IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 13-1231 & 13-1232

SPECTRUM FIVE LLC,
APPELLANT,
V.
FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE.

SPECTRUM FIVE LLC,
PETITIONER,
V.
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA
RESPONDENTS.

REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Spectrum Five has not carried its burden to demonstrate standing for three reasons. *First*, Spectrum Five still has not shown that the injury it asserts is substantially likely to occur. It must fund, build, and launch a satellite, and secure a Ku-DBS license, which is not now available, before it could suffer from the satellite interference it anticipates. As discussed below, it must also (together with its sponsoring administration, the Netherlands) obtain ITU priority over the U.K. It likewise has not shown that the *Order* has had any ongoing "concrete" effect on its ability to raise capital. *Second*, only the ITU can decide whether to remove the BERMUDASAT-1 filing from the ITU Master Register to redress Spectrum Five's purported injury, and Spectrum Five has not shown that a favorable decision from this Court is likely to have any effect at all on the ITU's decision, much less provide a substantial likelihood of redress. Indeed, Spectrum Five previously sought a stay before the FCC precisely because it believed that the "*mere location* of EchoStar 6" in the new orbital slot for 90 days "will enable ESOC to cement permanently" its filing in the ITU register. *See* Emergency Request for Stay, *EchoStar Satellite Operating Co. Application for STA*, File No. SAT-STA-20120320-00023, at 23 (April 5, 2013) ("Stay Request") (FCC Reply Add. at 25) (emphasis added). *Third*, Spectrum Five fails in its attempts to reassure this Court that the remedy it seeks—an order that would require the FCC to go back on its word to its U.K. counterpart and take a position contrary to that agreement before an international body—is any less than an extraordinary measure beyond this Court's powers.

ARGUMENT

I. DISMISSAL IS WARRANTED.

A. Spectrum Five Has Not Shown An Imminent Injury.

Spectrum Five does not contest that, before it could suffer any injury due to interference from EchoStar 6, it must first fund, build, and launch its own satellite;[1] the FCC must lift the freeze on Ku-DBS licenses; and Spectrum Five must apply for and be granted such a license by the FCC.[2] In addition, it must also persuade the ITU that EchoStar 6 did not bring the BERMUDASAT-1 filing into use, even though EchoStar maintains that that its satellite has been operating for more than 90 days at its new orbital location, and even though the ITU has already recorded the filing in its Master Register as brought into use. *See* FCC Motion at 11-12 ("Mot."); Spectrum Five Response at 3-4 ("Resp.").

Spectrum Five nevertheless argues that its injury here is not speculative because "there is no dispute" that the STA enabled EchoStar 6 to secure ITU priority, which stands as an *additional* obstacle to its plans. Resp. at 5. But the *Order* can cause injury only if all the other obstacles are also overcome, and

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[1] When Spectrum Five abandoned efforts to construct a previous satellite for over two years (after passing the same milestones it has passed in this case), the Commission refused to extend compliance milestones and withdrew a conditional grant. *See Spectrum Five LLC*, 26 FCC Rcd 10448 ¶¶ 1, 5 (Int'l Bur. 2011).

[2] In an ongoing rulemaking on Ku-DBS operations, the agency is considering whether "tweener" operations such as Spectrum Five proposes serve the public interest in light of possible harmful interference to established services. *Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service*, 21 FCC Rcd 9443 (2006).

Spectrum Five has not shown that this is substantially likely. This Court has repeatedly cautioned that an uncertain chain of events, which "stacks speculation upon hypothetical upon speculation, … does not establish an 'actual or imminent' injury." *New York Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011); *see also Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292 (D.C. Cir. 2007) ("alleged injury 'must be concrete in both a qualitative and temporal sense'") (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

The cases on which Spectrum Five relies drive home this point. In *Public Citizen*, this Court made clear that "*[a]llegations of possible future injury do not satisfy the requirement of Art[icle] III*," and that "[a] threatened injury must be certainly impending to constitute injury in fact." 489 F.3d at 1294 (quoting *Whitmore*, 495 U.S. at 158 (emphasis in original)). Moreover, a simple increase in the likelihood of injury is not sufficient—the resulting risk after that increase must itself be "substantial," and "the constitutional requirement of imminence … compels a very strict understanding of what increases in risk and overall risk levels can count as 'substantial.'" *Id.* at 1296. This "strict understanding" is evident in *Sherley v. Sibelius*, 610 F.3d 69 (D.C. Cir. 2010), also cited by Spectrum Five (Resp. at 4). There, petitioners were already active participants in the market in question and so could establish that it was substantially likely that the challenged order would affect them. 610 F.3d at 74. The Court contrasted this with other cases in which "it was uncertain whether [petitioner] would enter the market," *id.*,

just as it is uncertain here whether Spectrum Five can overcome the multiple obstacles it faces in order to enter this market.

Spectrum Five also claims that it was injured by the "regulatory uncertainty" resulting from the STA, which caused it to "delay by five months its auction of the South American payload capacity of its satellite" and thus interfered with its ability to raise capital. Resp. at 4, 6-7. Spectrum Five does not explain how potential future interference to *U.S.-based* service delayed an auction of *South American* capacity. But, even as described, any injury has apparently already occurred. Spectrum Five does not explain how any action from this Court can undo such an injury now. In short, Spectrum Five's allegations fall well short of this Court's requirement to show a "concrete" "impact of an agency decision on a company's ability to raise capital." *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013); *see also CNG Transmission Corp v. FERC*, 40 F.3d 1289, 1293 (D.C. Cir. 1994) (finding injury where agency forced company to write off $7.1 million loss, hampering ability to raise capital).

B. Any Purported Injury Is Not Redressable By This Court.

Only the ITU can find that the EchoStar 6 satellite was or was not properly "brought into use," and thus establish its priority over Spectrum Five's ITU filing. Mot. at 13-14. This Court is "loath to find standing" in cases like this, where relief is at the discretion of a governmental non-party. *U.S. Ecology, Inc. v. United States Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). Spectrum Five does not contest that the ITU is an "independent actor[] not before the court[]" that exercises "broad and legitimate discretion" that this Court "cannot presume … to

control." *Id.* Instead, Spectrum Five asserts that a favorable outcome in this case "will significantly increase the chances of favorable action by the ITU." Resp. at 1, 8, 9. As with injury, however, a mere *increase* in likelihood is not enough. If the likelihood of redress increases from "impossible" to "merely unlikely," for example, the end result is still short of "substantially likely," a showing this Court consistently requires. *See Town of Barnstable v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011) ("significant increase in the likelihood" test is simply "substantial probability" test "[p]ut another way").

Previously, Spectrum Five was far less confident that this Court could provide redress. When it applied to the Commission for a stay of the Bureau's Order, it stated that the "mere location of EchoStar 6" in the new orbital slot for 90 days "will enable ESOC to cement permanently" its filing in the ITU register. *See* Stay Request at 23 (FCC Reply Add. at 25); *see also id.* (describing STA as "the first step in an inevitable chain of events" leading to ESOC priority).

Now Spectrum Five claims this Court can take actions that will likely cause the ITU to act in its favor, but its arguments are unconvincing. Contrary to its assertion that ITU regulations require "that the satellite on which the U.K. relied … was authorized under U.S. law to be used for that purpose" (Resp. at 1), the regulations that Spectrum Five cites make no reference to authorization. Instead, Regulation 11.44B requires only that a satellite "with the capability of transmitting or receiving that frequency assignment has been deployed and maintained at the notified orbital position for a continuous period of ninety days." ITU Radio Regs., art. 11.44B. The reference to "capability," which Spectrum Five reads as a

requirement of valid legal status (Resp. at 8), is more naturally read as a technical requirement regarding the ability to transmit or receive the relevant frequency assignment. At a minimum, Spectrum Five fails to show that its reading is so plainly correct that vacatur of the FCC's *Order* will make relief likely, as opposed to speculative.

The cases cited by Spectrum Five underscore the inadequacy of its showing on redressability. In *Town of Barnstable*, petitioners challenged an FAA decision that found wind turbines would pose no hazard to air traffic. 659 F.3d at 31-32. Although the Department of the Interior gave final approval to the project, this Court found standing to challenge the FAA decision because petitioners demonstrated that "Interior repeatedly assigned the FAA a significant role in its decision-making process," *id.* at 32, making it "'likely, as opposed to merely speculative,'" that vacatur of the FAA decision would lead to redress. *Id.* at 34 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Here by contrast, Spectrum Five offers no evidence that domestic law plays any role in the ITU's decision-making process. Likewise, when this Court found standing to challenge the DEA's classification of marijuana as a Schedule I drug, the petitioner had demonstrated that "[t]he only thing stopping" VA doctors from filling out state medical marijuana forms was a VHA directive, "the only reason" for which was the DEA's classification of the drug. *Americans for Safe Access v. DEA*, 706 F.3d 438, 448 (D.C. Cir. 2013). Again, Spectrum Five makes no such showing that any action by this Court will "likely" lead to a favorable result before the ITU.

