

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

In the Matter of

SPECTRUM FIVE, LLC

Request to Modify Its Authorization to
Serve the U.S. Market Using Broadcast
Satellite Service (BSS) Spectrum from the
114.5° W.L. Orbital Location

File Nos. SAT-MOD-20101126-00245
SAT-MOD-20101126-00269

Call Signs: S2667, S2668

PETITION TO DENY OF DIRECTV ENTERPRISES, LLC

DIRECTV, Enterprises, LLC (“DIRECTV”) hereby requests that the Commission deny the petition filed by Spectrum Five, LLC (“Spectrum Five”) to extend or waive the milestone requirement that construction of the first satellite in its system be complete on or before November 29, 2010.¹ As demonstrated below, the factors cited by Spectrum Five in support of its petition are not the kind of “extraordinary circumstances” the Commission requires to satisfy its totality of the circumstances test. Indeed, the arguments raised by Spectrum Five have been consistently rejected by the Commission, are totally inapposite to the facts of this case, or both.

Moreover, given Spectrum Five’s unilateral decision to cease construction of its satellite system over two years ago – a fact flatly at odds with the annual progress reports

¹ See Petition for Declaratory Ruling, IBFS File Nos. SAT-MOD-20101126-00245 and -00269 (filed Nov. 26, 2010) (“Spectrum Five Petition”).

the company filed with the Commission² – there is no reason to believe that Spectrum Five would be able to complete construction by the November 29, 2012 deadline it now proposes. Accordingly, DIRECTV requests that the Petition be denied and Spectrum Five’s market access authorization be cancelled in its entirety.

BACKGROUND

Spectrum Five has been granted by the Netherlands an authorization “to construct, launch, and operate a satellite network comprised of two satellites (designated as Spectrum 1A and Spectrum 1B) at the 114.5° W.L. location” operating in the Direct Broadcast Satellite (“DBS”) bands.³ In March 2005, Spectrum Five filed a petition seeking authority to serve the U.S. market using this DBS system, representing that its agreement with the Netherlands “provides all of the authority required for Spectrum Five to launch and operate a DBS satellite at 114.5° W.L. according to the technical parameters described in [its application].”⁴ Spectrum Five also stated that it was “prepared to comply with the Commission’s due diligence requirements for DBS satellites” by, among other things, “completing construction of the first satellite within four years of the grant.”⁵

The 114.5° W.L. orbital location lies midway between the DBS slots allocated to the United States under the Region 2 Plan at 110° W.L. and 119° W.L., from which

² The Commission should consider investigating whether Spectrum Five’s representations in its annual progress reports were consistent with its duty of candor. *See, e.g., RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) (discussing “basic, and well known” duty of candor toward the Commission), *cert. denied*, 456 U.S. 927 (1982).

³ *See* Petition for Declaratory Ruling, IBFS File No. SAT-LOI-20050312-00062, at 1 (filed Mar. 12, 2005) (“Spectrum Five Application”).

⁴ *Id.* at 11.

⁵ *Id.* at 10 (citing 47 C.F.R. § 25.148(b)).

DIRECTV and EchoStar Satellite L.L.C. (“EchoStar”) currently provide DBS service to tens of millions of subscribers across the country. Because Spectrum Five’s proposed operations would reduce orbital spacing between co-coverage DBS systems from nine degrees to four-and-a-half degrees, DIRECTV and EchoStar have consistently raised concerns about the potential interference this new “tweener” satellite system could cause to service relied upon by millions of Americans.⁶

Notwithstanding these objections, the International Bureau granted Spectrum Five authority to serve the U.S. market from 114.5 W.L. on November 29, 2006.⁷ As anticipated by Spectrum Five, that authorization included due diligence milestones, including a requirement that construction of the first satellite be complete by November 29, 2010. “[I]n order to ensure that Spectrum Five is taking all necessary action to meet its milestones,” the authorization also imposed a requirement that Spectrum Five file annual progress reports each June.⁸ The authorization also provided that, unless and until Spectrum Five completed coordination with other affected DBS systems, it must not operate in a manner that exceeds the limits in Annex 1 to Appendices 30 and 30A of the ITU Radio Regulations that trigger the agreement seeking obligation.⁹ DIRECTV and EchoStar timely sought review of the Bureau’s decision, but the full Commission affirmed it on February 25, 2008.¹⁰

⁶ See *Spectrum Five, LLC*, 21 FCC Rcd. 14023, ¶¶ 25, 28 (Int’l Bur. 2006) (discussing opposition arguments) (“Spectrum Five Authorization”).

