

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

In the Matter of)	
)	
Spectrum Five LLC)	File Nos.: SAT-MOD-20101126-00245
)	SAT-MOD-20101126-00269
Petition for Declaratory Ruling To Modify Its)	
Authorization to Serve the U.S. Market Using)	Call Signs: S2667, S2668
BSS Spectrum from the 114.5° W.L. Orbital)	
<u>Location</u>)	

CONSOLIDATED RESPONSE AND OPPOSITION OF SPECTRUM FIVE LLC

David Wilson
President
SPECTRUM FIVE LLC

April 14, 2011

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. A MATERIAL LEGAL DISPUTE BETWEEN THE NETHERLANDS AND THE UNITED STATES REGARDING INTERNATIONAL COORDINATION OBLIGATIONS HAVE FRUSTRATED SPECTRUM FIVE’S EFFORTS TO COMPLETE ITS SYSTEM.....	2
III. MILESTONE EXTENSION IS WARRANTED BECAUSE SPECTRUM FIVE ENCOUNTERED AN UNPRECEDENTED AND WHOLLY UNPREDICTABLE GLOBAL FINANCIAL CRISIS	7
IV. GRANT OF SPECTRUM FIVE’S MILESTONE EXTENSION WOULD NOT UNDERMINE THE PURPOSE OF THE MILESTONE POLICY BECAUSE THE DBS APPLICATION FREEZE PREVENTS REASSIGNMENT OF SPECTRUM FIVE’S U.S. DBS RIGHTS.....	9
V. GRANT OF SPECTRUM FIVE’S REQUEST WOULD SERVE THE PUBLIC INTEREST.....	12
VI. CONCLUSION.....	15

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CONSOLIDATED RESPONSE AND OPPOSITION OF SPECTRUM FIVE LLC

I. INTRODUCTION AND SUMMARY

Spectrum Five LLC (“Spectrum Five”), pursuant to Section 25.154(c) of the Commission’s rules,¹ hereby replies to the petition to deny filed by DIRECTV Enterprises, LLC (“DIRECTV”)² and comments filed by EchoStar Corporation (“EchoStar”)³ in response to Spectrum Five’s above-referenced petition for a declaratory ruling to extend or waive the interim construction milestone associated with its authorization to provide Direct Broadcast Satellite (“DBS”) service in the United States from a Netherlands-authorized “tweener” satellite network at 114.5° W.L.⁴ Only DIRECTV, the nation’s largest incumbent DBS provider, expressly

¹ 47 C.F.R. § 25.154.

² Petition to Deny of DIRECTV Enterprises LLC, File Nos. SAT-MOD-20101126-00245 and SAT-MOD-20101126-00269 (filed Apr. 4, 2011) (“DIRECTV Petition to Deny”).

³ Comments of EchoStar Corporation, File Nos. SAT-MOD-20101126-00245 and SAT-MOD-20101126-00269 (filed Apr. 4, 2011) (“EchoStar Comments”).

⁴ Spectrum Five LLC, Petition for Declaratory Ruling To Modify Its Authorization to Serve the U.S. Market Using BSS Spectrum from the 114.5° W.L. Orbital Location, File Nos. SAT-MOD-20101126-00245 and SAT-MOD-20101126-00269 (filed Nov. 26, 2010) (“Petition”).

opposes grant of Spectrum Five's petition. EchoStar filed comments primarily "to point out" that its efforts to develop its own "tweener" satellite at 86.5° W.L. are "superior in all respects" to Spectrum Five's activities to date, but EchoStar does not ask the FCC to deny Spectrum Five's request for an extension.

Neither DIRECTV's petition to deny nor EchoStar's comments provide any basis to reject Spectrum Five's request to extend or waive its interim construction milestone.⁵ As Spectrum Five has explained, it is in the best position to bring much-needed competition to the entrenched U.S. DBS operators. Consequently, Spectrum Five respectfully requests that the Commission promptly approve the pending petition for extension of Spectrum Five's interim construction milestone.

II. A MATERIAL LEGAL DISPUTE BETWEEN THE NETHERLANDS AND THE UNITED STATES REGARDING INTERNATIONAL COORDINATION OBLIGATIONS HAVE FRUSTRATED SPECTRUM FIVE'S EFFORTS TO COMPLETE ITS SYSTEM.