C. The Requested Relief Would Embroil This Court In Foreign Relations.

Spectrum Five still seeks the extraordinary remedy of an order "direct[ing] the FCC to take appropriate steps to cure the effects" of the STA (Resp. at 8 (quoting Spectrum Five Mot. at 20)), including "informing the ITU that [the FCC] objects to the U.K.'s claim." Resp. at 9. As we have explained, such an objection before the ITU would run directly counter to the commitment made by the FCC, on behalf of the U.S., to the U.K. Mot. at 15. In addition to the legal obstacles to such such an extraordinary remedy (*see* Mot. at 14-16), such an order would severely hamper the FCC's ability to negotiate similar coordinations in the future. Satellite coordination with other countries is a requirement for most satellite networks under ITU Radio Regulations, *see generally* ITU Radio Regs. art. 9, and a key tool by which the federal government advances the national interest in ensuring the efficient use of satellite spectrum. If the U.S. is seen to go back on its word—precisely what Spectrum Five seeks here—it will impair the government's ability to negotiate these coordinations in the future.

In response, Spectrum Five recites the general principle that courts seek remedies that make a party whole. Resp. at 7. But the cases that Spectrum Five cites deal with an agency's authority to order refunds. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965); *AT&T Corp. v. FCC*, 448 F.3d 426, 433-35 (D.C. Cir. 2006); *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49-50 (D.C. Cir. 1999). They fall well short of the remedy Spectrum Five

seeks here—an order that an agency take a particular position before an international organization contrary to a prior commitment.

Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 229-30 (1986), is also not to the contrary. There, the Court found it had authority to determine whether a statute required the Secretary of Commerce to certify that Japan's whale harvests diminished the effectiveness of an international conservation program, even though the executive branch had agreed with Japan that it would not make such a certification. *Id.* at 223, 228. Because the case "present[ed] a purely legal question of statutory interpretation," *id.* at 230, it did not call on the Court to "formulate national policies or develop standards for matters not legal in nature," tasks for which courts are "fundamentally underequipped." *Id.* (quotation marks and citation omitted). That is far afield from Spectrum Five's request here that this Court craft an equitable remedy, not compelled by any statute, directing the FCC to take a position before an international body contrary to its commitment with its U.K. counterpart.

Spectrum Five next argues that the agency has not actually committed to the U.K. to not object before the ITU because, Spectrum Five contends, if the STA is vacated then "the FCC's commitment will be without effect." Resp. at 11-12. This is incorrect. The *Order* describes the FCC's commitment as a straightforward one to "not object to the U.K. Administration notifying the ITU that the BERMUDASAT-1 Network was brought into use." *Order* ¶ 8 (Pet. Add. 129). Nothing in that description indicates that the commitment is contingent on the subsequent legal status of the FCC's STA.

Spectrum Five seeks to create ambiguity by misreading the letter from the FCC to OFCOM, its U.K. counterpart, describing the commitment. Resp. at 12. That letter sets out that "any FCC authorization for operations of Echostar-6 … will state … that the FCC will not object to the UK administration bringing into use the BERMUDASAT-1 network." Letter from FCC, Int'l Bureau to OFCOM, U.K. (Mar. 29, 2013) (Reply Add. at 40-41). Spectrum Five argues that, because the *Order*, *i.e.*, the "authorization," did in fact "state … that the FCC will not object," the FCC has already fulfilled its commitment by simply including the relevant language in the *Order*, and so is now free to object anyway, despite the language in the commitment. Resp. at 12. The reading makes no sense. An undertaking to the U.K. that the FCC will simply memorialize the terms of a satellite coordination without the concomitant commitment to abide by the negotiated terms would be meaningless. Moreover, the U.K.'s own understanding of the commitment, embodied in its letter in response, is plain: "you will not object to use of EchoStar 6 for the due diligence and bringing into use of the BERMUDASAT-1 satellite network." Letter from OFCOM, U.K. to FCC, Int'l Bureau (Mar. 29, 2013) (Reply Add at 43). The U.K.'s letter, which is not couched in terms of an "authorization," also belies Spectrum Five's contention that, on vacatur, the FCC will be absolved of its commitment because there will be no "authorization" "into which to insert" a commitment not to object. Resp. at 12.

In short, nothing in the exchange of letters or the *Order* supports Spectrum Five's contention that the FCC's commitment is contingent on the status of the STA under domestic law. The record plainly shows that the FCC has made a

commitment to its U.K. counterpart, and an order from this Court directing the FCC to renege on that commitment would force the United States government to go back on its word.

Spectrum Five cannot avoid that result with its passing suggestion that vacatur of the *Order* by itself may suffice to redress its purported injury. Resp. at 1, 8. By Spectrum Five's admission, that remedy, like its other proposals, may require the FCC, in order to comply with the Court's mandate, to "inform[] the ITU that it objects to the U.K.'s claim." Resp. at 8-9. It thus equally interferes with the FCC's commitments to OFCOM.

II. EXPEDITION IS NOT WARRANTED.

Spectrum Five requests that this Court expedite the case by "scheduling oral argument before a merits panel on the current motion papers." Resp. at 20. The Commission objects to that request. The motion papers in this case address limited issues, under a different standard of review, and with stricter page limits than permitted by the Federal Rules for merits briefing. Deciding the case on these papers alone would deprive the Court of full consideration of the issues. However, as stated previously (Mot. at 23), while the Commission believes expedition is not warranted, it stands ready to comply with an expedited schedule for plenary briefing if the Court so orders.

CONCLUSION

The Court should dismiss the petition for review and notice of appeal for lack of jurisdiction.

Respectfully submitted,

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September 23, 2013

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ADDENDUM TO REPLY IN SUPPORT OF MOTION TO DISMISS

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SEPTEMBER 23, 2013

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

In the Matter of	)	
	)	
EchoStar Satellite Operating Company	)	File No. SAT-STA-20130320-00023
	)	Call Sign : S2232
Application for Special Temporary Authority	)	
Related to Moving the EchoStar 6 Satellite	)	
from the 77° W.L. Orbital Location to the 96.2°	)	
W.L. Orbital Location, and to Operate at the	)	
96.2° W.L. Orbital Location	)	

SPECTRUM FIVE LLC'S EMERGENCY REQUEST FOR A STAY

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Washington, D.C. 20554

In the Matter of	)	
	)	
EchoStar Satellite Operating Company	)	File No. SAT-STA-20130220-00023
	)	Call Sign : S2232
Application for Special Temporary Authority Related to Moving the EchoStar 6 Satellite from the 77° W.L. Orbital Location to the 96.2° W.L. Orbital Location, and to Operate at the 96.2° W.L. Orbital Location	)	

SPECTRUM FIVE LLC'S
EMERGENCY REQUEST FOR A STAY

I. INTRODUCTION AND SUMMARY

Pursuant to Commission Rules 1.43[1] and 1.102(b)(3),[2] Spectrum Five LLC ("Spectrum Five"), by its attorneys, hereby files this emergency request that the Federal Communications Commission ("Commission") stay the International Bureau's ("Bureau") Order and Authorization granting EchoStar Satellite Operating Corporation ("ESOC") Special Temporary Authority ("STA") to relocate the EchoStar 6 satellite from the 76.8° W.L. orbital location to the 96.2° W.L. orbital location.[3] Because of a significant risk that immediate irreparable harm will result if the STA remains in effect, Spectrum Five respectfully requests Commission action on this stay request as expeditiously as possible. At the very least, the Commission should enter a

[1] 47 C.F.R. § 1.43.

[2] 47 C.F.R. § 1.102(b)(3).

[3] *See EchoStar Satellite Operating Company, Application for Special Temporary Authority Related to Moving the EchoStar 6 Satellite from the 77° W.L. Orbital Location to the 96.2° W.L. Orbital Location, and to Operate at the 96.2° W.L. Orbital Location*, Order and Authorization, DA 13-593 (Apr. 1, 2013) ("Order"). Spectrum Five is concurrently filing an Application for Review of the Order.

brief administrative stay pending its full consideration of this request in advance of April 14, 2013.