⁷ See generally *id.*

⁸ See *id.*, ¶ 41.

⁹ *Id.*, ¶ 30.

¹⁰ See *Spectrum Five, LLC*, 23 FCC Rcd. 3252 (2008).

Spectrum Five submitted materials claiming to have met its first milestone (contracting for satellite construction) in November 2007 and its second milestone (completion of critical design review, or “CDR”) in November 2008.¹¹ Thereafter, in its annual report for June 2009, Spectrum Five represented to the Commission that it was working with its satellite contractor, Space Systems/Loral, “to ensure that Spectrum Five accomplishes its next milestone, construction of the first satellite in its system.”¹² In its June 2010 report, Spectrum Five similarly represented to the Commission that it “is working toward its next milestone, construction of its first satellite.”¹³

Less than five months after this most recent report, and just three days before it was required to complete construction of its first satellite, Spectrum Five filed a petition to extend or waive that very same milestone. In support of its Petition, Spectrum Five cited market conditions and coordination issues that it contends should excuse failure to comply with its milestone. However, Spectrum Five’s filing was completely silent on the degree to which it had made any progress toward constructing its first satellite as required.

Accordingly, the International Bureau requested additional information on the status of Spectrum Five’s contract with Space Systems/Loral and its satellite work-in-

¹¹ See Letter from Todd M. Stansbury to Marlene H. Dortch, IBFS File Nos. SAT-LOI-20050312-00062 and -00063 (Nov. 28, 2007); Letter from Todd M. Stansbury to Marlene H. Dortch, IBFS File Nos. SAT-LOI-20050312-00062 and -00063 (Nov. 25, 2008).

¹² Annual Report of Spectrum Five, LLC (attached to Letter from Howard W. Waltzman to Marlene H. Dortch (June 29, 2009)).

¹³ Annual Report of Spectrum Five, LLC (attached to Letter from Howard W. Waltzman to Marlene H. Dortch (June 29, 2010)).

progress.¹⁴ Although almost all of Spectrum Five’s response to this inquiry was filed confidentially,¹⁵ the publicly available information reveals that “construction of the satellites halted after completion of CDR” in November 2008, and “is currently suspended,”¹⁶ facts that are contrary to multiple prior representations.

DISCUSSION

A. Spectrum Five Has Failed to Justify a Milestone Extension.

As Spectrum Five recognizes, due diligence milestones are a standard feature of any DBS authorization issued by the Commission. The Commission has chosen, as a policy matter, to rely on milestones rather than protracted proceedings (such as comparative hearings) to determine a licensee’s financial and technical capabilities to build and operate a DBS system.¹⁷ This makes strict enforcement of milestone obligations especially important.¹⁸

In deciding whether a request for extension of DBS due diligence milestones is justified, the Commission has traditionally applied a “totality of the circumstances” test, which includes consideration of “those efforts made and those not made, the difficulties

¹⁴ See Letter from Robert G. Nelson to David Wilson, IBFS File No. SAT-MOD-20101126-00245 (Jan. 13, 2011).

¹⁵ DIRECTV has filed a request for access to the confidential materials filed by Spectrum Five pursuant to the Freedom of Information Act. See Letter from Mark D. Davis to FCC FOIA Office, FOIA Control No. 2011-244 (Mar. 7, 2011). That request remains pending. Should that request be granted, DIRECTV intends to supplement this petition to deny. The Commission has recognized that petitioners should be given at least thirty days to file such a supplement after gaining access to materials filed confidentially. See *Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24816, ¶ 34 (1998).

¹⁶ Letter from David Wilson to Robert G. Nelson, IBFS File No. SAT-MOD-20101126-00245, at 2 (Feb. 11, 2011) (“Spectrum Five LOI Response”).

¹⁷ *EchoStar Satellite Corp.*, 17 FCC Rcd. 8831, ¶ 8 (Int’l Bur. 2002) (“*EchoStar*”).

