules and policies[] and fail[s] to support the necessary waivers”).

³⁹ See Region 2 Appendix 30 BSS Plan, USABSS-14, SNS No. 102555001, WIF/IFIC Nos. 2521, 2534 (received Mar. 7, 2002).

characteristics [*i.e.*, orbital location] differ from those specified in the Appendix 30 BSS Plans [or] the Appendix 30A feeder link Plans,”⁴⁰ and so the Application was required to provide:

- (i) The information requested in Appendix 4 of the ITU’s Radio Regulations. . . .
- (ii) Analyses of the proposed system with respect to the limits in Annex 1 to Appendices 30 and 30A.

47 C.F.R. § 25.114(d)(13).

Applications for modifications of space station authorizations are permitted to incorporate by reference information from previously filed applications, but *only* if the “information has not changed.” 47 C.F.R. § 25.117(d). This exception is not applicable here. It is plain that relocating EchoStar 7 to 118.8° W.L. would produce a different—and indeed, substantially greater—amount of interference to other systems, such as Spectrum Five’s authorized satellite network at 114.5° W.L. The Commission’s rules require that the Application must take such other systems into account. The interference “[a]nalyzes of the proposed system with respect to the limits in Annex 1 to Appendices 30 and 30A” could not possibly be unchanged from the interference analyses submitted in connection with EchoStar 7’s original application to operate at 119.0° W.L. *See* 47 C.F.R. § 25.114(d)(13)(ii). The showing required by Section 25.114(d)(13)(ii) is “intended to demonstrate how the proposed system will affect

⁴⁰ The Commission’s orders make clear that the orbital location of the satellite is a relevant “technical characteristic[.]” As noted in the *Spectrum Five ‘Tweeners’ Order*, “foreign-licensed DBS operators seeking U.S. market access . . . must file the same information requested under Section 25.114 of the Commission’s rules that U.S. DBS applicants must file (including, without limitation, the *technical characteristics* of the satellite as specified in *Section[] 25.114(c)*).” 21 FCC Rcd. 14023, ¶ 8 (emphasis added); *accord* Notice of Proposed Rulemaking, *In re: 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*, IB Docket No. 06-160, 21 FCC Rcd. 9443, ¶ 23 (rel. Aug. 18, 2006). And one of the items required under Section 25.114(c) is, “[f]or satellites in geostationary-satellite orbit,” the requested “[o]rbital location.” *Id.* § 25.114(c)(5)(i).

operating DBS systems and those systems that are subject to *pending Region 2 modification proposals*.”⁴¹

Yet the analyses originally submitted with the EchoStar 7 application on August 10, 2001⁴² could not have taken Spectrum Five’s licensed satellite network at 114.5° W.L. into account—the system was not yet the subject of Commission or ITU filings. Thus, the exception in Section 25.117 for unchanged information cannot apply: the relevant analyses manifestly need to be updated. Even if the analysis in the original EchoStar 7 application had somehow taken Spectrum Five’s network into account, that analysis would be different now that DISH is proposing to operate EchoStar 7 two-tenths of a degree closer to Spectrum Five’s already-licensed satellite network at 114.5° W.L.⁴³ The Application’s failure to address this interference alone renders it defective and subject to dismissal.

⁴¹ *Spectrum Five ‘Tweener’ Order*, 21 FCC Rcd. 14023, ¶ 6 (emphasis added).

⁴² *EchoStar 7 Order*, 17 FCC Rcd. 894, ¶ 1 n.1.

⁴³ It is DISH’s obligation, as the applicant seeking a modification of authorization, to include the requisite technical analyses with its application. *See* 47 C.F.R. § 25.114(b); *id.* § 25.114(d)(13). DISH’s failure to do so therefore *independently* requires dismissal or denial of the Application.