Spectrum Five is likely to prevail on the merits of its Application for Review of the Bureau's decision because it is in conflict with the Communications Act, Commission regulations, Commission precedent, and established policies. In addition, the equities weigh strongly in favor of staying the Bureau's decision pending review by the full Commission. Absent a stay, Spectrum Five will suffer irreparable harm in the form of substantial competitive injury. No other party – not even ESOC – will suffer harm remotely close to the competitive injury that Spectrum Five will experience if the Bureau's decision is allowed to stand pending review. The public interest, moreover, weighs in favor of preserving the *status quo* pending review by the full Commission. For all these reasons, a stay should be granted.

II. BACKGROUND

A. Spectrum Five

Spectrum Five is a U.S.-based company that was formed to develop, launch and operate satellite systems for the provision of additional, competitive, and innovative services to U.S. consumers.[4] Spectrum Five holds a license issued by the FCC to provide service in the 17/24 GHz reverse band from the 95.15 ° W.L. orbital location.[5] In addition, Spectrum Five and its wholly-owned subsidiary Spectrum Five BV (a Netherlands corporation) are parties to agreements with the State of the Netherlands and the Government of the Netherland Antilles, which authorize the launch and operation of satellite systems using 12/17 GHz and 17/25 GHz frequencies at several orbital locations, including the nominal 95° W.L. location, for the purpose

[4] Declaration of David Wilson ¶ 2 ("Wilson Decl.").

[5] *Id.*; *see Policy Branch Information; Actions Taken*, Public Notice, Report No. SAT-00834, DA No. 12-14, File No. SAT-T/C-20111013-00201 (Jan. 6, 2012).

of providing service to the United States.[6] Pursuant to these agreements, the State of the Netherlands acts as the sponsoring administration for Spectrum Five before the International Telecommunication Union ("ITU") and has submitted filings for Spectrum Five's use of frequencies and orbital locations, including that slot.[7]

Spectrum Five has long planned to introduce competitive Direct Broadcast Satellite ("DBS") service to the United States.[8] It has patiently waited for the Commission to lift its freeze on applications for authority to provide DBS services using new orbital and spectrum resources, which has been in effect since 2005.[9] In the meantime, Spectrum Five is developing a hybrid Broadcast Satellite Service ("BSS")/reverse band platform that would enable it to provide highly spectrum-efficient video, broadband, and other services to the United States and the Americas from the 95° W.L. orbital location after the freeze is lifted.[10]

B. ITU Procedures for Determining BSS System Priority and the BERMUDASAT-1 Filing

DBS operations in the United States occur under the framework specified in ITU Radio Regulations for the BSS. BSS operations occur within planned frequency bands set out in Appendices 30 and 30A of the ITU Radio Regulations, which reflect the orbital locations and frequency channels assigned to each administration that was included in the original BSS Plan.

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6 *Id.*

7 *Id.*

8 Wilson Decl. ¶ 3.

9 *See Direct Broadcast Satellite (DBS) Service Auction Nullified: Commission Sets Forth Refund Procedures for Auction No. 52 Winning Bidders and Adopts a Freeze on All New DBS Service Applications, Public Notice*, Public Notice, 20 FCC Rcd 20618 (2005) ("*DBS Freeze Order*").

10 Wilson Decl. ¶ 3.

An administration may seek to modify the BSS Plan, but before doing so must obtain the agreement of any other administration that would be deemed "affected" by the proposed modification.[11] A proposed modification expires automatically if the agreement of all affected administrations is not secured, and/or if the filing is not "notified" and "brought into use," within eight years of its filing.[12] If, on the other hand, those steps are completed and a satellite is brought into use by being positioned at a particular slot for at least 90 days, then the proposed modification is considered perfected and entitled, pursuant to ITU rules, to full protection, in perpetuity, from any modification of the BSS Plan that was or is submitted by any other administration after the date that the proposed modification was submitted.

On April 15, 2005, Bermuda submitted to the ITU a proposed modification to the Region 2 BSS Plan, through its BERMUDASAT-1 filing, which identified a service area covering the entirety of the United States (including Alaska and Hawaii) and Bermuda.[13] Multiple administrations, including the United States would be deemed "affected" by this modification under ITU Radio Regulations. The modification must be brought into use by April 14, 2013, or it will expire. If, however, the BERMUDASAT-1 filing is perfected, the modification to the BSS Plan forever will be entitled to full protection against any modification requests submitted after its initial filing, including the Netherlands' January 28, 2011 modification filing that was submitted on Spectrum Five's behalf (BSSNET3-95W).

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11 ITU Radio Regulations, Appendix 30, Article 4.1.1.

12 ITU Radio Regulations, Appendix 30, Article 4.1.3.

13 *See* BERMUDASAT-1, *published in* Special Section AP30-30A/E/389 of IFIC 2553 (20 Sept. 2005); *see also* Letter from William S. Wiltshire, counsel for DIRECTV Enterprises, LLC, to Marlene H. Dortch, at 2, Figure 1 (Feb. 25, 2013) ("*DIRECTV Feb. 25 Opposition*").

C. EchoStar's STA Request and Subsequent Proceedings Before the Bureau

On February 20, 2013, ESOC filed a request for STA to relocate the EchoStar 6 satellite for operations at the 96.2° W.L. orbital location. ESOC stated in its initial filing that grant of its STA request was necessary "to accommodate the needs of its customer and development partner, SES Satellites (Bermuda) Ltd. ('SES Bermuda,' and along with its affiliates, 'SES')."[14] ESOC claimed that SES intended to use EchoStar 6 at that location in order to "evaluate and develop commercial service opportunities in the Caribbean, Latin American, and North Atlantic markets outside of the United States."[15] It described those "opportunities" as including "the provision of video programming and other services, including international maritime services, to consumers in Bermuda and elsewhere."[16] ESOC requested that the Bureau grant its request by March 12, 2013, "so that commercial development may begin at the earliest possible date."[17]

Although ESOC stated that its operations at 96.2° W.L. would be "pursuant to the BERMUDASAT-1 filing,"[18] it proposed service with parameters entirely different from those portrayed in that filing.[19] Indeed, although the service area covered by the BERMUDASAT-1 filing includes the entirety of the United States, the explained purpose of the STA was to

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[14] *Application for Special Temporary Authority Beginning on or Before March 12, 2013 to Move EchoStar 6 to, and Operate It at, 96.2 W.L.*, IBFS File No. SAT-STA-20130220-0023 (filed Feb. 20, 2013), at 2 ("STA Request").

[15] *Id.*

[16] *Id.*; *see id.* at 4 (noting plans to conduct an "assessment of the viability of direct-to-home and other services, including international maritime services").

[17] *Id.* at 2, 5, 7.

[18] *Id.* at 2.

[19] *See id.* at Exhibit 2, 1-2 & Figure 2-1.

evaluate opportunities "outside of the United States," as it had to be due to the existing freeze[20] on applications for new domestic DBS services.[21]

Two parties initially opposed ESOC's STA Request: Spectrum Five and DIRECTV Enterprises, LLC ("DIRECTV"). The oppositions exposed the real purpose behind the STA Request: to prejudice the international coordination rights of the United States, and thereby providers that either currently offer service to domestic customers (such as DIRECTV) or seek to do so in the future (such as Spectrum Five), by securing international priority for the BERMUDASAT-1 filing before its expiration on April 14, 2013.[22] They also exposed numerous legal and technical flaws in the STA filing, including that it failed to meet the Communications Act's requirements for an STA grant, that grant of the STA would be inconsistent with the ITU Radio Regulations, that it would impose an undue risk of international liability to the United States should EchoStar 6 cause harmful interference or physical damage to other operators, that it was unsupported by precedent, and that it proposed operations inconsistent with the freeze on applications for authority to provide new DBS service.[23] They emphasized, further, precedent

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[20] As noted above, the Commission adopted a freeze on DBS applications in 2005 that remains in effect. *See supra* note 9; *DBS Freeze Order*, 20 FCC Rcd 20618.

[21] *See* STA Request at 2, 4.

[22] *See, e.g.*, *DIRECTV Feb. 25 Opposition*, at 1, 4-5; Letter from Todd Stansbury, counsel for Spectrum Five, LLC, to Marlene H. Dortch, at 2-3 (Mar. 12, 2013) ("*Spectrum Five Mar. 12 Opposition*").