¹⁸ See, e.g., *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 15 FCC Rcd. 16127, ¶ 106 (2000) (“milestone requirements are especially important because we are declining to adopt financial qualifications as an entry criterion for 2 GHz MSS systems”).

encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public.”¹⁹ During the developing years of the DBS service, the Commission also considered the industry’s infancy as a potential factor favoring extension. However, over 15 years ago, the Commission announced that latitude in granting milestone extensions was no longer appropriate due to the established nature of the DBS service.²⁰ As a result, the Commission has cancelled DBS authorizations when permittees did not make “concrete progress” toward system implementation, and has announced that it would only grant extension requests in “situations involving extraordinary circumstances.”²¹

Spectrum Five’s extension request does not even begin to satisfy this rigorous standard. Indeed, as demonstrated below, the factors cited by Spectrum Five in support of its extension request have either been rejected in prior cases or are totally inapposite to the facts of this case.²²

Efforts made and not made. Analysis of the first factor in the totality of the circumstances test – “those efforts made and those not made” – must begin with Spectrum Five’s admission that it halted construction of its satellites over two years ago, and that suspension remains in effect today. Accordingly, as the Commission found in denying an extension request by Advanced Communications, “[f]or purposes of our due

¹⁹ See, e.g., *United States Satellite Broadcasting Co.*, 3 FCC Rcd. 6858, ¶ 10 (1988).

²⁰ *Advanced Communications Corp.*, 10 FCC Rcd. 13337, ¶ 4 (Int’l Bur. 1995)(“*Advanced Communications*”), *rev. denied*, 11 FCC Rcd. 3399 (1995)(“*Advanced Review Order*”), *aff’d sub nom. Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1071 (1997).

²¹ *EchoStar*, ¶ 9 (citing cases).

²² Although Spectrum Five did not relate its arguments to the four categories identified by the Commission as components of the totality of the circumstances test, we have attempted to do so for purposes of assessing the merits of its Petition. We were unable to identify any argument related to the “rights of all parties” category, however.

diligence analysis, we must recognize that *none* of the efforts cited by [Advanced] involves the actual construction of a DBS satellite.”²³ While other activities “may be laudable, [Commission] precedent makes it clear that diligent progress toward actual operation must be the touchstone for our analysis of whether to grant an extension.”²⁴ The same is true in this case, and should alone be sufficient to result in denial of the requested extension.

Even were the Commission inclined to ignore its precedent and examine non-construction related factors, those cited by Spectrum Five are patently insufficient to justify an extension. For example, Spectrum Five asserts that substantial uncertainty created by administrative review of its authorization justifies an extension.²⁵ As an initial matter, the Commission has established that “[a] petition for reconsideration does not justify delaying milestone requirements.”²⁶ In addition, in this particular case, the full Commission had resolved all challenges to Spectrum Five’s market access authorization by February 2008. If Spectrum Five’s certifications are to be believed, it completed contracting for construction of its satellite system by November 2007 and completed critical design review by November 2008, and did not halt construction of its satellites until after November 2008. In other words, Spectrum Five actually complied with its milestones during the period it was allegedly laboring under regulatory uncertainty, and

²³ *Advanced Review Order*, ¶ 31 (emphasis in original).

²⁴ *Id.*, ¶ 37.

²⁵ Spectrum Five Petition at 10-11.

²⁶ *Assignment of Orbital Locations to Space Stations in the Domestic Fixed Satellite Service*, 13 FCC Rcd. 13863, ¶ 12 (Int’l Bur. 1998). Spectrum Five cites a rule applicable only in the terrestrial broadcast service under which the period for construction of a new station is tolled pending resolution of administrative review. *Id.* at 10 and n.24. The Commission has adopted no similar rule for any satellite service, and in fact has applied a contrary rule for satellite milestones.

only fell out of compliance nine months *after* that uncertainty had been definitively removed.

Next, Spectrum Five cites two issues related to the international priority and coordination of its satellite system. The first such issue related to an authorization granted to EchoStar in January 2008, which was resolved in August 2008 when the Commission modified EchoStar's authorization as requested by Spectrum Five.²⁷ Here again, Spectrum Five's efforts were concluded and its concerns resolved several months *before* it decided to halt construction of its satellites. The second such issue involved another EchoStar authorization, issued in March 2010, which led the Netherlands to lodge a procedural question as to the U.S.'s compliance with ITU rules for planned bands (such as DBS).²⁸ Yet this issue was not raised by the Dutch until July 2010.²⁹ It cannot explain Spectrum Five's decision to suspend construction of its satellites two years

²⁷ *Id.* at 4 (citing *Petition for Clarification of Condition in EchoStar 11 License*, 23 FCC Rcd. 12786 (Int'l Bur. 2008)).

