

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

In the Matter of)	
)	
Spectrum Five LLC)	File Nos. SAT-LOI-20050312-00062
)	SAT-MOD-20101126-00245
)	Call Sign S2667
Petition for Declaratory Ruling to Extend or)	File Nos. SAT-LOI-20050312-00063
Waive Construction Milestone)	SAT-MOD-20101126-00269
)	Call Sign S2668

Memorandum Opinion and Order

Adopted: July 26, 2011

Released: July 26, 2011

By the Chief, International Bureau:

I. INTRODUCTION

1. With this Order, we deny Spectrum Five LLC's (Spectrum Five) request to extend or waive the construction completion milestone associated with its grant to serve the U.S. market using two Netherlands-authorized Direct Broadcast Satellite (DBS) service satellites.¹ Spectrum Five ceased all construction activities on the two satellites over two years ago. Further, Spectrum Five has not provided a persuasive reason that warrants additional time to meet the milestone or a waiver of the milestone. For these reasons, and in light of Spectrum Five's failure to meet other conditions of its market access grant, we declare that the market access grant is now null and void.

II. BACKGROUND

2. On November 29, 2006, the International Bureau granted Spectrum Five's request for a declaratory ruling to permit it to access the U.S. market using two Netherlands-authorized DBS satellites, Spectrum 1A and 1B, to be located at the 114.5° W.L. orbital location.² The grant required Spectrum Five to meet the same milestone schedule that U.S.-licensed operators must meet.³ The milestone schedule required Spectrum Five to execute a contract for construction of both satellites within one year of the grant (November 29, 2007), complete critical design review (CDR) for both satellites within two years of grant (November 29, 2008), complete construction of the first satellite within four years of grant (November 29, 2010), and operate both of the satellites within six years of grant (November 29, 2012).⁴

¹ 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, *Order and Authorization*, 21 FCC Rcd 14023 (Int'l Bur. 2006) (*Market Access Grant*), applications for review denied, *Memorandum Opinion and Order*, FCC 08-64, 23 FCC Rcd 3252 (2008) (*Review Order*).

² *Market Access Grant*, 21 FCC Rcd at 14023.

³ 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, 14058, ¶ 25 (Int'l Bur. 2006).

⁴ *Market Access Grant*, 21 FCC Rcd at 14041, ¶ 40 and at 14043, ¶ 45.

3. In addition, because the 114.5° W.L. orbital location is a “tweener” location – a non-planned location between operating DBS satellites – we placed additional conditions on the market access grant to protect existing DBS systems from interference from Spectrum Five’s system.⁵ As proposed, the Spectrum Five system would have caused substantial disruptions to DBS service being provided by EchoStar Satellite Operating Company and EchoStar Corporation (collectively EchoStar) and DIRECTV Enterprises, LLC (DIRECTV).⁶ Nevertheless, because Spectrum Five stated it was willing to modify the technical characteristics of its proposed system to enable it to reach a coordination agreement with the existing DBS operators, we granted the market access petition.⁷ In this regard, we required Spectrum Five to coordinate its proposed operations with affected DBS operators before Spectrum Five could operate in a manner exceeding the interference limits in the International Telecommunication Union’s (ITU’s) Radio Regulations.⁸ Recognizing that Spectrum Five would need to modify its proposed technical design parameters to reach coordination agreements, we also required Spectrum Five to provide all the technical characteristics of the satellites modified as a result of the coordination process, within 30 days after completing CDR.⁹ On review, the Commission clarified that if Spectrum Five did not reach a coordination agreement with the existing DBS operators that allowed Spectrum Five’s proposed operations, Spectrum Five had to file a modification application that demonstrated it had reduced its system’s power to a level that did not exceed the ITU coordination trigger.¹⁰ Finally, the grant required Spectrum Five to provide updated service area information and the final characteristics for each antenna beam within 30 days after completing CDR.¹¹