DIRECTV and EchoStar fault Spectrum Five for its inability to complete coordination of its satellite network. But, as even EchoStar acknowledges, the technical challenges faced by Spectrum Five are unique and unprecedented. Moreover, the concerns raised by the Netherlands regarding the United States' treaty obligations have cast a serious cloud over the ITU coordination process and as a result, the rights and responsibilities of the parties in coordination. Neither DIRECTV nor EchoStar acknowledge that coordination cannot be accomplished when the basic international rules governing that process are in material question.

EchoStar, which as noted above does not advocate denial of Spectrum Five's milestone

⁵ DIRECTV's suggestion that this petition for milestone extension is somehow inconsistent with statements in Spectrum Five's Annual Reports totally misses the mark. *See* DIRECTV Petition to Deny at 1-2, note 2. DIRECTV's rhetoric aside, no fact represented to the Commission in prior Annual Reports contradicts any statement made by Spectrum Five here.

extension request,⁶ effectively concedes that Spectrum Five has confronted significant technological difficulties in designing and coordinating its satellite system not faced by any other operator.⁷ Although both EchoStar and Spectrum Five have been granted “tweener” authorizations, these entities face very different interference and coordination environments. EchoStar has been authorized to provide U.S. DBS service from a reduced-spacing orbital location at 86.5° W.L., which is adjacent to Canadian DBS providers, rather than other U.S. DBS providers.⁸ EchoStar’s revised service area does not overlap the service area of the Canadian DBS providers, greatly simplifying coordination. By contrast, Spectrum Five is the only licensee with a “full-fledged tweener location” authorization⁹ because Spectrum Five’s authorization to provide DBS service to the United States from the 114.5° W.L. orbital location falls directly between the two orbital locations used by the incumbent U.S. DBS providers at 110° W.L. and 119° W.L. Consequently, only Spectrum Five seeks to provide the same service, in the same spectrum bands and in overlapping geographic areas as the two U.S. DBS providers providing service only 4.5 degrees away. This novel interference environment is a unique coordination factor supporting grant of Spectrum Five’s request.¹⁰

⁶ See EchoStar Comments at 2.

⁷ See EchoStar Comments at 8-9.

⁸ *Id.* See *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 14,045 (2006).

⁹ EchoStar Comments at 9.

¹⁰ Indeed, an FCC rulemaking considering technical rules for reduced spacing has been pending at the Commission for as long as Spectrum Five has held its FCC authorization. See *Amendment of the Commission’s Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service; Feasibility of Reduce Orbital Spacing for Provision of Direct Broadcast Satellite Service in the United States*, Notice of Proposed Rulemaking, IB Docket No.

In addition, Spectrum Five's milestone extension request is not precipitated by the typical coordination issues that arise between satellite operators. Rather, Spectrum Five's coordination issues are part of a larger disagreement between the United States and the Netherlands regarding the applicable rules of coordination.¹¹ Spectrum Five's efforts to coordinate its satellite system at the 114.5° W.L. orbital location are caught in the middle of an ongoing dispute between the Administrations of the United States and the Netherlands regarding the appropriate coordination rights and responsibilities of the parties that arise from the ITU regulation of coordination in the planned band.¹² Prior to 2006, the U.S. effectively coordinated only with itself with respect to DIRECTV's and EchoStar's (and its sister company DISH Network's) systems at 110° W.L. and 119° W.L. As shown in the correspondence between the Netherlands and the ITU attached as Exhibit A to Spectrum Five's Petition, over the years the United States did not follow proper ITU procedures for modifying the Region 2 BSS Plan. The United States' actions went unchallenged, as there were no other Administrations affected by them until the FCC's grant of landing rights for Spectrum Five's Netherlands-authorized satellite network at 114.5° W.L.

06-160, Report No. SPB-196, 21 FCC Rcd 9443 (2006).

¹¹ See Petition at 5-6.

¹² DIRECTV suggests, incorrectly, that the Netherlands' efforts to protect its applicable ITU rights at 114.5° W.L. are somehow inconsistent with Spectrum Five's original petition seeking market access. See DIRECTV Petition to Deny at 8, note 28. DIRECTV fails to acknowledge that, unlike the EchoStar 11 and EchoStar 14 satellites, Spectrum Five's authorization to operate at the 114.5° orbital location includes a condition that explicitly prohibits operation above coordination triggers. *Spectrum Five LLC, Petition for Declaratory Ruling to Serve the U.S. Market Using Broad. Satellite Spectrum from the 114.5° W.L. Orbital Location*, Order and Authorization, 21 FCC Rcd 14,023, 14,037 (2006) ("*Spectrum Five 2006 Authorization*") ("Spectrum [Five] shall not operate the feeder links and service links originating or terminating in the United States on its Spectrum 1A and Spectrum 1B satellites 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 process under No. 4.2 of Appendices 30 and 30A at any location within the service areas of any affected operators that lie within the territory of the United States, until Spectrum Five has obtained the agreement of those operators.").