[23] *See generally DIRECTV Feb. 25 Opposition*; *Spectrum Five Mar. 12 Opposition*; Letter from William M. Wiltshire, counsel to DIRECTV, to Marlene H. Dortch (Mar. 12, 2013) ("DIRECTV Mar. 12 Ex Parte").

squarely holding that bringing into use an ITU filing – the unstated but transparent purpose of the ESOC STA Request – is *not* a proper basis on which to grant an STA.[24]

Only after these filings did ESOC acknowledge its motivation to accomplish "an efficient move of the satellite before expiration of the underlying Bermuda ITU filing," to "allow it to capitalize on a unique, but time-limited, opportunity to begin developing the 96.2° W.L. orbital slot for new services and markets."[25] It claimed, however, that "the fact that an STA grant may have the incidental effect of bringing an ITU filing into use is *irrelevant* to the Commission's public interest determination."[26]

In subsequent filings and at multiple meetings with Commission staff, Spectrum Five and DIRECTV separately elaborated on the arguments they had previously presented and provided additional reasons for denial of ESOC's STA Request.[27] In particular, they emphasized the serious, prejudicial, perpetual harm that would befall their own operations and future plans, as well as the fact that the grant of the STA Request could result in the permanent loss of

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[24] *See, e.g.*, DIRECTV Mar. 12 Ex Parte, at 2 n.6 (citing *EchoStar Satellite L.L.C.*, 20 FCC Rcd 10033 (¶ 9) (2005)); *see also* Letter from Todd M. Stansbury, counsel for Spectrum Five, to Marlene H. Dortch (Mar. 29, 2013), at 8 & n.17 (citing same) ("Spectrum Five Mar. 29 Ex Parte").

[25] Letter from Dean Manson, EchoStar, to Marlene H. Dortch, at 1, 2 (Mar. 13, 2013); *see id.* at 6.

[26] *Id.* at 3 (emphasis added).

[27] See, e.g., Letter from William S. Wiltshire, counsel for DIRECTV Enterprises, LLC, to Marlene H. Dortch (Mar. 19, 2013) ("DIRECTV Mar. 19 Ex Parte #1) (written ex parte presentation); Letter from William S. Wiltshire, counsel for DIRECTV Enterprises, LLC, to Marlene H. Dortch (Mar. 19, 2013) (reporting on meeting held with staff and summarizing oral ex parte presentation made during meetings); Letter from Todd M. Stansbury, counsel for Spectrum Five, to Marlene H. Dortch (Mar. 20, 2013) ("Spectrum Five Mar. 20 Ex Parte"); Spectrum Five Mar. 29 Ex Parte; Letter from Todd M. Stansbury, counsel for Spectrum Five, to Marlene H. Dortch (Apr. 1, 2013) ("Spectrum Five Apr. 1 Ex Parte").

opportunities for competition in the United States and increased service to United States consumers, even though ESOC admitted it planned to offer no service to the United States.[28]

In the meantime, Spectrum Five and DIRECTV independently entered into private coordination negotiations with ESOC in an attempt to find mutually agreeable approaches that would permit ESOC to provide the services described in the STA. DIRECTV ultimately reached a coordination agreement with ESOC, and thus withdrew its opposition to the STA Request on March 27.[29] Although DIRECTV previously had indicated its view that "even if" such agreement were reached, "the procedural and institutional bases for denying the requested STA will remain,"[30] the effect of the agreement between ESOC and DIRECTV was to enable DIRECTV to protect its own private business interests from harm as a result of ESOC's operations pursuant to the STA. The Netherlands subsequently submitted a letter raising concerns, similar to those voiced by Spectrum Five, regarding the impact that grant of the STA Request would have on the Netherland's own ITU filings.[31] For its part, ESOC persistently refused to provide Spectrum Five with basic technical information necessary for coordination of its operations with EchoStar 6,[32] and never provided adequate responses to the myriad technical

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28 *See, e.g.*, DIRECTV Mar. 19 Ex Parte at 1; Spectrum Five Mar. 20 Ex Parte, at 1-2, 5; Spectrum Five Mar. 29 Ex Parte, at 1, 3, 4-9; Spectrum Five Apr. 1 Ex Parte at 2.

29 Letter from William S. Wiltshire, counsel for DIRECTV Enterprises, LLC, to Marlene H. Dortch (Mar. 27, 2013).

30 DIRECTV Mar. 12 Ex Parte at 6.

31 Letter from R. Agema, Radiocommunications Agency Netherlands (Mar. 28, 2013).

32 *See, e.g.*, Letter from Todd Stansbury, counsel for Spectrum Five, LLC (Mar. 29, 2013).

and legal flaws that Spectrum Five, DIRECTV, and the Netherlands had identified. As the end of March approached, ESOC made multiple demands for FCC action by April 1, 2013.[33]

D. The Bureau's Decision

On April 1, 2013, without ever providing notice to the public of the STA Request, the Bureau nevertheless granted the STA to ESOC. The Bureau expressly "agree[d] with Spectrum Five's assessment" that "ESOC seeks temporary authority, rather than waiting for normal processing of its application for regular authority, due to the April 14, 2013 deadline for the U.K. to have a satellite at the 96.2° W.L. orbit location for purposes of bringing the BERMUDASAT-1 filing into use."[34] Sharply departing from precedent, the Bureau found it inappropriate to take into account the "motivations of non-U.S. commercial operators related to their tactical approach to ITU filing matters," and concluded that ESOC's expressed "need . . . to move a geostationary satellite" amounted to "extraordinary circumstances" sufficient to warrant an STA.[35] The Bureau also rejected arguments that grant of the STA would violate the DBS processing freeze,[36] found that commitments made by ESOC and SES with respect to Spectrum Five's U.S.-Licensed 17/24 BSS Satellite at 95.15° W.L. obviated any potential for prejudicing Spectrum Five's rights with respect to that U.S. license,[37] and rejected the arguments of Spectrum Five and the

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33 *See* Letter from Bryan Tramont, counsel to EchoStar, to Marlene H. Dortch (Apr. 2, 2013) at 2; Letter from Anders N. Johnson, President, EchoStar Satellite Services LLC to Marlene H. Dortch (Mar. 29, 2013) at 1-2; Letter from Bryan Tramont, counsel to EchoStar, and Daniel Mah, Regulatory Counsel, SES Satellites (Bermuda) Ltd., to Marlene H. Dortch (Mar. 28, 2013) at 1.

34 *Order* ¶ 8.

35 *Id.* ¶ 9.

36 *Id.* ¶¶ 11-12.

37 *Id.* ¶¶ 13.

Netherlands with respect to the Netherlands' BSS filing at the 95.0° W.L orbital slot.[38] Finally, the Bureau purported to "clarify" certain matters.[39] In the ordering clause, the Bureau expressly stated that "[a]ny action taken or expense occurred as a result of operations pursuant to this special temporary authority is solely at ESOC's own risk."[40]

III. THE BUREAU'S DECISION SHOULD BE STAYED PENDING REVIEW BY THE FULL COMMISSION.

In determining whether to grant a stay, "the Commission applies the four factor test established in *Virginia Petroleum Jobbers Association v. FPC*, as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*"[41] Under that test, the Commission asks whether: "(i) Petitioners are likely to prevail on the merits; (ii) Petitioners will suffer irreparable harm absent a stay; (iii) other interested parties will not be harmed if the stay is granted; and (iv) the public interest favors grant of the stay."[42] "To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced."[43] In this case, all four factors strongly weigh in favor of a stay.

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38 *Id.* ¶¶ 14-17.

39 *Id.* ¶ 18.

40 *Id.* ¶ 20(c).

41 *In re Regulation of Prepaid Calling Card Servs.*, Order, 22 FCC Rcd 5652, ¶ 7 (2007) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

42 *In re City of Boston, Mass, & Sprint Nextel*, Order, 22 FCC Rcd 2361, ¶ 8 (2007) (footnote omitted).

43 *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *accord Charter Commc'ns Entm't I, LLC*, 22 FCC Rcd 13890, 13892 ¶ 4 n.17 (Media Bureau 2007).

A. Spectrum Five Is Likely To Succeed On The Merits Of Its Challenge To The Bureau's Order And Authorization.

Spectrum Five is likely to prevail on review before the Commission because the Bureau's grant of the STA request is in conflict with the Communications Act, the Commission's regulations, and established Commission precedent. Moreover, the Bureau's grant of the STA harms the public interest by foreclosing the ability of competitors to provide service to U.S. customers in the future. Such harm to competition and the public cannot rationally be squared with a statutory obligation to grant an STA only when necessary to avoid prejudice to the public.