²⁸ Spectrum Five Petition at 5. The Netherlands argues that the Commission should not have authorized EchoStar to launch and operate a DBS satellite with lower ITU priority before completing coordination with a yet-to-be launched and operated Spectrum Five satellite. Yet the Netherlands apparently saw no issue in granting Spectrum Five authority to launch and operate its system prior to completing coordination with higher-priority systems that were already in operation – including both EchoStar and DIRECTV – as well as a system licensed to SES Americom, Inc. for operation at the same 114.5° W.L. orbital location. As Spectrum Five has conceded, operation of its system and this latter system would be mutually exclusive. *See* Spectrum Five Application, Ex. 1 to Technical App. at 4 (concluding that simultaneous operation of these systems “is not considered to be possible”). Moreover, the Netherlands' position is directly contrary to the position adamantly maintained by Spectrum Five throughout its efforts to gain access to the U.S. market, which was the basis for grant of its authorization. *See, e.g.*, Letter from Howard W. Waltzman to Marlene H. Dortch, IBFS File Nos. SAT-LOI-20050312-00062 and -00063, at 3 (Feb. 18, 2009) (granting conditioned authorizations to Spectrum Five and EchoStar “applied the existing ITU rules”); Consolidated Response of Spectrum Five LLC, IBFS File Nos. SAT-LOI-20050312-00062 and -00063, at 5 (June 1, 2005) (arguing that grant of market access would be consistent with the Commission's policy of “routinely grant[ing] applications by U.S. DBS operators prior to completion of international coordination and successful modification of the Region 2 Plan”); Consolidated Opposition to Applications for Review, IBFS File Nos. SAT-LOI-20050312-00062 and -00063, at 10 (Jan. 16, 2007) (same); Spectrum Five Authorization, ¶ 31.

²⁹ Spectrum Five Petition at 5-6.

earlier. By contrast, even though confronted by these same coordination uncertainties, EchoStar completed construction of and launched two DBS satellites during the period in question.

Moreover, the Commission has, on numerous occasions, confirmed the long-established proposition that difficulties in coordinating a satellite system do not justify a waiver or extension of milestone requirements.³⁰ Indeed, the Commission drew Spectrum Five's attention to this fact in granting access to the U.S. market, stating that "coordination difficulties do not justify extension of milestone requirements."³¹

Lastly, Spectrum Five fails to mention a singularly important category of "efforts not made": its own lack of activity toward coordination of its system with those of DIRECTV and EchoStar, which enjoy ITU priority. Under the terms of its market access authorization, Spectrum Five is required to operate within the limits of Annex 1 unless it can coordinate more favorable parameters. Spectrum Five waited nearly four years before contacting DIRECTV engineers to engage in coordination discussions, only to cancel the scheduled meeting and then fail to respond to DIRECTV's request for proposed dates to reschedule.³² As a result, Spectrum Five has yet to hold a single coordination discussion with DIRECTV.

³⁰ See, e.g., *Star One, S.A.*, 25 FCC Rcd. 14338, ¶¶ 11-12 (Int'l Bur. 2010) (rejecting a request for milestone relief based on "unanticipated difficulties in international coordination"); *Loral SpaceCom Corp.*, 20 FCC Rcd. 12045, ¶ 13 (Int'l Bur. 2005) ("Consequently, problems with coordination cannot be used as a basis for extension of milestone requirements because the duty to coordinate with potentially affected satellite operators, and the risks inherent in this process, are assumed by the licensee upon acceptance of the authorization.").

³¹ See Spectrum Five Authorization, ¶ 35 n.119.

³² See Declaration of David Pattillo, attached hereto as Exhibit A.