4. On November 28, 2007, Spectrum Five filed a copy of its contract with Space Systems/Loral to construct two satellites. On November 25, 2008, Spectrum Five submitted a letter from Space Systems/Loral certifying that it had completed CDR for both satellites. On December 2, 2008, Spectrum Five filed a letter providing updated antenna beam information and updated service area information.¹² In the letter, Spectrum Five stated that it “is preparing, and will soon file, a petition to modify the technical parameters of its authorization.”¹³ On January 21, 2009, DIRECTV filed a letter asking the Commission to declare that Spectrum Five’s grant was null and void for failure to timely submit a

⁵ The 114.5° W.L. orbital location is not a planned location under the International Telecommunication Union (ITU) Region 2 Broadcasting Satellite Service (BSS) Plan, but is instead a location mid-way between two planned locations. ITU Region 2 includes North, Central, and South America and Greenland. See Article 5, Section I of the ITU Radio Regulations. The ITU Region 2 BSS Plan is comprised of the Plan for BSS in the 12.2-12.7 GHz band in ITU Region 2, as contained in Appendix 30 of the ITU Radio Regulations, and the associated Plan for feeder links in the 17.3-17.8 GHz band for the BSS in Region 2, as contained in Appendix 30A of the ITU Radio Regulations. If an Administration seeks to operate at variance from the Region 2 BSS Plan, it must effectuate a modification to the Plan pursuant to ITU procedures, stipulated in Section 4.2 of Article 4 of Appendices 30 and 30A of the ITU Radio Regulations.

⁶ *Market Access Grant*, 21 FCC Rcd at 14036, ¶ 28. Both DIRECTV and EchoStar operate in-orbit DBS satellites at the planned orbital locations (110° W.L. and 119° W.L.) on either side of Spectrum Five’s location.

⁷ *Id.* at 14037, ¶ 30.

⁸ *Id.* at 14037, ¶ 31 and 14042-43, ¶ 43(d).

⁹ *Id.* at 14042-43, ¶¶ 43(b) and (c).

¹⁰ *Review Order*, 23 FCC Rcd at 3259, ¶ 19.

¹¹ *Market Access Grant*, 21 FCC Rcd at 14042-43, ¶¶ 43(b) and (c).

¹² Letter from Todd M. Stansbury, Counsel to Spectrum Five LLC to Marlene Dortch, Secretary, FCC (filed Dec. 2, 2008).

¹³ *Id.*

modification application and related technical showings.¹⁴ In response, Spectrum Five asserted that it had met all conditions of its market access grant.¹⁵

5. In annual reports filed with the Commission in June 2009 and June 2010, Spectrum Five reported that it was working with Space Systems/Loral toward meeting its milestone for completing construction of its first satellite.¹⁶ On November 26, 2010, Spectrum Five filed a request for a two-year extension of that milestone.¹⁷ In a January 13, 2011 letter, the Satellite Division asked Spectrum Five whether construction of the satellite was continuing and what payments Spectrum Five had made under the Space Systems/Loral contract. In response, Spectrum Five stated that it halted work under the Space Systems/Loral contract after the November 2008 CDR milestone.¹⁸

III. DISCUSSION

6. *Milestone Extension.* The Commission's DBS due diligence rules are designed to ensure that valuable spectrum is not held by those unable or unwilling to proceed with their plans,¹⁹ and that service is timely deployed for the benefit of the public.²⁰ To this end, the Commission places certain conditions, referred to as due diligence milestones, on all DBS licenses and DBS market access grants. These milestones track the three-to-five year period needed to construct and launch a new satellite.

7. When deciding whether to grant an extension of DBS due diligence milestones, the Commission considers the "totality of circumstances." The Commission considers four factors in this determination: (1) the efforts made and not made; (2) the difficulties encountered and overcome; (3) the rights of all parties; and 4) the ultimate goal of service to the public.²¹ The Commission has stated that

¹⁴ Letter from William W. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC at 2 (filed Jan. 21, 2009) (DIRECTV January 2009 Letter) (referencing the *Market Access Grant*, 21 FCC Rcd at 14042, ¶¶ 43(b) and (c)).