Spectrum Five's original market access petition and satellite design were based on the satellites notified to the ITU by the U.S. at that time. As explained in Spectrum Five's Petition, since then, the Commission has authorized the operation of satellites that do not operate in conformity with the Region 2 Band Plan and, to date, do not appear to have been properly notified at the ITU. For example, in a letter dated July 15, 2010, the Netherlands raised serious questions regarding the United States' adherence to the ITU's procedural rules for planned bands.¹³ Specifically, more than two years after the FCC granted Spectrum Five market access from the 114.5° W.L. orbital location, the United States made ITU filings for the EchoStar 11 and EchoStar 14 satellites in 2008 and 2009 at the 110.0° W.L. and 119.0° W.L. orbital locations. Although the Netherlands ITU filing at 114.5° W.L. had priority over these filings, the FCC authorized these satellites to operate with higher powers and greater coverage than the satellites they replaced. These satellites consequently had significantly greater interference potential into Spectrum Five's system than the satellites that previously operated at the 110.0° W.L. and 119.0° W.L. orbital locations. EchoStar, who controls 50 of the 64 transponders used in the adjacent 110.0° W.L. and 119.0° W.L. orbital locations, significantly raised the power levels on 40 of these transponders (as much as 200-400% in some cases) above the power levels of satellites previously operating at these orbital locations. The power level of these transponders is critical to successful coordination, and this dramatic increase in power level creates significant additional interference and a corresponding loss of capacity for the Spectrum Five satellite network at the 114.5° W.L. orbital location. Although these satellites are now operational, the U.S. apparently has not yet filed ITU notifications of the bringing into use of

¹³ Letter from M.M. Hoogland, Head of the Networks Department, Radiocommunications Agency Netherlands to Valery Timofeev, Director, Radiocommunication Bureau, ITU, Netherlands Telefax AT-EZ/6432257 (July 15, 2010).

these satellites.

Moreover, in another letter, the Netherlands alerted the ITU that the EchoStar 7 satellite, authorized to operate at 119.0° W.L. and notified by the U.S. as such, actually was in operation at the 118.9° W.L. orbital location and according to the NORAD database, now resides at 118.8° W.L., while EchoStar 14 operates at 118.9° W.L.¹⁴ Moving a satellite a 0.1 degrees significantly changes the interference environment to a satellite at 114.5° W.L. from a coordination perspective and thus warrants modification of the Region 2 BSS Plan Treaty. In addition, it does not appear that the DIRECTV 5 (Tempo 1) satellite at 110° W.L. is operating within the parameters of the ITU filing (USABSS-16) that had been submitted for the satellite it replaced (DIRECTV 6).¹⁵

The Netherlands asserts that the authorization and operation of these three EchoStar and DIRECTV 5 satellites impinge on the rights of the Netherlands and Spectrum Five.¹⁶ Until this material dispute is resolved among the affected Administrations, Spectrum Five has no way of knowing which satellite operations of third parties it must protect, nor which of its own

¹⁴ Letter from M.M. Hoogland, Head of the Networks Department, Radiocommunications Agency Netherlands to Valery Timofeev, Director, Radiocommunication Bureau, ITU, Netherlands Telefax AT-EZ/6432276 (July 15, 2010).

¹⁵ See Letter from Robert G. Nelson, FCC, to William M. Wiltshire, Counsel for DIRECTV Enterprises, LLC, Application for Authorization to Launch and Operate DIRECTV 13 at 110° W.L., IBFS File No. SAT-RPL-20060119-00005, Call Sign: S2693, DA 06-1651 (Aug. 17, 2006) (noting that the DIRECTV 5 satellite would operate consistent with the prior parameters).

