

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
EHOSTAR SATELLITE OPERATING CORPORATION)	File No. SAT-STA-20140113-00004
)	Call Sign S2232
)	
Request for Renewal of Special Temporary Authorization to Move EchoStar 6 to, and Operate It at, 96.2° W.L.)	

To: Chief, International Bureau

REPLY OF SPECTRUM FIVE LLC

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March 11, 2014

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction and Summary	1
II. EchoStar’s Statement that SES-Bermuda was Not Licensed by Bermuda Until August 2013 Is a New and Significant Inconsistency That Renders All the STA Requests Defective.	2
III. EchoStar’s Failure to Provide Communications Service Means the STA Standard Cannot be Satisfied for Any of the Pending STA Requests.	4
IV. EchoStar’s Responses to Spectrum Five’s Demonstration that the Station-Keeping Condition of the April STA has been Willfully and Repeatedly Violated is Unavailing; “Substantial Compliance” is no Substitute for Actual Compliance.	7
V. EchoStar 6’s Highly-Inclined Operation Prevents EchoStar from Providing Service to Any Consumer-Grade, Non-Tracking Earth Station Antennas of the Type Used in DBS/BSS.	11
VI. Conclusion	12

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To: Chief, International Bureau

REPLY OF SPECTRUM FIVE LLC

Spectrum Five LLC (“Spectrum Five”), pursuant to Section 25.154 of the Commission’s Rules, hereby replies to the “Response to ‘Opposition’” filed by EchoStar Satellite Operating Corporation (“EchoStar”) in the above-captioned proceeding stemming from EchoStar’s request for Special Temporary Authority (“STA”) to provide Direct Broadcasting Satellite (“DBS”) service at the unassigned 96.2° W.L. orbital location from the highly-inclined-orbit EchoStar 6 satellite.¹

I. Introduction and Summary

In its Opposition, Spectrum Five provided three compelling reasons why the Commission should deny the January 2014 60-day STA Request (which sought to extend or renew the 60-day STA the International Bureau granted in April 2013) and dismiss the four other pending 60-day STA extension/renewal requests as moot.² Spectrum Five showed that:

¹ EchoStar Satellite Operating Company Response to “Opposition” in File No. SAT-STA-20140113-00004 (filed February 26, 2014) (“EchoStar Response”). The EchoStar STA request is referred to herein as the “EchoStar January STA Request.” The filing deadline for this Reply was extended by one day pursuant to Public Notice Report No. 14-299 (released March 4, 2014).

² Spectrum Five Opposition in File No. SAT-STA-20140113-00004 (filed February 11, 2014).

(i) EchoStar has violated the express condition that the EchoStar 6 satellite be maintained at 96.2° W.L. with an east/west longitudinal station-keeping tolerance of +/- 0.05 degrees;³ (ii) EchoStar continues to misrepresent the extent to which the EchoStar 6 satellite is being used near 96.2° W.L. for the fixed-satellite and mobile-satellite services authorized in the EchoStar 60-Day STA Grant;⁴ and (iii) the extent of EchoStar 6 satellite's north-south inclination prevents any non-tracking earth station (such as consumer-grade earth stations used with DBS systems) from receiving a constant signal from EchoStar 6.

EchoStar's Response does not meaningfully address the issues raised by Spectrum Five. Instead, EchoStar provides materially inconsistent claims that serve only to reinforce the points Spectrum Five raised against the pending STA requests for EchoStar 6 and introduce new reasons to deny the pending STA requests.

As Spectrum Five demonstrated in its Opposition and reinforces here, the Commission must deny the January STA Request and all pending EchoStar 6 STA requests. The Commission should also refer EchoStar's violations of the station-keeping condition in the EchoStar 60-Day STA Grant and its subsequent misrepresentations to the Enforcement Bureau for appropriate disciplinary action.