1. The Bureau's Grant Of ESOC's STA Request Conflicts With Statutory And Regulatory Requirements And Established FCC Precedent.

Section 309(b) of the Communications Act establishes strict procedures to ensure that certain material applications, including applications to operate communications satellites on specified frequencies at specific orbital locations, are not granted without notice to the public and a 30-day period for public comment.[44] Subsections (c) and (f) of Section 309, and Section 25.120 of the Commission's Rules, carve out very narrow exceptions to this statutorily mandated notice and comment obligation to enable the Commission, in rare instances, to authorize service in an emergency without delay. To ensure that the public's right to review and comment on applications affecting their rights is not abridged, the statute and the Commission's rules necessarily establish a high bar for invoking these exceptions to the general notice-and-comment procedures.[45] Thus, the Communications Act and the FCC's regulations provide that "[t]he Commission may grant a temporary authorization *only* upon a finding that there are *extraordinary circumstances* requiring temporary operations in the public interest and that delay

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[44] 47 U.S.C. § 309(b).

[45] 47 U.S.C. § 309(c).

in the institution of these temporary operations would *seriously prejudice* the public interest."[46] Without strict standards, the exception to public notice and comment could be employed in ways that eviscerate the rule.[47] Unfortunately, that is the case here.

First, the Bureau manufactures a theoretical "extraordinary circumstance," which if allowed to stand, would effectively authorize any satellite to relocate to any slot for the provision of any service, or even no service at all, under an STA without any notice to or comment from the public. According to the Bureau, in "ordinary circumstances" satellites maintain their "authorized orbital locations" using "propulsion systems ultimately controlled using radio commands."[48] The Bureau then concludes that the "need on the part of a licensee to move a geostationary satellite . . . provides the necessary extraordinary circumstances" to justify an STA.[49] In other words, the Bureau holds that the movement of a satellite, which ordinarily requires an application subject to public notice and comment procedures,[50] is itself grounds for

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[46] 47 C.F.R. § 25.120(b)(1) (emphasis added); *see also* 47 U.S.C. § 309(f) (emphasis added).

[47] It is fundamental that "'[a] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal citation omitted); *accord Donnelly v. FAA*, 411 F.3d 267, 271 (D.C. Cir. 2005) ("We must strive to interpret a statute to give meaning to every clause and word.").

[48] Order, ¶ 9.

[49] *Id.* The Bureau notes (at ¶ 9) that "in this case" DIRECTV and SES Bermuda had entered into an operator-to-operator coordination agreement and that ESOC/SES Bermuda made certain "commitments regarding" Spectrum Five's reverse band operations at 95° W.L., but neither fact materially distinguishes the Bureau's holding here from just about any conceivable future case in which an operator requests STA to relocate a satellite. Respecting legal rights of other parties is certainly an appropriate consideration in the Commission's weighing of public interest benefits and harms in an STA proceeding, but by no measure can it independently create the "extraordinary circumstance" needed to justify an STA in the first instance.

[50] *See* 47 U.S.C. § 309(b).

circumventing public notice and comment procedures. Thus, if left undisturbed, the Bureau's Order would enable the exception to swallow the rule, whole.

The Bureau cites *DIRECTV Enterprises, LLC*[51] for the proposition that the FCC's "practice" is to authorize relocation of satellites pursuant to STA. But, that decision granted permanent authority to relocate a satellite pursuant to an application for modification of license that was processed under notice and comment procedures as required by Section 309(b) of the Communications Act, not under STA. Moreover, *DIRECTV Enterprises, LLC* concerned the relocation of the DIRECTV 1R satellite to 55.8° E.L. to ensure continuity of service to customers potentially affected by a launch delay of a new satellite.[52] In a separate decision not cited by the Bureau, the FCC authorized the *transit* of the DIRECTV 1R satellite to 55.8° E.L. pursuant to STA, but in that case, there was a specific, demonstrable public interest benefit – continuity of specific existing services as described in DIRECTV's application for modification of license – that justified the STA.[53] In contrast, no such rationale is provided here.

The Bureau expressly agreed with Spectrum Five that "ESOC seeks temporary authority, rather than waiting for normal processing of its application for regular authority, due to the April 14, 2013 ITU deadline for the U.K. to have a satellite at the 96.2° W.L orbit location for purposes of bringing the BERMUDASAT-1 filing into use."[54] The Bureau then dismissed the

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[51] Order, ¶ 9 n.19 (*citing DIRECTV Enterprises, LLC*, Grant Stamp, File No. SAT-A/O-20120817-00137, SAT-AMD-20120824-00142, SAT-AMD-2012-0913-00148 (granted Dec. 21, 2012)).

[52] *See DIRECTV Enterprises, LLC*, File No. SAT-A/O-20120817-00137 at 2-3 (filed Aug. 17, 2012).

[53] *See DIRECTV Enterprises, LLC*, Stamp Grant, File No. SAT-STA-20121109-00197, ¶ 3 (Dec. 14, 2012).

[54] Order, ¶ 8.

obvious as mere "motivations" of operators regarding "ITU filing matters" that are not appropriate to determining whether an STA would serve the public interest.[55] But the Bureau does not, and cannot, reconcile this conclusion with its specific holding in the precedent established with very same operator in *EchoStar Satellite LLC* that the bringing into use of an ITU filing is *not* a public interest basis for an STA.[56]

The Bureau also failed to acknowledge other precedent cited by Spectrum Five and DIRECTV holding that an STA must be supported by specific, demonstrable public interest benefit, such as ensuring continuity of service or expanding service to customers.[57] ESOC made no representation that the EchoStar 6 satellite will be used to provide any actual service to any consumer anywhere in the world. Indeed, because EchoStar 6 would not even cast a shadow on much of the area that ESOC purportedly desires to serve (*i.e.*, most of the Caribbean and Latin America), and because it is not able to serve the U.S. in order to avoid dismissal due to the

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[55] *Id.*

[56] *See EchoStar Satellite L.L.C.*, 20 FCC Rcd. 10033, ¶ 9 (Int'l Bur. 2005) (denying request for STA by EchoStar for the purpose of bringing into use an ITU filing by Mexico for the 77° W.L. orbital slot). The Bureau subsequently reinstated EchoStar's request for STA at 77° W.L., only upon a specific showing that grant of the STA would result in a real and demonstrable benefit to the U.S. public. Specifically, EchoStar represented that it "can and will provide service to the United States using the EchoStar 4 satellite" upon grant of the STA. *EchoStar Satellite L.L.C.*, 20 FCC Rcd 12507, 12509 (I.B. 2005). Of course, no such rationale exists here.

[57] *See, e.g., Applications of DIRECTV Enterprises LLC*, 20 FCC Rcd 11772, 11775 (2005) (granting a 180-day request for special temporary authority to relocate a DIRECTV satellite in order to maintain continuity of DBS service for consumers); *see also Policy Branch Information; Actions Taken*, Report No. SAT-00909, File No. SAT-STA-20120621-00103 (Nov. 2, 2012) (Public Notice) (granting Intelsat License LLC's 180-day request for temporary authority to drift a satellite where Intelsat's application asserted that temporary authority would serve the public interest by allowing "Intelsat to expand customer services"); *Policy Branch Information; Actions Taken*, Report No. SAT-00894, File No. SAT-STA-20120817-00138 (Aug. 31, 2012) (Public Notice) (granting DIRECTV's 60-day request for special temporary authority where DIRECTV explained that temporary authority would allow the satellite to "help ensure continuity of service for another DBS operator.").

FCC's DBS processing freeze, it is hard to conjure any business that ESOC could provide, much less a business that has to commence immediately to avoid serious harm to the public interest. Moreover, Spectrum Five provided the Commission public information that both SES and ESOC have several in-orbit satellites, most of which have been launched in the last three years and operate with equal or higher power than proposed by EchoStar 6, that already provide service to the very same locations that they claim they wish to serve. Given the low power levels specified in ESOC's STA request, it is unlikely that ESOC could compete against any of the multiple Ku-band based satellite service providers already serving the area, including their own.