Nonetheless, the concern with increased interference is not merely a theoretical one. Although Spectrum Five’s analysis necessarily is a preliminary one—and one that is further handicapped by DISH’s failure to specifically articulate how it plans to operate EchoStar 7 and EchoStar 14 if the proposed relocation is granted—it is clear that there would be a substantial impact on Spectrum Five’s licensed satellite network at 114.5° W.L. That analysis shows that changing EchoStar 7’s orbital location from 119.0° W.L. to 118.8° W.L. would reduce the discrimination of a 45 cm reference antenna (as described in Appendix 30) due to the decreased angular spacing by anywhere from 1.59 dB (in Anchorage) to 1.86 dB (in Los Angeles), which would result in an increase in the interference level at the 114.5° W.L. location of between 30 and 35 percent. Particularly given DISH’s prior representation that EchoStar 14 would “replace” EchoStar 7’s operations at 118.9° W.L. (*EchoStar 14 Application* at 1-2), it is at the very least “prima facie inconsistent with the public interest” (47 C.F.R. § 25.154(a)(4)) to permit EchoStar 7 to “supplement” EchoStar 14 and operate at a *new* orbital location that would cause even *greater* interference with other satellite networks.

In addition, recognizing Spectrum Five’s “willingness . . . to achieve a coordination agreement with the existing DBS operators,” the Commission approved Spectrum Five’s DBS satellite network at 114.5° W.L. “on the condition that it coordinate with EchoStar and DIRECTV.”⁴⁴ In accepting the Commission’s grant of authority subject to conditions, Spectrum Five also agreed that it would “tolerate additional interference” to its operations at 114.5° W.L. from other systems.⁴⁵ As DISH now proposes moving EchoStar 7 closer to Spectrum Five’s approved satellite network at 114.5° W.L., Spectrum Five should not be required to coordinate with a moving target; it would be grossly unfair if the conditions of the *Tweener* approval could in essence be changed after the fact merely on DISH’s request. The Commission should therefore ensure that EchoStar 7 is entitled to no greater interference protection at the proposed 118.8° W.L. orbital location than it would have been afforded at 119.0° W.L., where EchoStar 7 was originally approved to operate.⁴⁶ And as a corollary, EchoStar 7 cannot be permitted to cause any more interference to Spectrum Five’s 114.5° W.L. satellite network than if EchoStar 7 had remained at its original 119.0° W.L. orbital location. Whether the proposed modification of

⁴⁴ *Spectrum Five ‘Tweener’ Order*, 21 FCC Rcd. 14023, ¶¶ 29-30.

⁴⁵ *Id.* ¶¶ 30, 43(d)-(e), (i).

⁴⁶ *Cf. EchoStar 7 Order*, 17 FCC Rcd. 894, ¶ 8; *In re Spectrum Five, LLC Petition for Declaratory Ruling to Serve the U.S. Market Using BSS Spectrum from the 114.5° Orbital Location*, File Nos. SAT-LOI-20050312-00062, SAT-LOI-20050312-00063, Call Signs S2667, S2668 (filed Mar. 12, 2005).

Moreover, given that it is **DISH** that seeks to move EchoStar 7 to 118.8° W.L., and therefore place EchoStar 7 **directly on top** of Spectrum Five’s long-pending application for a 17/24 GHz BSS system at 118.8° W.L., **Spectrum Five** should not be accountable for any additional space path interference that may result on account of EchoStar 7’s proposed relocation from its originally authorized location. *Cf. Report and Order and Further Notice of Proposed Rulemaking, In re: The Establishment of Policies and Service Rules for the Broadcasting-Satellite Service at the 17.3-17.7 Ghz Frequency Band and at the 17.7-17.8 Ghz Frequency Band Internationally, and at the 24.75-25.25 Ghz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-Directionally in the 17.3-17.8 Ghz Frequency Band*, IB 06-123, 22 FCC Rcd. 8842, ¶ 180 (rel. May 4, 2007).

EchoStar 7's authorization sought by the Application is consistent with these limitations is impossible to discern (although, it seems, exceedingly unlikely, *see supra* note 43), because the Application does not contain the interference analyses required by Section 25.114(d)(13). Given its patently incomplete and defective state, the Application cannot be approved.