II. EchoStar's Statement that SES-Bermuda was Not Licensed by Bermuda Until August 2013 Is a New and Significant Inconsistency That Renders All the STA Requests Defective.

One significant and new inconsistency relates to the question of when EchoStar's customer had authorization from the Bermudian government. In the initial STA request, EchoStar attached a letter from a Bermuda government official dated February 20, 2013

³ Spectrum Five Opposition, at 2 - 4 (citing *EchoStar Satellite Operating Corporation*, 28 FCC Rcd 4229, ¶ 20 (Int'l Bur. 2013) ("EchoStar 60-Day STA Grant").

⁴ Spectrum Five Opposition, at 4-6.

stating that Bermuda had authorized SES's Bermudian subsidiary to operate DBS/BSS satellites at 96.2° W.L.⁵ In its current Response, however, EchoStar claims that SES "obtained a license from the Bermuda Ministry of Economic Development to provide satellite service to Bermuda via EchoStar 6" on August 14, 2013.⁶ EchoStar Response at 3.

Under Bermuda law, a satellite operator must receive three separate certifications to be licensed – a "certification of compliance," a "certification of competence to engage in coordination," and "a certification of coordination." The certification of compliance is a determination by the Bermuda government that the operator is qualified to apply for a license by meeting a long list of basic qualifications, is "competent and capable of carrying out the proposed satellite network project," and that the project "is in the interests of the people of Bermuda." All three are prerequisites for Bermudian satellite licensing, although it is possible to gain a conditioned license if coordination has been started but not completed.⁷

According to a February 14, 2014 statement to the Bermuda Parliament by Bermuda's minister with responsibility for Telecommunications, the first two certificates were issued to SES's subsidiary in March 2013 – a month after Bermuda informed the Commission via letter that SES was "authorized" to provide service at 96.2° W.L. under the BERMUDASAT-1 ITU filings.⁸ If Bermuda had not even determined if SES was eligible to hold a satellite license at

⁵ See EchoStar February 20, 2013 STA Request in File No. SAT-STA-20130220-00023, at Exhibit 1.

⁶ EchoStar Response at 3.

⁷ See Bermuda Satellite Network Notification and Coordination Regulations 2007 (Regulation Nos. 5, 6, 9, 10, 12, and 18), available at <http://www.bermudalaws.bm/Laws/Consolidated%20Laws/Satellite%20Network%20Notification%20and%20Coordination%20Regulations%202007.pdf>.

⁸ See Ministerial Statement to the Bermuda House of Assembly by Dr the Hon. E. Grant Gibbons, JP, MP, Minister of Education and Economic Development, February 14, 2014, at 2, available at <http://www.parliament.bm/uploadedFiles/Content/Home/BermudaSat-1%20-%20G.%20Gibbons%20-%20Feb14%202014.pdf>.

the time of the statement to the Commission, it is now unclear how SES could have been “authorized” at the time of that statement. Furthermore, ex parte submissions show that coordination discussions between SES and DIRECTV were underway on or before March 7, 2013, which draws into question whether SES was even authorized to enter into coordination talks with DIRECTV at the time those discussions began.

Whether or not it was reasonable for the Bureau to rely on the letter submitted with EchoStar’s original STA request, EchoStar’s new statements and those from the Bermuda government demonstrate that SES was not authorized to provide service pursuant to BERMUDASAT-1 ITU filing at the time the original STA request was filed, granted, or for that matter, for the duration of the original 60-day STA. Furthermore, Bermuda is not an ITU recognized Administration. No.18.1 of the ITU Radio Regulations requires that a private party must be licensed to operate by its Administration, in this case the United Kingdom. The record is entirely silent about when – if ever – SES’s Bermudian subsidiary received authorization from the United Kingdom, only from Bermuda. Indeed, any action by the United Kingdom to ratify the Bermuda license could only have occurred *after* Bermuda granted the license, which according to EchoStar was August 14, 2013 – six months after application was made. The absence of the license renders all of the STA requests and modification application incomplete and defective.