Nor is there any finding by the Bureau that service must commence immediately to avoid serious prejudice to the public. No finding could possibly be made, given that ESOC does not commit to provide any service whatsoever at any time, and its sole express claim for the STA is nothing more than the "unique, but time limited, opportunity" to bring into use the BERMUDASAT-1 filing.[58]

Further, contrary to the Bureau's claim that "delay could place the Commission in the position of resolving through inaction a potential dispute between other Administrations," the Commission has instead *created* a potential dispute by its *action* of granting an STA for the purpose of perfecting another country's ITU filing, contrary to the FCC's own precedent. Thus, by employing the extraordinary remedy of an STA to benefit one party, the Bureau dictated the outcome by picking the winner. In contrast, had the Bureau properly refrained from granting one party an STA, it would have maintained a level playing field for all applicants interested in securing authority to provide service to the U.S. Ironically, by granting an STA to enable another administration to bring into use an ITU filing, the Bureau used its own extraordinary

[58] ESOC March 13, 2013 Ex Parte Letter at 2.

power to grant temporary relief in a manner that forecloses an opportunity to secure rights at 96.2° W.L. for the United States' own benefit.

In sum, the Bureau's Order failed to satisfy the basic statutory elements to grant an STA, unlawfully deprived the public of its right to notice and comment on an application that materially affected its rights, and conflicted with directly applicable precedent. To the extent the Bureau was attempting to create a new permissive standard for STAs, moreover, it failed to explain its departure from precedent, contrary to law.[59] Therefore, Spectrum Five is likely to prevail on the merits of its application for review.

2. Unnecessary Use Of The Expedited STA Procedures Deprived The Bureau And The Public Adequate Time To Obtain All Necessary Facts And Analyze The Technical Operations Affected By Relocation Of ECHOSTAR 6.

The expedited procedures used to consider ESOC's request to relocate the EchoStar 6 satellite were unnecessary and shortchanged the Bureau's ability to carefully review and confirm that all material facts were provided to determine whether operation of the EchoStar 6 satellite at 96.2° W.L. as proposed was justified. Here, ESOC's failure to provide complete information to the Bureau and false claims of urgency resulted in a materially deficient record and an improperly issued decision.

ESOC initially claimed that it needed to begin relocating the satellite by March 12, 2013.[60] The rationale for the deadline was to permit some unstated commercial "development"

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[59] *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Satellite Broadcasting Company, Inc. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987) ("The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation.").

[60] STA Request at 2, 5; ESOC February 27, 2013 Ex Parte Letter at 1, 4; ESOC March 11, 2013 Ex Parte at 1.

to begin.[61] After admitting that the STA was, contrary to prior representations, to bring into use the BERMUDASAT-1 filing, ESOC adjusted its request and demanded the Bureau staff grant the STA by April 1, 2013.[62] This enormous pressure to circumvent the Commission's normal internal review process was inappropriate and, ultimately, unnecessary. Based on public records available to Spectrum Five, EchoStar 6 did not begin its drift until three days later on April 4.[63] Thus, ESOC's demand for action was misplaced and deprived the Commission and interested parties with the opportunity to fully address the highly technical merits of ESOC's STA request and the public interest ramifications of using an STA solely to bring into use a non-U.S. ITU filing that will materially affect U.S. interests.

Moreover, ESOC's STA Request failed to identify all of the administrations affected by the proposed operation of the BERMUDASAT-1 filing, which is a material issue in confirming ESOC's compliance with its legal obligations. ESOC incorrectly claimed in its STA Request that Jamaica would be the only administration "affected" by the operation of EchoStar 6.[64] Spectrum Five provided a technical analysis demonstrating that EchoStar 6 would affect multiple administrations, including the U.S., the Netherlands, and Russia.[65] Again, Spectrum Five

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61 *Id.*

62 *See* ESOC April 2, 2013 Ex Parte Letter at 2; ESOC March 29, 2013 Ex Parte Letter at 1-2; ESOC March 28, 2013 Ex Parte Letter at 1.

63 *See* http://www.n2yo.com/satellite/?s=26402 (last checked Apr. 4, 2013).

64 STA Request, Exhibit 2 at 4-5.

65 *See* Spectrum Five April 1, 2013 Ex Parte Letter (providing MSPACE analysis for BERMUDASAT-1 filing). After Spectrum Five's several requests, ESOC provided only the GXT files included in its application for modification of license, which are necessary to determine if ESOC's representations were accurate. Running an MSPACE analysis is very time consuming and requires that the data contained in the GXT files be entered manually, which in some instances can take weeks. Knowing how long the analysis would take, Spectrum Five requested the output file (SpaceCap) which results after the GXT files have been inputted.

presented these findings to the FCC as soon as it possibly could, but since the Bureau acted on the same day, it is clear that information that should have been material to the Bureau's review was not, in fact, properly considered, rendering the Bureau's decision arbitrary and capricious in violation of the Administrative Procedure Act.

3. Grant Of The STA Will Harm The Public Interest By Suppressing Competition.

The Bureau's failure to comply with statutory, regulatory, and established policy requirements and its unnecessary expedited treatment of ESOC's STA request will harm the public interest. As a result of the STA grant, ESOC will be able to preclude future competition[66] and harm the ability of U.S. consumers to receive new and higher quality services.

By permitting ESOC to relocate EchoStar 6 for the sole purpose of bringing into use the BERMUDASAT-1 ITU filing, the Bureau, for the first time in its history, has granted an STA to

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ESOC declined to provide the output file, claiming it was "proprietary". Spectrum Five completed the analysis on the morning of April 1 and presented the results to the Chairman's office and the Bureau that same morning, approximately eight hours prior to grant.

[66] Preserving competition in communications services has been a key congressional and regulatory policy for decades, and must be taken into consideration in the Commission's public interest analysis here. *See, e.g., News Corporation and the DIRECTV Group, Inc.*, 23 FCC Rcd 3265, 3277 (2008) ("The Commission's public interest evaluation necessarily encompasses the broad aims of the Communications Act, which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets.") (internal quotation marks omitted); *see also Comprehensive Review of Licensing and Operating Rules for Satellite Services, Notice of Proposed Rulemaking*, IB Docket No. 12-267, FCC 12-117 at ¶155 (Sept. 28, 2012) ("The Commission's licensing requirements are also intended to reinforce our fundamental policy goal of providing space and earth station operators with sufficient flexibility to implement technological advances and meet customer needs, while ensuring an operating environment free from harmful interference and a competitive marketplace."); *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9720-9721 (1995) (explaining that the Commission has "consistently sought to promote effective competition" and emphasizing that "competition is a relevant factor in weighing the public interest") (citing *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953)); *Competition in the Video Programming Distribution Market*, 9 FCC Rcd 7442, 7447 (1994) ("the Commission has sought . . . to foster the emergence of a competitive market for the delivery of video programming to consumers.").

perfect a non-U.S. ITU filing, and thereby enter it into the ITU's Master Registry forever more, to the demonstrable detriment of U.S. national interests. Other competitors will be forced to protect the operational parameters set forth in the BERMUDASAT-1 filing, which covers the entire continental United States and Alaska and Hawaii, even though U.S. residents will not receive a single service offering from ESOC under the STA.[67] ESOC, one of the two incumbent DBS providers, would essentially be able to block operations of any future DBS service to the U.S. from any orbital location potentially affecting the 96.2° W.L. orbital location. In practical terms, at least 500 MHz of extremely valuable spectrum that could otherwise be used to deliver new service to the United States public would instead be forced to remain fallow.[68]

Failure to reverse the Bureau would also enable ESOC to violate the freeze on new DBS proposals. Because all other operators would be required to protect the BERMUDASAT-1 filing for all time, ESOC/SES would effectively lock up extremely valuable DBS spectrum from slots short spaced to 96.2° W.L. by preserving for themselves the sole opportunity to apply for access to the U.S. market when the freeze is ultimately lifted. Moreover, even though the Bureau granted only temporary authority, the Order could negate the rights of other interested parties, like Spectrum Five, to have competing applications considered for authority to enter the U.S. market, in violation of their rights under *Ashbacker*.[69] There, the Court found that "[w]hile the statutory right of petitioner to a hearing on its application has in form been preserved, it has as a

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[67] Based on an initial analysis of ESOC's proposed operations at 96.2° W.L., EchoStar 6 will "affect" the Netherlands' BSSNET3-95W ITU filing and degrade Spectrum Five's BSS operations at 95° W.L. by more than 4 dB. This fact is in stark contrast to ESOC's prior claims that Spectrum Five would not be harmed by grant of the STA. In addition, DIRECTV's operations at 101 W.L. would also be affected as they too would be degraded more than the 0.25 OEPM limit.

[68] Spectrum Five April 1, 2013 Ex Parte Letter at 2.