¹⁵ Letter from Howard W. Waltzman, Counsel for Spectrum Five, to Marlene H. Dortch, Secretary, FCC (filed Jan. 29, 2009). See also Letter from William W. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC (filed Feb. 6, 2009); Letter from Howard W. Waltzman, Counsel for Spectrum Five, to Marlene H. Dortch, Secretary, FCC (filed Feb. 18, 2009).

¹⁶ Letters from Howard W. Waltzman to Marlene H. Dortch, Secretary, FCC, and attached Annual Reports of Spectrum Five, LLC (filed June 29, 2009 and June 29, 2010).

¹⁷ Spectrum Five LLC Petition for Declaratory Ruling to Extend or to Waive Interim Construction Milestone, IBFS File Nos. SAT-MOD-20101126-00245 and SAT-MOD-20101126-00269 (filed Nov. 26, 2010) (Milestone Extension Request). See also Letter from David Wilson, President, Spectrum Five LLC, to Marlene H. Dortch, Secretary, FCC (filed July 25, 2011) (Spectrum Five July 25 Letter) (supplementing Milestone Extension Request).

¹⁸ Letter from David Wilson, President, Spectrum Five LLC, to Robert G. Nelson, Chief, Satellite Division, International Bureau, FCC (filed February 11, 2011) (Spectrum Five February 2011 Letter) at 2. Spectrum Five's response included a request that CDR materials, agreements, and payment information containing commercially sensitive information submitted with that letter be kept confidential and withheld from public inspection. The statement that it had halted work was reported in the non-confidential, public version of the Spectrum Five February 2011 Letter.

¹⁹ Joint Application for Review of Constellation Holdings, Inc., Mobile Communications Holdings, Inc., and ICO Global Communications (Holdings) Limited, *Memorandum Opinion and Order*, 19 FCC Rcd 11631, 11632, ¶ 2 (2004).

²⁰ 47 C.F.R. § 25.148(b); Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, 17 FCC Rcd 11331, 11352, ¶ 42 (2002).

²¹ Applications of United States Satellite Broadcasting Company, Inc. and Dominion Video Satellite, Inc. for Extension of Time to Construct Direct Broadcast Satellite Systems, *Memorandum Opinion and Order*, 3 FCC Rcd 6858, 6859, ¶ 10 (1988) (*USSB Order*). See also Advanced Communications Corporation, *Memorandum Opinion and Order*, 10 FCC Rcd 13337, 13342 (Int'l Bur. 1995) (*Advanced Bureau Decision*), *aff'd Memorandum Opinion*

“diligent progress toward actual operation must be the touchstone for our analysis of whether to grant an extension.”²² Because strict enforcement of milestones ensures that valuable spectrum resources are efficiently used and are not “warehoused,” we have not granted milestone extensions absent extraordinary circumstances.²³

8. Spectrum Five states that an extension is warranted for five reasons. First, Spectrum Five claims that applications for review that had been filed regarding the *Market Access Grant* created uncertainty about Spectrum Five’s authority to serve the U.S. market using these satellites.²⁴ Second, Spectrum Five asserts that developing its “tweener” satellites required it to resolve unique engineering and coordination challenges.²⁵ Third, Spectrum Five claims that international coordination issues involving the Netherlands and the United States have affected its ability to proceed with construction.²⁶ Fourth, Spectrum Five argues that a milestone extension is the best means available to bring competition from a new entrant into the U.S. market for DBS service.²⁷ Fifth, Spectrum Five asserts that the recent global financial crisis presented unprecedented challenges for obtaining financing.²⁸

9. DIRECTV filed a petition to deny Spectrum Five’s milestone extension request and EchoStar filed comments.²⁹ DIRECTV argues that Spectrum Five has not presented any extraordinary circumstances, and that the Commission has rejected similar arguments in prior cases.³⁰ Both DIRECTV and EchoStar maintain that Spectrum Five has not begun substantive coordination discussions with them, as required by Spectrum Five’s market access grant.³¹

10. Spectrum Five acknowledges that it terminated all construction activities on its Spectrum 1A and Spectrum 1B satellites more than two years ago. It now requests a two-year extension until November 29, 2012, to complete construction of the first satellite in its system. Spectrum Five does not request an extension of the next and final milestone – to launch and operate both Spectrum 1A and Spectrum 1B by November 29, 2012. Spectrum Five, however, does not address whether, or how, it will be able to complete construction of both Spectrum 1A and Spectrum 1B by November 29, 2012 or be able to launch and operate both satellites on that same date.