III. EchoStar’s Failure to Provide Communications Service Means the STA Standard Cannot be Satisfied for Any of the Pending STA Requests.

On the subject of “operation” of EchoStar 6 at 96.2° W.L., EchoStar 6 conflates TT&C of the satellite with operation of it, and offers a series of internally inconsistent statements that fail to mask the flaws in its argument. The undisputed fact remains that there was no operation of the satellite’s communications payload at any time during the original 60-

day STA, and this is the key consideration for purposes of the Commission’s determination of whether the current STA request or any of the previous STA extension/renewal requests should be granted.

For most of its Response, EchoStar acknowledges that it has not operated the satellite’s payload at all in the more than 11 months since EchoStar 6 was relocated to the area of 96.2° W.L.⁹ Spectrum Five notes that EchoStar now claims, for the first time, that “EchoStar 6’s communications payload has been activated since November 2013[.]”¹⁰ EchoStar, however, offers no amplification or substantiation (with declarations or otherwise) of this claim of convenience – a claim that is contravened by the recent independent, third party monitoring showing no payload transmissions and EchoStar’s own statements and carefully parsed words. As it mentioned in the Opposition, Spectrum Five retained an independent third party to monitor the EchoStar 6 payload in February 2014, and observed no communications activity taking place on any of EchoStar 6’s transponders.¹¹

The point here, and one that cannot be erased with EchoStar’s empty and vague claims, is that EchoStar has failed to provide any service via the EchoStar 6 satellite’s communications payload for more than 345 days and counting since the EchoStar 60-Day STA Grant, and has no immediate prospects even now for doing so.¹² This core and

⁹ EchoStar reports that it “is engaged in discussions with various commercial partners to bring the benefits of its mobile video service to, for instance, the maritime market . . .” EchoStar Response, at 2. EchoStar claims that the conclusion of the negotiations “*will result* in the provision of new services to underserved markets in the mid-Atlantic Ocean region.” *Id.* (emphasis added). Later on, EchoStar talks about discussions it has held with potential customers/service providers, and describes what the satellite “will be used” to provide. *Id.* at 3.

¹⁰ *Id.* at 3-4.

¹¹ See Spectrum Five Opposition at 5-6.

¹² In fact, one of the main services EchoStar proposed to provide via EchoStar 6 at 96.2° W.L. – direct-to-home services to Bermuda – is clearly not viable due to the high inclination angle of the

uncontroverted fact begs the question why Echostar did not originally avail itself of normal licensing procedures, but instead forced the Commission to truncate normal licensing procedures through the use of the STA process. But for the bringing into use of the BERMUDASAT-1 ITU filing, it is clear that there was no urgency demanding the use of the STA process. EchoStar and its development partner SES are fully capable of exploring service to underserved markets in the mid-Atlantic Ocean region on any number of other satellites they control that have better and more powerful coverage of the area in question. These facts preclude the Commission from finding that the public interest would be seriously prejudiced (or indeed, negatively impacted in any way whatsoever) by a denial of the STA request.¹³ Spectrum Five made this point in its Opposition, and EchoStar offered no cogent response.¹⁴ And the irony is not lost on Spectrum Five that EchoStar demanded that the Commission use the STA process, and has continued to push it, only to reveal in its most recent response that SES did not even hold a license from Bermuda.

EchoStar's forward-looking public interest claims associated with all of the pending STA requests can be considered in connection with the pending application for a permanent

EchoStar 6 satellite, which would require tracking antennas in every installation. *See infra*, at Section V.

¹³ Spectrum Five does admit to being intrigued by EchoStar's claim to be in negotiations to provide "new services to underserved markets in the mid-Atlantic Ocean region." EchoStar Response, at 2. The record seems to be bereft of any indication of the number of unserved households EchoStar has found in the mid-Atlantic Ocean.