¹⁶ See, e.g. Letter from M.M. Hoogland, Head of the Networks Department, Radiocommunications Agency Netherlands to Valery Timofeev, Director, Radiocommunication Bureau, ITU, Netherlands Telefax AT-EZ/6432276 (July 15, 2010); Letter from M.M. Hoogland, Head of the Networks Department, Radiocommunications Agency Netherlands to Valery Timofeev, Director, Radiocommunication Bureau, ITU, Netherlands Telefax AT-EZ/6432257 (July 15, 2010). Copies of these letters were provided as Exhibit A to Spectrum Five's Petition.

operations are entitled to protection from interference under international law.¹⁷

III. MILESTONE EXTENSION IS WARRANTED BECAUSE SPECTRUM FIVE ENCOUNTERED AN UNPRECEDENTED AND WHOLLY UNPREDICTABLE GLOBAL FINANCIAL CRISIS.

Spectrum Five understands that changing financial conditions do not typically warrant extension of a milestone.¹⁸ The global economic crisis that paralyzed financial markets during the last few years, however, was unprecedented in scope and not merely “an uncertain business situation.”¹⁹ In fact, experts generally agree that the recent global financial crisis was the worst since the Great Depression.²⁰ Even EchoStar acknowledges that, under the “recent dire financial climate,” the inability to complete construction of a satellite network “might be

¹⁷ The Commission has not previously encountered or resolved such a significant international dispute regarding the rights of the parties in coordinating international BSS planned band satellite systems. Pursuant to Section 0.261(b) of the Commission’s rules, the International Bureau does not have delegated authority to act on petitions that “[p]resent new or novel arguments not previously considered by the Commission.” 47 C.F.R. § 0.261(b)(1)(i). This rule consequently dictates that Spectrum Five’s petition for extension of milestones must be resolved by the full Commission.

¹⁸ See DIRECTV Petition to Deny at 10, citing *VisionStar, Inc.*, 19 FCC Rcd 14820, 14823-24 (¶ 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, 17727-28 (¶ 14) (Int’l Bur. 2004) (“failure to attract investors or an unfavorable business climate does not warrant an extension of a licensee’s milestones”); *Advanced Review Order*, 11 FCC Rcd 3399, 3409 (¶ 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”).

¹⁹ *VisionStar, Inc.*, 19 FCC Rcd 14820, 14823-24 (¶ 10).

²⁰ Three Top Economists Agree 2009 Worst Financial Crisis Since Great Depression; Risks Increase if Right Steps are Not Taken, Business Wire (Feb. 13, 2009), available at <http://www.businesswire.com/news/home/20090213005161/en/Top-Economists-Agree-2009-Worst-Financial-Crisis>.

understandable.”²¹ The order of magnitude of this financial crisis could not reasonably have been anticipated or planned for by Spectrum Five or any other satellite licensee, and consequently provides good cause for extension of the interim construction milestone.

In analogous situations, the Commission has tolled construction deadlines where “certain causes not under the control,” of the licensee, including “Acts of God,” have caused construction delays. The Commission has found that “tolling might be warranted under other rare and exceptional circumstances beyond the permittee’s control.”²² The most recent global financial meltdown was not a risk that any licensee could reasonably foresee. While the FCC expects licensees to assume the risk of typical and expected events, such as “winter conditions in New Hampshire [that] may be harsh,”²³ the FCC does not fault licensees for failure to complete construction due to wholly unpredictable events, like lightning strikes causing serious damage to

²¹ See EchoStar Comments at 2. In fact, EchoStar, the only other tweener licensee with a far easier coordination burden, has not even financed construction of a new satellite, seeking instead to modify its authorization to conform to an in-orbit spacecraft. Specifically, EchoStar is attempting to use the EchoStar 8 satellite, an aging satellite that recently suffered a serious anomaly, to meet a construction milestone. Substitution of this marginally useful satellite is not motivated by coordination concerns and does not reflect any investment by EchoStar to develop a technically advanced satellite that can operate in a challenging interference environment. See EchoStar Corporation, Application for Modification of Authority to Provide DBS Service at 86.5° W.L. Using the EchoStar 8 Satellite, File No. SAT-MOD-20101124-00244 (filed Nov. 24, 2010); see also Letter from Pantelis Michalopoulos, Counsel for EchoStar Corporation, to Marlene H. Dortch, FCC, File No. SAT-MOD-20101124-00244 (filed Mar. 30, 2011) (notifying the FCC of that the EchoStar 8 satellite had recently experienced a single event upset (“SEU”).