11. Nevertheless, Spectrum Five claims that an extension is warranted because applications for review of the *Market Access Grant* created regulatory uncertainty about the status of Spectrum Five’s

and Order, 11 FCC Rcd 3399 (1995) (*Advanced Review Order*), *aff’d* *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996), *cert. denied*, *Advanced Communications Corp. v. FCC*, 519 U.S. 1071 (1997).

²² *Advanced Review Order*, 11 FCC Rcd at 3414, ¶ 37.

²³ *Id.* at 3411; *Tempo Satellite, Inc.*, 13 FCC Rcd 11068, 11074 (Int’l Bur. 1998).

²⁴ Milestone Extension Request at 10.

²⁵ *Id.* at 11-14.

²⁶ *Id.* at 8-9.

²⁷ *Id.* at 14-15.

²⁸ *Id.* at 6.

²⁹ Petition to Deny of DIRECTV Enterprises, LLC (filed April 4, 2011) (DIRECTV Petition to Deny); Comments of EchoStar Corporation (filed April 4, 2011). DIRECTV also filed a reply. Reply of DIRECTV Enterprises, LLC (filed April 22, 2011). Spectrum Five filed a consolidated response to DIRECTV’s and EchoStar’s filings. Consolidated Response and Opposition of Spectrum Five LLC (filed April 14, 2011).

³⁰ DIRECTV Petition to Deny at 5-14.

³¹ DIRECTV Petition to Deny at 9 and exhibits; EchoStar Comments at 2, 6.

market access grant.³² Spectrum Five, however, represents that it did not stop work under the construction contract until November 2008. This is nine months *after* the Commission denied the applications for review in February 2008.³³ Thus, we cannot find that the applications for review of Spectrum Five's market access grant affected Spectrum Five's construction activities. In any event, the Commission has held that regulatory uncertainty does not justify a milestone extension.³⁴ Moreover, Spectrum Five was free to construct and launch its satellites under the jurisdiction of the Netherlands regardless of the status of Spectrum Five's U.S. market access grant.

12. Spectrum Five also claims that developing its satellites involves unique engineering challenges. We acknowledge that operating a new DBS satellite between two in-orbit satellites requires significantly smaller orbital separations between DBS satellites than are now used. Nevertheless, in its application for market access, Spectrum Five stated it could operate its proposed satellite in a "reduced spacing" environment by accepting more interference from adjacent in-orbit satellites, by modifying its power levels, by increasing the size of its customer antennas, and by using certain forward error correction coding rates in the data stream.

13. None of these methods requires the development of new technology. Indeed, in its petition for market access, Spectrum Five described these coordination strategies with adjacent operators as "well-understood sharing techniques" and stated that its satellites "will make use of available modern technology...well within the capability and technology of commercial satellite suppliers."³⁵ Nothing in the record suggests Spectrum Five will use any unique or technologically innovative equipment in its proposed satellites. To the contrary, the satellite designs in Spectrum Five's CDR filing reflect existing, off-the-shelf technology already used to manufacture a number of on-orbit space stations. In any event, the Commission has rejected generalized assertions about the need for new technology as a basis for milestone extensions.³⁶ Spectrum Five accepted its market access grant, which included milestone conditions, knowing that operating its proposed "tweener" satellite could pose some challenges. It cannot now claim that those challenges justify its failure to meet the milestones.

14. Spectrum Five also claims that a "dispute" between the Netherlands and the United States regarding Spectrum Five's operations at the 114.5° W.L. orbital location and proposed U.S. operations at adjacent orbital locations warrants a milestone extension.³⁷ Spectrum Five states that the Commission's 2008 authorization to EchoStar to launch and operate the proposed EchoStar 14 satellite at the 110° W.L. orbital location and the 2010 authorization to launch and operate the EchoStar 11 satellite at the 118.9° W.L. orbital location did not "respect and protect the spectrum rights of the Netherlands at the 114.5°

³² Milestone Extension Request at 10. In December 2006, DIRECTV and EchoStar each filed an application for review of the *Market Access Grant*.