¹⁴ *See* Spectrum Five Opposition, at 6. EchoStar cites the Commission's July 2013 decision affirming the EchoStar 6 STA Grant for the proposition that the Commission has already addressed and rejected this argument on the merits. EchoStar is wrong. At the point of the Commission decision cited by EchoStar (¶ 15), the Commission reiterated that it found the original STA to be in the public interest because the United States was able to fully protect orbital locations currently providing service to the United States. *EchoStar Satellite Operating Corp.*, 28 FCC Rcd 10412, at ¶ 15 (2013). That finding does not apply to the later STA requests, which must be evaluated *de novo* as there are no "renewals" of STAs. With no service requirements extant or imminent, EchoStar cannot show (and indeed has made no attempt to show) that it would be seriously prejudiced by the denial of any of the pending STA requests.

modification of EchoStar's license for EchoStar 6,¹⁵ but they do not and cannot be deemed to satisfy the second of the required elements for STA grants – i.e., that the public interest would be seriously prejudiced by a denial of the STA request. With no service being provided or even on the imminent horizon, there can be no prejudice from a denial of the STA request. This is inexorably true for each of the pending STA extension/renewal requests.¹⁶ All of the pending STA extension/renewal requests for EchoStar 6 at 96.2° W.L. should now be denied or dismissed.

IV. EchoStar's Responses to Spectrum Five's Demonstration that the Station-Keeping Condition of the April STA has been Willfully and Repeatedly Violated is Unavailing; "Substantial Compliance" is no Substitute for Actual Compliance.

In response to Spectrum Five's demonstration that EchoStar 6 violated the Commission's condition of the EchoStar 60-Day STA Grant requiring EchoStar to maintain the EchoStar 6 satellite within 0.05° W.L. of the 96.2° W.L. orbital location,¹⁷ EchoStar makes two assertions – first, that the original STA did not specify when EchoStar was obliged to commence maintaining EchoStar 6 within the applicable +/- 0.05° station-keeping box, and second, that “the available tracking data shows substantial compliance with the FCC's station-

¹⁵ EchoStar Response, at 3.

¹⁶ If it were known at the time of the initial STA in February/March 2013 that EchoStar would not have offered a single bit of service to anyone over EchoStar 6 at 96.2° W.L. in the more than 300 days since the STA was granted, this entire affair would have been avoided. The service arguments advanced by EchoStar were a pretext to its true motivation – the securing of permanent rights to the DBS slot at 95°/96° W.L. for itself and development partner SES, despite the continuing DBS freeze. Clearly, normal licensing procedures for the modification application would have been sufficient for the stated objective; the STA just wasted everyone's time and left the Commission in a difficult position of defending an anticompetitively-motivated action. This is especially the case given, as noted above, that EchoStar and its development partner SES are fully capable of exploring service to underserved markets in the mid-Atlantic Ocean region on any number of other satellites they control that have better and more powerful coverage of the area in question.

¹⁷ Spectrum Five Opposition, at 2-4.

keeping requirement.”¹⁸ Neither assertion is true, and the second assertion is also irrelevant. EchoStar has failed once again to respond to Spectrum Five’s serious allegations of misconduct.

EchoStar argued to the Commission in earlier filings that since April 25, 2013, EchoStar 6 has been completely within 0.05° of 96.2° W.L.¹⁹ Using real tracking data taken from NORAD (a neutral party), Spectrum Five showed that EchoStar 6 was not within its required +/- 0.05° station-keeping box during the first 60-day STA term and well thereafter.²⁰ At the time Spectrum Five presented this data to the Commission (July 2013), EchoStar criticized NORAD for being inaccurate and Spectrum Five for challenging the experienced operator, EchoStar. As it turns out, NORAD knew where EchoStar 6 was, while EchoStar did not. What is clear is that EchoStar 6 was not station-kept to within 0.05° of 96.2° W.L. during the initial 60-day STA term.