²² WMEI(TV), Arecibo, Puerto Rico (Facility ID # 26676) BMPCT-20060614ABI, DA 06-2233 at 2 (rel. Nov. 1, 2006) (“WMEI(TV) Tolling Decision”).

²³ See *In re: Koor Communications, Inc. WQTH(AM), Claremont, New Hampshire* Facility ID No. 85956 File No. BP-19970328AB as modified by BMAP-20050118AAN, Petition for Reconsideration, DA 08-2029 (Sept. 2, 2008).

a tower and work site.²⁴ In this regard, the global financial crisis is akin to the once-in-a-lifetime lightning strike, not to the mere presence of snow in winter.

IV. GRANT OF SPECTRUM FIVE’S MILESTONE EXTENSION WOULD NOT UNDERMINE THE PURPOSE OF THE MILESTONE POLICY BECAUSE THE DBS APPLICATION FREEZE PREVENTS REASSIGNMENT OF SPECTRUM FIVE’S U.S. DBS RIGHTS.

Grant of the requested milestone extension request is the best means available to promptly bring much-needed competition to the U.S. DBS market from a new entrant operating from a new orbital location. As explained in Spectrum Five’s Petition, the Commission imposed a freeze on all new DBS applications on December 21, 2005.²⁵ Today, the freeze continues to preclude the Commission from processing or approving any new DBS satellite applications or any major modifications, including relocation to a new orbital location. Spectrum Five reiterates that because of this freeze, no operator, including new or established DBS providers, can apply for rights to provide DBS service from the 114.5° W.L. orbital location. The Commission, therefore, has no means of reassigning the 114.5° W.L. orbital location to another licensee for the provision of DBS services to the public.

In light of the DBS freeze, the underlying goals of the Commission’s due diligence rules support grant of a milestone extension in this case. These rules are designed to ensure that

²⁴ See *supra* note 22. Moreover, the uncertainty created by the ongoing international coordination dispute between the United States and the Netherlands has exacerbated the existing poor investment market by prompting investors to exercise greater caution in investing in Spectrum Five’s satellite network.

²⁵ See Spectrum Five Petition at 14. See also *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 at 2 (Dec. 21, 2005) (explaining that the freeze “applies to any application for authority to provide DBS service to the United States using the 12.2-12.7 GHz band and associated feeder links in the 17.3-17.8 GHz band,” including “requests for market access by foreign-licensed space stations”).

valuable spectrum is not warehoused and that service is timely deployed for the benefit of the public.²⁶ For that reason, when evaluating whether extension of a milestone is warranted, the Commission will consider whether a different satellite operator can more quickly provide service to the public.²⁷ The Commission explains that “it would be very short-sighted to eliminate the very parties whose efforts to date, even if not in accord with a pre-established timetable set without the benefit of experience, now would appear to have brought them closer to the threshold of providing experience than any non-permittee.”²⁸ In the case at hand, no other satellite operator will be able to provide DBS services from the 114.5° W.L. orbital location any sooner than Spectrum Five. If the Commission denies Spectrum Five’s extension request now, with no available means to reassign the orbital location at issue, it will undermine the purpose of its milestone policy by creating fallow spectrum and precluding added DBS service to the public, with no concomitant benefit.

Additionally, because of the freeze, no current or potential satellite providers will be harmed by grant of the milestone extension.²⁹ Considering that no operator can apply for rights

²⁶ *Policies and Rules for the Direct Broadcast Satellite Service*, Report and Order, 17 FCC Rcd 11331, 11352 (¶ 42) (2002); *R/L DBS Company, LLC for Extension of its Direct Broadcast Satellite Construction Permit*, Memorandum Opinion and Order, 16 FCC Rcd 9, 12-13 (Int’l Bur. 2000) (noting that “strict enforcement of our DBS milestones further the very important spectrum management goal of ensuring that valuable spectrum resources are efficiently put to use”).

²⁷ *United States Satellite Broadcasting Co., Application for Extension of Time to Construct Direct Broadcast System*, Memorandum Opinion and Order, 3 FCC Rcd 6858, 6860 (¶ 14) (1988).