Finally, the Application runs afoul of the Commission's rules in yet another respect because the Application is frustratingly short on details and does not adequately describe EchoStar 7's planned operation at the 118.8° W.L. orbital location. For example, the Application claims that EchoStar 7's proposed relocation is meant to "accommodate" or "make 'room'" for EchoStar 14.⁴⁷ It asserts EchoStar 7 at 118.8° W.L. would "provide service that supplements the service to be provided by EchoStar 14" at 118.9° W.L.⁴⁸ In its application for special temporary authority to operate EchoStar 7 at 118.8° W.L., DISH similarly stated that EchoStar 7 will "continue to support" DISH's other "DBS services" around the "nominal 119° W.L. orbital location."⁴⁹ What any of this means is left alarmingly undefined in the Application. In other filings, DISH has represented that EchoStar 14, once brought into operation, would use "the 21 DBS channels" currently used by EchoStar 7 at the 118.9° W.L. orbital location.⁵⁰ It is unclear from the Application whether DISH intends to operate both EchoStar 7 and EchoStar 14 in full frequency reuse, what power the satellites would use, and what impact these operations would have on other networks, both proposed and operational. That is also an independent reason to dismiss or deny the Application. The Commission's rules require applications to be

⁴⁷ Application at 1-2.

⁴⁸ *Id.* at 2.

⁴⁹ *In re DISH Operating L.L.C. Application for Special Temporary Authority to Move EchoStar 7 to 118.8° W.L.*, File No. SAT-STA-20100219-00031, Call Sign S2740, at 1 n.4 (filed Feb. 19, 2010).

⁵⁰ *EchoStar 14 Application*, at 2.

“complete in all pertinent details” and to describe the “overall system facilities, operations and services” precisely so that licensing decisions can be made with all relevant information at hand. *See* 47 C.F.R. § 25.114(b), (d)(1).

In sum, the Application does not contain the “information requested in Appendix 4 of the ITU’s Radio Regulations,” or “[a]nalyzes of the proposed system with respect to the limits in Annex 1 to Appendices 30 and 30A” required by Section 25.114(d)(13). The Application also fails to provide any meaningful description of EchoStar 7’s proposed operations at 118.8° W.L., as required by Section 25.114(d)(1). Accordingly, the Application is not substantially complete and should be dismissed as defective under Section 25.112(a)(2).⁵¹ In the alternative, the Application should be denied on the merits under Section 25.156(a) because the Commission is not a position to find that the “proposed . . . operations [will] comply with all applicable rules, regulations, and policies, and that grant of the application will serve the *public interest, convenience and necessity*” given that the Application does not make the requisite technical showing.⁵² (Emphasis added.)

CONCLUSION

For the foregoing reasons, the Application to relocate EchoStar 7 to 118.8° W.L. is incomplete, defective, and does not substantially comply with the Commission’s rules. It should be dismissed, or, in the alternative, simply denied on the merits.

⁵¹ E.g., Letter from Fern J. Jarmulnek, Deputy Chief, Satellite Division, to Todd M. Stansbury, Esq., Counsel for Spectrum Five LLC, *Re: Spectrum Five LLC Petition for Declaratory Ruling To Serve the U.S. Market from the 114.5° W.L. Orbital Location, File No. SAT-LOI-20041228-00228, Call Sign S2649*, 20 FCC Rcd. 3451, 2451 (Feb. 17, 2005) (dismissing application because it “did not include any information pursuant to Section 25.114(d)(13)(ii)”).

⁵² *See also* Third Report and Order, *In re: Amendment of Space Station Licensing*, 18 FCC Rcd. 15306, ¶ 11 (rel. July 8, 2003) (“The information in Section 25.114 ensures that the satellites will comply with our rules.”).

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May 17, 2010

DECLARATION OF TOM SHARON

I, Tom Sharon, hereby declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that I have personal knowledge of such allegations of fact as contained therein (except for those matters of which official notice may be taken). *See* 47 C.F.R. § 25.154(a)(4).

Executed on May 17, 2010, in Washington, D.C.

A handwritten signature in black ink, appearing to read 'Tom Sharon', is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I, Howard W. Waltzman, hereby certify that on this 17th day of May, 2010, I caused to be hand-delivered a true copy of the foregoing, upon the following:

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