[69] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

practical matter been substantially nullified by the grant of the [ ] application."[70] If ESOC and SES are successful in bringing into use the BERMUDASAT-1 filing, no other operator could possibly apply for authority to provide DBS service to the U.S. from this or adjacent orbital locations as it will be controlled forevermore by the United Kingdom. As previously stated, all operators are precluded from filing for rights to provide DBS services to the U.S.[71] When the freeze preventing such applications is lifted, ESOC's ITU rights will have the practical effect of precluding the Commission from considering applications from other parties to provide competitive DBS service to the U.S. public – all because normal licensing procedures were skirted by the Bureau's failure to apply the high standards for grant of STA required by statute.[72]

Although ESOC falsely claims that "Spectrum Five has no operational or planned satellite service in the United States that would be adversely affected by an STA grant,"[73] Spectrum Five has explained that its interest in ITU filings made by the Netherlands for BSS service at 95° W.L., and its FCC-issued license for reverse band operations at 95° W.L., would in fact be severely impacted.[74] In particular, Spectrum Five is developing a hybrid BSS/reverse band platform that would provide highly spectrum-efficient video, broadband and other services to the U.S. and the Americas from the 95° W.L. orbital location. Grant of the STA would

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70 *Id.* at 334.

71 *DBS Freeze Order*, 20 FCC Rcd 20618.

72 Given that the two incumbent DBS operators – ESOC and DIRECTV – have through the coordination agreement reached between ESOC's partner SES and DIRECTV presumably resolved any future DBS coordination issues regarding the BERMUDASAT-1 filing, the grant of the STA was in practical effect the grant of the DBS rights in the proximity of 96.2 degrees WL whenever the freeze is lifted.

73 ESOC March 27, 2013 Ex Parte Letter, at 1.

74 Spectrum Five March 20, 2013 Ex Parte Letter, at 1-2.

substantially hinder the ability of Spectrum Five (and other new entrants) from competing against the incumbent providers of U.S. DBS service, even if ESOC never delivered a single service to a single customer anywhere in the world from the 96.2° W.L. orbital slot.[75]

Moreover, these potential harms would not be limited to 96.2° W.L. By establishing the precedent of authorizing temporary operations to bring into use ITU filings without requiring any showing of extraordinary circumstances and despite demonstrable harm to U.S. interests, ESOC could rely on an approval here to bring into use other BSS modifications at orbital locations of strategic value to the U.S. (*i.e.*, 86.5° W.L., 105.5° W.L. and 114.5° W.L) currently controlled by SES.[76]

The harm caused by precluding future competitive, high power, spectrum efficient services is made worse by the materially degraded service that ESOC/SES would certainly have to provide from 96.2° W.L. if, and when, they seek access to the U.S. market. Due to the operational constraints that SES had to have assumed in the coordination agreement with DIRECTV, 96.2° W.L. will likely have to operate with lower power, larger antennas, and less effective bandwidth that would an unencumbered service.

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[75] Spectrum Five March 20, 2013 Ex Parte Letter, at 1-2; *see also* DIRECTV March 4, 2013 Ex Parte Letter, at 2.

[76] Specifically, the precedent established by grant of ESOC's STA would seemingly allow ESOC/SES to file an application for a DBS satellite with operational technical parameters, and then modify the authorization offset with a pointed beam outside the real intended coverage area with a technical analysis demonstrating no operators are affected. The operator could then move the satellite to the new location for 90 days to satisfy the ITU bring into use obligation. At that point, other operators would be forced to enter into coordination agreements to protect their future satellite replacements, whether or not ESOC/SES ever provided actual service. The same satellite could be used in multiple locations to lock up valuable DBS spectrum and prevent any meaningful competition from new entrants.

Even ESOC acknowledged Chairman Genachowski's admonition that "we must make better, more efficient use of spectrum."[77] But granting the STA and *precluding* bandwidth around 96.2° W.L. from being used for the benefit of the United States turns the Chairman's call to arms for improved spectrum efficiency completely upside down. A more harmful STA could hardly be imagined: FCC-issued authority to conduct ostensibly non-interfering, non-protected operations *outside* the United States could be used to foreclose new competitive service – including future broadband service – that would have been delivered *inside* the United States for the benefit of the American public. This is warehousing at its worst. Accordingly, the Commission is likely to overturn the Bureau's grant of STA to prevent this present and future harm to U.S. customers.

B. <u>The Equities Weigh Strongly In Favor Of A Stay.</u>

1. Absent a stay, Spectrum Five will suffer irreparable harm that is "both certain and great; . . . actual and not theoretical."[78] The Bureau's decision to allow ESOC to relocate the EchoStar 6 satellite to the 96.2° W.L. orbital location will cause Spectrum Five to suffer competitive injury.[79] This type of economic harm is unquantifiable and thus irreparable.[80] It is precisely the type of harm that warrants a stay pending review.

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[77] ESOC March 11, 2013 Ex Parte Letter, at unnumbered page 2 (citing Prepared Remarks of FCC Chairman Genachowski, *Winning the Global Bandwidth Race: Opportunities and Challenges for Mobile Broadband*, University of Pennsylvania – Wharton, Philadelphia, PA, Oct. 4, 2012).

[78] *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

[79] *PGBA, LLC v. United States*, 57 Fed. Cl. 655, 664 (2003) (explaining that "a lost opportunity to compete may constitute an irreparable harm"); *see also Autoskill Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1498 (10th Cir. 1993) (agreeing with the district court that the loss of "investment and competitive position" constitutes irreparable harm), *overruled on other grounds TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011); *BasicComputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992) (concluding that "the loss of fair competition . . . is likely to irreparably harm an employer"); *Ferry-Morse Seed Co. v.*

The Bureau's decision places Spectrum Five at a competitive disadvantage vis-à-vis incumbent U.S. DBS operators (EchoStar/DISH and DIRECTV) because it substantially hinders the company's ability to offer a competitive service.[81] The mere location of EchoStar 6 at the 96.2° W.L. orbital slot for a minimum of 90 days, commencing by April 14, 2013, will enable ESOC to cement permanently the modifications to the Region 2 BSS Plan set forth in the United Kingdom's BERMUDASAT-1 ITU filing in the ITU Master Register.[82] The Netherlands' BSSNET3-95W filing on behalf of Spectrum Five was submitted *after* the BERMUDASAT-1 filing; accordingly, under ITU regulations, if the BERMUDASAT-1 filing is perfected, then Spectrum Five – and any other new entrant – forever will be required to protect the BERMUDASAT-1 modifications to the Region 2 BSS Plan, even if neither ESOC nor the U.K. ever provide service to the United States from 96.2° W.L.[83] Thus, the STA grant is the first step in an inevitable chain of events that effectively will force any new entrant that would technically "affect" BERMUDASAT-1 to secure permission from the United Kingdom and the BERMUDASAT-1 operator before offering new competitive service to the U.S. public.[84] Once the BERMUDASAT-1 filing is permanently installed in the ITU Master Register, ESOC (and its

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Food Corn, Inc., 729 F.2d 589, 592 (8th Cir. 1984) (breach of exclusive distribution agreement constituted irreparable harm where company was disadvantaged in competitive market by inability to market unique seed corn).

80 *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673-74 (D.C. Cir. 2005) (explaining that "irreparable injury is suffered when monetary damages are difficult to ascertain or inadequate" (quotation omitted)).

81 Wilson Decl. ¶ 5.

82 *Id.*

83 *Id.*

84 *Id.*

partner SES) will wield the preclusive power of the international protection available from the filing to preserve for themselves alone the ability to enter the U.S. DBS market using satellite slots short spaced to 96.2° W.L. along the geostationary arc when the Commission lifts the freeze on new DBS applications.[85] Absent a stay from the Commission, Spectrum Five, which is developing a competing satellite video and broadband service, will suffer irreparable injury in the form of the "lost opportunity to compete" against incumbent DBS operators because its ability to offer a competing service will be at the mercy of a direct competitor.[86]

The Bureau's decision will prevent Spectrum Five from offering a BSS hybrid service to United States consumers because it affords the incumbent DBS operator ESOC enormous leverage over Spectrum Five's offering of this service.[87] If allowed to stand, the decision thus will necessarily impair Spectrum Five in its ongoing efforts to attract and retain investors to fund its hybrid BSS/reverse band system, which would otherwise be able to provide highly spectrum-efficient (and thus extremely valuable) video, broadband and other services to the U.S. and the Americas from the 95° W.L. orbital location.[88] If ESOC can block Spectrum Five's entry into the DBS market, Spectrum Five's value as a company will be substantially diminished because its ability to attract investors will be significantly reduced if the Commission does not protect the rights of its licensees and overturn the Bureau's decision.[89] It would be "exceedingly speculative" to attempt to quantify the diminution in Spectrum Five's "value" caused by the

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85 *Id.*

86 *PGBA, LLC*, 57 Fed. Cl. at 664.