²⁸ *Id.*

²⁹ The third prong of the “totality of circumstances” test requires the Commission to consider the rights of the parties involved. *See United States Satellite Broadcasting Co., Application for Extension of Time to Construct Direct Broadcast System*, Memorandum Opinion and Order, 7 FCC Rcd 7247, 7252 (Int’l Bur. 1992).

to provide DBS service from the 114.5° W.L. orbital location, grant of the requested extension would not negatively impact the rights of any current or potential satellite providers. The Commission has previously granted extensions where it finds that the rights of parties opposing an extension do not outweigh the efforts a permittee has made in implementing its DBS system, the difficulties encountered and overcome, and the ultimate goal of public service.³⁰ As such, the Commission's milestone policy favors grant of the instant extension request in light of the freeze on all DBS applications.

DIRECTV claims that the Commission could lift the current DBS freeze and "implement a new DBS processing regime at any time."³¹ However, history indicates that would be a lengthy process. The Reverse Band took nearly a decade from inception to licensing, and no license has been brought into use at this time, with the exception of the temporary test Reverse Band payload that DIRECTV has at 103 ° W.L.. Moreover, even if the Commission were to lift the freeze tomorrow, the underlying goal of ensuring prompt delivery of DBS service to the public would still favor grant of Spectrum Five's extension request. Denial of Spectrum Five's request would only perpetuate delays in providing DBS service to the public. Another DBS service provider would need to prepare and file an application, receive approval from the Commission, undertake the whole process of contracting for and designing a satellite, and construct and launch a DBS system before it could provide service to the public. And, even then, there is no guarantee that a new U.S. licensee could provide service to the public. As the Commission is aware, Spectrum Five's authority to launch and operate a satellite at the 114.5° W.L. orbital location is derived from the Netherlands and is independent of the FCC's grant of

³⁰ See *R/L DBS Company*, 16 FCC Rcd at 12.

³¹ DIRECTV Petition to Deny at 12.

U.S. market access to Spectrum Five. Spectrum Five’s launch and operation pursuant to this Dutch authorization with ITU date priority—even absent U.S. market access—would preclude any new U.S. licensee’s use of this same location. Such an outcome would only deprive U.S. consumers of a new competitive DBS choice.

Finally, neither DIRECTV nor EchoStar dispute the fact that in light of the freeze, strict adherence to the Commission’s milestone policy and denial of Spectrum Five’s extension request would unfairly impose a greater hardship on Spectrum Five than similarly situated licensees.³² Normally, a licensee whose milestone extension request is denied and authorization to serve the U.S. market cancelled would be able to apply for a new authorization from the Commission. In this case, however, the DBS freeze would effectively preclude Spectrum Five from reapplying for a new authorization, thereby imposing a far more punitive result than anticipated by the FCC in establishing its milestone policies.

V. GRANT OF SPECTRUM FIVE’S REQUEST WOULD SERVE THE PUBLIC INTEREST

The Commission’s options are simple: allow Spectrum Five to move forward with its efforts to construct and launch a satellite system that will provide competition in the DBS market and bring new service offerings, including enhanced content delivery to both fixed and mobile users, or instead allow a valuable public resource to remain unused. In this case, grant of Spectrum Five’s request is amply supported by the public interest objective of promoting the evolution of DBS technology and the provision of mobile broadband services to U.S. consumers.³³

³² Spectrum Five Petition at 14, fn. 37.

³³ See, e.g., Federal Communications Commission, *Connecting America: The National Broadband Plan* at 19 (2010) (“National Broadband Plan” or “NBP”) (“Broadband is a platform to create today’s high-performance America—an America of universal opportunity and

The Commission previously has recognized the value of added competition in the U.S. DBS market,³⁴ and even recently approved extension requests where a new entrant planned to provide a service not otherwise available in the DBS service at that time, much like Spectrum Five.³⁵ Furthermore, the Commission has exercised flexibility in enforcing milestones during the early stages of satellite technology and to advance policy objectives.³⁶

Here, as Spectrum Five noted in its Petition, the development of a “tweener” satellite system leverages technological improvements to reduce the required orbital spacing between

unceasing innovation, an America that can continue to lead the global economy, an America with world-leading, broadband-enabled health care, education, energy, job training, civic engagement, government performance and public safety.”); National Broadband Plan at 77 (noting that the “scarcity of mobile broadband could mean higher prices, poor service quality, an inability for the U.S. to compete internationally, depressed demand and, ultimately, a drag on innovation.”).