In early January 2014, EchoStar – without regard to any of the pending STA requests – made a new submission acknowledging that the original “data” it provided on EchoStar 6’s location from April to June 2013 were inaccurate due to a calibration error in its TT&C

¹⁸ EchoStar Response, at 4.

¹⁹ *See, e.g.*, Letter dated July 15, 2013, in File No. SAT-STA-20130510-00067, from P. Pham, Counsel for EchoStar, to M. Dortch, Secretary, FCC, at 3 and Attachment 2 (EchoStar Spacecraft Engineering Manager declares under penalty of perjury that “[f]rom April 25 to the present, the satellite has remained fully within a 0.05° station-keeping box at all times.”). *See also* Letter dated August 26, 2013, in File No. SAT-STA-20130510-00067, from B. Tramont, Counsel for EchoStar, to M. Dortch, Secretary, FCC, at 2. As Spectrum Five noted in its Opposition, EchoStar made these claims while attempting to dismiss or discredit NORAD data supplied by Spectrum Five which showed that the EchoStar 6 satellite was clearly not station kept to within 0.05 degrees of 96.2° W.L. during or after April 2013, and continuing on through the summer and into the fall. Spectrum Five Opposition, at 2-3.

²⁰ *See* Spectrum Five Opposition, at 3 & n.6.

system.²¹ EchoStar provided the Commission with a “chart” that it asserts “depicts EchoStar 6’s east-west orbital movement and location based upon tracking data and calculations” correcting for its calibration error.²² This means that EchoStar has not produced any “new” data regarding EchoStar 6’s location from April through June 2013; it has only made an attempt to reconstruct corrupt data after the fact.

Now, EchoStar comes back, in response to an opposition to its request for a fifth extension of the initial STA from April 2013, and proffers the incredible argument that the Commission’s condition for station-keeping did not specify when station-keeping had to commence. To EchoStar, this means that station keeping to the required tolerance did not have to commence during the initial term, or during the terms of the three succeeding (and still pending) STAs. Instead, it means that the station keeping was acceptably commenced during the term of the fourth STA extension, once EchoStar figured out where its satellite was for the preceding eight months and corrected its telecommands.

The Commission should not stand for EchoStar’s disregard for the station-keeping condition it imposed in the EchoStar 60-Day STA Grant. EchoStar shrugged off Spectrum Five’s demonstrations of non-compliance back in July 2013, and did not “discover” its error until after ITU began investigating the satellite’s location in October 2013. EchoStar then waited three months after “discovering” its error to report the matter to the Commission (under Section 1.65 of the Commission’s Rules, a regulation that requires reporting within 30

²¹ See Letter (redacted version) dated January 3, 2014, from J. Manner, EchoStar, to M. Dortch, Secretary, FCC (“Manner Letter”). This Reply does not rely upon or utilize in any way material EchoStar submitted to the Commission under request for confidential treatment, so there is no need for redaction or confidential treatment of this Opposition.

²² Manner Letter, at 2.

days). Finally, EchoStar has, to this date, not sought a waiver or any relief from the condition.

EchoStar's claim that "the available tracking data shows substantial compliance with the FCC's station-keeping requirement"²³ is both untrue and irrelevant. The condition to maintain EchoStar 6 within 0.05° of 96.2° W.L. was not a best-efforts matter, it was a hard and fast obligation. Either EchoStar complied with the condition or it did not. EchoStar did not comply, and simply dismissed NORAD data. EchoStar offers no precedent for the proposition that it could violate the condition and still be found in compliance with the EchoStar 60-Day STA Grant.²⁴

Moreover, EchoStar did not apprise the Commission of its supposedly newly-discovered error until another three months had elapsed. EchoStar has filed multiple STA requests for EchoStar 6 since the July demonstration (including two requests after its October "discovery"), and never sought a waiver of the station-keeping obligation. This is the epitome of willful and repeated violations of Commission obligations that results in enforcement action at the Commission. Under no circumstances can the Commission ignore the

²³ EchoStar Response, at 4.