³³ *Review Order*, 23 FCC Rcd 3252 (2008). On review, the Commission affirmed the *Market Access Grant*.

³⁴ *See, e.g.*, Application of GE American Communications, Inc. Request for Extension of Construction and Launch Milestones for GE-3, 13 FCC Rcd 13863, 13866, ¶ 7 (Int'l Bur. 1998) ("a petition for reconsideration does not justify delaying milestone requirements"); Norris Satellite Communications, Inc. Application for Review of Order Denying Extension of Time to Construct and Launch Ka-Band Satellite System, *Memorandum Opinion and Order*, 12 FCC Rcd 22299 (1997) (*Norris*).

³⁵ Spectrum Five Petition for Declaratory Ruling, Technical Appendix at 17 (IBFS File No. SAT-LOI-20050312-00062).

³⁶ *Norris*, 12 FCC Rcd at 22308, ¶ 22 ("While we are mindful of the obstacles innovators may encounter when developing new technologies, these are not justifications for failure to meet explicit milestone commencement standards.").

³⁷ Milestone Extension Request at 8. *See also* Spectrum Five July 25 Letter (providing additional information regarding correspondence between the Netherlands administration and the ITU).

W.L. orbital location.”³⁸ Spectrum Five claims that uncertainty created by these coordination issues has “materially frustrated Spectrum Five’s ability to complete construction of its satellite” by the milestone date.³⁹

15. It is inappropriate to consider the merits of the coordination positions of the Netherlands or the United States in this Order.⁴⁰ Moreover, these positions are immaterial to a milestone extension request. The Commission has consistently stated that applicants take Commission grants subject to the outcome of the international coordination process, and that the Commission “does not guarantee the success of the required coordination.”⁴¹ The Commission has also held that coordination difficulties do not justify milestone extensions because the duty to coordinate with potentially affected satellite operators, and the risks inherent in this process, are assumed upon acceptance of the grant.⁴² Indeed, in Spectrum Five’s case, the market access grant specifically stated that coordination difficulties would not justify an extension of the milestone dates.⁴³

16. Spectrum Five also asserts that we should grant its milestone extension request because it alone can best and most quickly deploy new service to U.S. consumers from the 114.5° W.L. orbital location.⁴⁴ Spectrum Five notes that the Commission has imposed a freeze on filing new DBS applications.⁴⁵ Spectrum Five argues that extending the milestone is therefore the only means of providing service to the public.

17. We are not convinced that the DBS application freeze justifies the requested extension. Spectrum Five has asked for a two-year extension of the completing construction milestone for Spectrum Five’s first satellite, until November 29, 2012. Spectrum Five does not, however, provide any concrete plan for completing the satellite, or for building its second satellite and operating both satellites by the

³⁸ Milestone Extension Request at 8.

³⁹ *Id.* at 9.

⁴⁰ Furthermore, Spectrum Five’s argument relates to coordination of the EchoStar 11 and EchoStar 14 satellites with Spectrum Five’s satellites. This ignores Spectrum Five’s prior obligation to coordinate its proposed satellites with operating satellites at adjacent locations. Specifically, Spectrum Five’s 2006 *Market Access Grant* recognized that *existing* DBS services being provided by EchoStar and DIRECTV would be affected by Spectrum Five’s proposed operations by substantially more than the trigger requiring coordination in the ITU’s Radio Regulations. *Market Access Grant*, 21 FCC Rcd at 14034-35, ¶ 24. The Commission authorized operator-to-operator negotiations between Spectrum Five and the affected U.S. DBS operators in May 2005. Letter from Kathryn O’Brien, Chief, Strategic Analysis and Negotiations Division, International Bureau, FCC, to Head Frequency Planning and Coordination Section, Radiocommunication Agency Netherlands (May 19, 2005). DIRECTV notes that Spectrum Five did not contact it to set up a coordination meeting until five years later – in mid-2010 – and then cancelled the meeting. DIRECTV Petition to Deny at 9, *citing* Declaration of David Pattillo, Technical Director, DIRECTV, attached as Exhibit A. DIRECTV also asserts that Spectrum Five did not respond to DIRECTV’s proposed date for a rescheduled meeting. *Id.* See also EchoStar Comments at 2, 6. There is no evidence to date that the parties have held a coordination meeting.