Difficulties encountered and overcome. With respect to “difficulties encountered and those overcome,” Spectrum Five cites the collapse of credit markets and a world financial crisis that caused many companies to enter bankruptcy.³³ Here again, the Commission has repeatedly made clear that unfavorable market conditions do not warrant milestone extension.³⁴ In fact, even a licensee’s own bankruptcy has been deemed insufficient to justify such an extension.³⁵ Moreover, even if this difficulty were cognizable in the Commission’s analysis, Spectrum Five has failed to demonstrate that it has “overcome” this obstacle. Specifically, Spectrum Five has presented no evidence showing that its economic situation has improved sufficiently to enable completion of its system within the period of extension requested, stating only that it is attempting to “finaliz[e] funding to resume construction pursuant to the contract with Space Systems/Loral.”³⁶ In a similar situation, the Commission found that granting an extension “risks undermining the policy goals of its milestone rules without achieving any corresponding public benefit.”³⁷ Like Spectrum Five’s other asserted bases for extension, this argument must also be rejected.

³³ Spectrum Five Petition at 6.

³⁴ See, e.g., *VisionStar, Inc.*, 19 FCC Rcd. 14820, ¶ 10 (Int’l Bur. 2004) (citing cases) (“The Commission has held that a failure to attract investors, an uncertain business situation, or an unfavorable business climate in general has never been an adequate excuse for failure to meet a construction timetable.”); *NetSat 28 Company, LLC*, 19 FCC Rcd. 17722, ¶ 14 (Int’l Bur. 2004) (“*NetSat*”) (“failure to attract investors or an unfavorable business climate does not warrant an extension of a licensee’s milestones”); *Advanced Review Order*, ¶ 22 (the Commission has “explicitly put permittees on notice that uncertainties in or miscalculations of the business climate are not factors beyond permittees’ control that could justify an extension, but rather are risks that each permittee must bear alone”).

³⁵ See, e.g., *Final Analysis Communications Services Inc.*, 19 FCC Rcd. 4768, ¶¶ 20-24 (Int’l Bur. 2004) (“*Final Analysis*”).

³⁶ Spectrum Five LOI Response at 2.

³⁷ *VisionStar*, ¶ 11.

As Spectrum Five acknowledges, the Commission announced 15 years ago that latitude in granting extension of DBS milestones could no longer be justified in an era in which DBS licensees are successfully operating and competing for subscribers.³⁸ Nonetheless, Spectrum Five claims that it should be afforded just such latitude based on what it describes as “new and untested technology” it will be required to deploy in order to operate from a tweener orbital location.³⁹ This claim is contrary to previous claims Spectrum Five has made about its satellite system. For example, Spectrum Five now cites “unique technical and coordination challenges” arising from coordination with incumbent DBS providers that could require the use of lower power levels or increased subscriber antenna sizes⁴⁰ – a curious claim given has yet to meet even once with DIRECTV to discuss coordination. Moreover, far from being new or innovative, such coordination strategies are – as Spectrum Five has itself described them – “well-understood sharing techniques.”⁴¹ Similarly, Spectrum Five’s initial application confirms that its “spacecraft will make use of available modern technology.”⁴² While Spectrum Five has incorporated spot beam technology into its design, DIRECTV launched its first DBS spot beam satellite (DIRECTV 4S) nearly a decade ago (November 2001). In addition, its second spot beam satellite (DIRECTV 7S), launched in May 2004, reuses DBS frequencies 9.5 times, or more than double the 4:1 reuse factor of Spectrum Five’s

³⁸ Spectrum Five Petition at 13 n.31 (citing *Advanced Communications*, ¶ 4).

³⁹ *Id.*

⁴⁰ *Id.* at 12.

⁴¹ See Consolidated Response of Spectrum Five LLC, IBFS File Nos. SAT-LOI-20050312-00062 and -00063, at 9 and Technical App. at 4 (June 1, 2005).