²⁴ EchoStar's attempt to rely on a preliminary finding at the ITU regarding the United Kingdom's claim that EchoStar 6 satisfied the ITU "bringing-into-use" regulation for the BERMUDASAT-1 frequency assignments is both incorrect and unavailing. First, the ITU's Radiocommunication Bureau ("BR") did not determine that EchoStar 6 "is in full compliance with the ITU's station-keeping requirement." *See* EchoStar Response, at 4. The BR (improperly in Spectrum Five's view) seemed to base its determination on a station-keeping tolerance of +/- 0.1° (as allowed as a maximum in the Region 2 BSS Plan), notwithstanding the BERMUDASAT-1 filings' specification of +/- 0.05° stationkeeping. Moreover, the BR confirmed that EchoStar 6 was not station-kept to within 0.05° of 96.2° W.L.; it found (again improperly for multiple reasons in Spectrum Five's view) that EchoStar "had the capability to maintain its position" within 0.05°. The BR finding is preliminary, and is being taken to the Radio Regulations Board for review by the administration of the Netherlands. The BR's findings to date, however, not only fail to advance EchoStar's claim, they confirm its violation of the Commission's station-keeping obligation from the EchoStar 60-Day STA Grant.

brazenness and gravity of EchoStar's malfeasance; it certainly cannot reward such behavior with a grant of any of the pending STA requests.

V. EchoStar 6's Highly-Inclined Operation Prevents EchoStar from Providing Service to Any Consumer-Grade, Non-Tracking Earth Station Antennas of the Type Used in DBS/BSS.

EchoStar responds ineffectively to Spectrum Five's demonstration that EchoStar 6 is incapable of providing the types of service outlined in the STA extension/renewal requests. Spectrum Five, noting that EchoStar 6 was at approximately 1.3° of north-south excursion in April 2013, and at approximately 1.9° of north-south excursion today, observed that the satellite is incapable of providing any services to non-tracking earth stations.²⁵

EchoStar does not take issue with the observation that tracking earth stations would be required for operation with EchoStar 6. Instead, it asserts that the inclined-orbit operation of EchoStar 6 is well suited for mobile services to ships and vessels that "require tracking earth stations antennas to compensate for both the ship's movement and EchoStar 6's inclination" ²⁶ EchoStar's response confirms that operation of EchoStar 6 with fixed land-based consumer-grade terminals such as those used in BSS/DBS is not possible due to the satellite's high inclination.

VI. Conclusion

On the basis of Spectrum Five's Opposition and the foregoing discussion, the Commission must deny all of EchoStar's pending requests for extension/renewal of the April 2013 STA grant authorizing the temporary relocation of EchoStar 6 to the 96.2° W.L. orbital location. EchoStar and its development partner SES have numerous operational satellites (as

²⁵ Spectrum Five Opposition, at 6-7.

²⁶ EchoStar Response, at 5.

contrasted with the inoperative EchoStar 6 satellite) that are newer, have superior coverage of the area they state they wish to serve, and more power. These existing operational satellites are well suited to explore the future service opportunities EchoStar wants to explore under STAs at 96.2° W.L. In light of the fact that this exploration is not exclusive to 96.2° W.L., and the EchoStar 6 satellite was inoperative as late as February 2014, the Commission should rely on its normal licensing process; reject any further consideration of the STA requests; order EchoStar 6 back to its prior location at 77° W.L.; and address any future opportunities in the course of the pending modification of license application or in response to a new modification application.

Respectfully submitted,

SPECTRUM FIVE LLC

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March 11, 2014

CERTIFICATE OF SERVICE

I, Pam Conley, hereby certify that a true and correct copy of the foregoing Reply of Spectrum Five LLC was served on the following, by First-Class U.S. Mail, postage prepaid, this 11th day of March, 2014.

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