⁴¹ Amendment of the Commission’s Space Station Licensing Rules and Policies, *First Report and Order*, 18 FCC Rcd 10760, 10799-80, ¶ 96 (2003).

⁴² Loral Spacecom Corporation Application for Extension of Milestone Dates, *Memorandum Opinion and Order*, 20 FCC Rcd 12045, 12050, ¶ 13 (Int’l Bur. 2005). See also Star One, S.A. Petition for Declaratory Ruling to be Added to the Permitted List, *Order*, 25 FCC Rcd 14338, 14344, ¶ 12 (Int’l Bur. 2010) (*Star One Order*).

⁴³ *Market Access Grant*, 21 FCC Rcd at 14039, ¶ 35 n.119.

⁴⁴ Milestone Extension Request at 14.

⁴⁵ See Direct Broadcast Satellite (DBS) Service Auction Nullified: Commission Sets Forth Refund Procedures For Auction No. 52 Winning Bidders and Adopts a Freeze On All New DBS Service Applications, *Public Notice*, FCC 05-213, 20 FCC Rcd 20618 (2005).

next milestone date, also November 29, 2012. In fact, Spectrum Five has provided no evidence that it has made *any* progress on either satellite or that it is closer to providing service than it was when we granted it market access in 2006. Thus, we are not persuaded that Spectrum Five will provide service from this orbital location any sooner than another entity once we lift the DBS application freeze. Given Spectrum Five's lack of progress in the last four years, we will not permit it to continue to hold these orbital resources.⁴⁶ Once the Commission lifts the DBS application freeze, Spectrum Five may file a new request for market access. We will consider this request together with any other requests filed at that time.

18. Finally, Spectrum Five asserts that the recent global financial crisis presented "unprecedented challenges for financing an innovative service such as Spectrum Five's."⁴⁷ The Commission has consistently held that a failure to attract investors, an uncertain financial situation, or an unfavorable business climate do not excuse licensees from meeting milestones.⁴⁸ The Commission has stated that "to whatever extent a permittee's ability or willingness to maintain the construction of its DBS facilities is dependent on uncertain future fundraising or tentative business projections, the risk of success or failure in that endeavor falls squarely on that party's shoulders."⁴⁹ Further, the Bureau explicitly held that the recent financial crisis does not warrant an extension of time to meet Commission rules.⁵⁰ In doing so, we noted that many entities have been able to proceed with space station implementation in the late-2008 to 2009 time frame.⁵¹

19. Consequently, we do not find any of Spectrum Five's arguments justify an extension of the construction completion milestone. Further, we conclude that Spectrum Five's progress towards construction fell short of where it should have been at the November 2008 date at which it states it stopped construction. In fact, contrary to its assertion, we find that Spectrum Five has not met the November 2008 CDR milestone. CDR is "the stage in the spacecraft implementation process at which the design and development phase ends and the manufacturing phase starts."⁵² In the *Market Access Grant*, we provided several examples of evidence that Spectrum Five could supply to demonstrate that it had met the CDR milestone: (1) evidence of a large payment of money, required by most construction contracts at CDR; (2) affidavits from independent manufacturers; and (3) evidence that it had ordered all long-lead items needed to begin physical construction of the spacecraft.⁵³

⁴⁶ Spectrum Five notes that the United States has not made any filings with the ITU regarding U.S. operations at the 114.5° W.L. orbital location and that ITU procedures provide Spectrum Five until 2013 to bring its Netherlands-authorized service into use. Milestone Extension Request at 15. The Commission has stated that enforcement of its milestone policies "is not measured against whether another satellite operator would choose to provide service at a given location." *Star One Order*, 25 FCC Rcd at 14344, ¶ 13. Further, the ITU Region 2 BSS Plan has not been modified to enable Spectrum Five to provide its proposed service from this location.