⁴² Spectrum Five Application, Technical App. at 17.

system.⁴³ Thus, even if the Commission had not long ago announced the end of the “pioneering era” of the DBS service, nothing about Spectrum Five’s proposed operations would qualify as sufficiently new or innovative to support a milestone extension.⁴⁴

Service to the Public. Spectrum Five also argues that excusing its failure to proceed with satellite construction would not undermine the “ultimate goal of service to the public” because no other operator would be able to make use of its DBS orbital and spectrum resources.⁴⁵ In support of this assertion, Spectrum Five notes that the Commission imposed a freeze on all new DBS applications in December 2005, precluding re-licensing of the 114.5° W.L. location.⁴⁶ However, in August 2006, the Commission initiated a rulemaking proceeding designed, in part, to determine the appropriate method for processing DBS applications going forward.⁴⁷ The record in that proceeding is closed, and the Commission could implement a new DBS processing regime at any time. In a prior case involving Big LEO satellite systems, the Commission found that the pendency of a similar application processing proposal negated the argument of a party seeking a milestone extension. “Although there is no guarantee that

⁴³ Compare Application for Authority to Launch and Operate DIRECTV 7S, IBFS File No. SAT-LOA-20030611-00115, Technical Annex at 3 (June 11, 2003); Spectrum Five Application, Technical App. at 1.

⁴⁴ Spectrum Five refers to a case in which, Spectrum Five asserts, a remote-sensing satellite system operator was granted a milestone extension that was found to be “warranted in light of the nascent stage of developing technology.” Spectrum Five Petition at 13 (citing *EarthWatch, Inc.*, 12 FCC Rcd. 19556 (Int’l Bur. 1997)). In fact, the Commission in that case found that the applicant had *failed* to meet the requirements for an extension, but waived those requirements based primarily upon the fact that the applicant had actually commenced construction of two satellites with significantly upgraded capabilities. *EarthWatch*, ¶ 10.

⁴⁵ Spectrum Five Petition at 14-15.

⁴⁶ *Id.* at 15 n.36.

⁴⁷ See *Amendment of the Commission’s Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service*, 21 FCC Rcd. 9443, ¶¶ 20-26 (2006).

this proposal will be adopted, its consideration signifies that future entry into the Big LEO service by MSS applicants, including possibly Constellation, is not foreclosed by the cancellation of Constellation's license.”⁴⁸ Here too, cancellation of Spectrum Five’s authorization would not result in a fallow orbital location if the Commission resolved its pending rulemaking proceeding.⁴⁹

Spectrum Five also argues that grant of its Petition would further the interests of greater competition from a new entrant in the multichannel video programming distribution market.⁵⁰ Yet the Commission has previously rejected just such an argument as a basis for milestone extension, finding that

new entrants and the innovative services that they might provide are of little public value if the proposed satellite services are not predictably and promptly made available. In addition, if we were to accept [petitioner’s] argument that a prospective increase in competition justifies an extension of a licensee’s milestones, the result would vitiate our milestone policy entirely since every authorized system has the potential to increase competition in some market.⁵¹

Moreover, Spectrum Five is not currently constructing either of its DBS satellites and has provided no firm timetable for resuming such construction, calling into question whether it will ever complete its system (much less whether it can do so in less than 20 months).

The Commission has consistently denied milestone relief “where construction of satellites had either not begun or was not continuing, thus raising questions regarding the

⁴⁸ *Constellation Communications Holdings, Inc.*, 18 FCC Rcd. 18822, ¶ 20 (2003) (“*Constellation Communications*”).

⁴⁹ Indeed, as Spectrum Five recognizes, Gibraltar has made ITU filings on behalf of SES Americom for DBS systems operating at the 114.5° W.L. orbital location, some of which have international priority over the ITU filings made by the Netherlands on behalf of Spectrum Five.

⁵⁰ See Spectrum Five Petition at 14-15.

⁵¹ *NetSat*, ¶ 16.

licensee's intention to proceed."⁵² In these circumstances, there is no reason to conclude that denying Spectrum Five's milestone extension request would conflict with the ultimate goal of service to the public.

B. Spectrum Five Has Failed to Justify a Milestone Waiver.

In the alternative, Spectrum Five requests that the Commission waive the requirement that it complete construction of its first satellite. The Commission has established that waiver is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than would strict adherence to the general rule.⁵³ In addition, the Commission may grant a waiver in a particular case only if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.⁵⁴ Spectrum Five does not set forth these criteria in its Petition, much less attempt to demonstrate how its circumstances would satisfy them.

The Commission adopted milestone requirements in order to "ensure that valuable spectrum is utilized, not warehoused, and that service is deployed for the benefit of the public."⁵⁵ Granting the Petition would undermine these objectives. For example, in its Petition, Spectrum Five discusses spectrum coordination issues and an unfavorable economy as extenuating circumstances. Such factors have consistently been rejected as a basis for milestone waiver.