³⁴ See *Digital Broadband Applications Corp. Consolidated Application for Authority to Operate U.S. Earth Stations with a U.S.-Licensed Ku-Band FSS Satellite*, Order, 18 FCC Rcd 9455, 9463-64 (¶ 18) (2003) (“Most importantly, rather than creating a competitive distortion, entry by DBAC into the U.S. market can increase competition in DBS services and in MVPD service generally. The markets for delivery of video programming to households are highly concentrated. In the vast majority of local markets, the primary providers of MVPD services are two DBS providers, EchoStar and DirecTV, and cable operators, and for the vast majority of those markets where cable service is available, there is a single, franchised cable provider. Future provision of DBS services in these markets as proposed by DBAC, with Canadian satellites, will not create a competitive distortion, and could increase competition in MVPD services.”).

³⁵ *R/L DBS Company, LLC*, 16 FCC Rcd at 16 (¶ 19). In deciding whether to grant an extension of DBS due diligence milestones, the Commission emphasized that R/L DBS’s planned service “is perhaps the last opportunity in the near-term for entry by a competitive provider within the DBS service itself,” and that R/L DBS plans to “provide a service not now available in the DBS service.” *Id.*

³⁶ See, e.g., *Applications of United States Satellite Broadcasting Co., Inc. and Dominion Video Satellite, Inc.; For Extensions of Time to Construct Direct Broadcast Satellite Sys.*, Memorandum Opinion and Order, 3 FCC Rcd 6858, 6859-60 n.13 (1988) (“USSB First Extension Order”) (noting in the FSS context that “[c]onstruction deadlines were not strictly enforced in the early years, and became strictly enforced only after the satellite communications industry and markets were established.”).

DBS satellites.³⁷ It is the type of novel and complex undertaking that historically supports extension of construction deadlines.³⁸ Indeed, the novelty of Spectrum Five's undertaking is akin to the "pioneering era" of DBS technology when the Commission granted milestone extensions with acknowledgement that the new technological advances could not be expected to be deployed "in accord with pre-established timetable set without the benefit of experience."³⁹

In addition, Spectrum Five believes that its continued development of a next generation DBS satellite will play a major role in advancing the Commission's broadband goals. For example, it will facilitate the delivery of ubiquitous and mobile broadband video – video not just to the home, but specially formatted for viewing on wireless devices. DBS spectrum is also the preferred infrastructure for a ubiquitous combination of the highest quality video (HDTV+) with "over-the-top" on-demand content delivered by the Internet. Using DBS satellite capacity for content delivery and "femtocell technology" for wireless frequency re-use, DBS satellite technology can also play a role in helping to solve the severe (and growing) wireless bandwidth gap which exists in the mobile wireless world, as well as creating new mobile satellite services to mobile users with extremely small antennas. Overall, the Commission's compelling interest in promoting the development of broadband technology and otherwise spurring DBS competition warrants milestone flexibility and grant of Spectrum Five's request.

³⁷ Petition at 11-14.

³⁸ *Application of EarthWatch Incorporation for Modification of its Authorization to Construct, Launch and Operate a Remotes Sensing Satellite System*, Order and Authorization, 12 FCC Rcd 19556 (Int'l Bur. 1997).

³⁹ *USSB First Extension Order*, 3 FCC Rcd at 6860.

VI. CONCLUSION

For the foregoing reasons, Spectrum Five respectfully requests that the Commission promptly approve Spectrum Five's petition for extension of the interim construction milestone.

Respectfully submitted,
Spectrum Five LLC

By: /s/ David Wilson
David Wilson
President
SPECTRUM FIVE LLC

Dated: April 14, 2011

CERTIFICATE OF SERVICE

I, Pam Conley, hereby certify that on this 14th day of April 2011, a copy of the foregoing Consolidated Response and Opposition of Spectrum Five LLC is being sent via U.S. Mail, postage paid, to the following:

Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV Enterprises, LLC
901 F Street, NW
Suite 600
Washington, DC 20004

Alison Minea
Corporate Counsel
EchoStar Corporation
1110 Vermont Avenue, NW, Suite 750
Washington, D.C. 20005

William M. Wiltshire
Michael Nilsson
Wiltshire & Grannis LLP
1200 Eighteenth Street, NW
Washington, DC 20036
Counsel for DIRECTV Enterprises, LLC

Pantelis Michalopoulos
Petra A. Vorwig
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036
Counsel for EchoStar Corporation

/s/ Pam Conley
Pam Conley