⁴⁷ Milestone Extension Request at 6.

⁴⁸ *USSB Order*, 3 FCC Rcd at 6859, ¶ 11.

⁴⁹ *Id.*

⁵⁰ Globalstar Licensee LLC Application for Modification of License to Extend Dates for Coming into Compliance with Ancillary Terrestrial Component Rules, *Order*, 25 FCC Rcd 13114 (Int'l Bur., WTB, OET 2010) (*Globalstar Order*).

⁵¹ *Globalstar Order* at 13125, ¶ 25 n.62.

⁵² *Market Access Grant*, 21 FCC Rcd at 14041, ¶ 40 (citing Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 10760, 10826, ¶ 170 (2003)).

⁵³ *Id.*

20. While the documentation Spectrum Five submitted in its CDR showing identifies some components of a satellite, it does not show that these components have been incorporated into a detailed electrical and mechanical design specific to the Spectrum Five 1A and 1B satellites.⁵⁴ Furthermore, Spectrum Five provides no evidence that it made the large payment at CDR that was due under its construction contract.⁵⁵ In fact, Spectrum Five's total payments as of November 2008 amounted to less than 10% of what was due by the CDR milestone and was only a fraction of one percent of the contract price.⁵⁶ For these reasons, we find that Spectrum Five did not meet the CDR milestone.

21. Consequently, we do not find that the "totality of the circumstances" warrants an extension of time for Spectrum Five to meet the completing construction milestone for its first satellite. Spectrum Five stopped all work on the satellites over 30 months ago, and did not meet the earlier CDR milestone. Further, Spectrum Five has presented no plan for resuming construction, or for completing construction and launching both of its satellites by the required November 2012 date. Even assuming that Spectrum Five encountered technical difficulties, which is not supported by the record, Spectrum Five has provided no evidence that it has worked through those difficulties in the four-plus years since we granted it U.S. market access. Indeed, Spectrum Five did not contact existing DBS operators to coordinate Spectrum Five's potentially interfering operations, as required by the market access grant, until nearly four years after the grant. Further, there is no evidence that Spectrum Five has actually engaged in a single coordination discussion. For these reasons, we deny Spectrum Five's request for a two-year extension of the construction milestone.

22. *Waiver.* Spectrum Five alternatively seeks a waiver of the construction milestone. Section 1.3 of the Commission's rules provides that waiver of a rule may be granted upon "good cause shown."⁵⁷ Good cause may be found "where particular facts would make strict compliance inconsistent with the public interest."⁵⁸ To make this public interest determination, the waiver cannot undermine the purposes of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule.⁵⁹ As discussed above, Spectrum Five suspended work on satellite construction, and its pleadings contain no concrete plan or timetable under which Spectrum Five could resume construction and meet the requested new milestone date, nor the remaining milestones in its market access grant. Under these circumstances, we cannot conclude that grant of a waiver would serve the public interest.

23. In sum, Spectrum Five did not meet the CDR milestone included as a condition in its market access grant. Further, it did not justify an extension of time to meet the completing construction milestone, or a waiver of this milestone. For these reasons, we declare that the market access grant is null and void.

⁵⁴ The Spectrum Five satellites are similar to satellites Space Systems/Loral has built for other satellite operators. Many of the major components are "heritage" components from other programs.

⁵⁵ Spectrum Five February 2011 Letter at Attachment A, Exhibit E: Table 1, and Attachment C (confidentiality requested).

⁵⁶ *Id.* See *Advanced Application for Review*, 11 FCC Rcd at 3418, ¶ 50 (declaring DBS license null and void for failure to meet due diligence obligations, as Advanced had paid less than 1% of the contract price).

⁵⁷ Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3. See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio*); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).