⁵² *Final Analysis*, ¶ 44.

⁵³ *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁵⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

⁵⁵ *EchoStar Satellite Corp.*, 17 FCC Rcd. 8831, ¶ 8 (Int'l Bur. 2002).

Milestone compliance, like any licensee responsibility, is not excused merely because of changes in technology or poor market conditions. In industries characterized by rapid changes in technology and uncertain market conditions, such as satellite communications, these reasons would justify delays in the implementation of virtually all licensed systems, and acceptance of such reasons by themselves would undermine the objectives for our milestone policy.⁵⁶

As discussed above, none of the excuses proffered by Spectrum Five are the kinds of “special circumstances” that would justify a departure from the Commission’s policy of strict milestone enforcement.

As importantly, in response to Commission inquiry, Spectrum Five has revealed that it suspended satellite construction over two years ago. It has not provided any timetable for resuming construction, identified where it would secure the funding necessary to finance such construction, or otherwise explained how it intends to complete construction of and launch its two-satellite system by November 2012.⁵⁷ In similar circumstances, the Commission denied a previous milestone waiver request because the petitioner failed to provide “any information or plans to assure that it can and will complete construction of its system even within the requested timeframe of its extension requests,” concluding that “to waive construction deadlines in reliance on an equivocal and indefinite ‘commitment’ to proceed would make our milestone requirements meaningless.”⁵⁸ Spectrum Five presents no better case for waiver, and its Petition should be no more successful.

⁵⁶ *Constellation Communications*, ¶ 16.

⁵⁷ Spectrum Five has merely asserted that it is “finalizing funding to resume construction pursuant to the contract with Space Systems/Loral,” but provided no further detail or substantiation. *See* Spectrum Five LOI Response at 2.

⁵⁸ *Constellation Communications*, ¶ 21.

EXHIBIT A

DECLARATION OF DAVID A. PATTILLO

1. My name is David A. Pattillo. I am Technical Director, Engineering of DIRECTV Enterprises, LLC (“DIRECTV”), a position I have held for five years. Among other things, I am responsible for international spectrum coordination of DIRECTV’s Direct Broadcast Satellite (“DBS”) systems with systems licensed by other administrations.

2. With respect to coordination of the “tweener” DBS system authorized by the Netherlands government for operation by Spectrum Five LLC (“Spectrum Five”), I have been identified to the Netherlands administration and Spectrum Five as the DIRECTV contact for operator-to-operator technical discussions on coordination. *See* Letter from Kathryn O’Brien, FCC, to Head Frequency Planning and Coordination Section, Radiocommunications Agency Netherlands (May 19, 2005). A copy of that letter is attached hereto as Exhibit 1.

3. The first contact I received from Spectrum Five was a letter from its Chief Operating Officer, Dr. Thomas E. Sharon, dated July 2, 2010. A copy of that letter is attached hereto as Exhibit 2.

4. Over the next several weeks, the parties corresponded in an attempt to set a meeting date. In order to accommodate vacation schedules, DIRECTV proposed a meeting on September 16, 2010. Spectrum Five agreed to that date.

5. On September 9, 2010, Spectrum Five informed DIRECTV that one of its planned participants would not be able to attend the meeting because of jury duty, and therefore Spectrum Five had to cancel the meeting.

6. On October 5, 2010, Spectrum Five contacted me to discuss rescheduling the coordination meeting. The parties tentatively set a November 9, 2010 meeting date.

7. On October 25, 2010, I sent an e-mail to Spectrum Five asking that it confirm availability for the November 9 meeting by October 29, 2010. To date, I have received no response from Spectrum Five to that e-mail.

I, David A. Pattillo, declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on April 4, 2011



David A. Pattillo

EXHIBIT 1



FEDERAL COMMUNICATIONS COMMISSION
INTERNATIONAL BUREAU
WASHINGTON, D.C. 20554



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May 19, 2005

IN REPLY REFER TO:
800C2/SEB05155

Head Frequency planning and Coordination Section
Radiocommunications Agency Netherlands
Emmasingel 1
P.O. Box 450
9700 AL Groningen
The Netherlands

Subject: Frequency coordination of satellite networks between
our administrations

Reference: Your letter ref. AT-EZ/5629709/VFC, dated
March 18, 2005

Dear Sir:

Thank you for your above-referenced letter to Chairman Martin regarding satellite coordination between our administrations. Specifically, the letter indicates that the Netherlands is proposing to implement a Broadcasting-Satellite Service system, identified as BSS-5 that proposes to provide service to the United States. The letter requests that BSS-5 coordinate with our existing and proposed satellite television networks. The BSS-5 network has recently been filed with the International Telecommunications Union to modify the Region 2 BSS Plan according to your letter and you wish to seek the agreement of the U.S. Administration in accordance with Appendix 30/30A, Article 4 of the ITU's Radio Regulations.

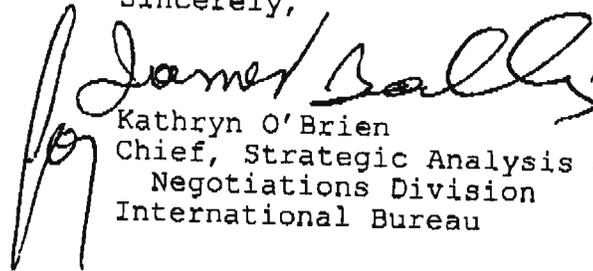
Your letter proposes that our administrations should initially permit operator-to-operator negotiations and we agree with this approach. It is noted that any operating arrangements agreed between the operators must be approved by both administrations. Spectrum Five LCC is identified as the operator of the BSS-5 system that proposes to operate at the 114.5° WL geostationary satellite orbital location. Two of our direct broadcast satellite service providers, DirecTV and EchoStar, have nearby operations at both the 110° and 119° WL geostationary orbital locations that may be affected by the proposed

BSS-5 modification to the Region 2 Plan. DirecTV and EchoStar are authorized to enter into operator-to-operator technical discussions with Spectrum Five regarding the proposed BSS-5 Region 2 modification. Contact information for the U.S. operators is as follows; DirecTV, 2230 E. Imperial Hwy. M/S D5/N357, El Segundo, CA 20245, the point of contact is Mr. David Pattillo, telephone number +1 310 964-4993, and e-mail address dapattillo@directv.com. EchoStar, 9601 S. Meridian Blvd., Englewood, CO 80112, the points of contact is Mr. David Bair, telephone number +1 303-723-1068, and e-mail address david.bair@echostar.com and Richard Barnett, Telecom Strategies, 6404 Highland Dr., Chevy Chase, MD, 20815, telephone +1 301-656-8969, and e-mail address Richard@TelecommStrategies.com.

We note that the United Kingdom has also submitted the USAT-S2 and USAT-S2 MOD A filings with the ITU to modify the Region 2 Plan to serve the United States market from the 114.5° WL geostationary orbital location and that operator-to-operator discussions between our administrations have been authorized and are ongoing.

Please do not hesitate to contact us with any questions that you may have.

Sincerely,



Kathryn O'Brien
Chief, Strategic Analysis and
Negotiations Division
International Bureau

EXHIBIT 2



July 2, 2010

Mr. David Patillo
Director, Engineering
DIRECTV
2230 E. Imperial Highway, LA3/N357
El Segundo, CA 90245

Re: Coordination of Satellite Networks

Dear Mr. Patillo:

I am writing to request coordination negotiations relating to Spectrum Five's satellite network at the 114.5° W.L. orbital location and DIRECTV's satellites at the nominal 110° W.L. and 119° W.L. orbital locations. We are prepared to begin such negotiations at your earliest possible convenience.

Please let me know your availability for negotiations, and provide any information regarding your satellite networks at the nominal 110° W.L. and 119° W.L. orbital locations that would help Spectrum Five to prepare for our discussions.

I can be reached at (202) 293-3483 or tsharon@spectrumfive.com if you have any questions.

I look forward to meeting with you.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas Sharon".

Dr. Thomas E. Sharon
Chief Operating Officer
Spectrum Five LLC

cc: Robert G. Nelson, Chief, Satellite Division, International Bureau, Federal
Communications Commission
Kathryn Medley, Chief, Satellite Engineering Branch, Satellite Division, International
Bureau, Federal Communications Commission
J.G. Kroon, Advisor, Space Communications, Radio Communications Agency
Netherlands
M.M. Hoogland, Head of Networks Department, Radio Communications Agency
Netherlands