⁵⁸ *Northeast Cellular*, 897 F.2d at 1166; *ICO Global Communications (Holdings) Limited v. FCC*, 428 F.3d 264, 269 (D.C. Cir. 2005) (quoting *Northeast Cellular*); see also *WAIT Radio*, 418 F.2d at 1157-59.

⁵⁹ See, e.g., *WAIT Radio*, 418 F.2d at 1157 (stating that even though the overall objectives of a general rule have been adjudged to be in the public interest, it is possible that application of the rule to a specific case may not serve the public interest if an applicant's proposal does not undermine the public interest policy served by the rule); *Northeast Cellular*, 897 F.2d at 1166 (stating that in granting a waiver, an agency must explain why deviation from the general rule better serves the public interest than would strict adherence to the rule).

24. *Compliance with other grant conditions.* In its market access petition, Spectrum Five proposed to operate at power levels that, absent coordination, would interfere with service being provided by in-orbit DBS satellites to millions of U.S. consumers. Consequently, we conditioned Spectrum Five's market access grant on Spectrum Five completing coordination with EchoStar and DIRECTV,⁶⁰ and limited Spectrum Five's system to power levels not exceeding ITU interference criteria until it completed coordination.⁶¹ In this regard, the *Market Access Grant* required Spectrum Five to provide to the Commission all the technical characteristics of its satellites modified as a result of the coordination process, within 30 days after completing CDR.⁶² On review, the Commission clarified that, in the event Spectrum Five was unable to negotiate operational parameters that exceeded the levels in the ITU coordination trigger, it must file a modification application that demonstrated it had reduced its system's power to a level below the trigger.⁶³ Thus, if it did not succeed in negotiating higher power, Spectrum Five was obliged to file a modification showing a system design that would not exceed ITU interference limits.

25. As noted, Spectrum Five has not reached a coordination agreement with EchoStar and DIRECTV. Although Spectrum Five stated in December 2008 that it "is preparing and will soon file" a modification petition, it has not made any such filing. Because Spectrum Five did not meet this condition in its market access grant, this provides an additional, independent, ground for rendering its market access grant invalid.⁶⁴

IV. ORDERING CLAUSES

26. Accordingly, it is ORDERED, that Spectrum Five LLC's request to extend or waive the construction milestone associated with the *Market Access Grant*, IBFS File Nos. SAT-MOD-20101126-00245 and SAT-MOD-20101126-00269, IS DENIED.

27. IT IS FURTHER ORDERED, pursuant to Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, that the declaratory ruling concerning Spectrum Five LLC's access to the United States market to provide Direct Broadcast Satellite service from two Netherlands-authorized satellites at the 114.5° W.L. orbital location, File No. SAT-LOI-20050312-00062 (Call Sign S2667) and File No. SAT-LOI-20050312-00063 (Call Sign S2668), IS DECLARED NULL AND VOID.

28. IT IS FURTHER ORDERED that the Petition to Deny filed by DIRECTV Enterprises, LLC is GRANTED.

⁶⁰ *Market Access Grant*, 21 FCC Rcd at 14037, ¶ 30.

⁶¹ *Id.* at 14042, ¶ 43(d).

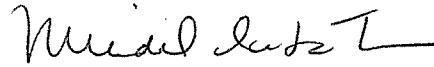
⁶² *Id.* at 14042, ¶ 43(c).

⁶³ *Review Order*, 23 FCC Rcd at 3259, ¶ 19.

⁶⁴ Spectrum Five asserts that the condition does not require it to file a modification application until coordination is complete. In contrast, DIRECTV urges us to declare the market access grant null and void for Spectrum Five's failure to file a modification. *See* DIRECTV January 2009 Letter. We agree with DIRECTV that the *Market Access Grant* required Spectrum Five to file a modification application 30 days after completing CDR. In any case, the timing of the modification filing does not alter our conclusion that the market access grant is invalid for other reasons.

29. IT IS FURTHER ORDERED that this Order is effective upon release. Petitions for reconsideration under 47 C.F.R. § 1.106 or applications for review under 47 C.F.R. § 1.115 may be filed within thirty days of the release date. See 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION



Mindel De La Torre
Chief, International Bureau