87 Wilson Decl. ¶ 6.

88 *Id.*

89 *Id.*

inability to provide these services to the public.[90] The "destruction of a business" is not "mere economic injur[y] . . . for which adequate compensatory or other corrective relief will be available at a later date."[91]

2. By contrast, a stay will not harm third parties because it would simply maintain the *status quo*. The issue here is "whether injunctive relief would significantly harm other interested parties."[92] Even if such harm were identified, the Commission must "'balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief.'"[93]

No third parties – not even ESOC – would be harmed by maintaining the *status quo* during Spectrum Five's appeal. ESOC sought an STA merely to "evaluate and develop" business opportunities in purportedly non-U.S. markets.[94] If a stay is granted, nothing prevents ESOC and its partner from pursuing opportunities to "evaluate and develop" services outside the United States from the 96.2° W.L. orbital slot following normal procedures to modify the EchoStar 6 license without STA. A stay will not disrupt existing services to the public because ESOC is not currently providing "DBS service in the United States from the 96.2° W.L. orbital location" and, indeed, is currently precluded from doing so due to the DBS freeze.[95] In fact,

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90 *CSX Transp., Inc.*, 406 F.3d at 673-74.

91 *Holiday Tours*, 559 F.2d at 843 n.2 (internal citations omitted); *see also Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995) ("financial ruin qualifies as irreparable harm").

92 *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 110 (D.C. Cir. 1986).

93 *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 326 (D.C. Cir. 1987) (citation omitted).

94 Order ¶ 2.

95 *Id.* ¶ 12.

ESOC failed, throughout the proceedings before the Bureau, to offer a single tangible, verifiable detail of a single customer, anywhere in the world let alone in the United States, that would be deprived of a single service unless the STA was immediately granted. Halting its effectiveness to permit Commission review will thus, by definition, cause ESOC no harm.

Nor will expiration of the BERMUDASAT-1 cause any harm to ESOC, because its proposed non-U.S. services would be essentially unprotected by the U.S.-centered beams described in the BERMUDASAT-1 filing. In any event, any harm to ESOC was wholly of its own making and is thus not entitled to weight in the balancing of harms.[96] If it had truly desired to commence service from the 96.2° W.L. orbital location for reasons other than bringing into use the BERMUDASAT-1 filing, it wasted multiple opportunities for doing so on a timely basis. For example, it could have filed an application to modify the EchoStar 6 license months ago, or could have timely sought authority to relocate other potential in-orbit spares that it has long had at its disposal very near the 96.2° W.L. orbital slot.

Further, in granting the STA the Bureau expressly stated that "[a]ny action taken or expense incurred as a result of operations pursuant to this special temporary authority is solely at

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[96] *E.g.*, *Pappan Enters. Inc. v. Hardee's Food Sys. Inc.*, 143 F.3d 800, 805 (3d Cir. 1998) (stating that claimed harm of party opposing preliminary injunction that "brought on by its own conduct" is entitled to no weight in the analysis and awarding preliminary injunction). *Cf. Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[A]ny such presumption of irreparable harm is inoperative if the plaintiff has delayed either in bringing suit or in moving for preliminary injunctive relief" because the "'failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury'"); *Arthur v. Allen*, 574 F. Supp. 2d 1252, 1256-57 (S.D. Ala. 2008) (rejecting claim of irreparable harm where party was "dilatory to an extreme degree in initiating this lawsuit" and "slept on his rights for years" because any harm was of his "own creation"); *Mooreforce, Inc. v. U.S. Dep't of Transp.*, 243 F. Supp. 2d 425, 435 (M.D.N.C. 2003) (rejecting claim of irreparable harm because "any irreparable harm the Plaintiffs face could perhaps be considered a consequence of 'their own procrastination'").

ESOC's own risk."[97] Accordingly, any expenditure by ESOC of money or fuel, whether to implement the Order or to comply with the terms of a stay, has or will be made expressly "at . . . its own risk" and also is not properly considered as cognizable harm in the stay analysis. Finally, even assuming ESOC could identify harm from a stay – which it cannot – the balance of harms tips heavily in favor of a stay because Spectrum Five's competitive harm strongly outweighs any harm to third parties.

3. The public interest also heavily favors granting a stay. Most importantly, a stay will promote competition in the communications marketplace, which has long been a key Congressional and regulatory policy goal. The Bureau's pro-incumbent decision suppresses competition in the DBS market by giving a direct competitor – who is not using the orbital location to provide any service to the United States and has expressly stated that it has no plan to do so – perpetual, unilateral, power to preclude new entrants such as Spectrum Five from entering the U.S. DBS market. The private coordination agreement between ESOC and DIRECTV ensures that DIRECTV itself will suffer no harm, but does nothing to permit *new* DBS competition.[98] A stay is thus necessary to put new entrants on a level playing field that will provide them with the opportunity to enter the DBS market when the Commission lifts the freeze without fear that incumbent DBS providers are in a position to refuse them permission.

Moreover, a stay is necessary to protect U.S. national interests. As explained above, the Bureau's decision grants the first STA to perfect a non-U.S. ITU filing to the detriment of U.S. national interests and U.S. consumers. Requiring competitors to forever protect the operational parameters set forth in the BERMUDASAT-1 filing harms U.S. interests. No service will occur

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97 Order ¶ 20(c).

98 The private nature of the coordination agreement also means that the public has had no opportunity to determine whether it has other aspects that might create public interest harms.

in the United States under the STA, but allowing the STA grant to stand would bring into use a foreign ITU filing that would then receive permanent protection from interference for its own U.S. services and constrain the U.S. services of other operators. Finally, due to the dramatically inefficient use of spectrum that the STA permits, a stay is necessary to further the national policy in favor of spectrum efficiency.

IV. CONCLUSION

For all these reasons, Spectrum Five's emergency request for a stay of the Bureau's Order and Authorization should be granted as expeditiously as possible. At the very least, prior to April 14, 2013, the Commission should enter a temporary administrative stay of the Bureau's order pending its review of this request. If the Commission fails to act on this request in an expeditious manner, Spectrum Five respectfully reserves its right to seek further relief.

Respectfully submitted,

By: */s/ Todd M. Stansbury*

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Dated: April 5, 2013

CERTIFICATE OF SERVICE

I, Pam Conley, hereby certify that on this 5th day of April, 2013, a copy of the foregoing Emergency Request for a Stay is being sent via first class, U.S. Mail, postage paid, to the following:

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/s/ Pam Conley

APPENDIX A

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

In the Matter of	)	
	)	
EchoStar Satellite Operating Company	)	File No. SAT-STA-20130320-00023
	)	Call Sign : S2232
Application for Special Temporary Authority Related to Moving the EchoStar 6 Satellite from the 77° W.L. Orbital Location to the 96.2° W.L. Orbital Location, and to Operate at the 96.2° W.L. Orbital Location	)	

DECLARATION OF DAVID WILSON

1. I am the Chief Executive Officer ("CEO") of Spectrum Five LLC ("Spectrum Five" or "the Company"), a satellite operations company. I am over the age of 18 and have personal knowledge of the following facts, and if called and sworn as a witness, I could and would testify competently thereto. I submit this declaration in support of Spectrum Five's efforts to obtain an emergency stay of the International Bureau's ("IB") Order and Authorization while the Commission reviews Spectrum Five's appeal.

2. Spectrum Five is a U.S.-based company that was formed to develop, launch and operate satellite systems for the provision of additional, competitive, and innovative services to U.S. consumers. Spectrum Five holds a license issued by the FCC to provide service in the 17/24 GHz reverse band from the 95.15° W.L. orbital location. In addition, Spectrum Five and its wholly-owned subsidiary Spectrum Five BV (a Netherlands corporation) are parties to agreements with the State of the Netherlands and the Government of the Netherland Antilles, which authorize the launch and operation of satellite systems using 12/17 GHz and 17/25 GHz frequencies at several orbital locations, including the nominal

95° W.L. location, for the purpose of providing service to the United States. Pursuant to these agreements, the State of the Netherlands acts as the sponsoring administration for Spectrum Five before the International Telecommunication Union ("ITU") and has submitted filings for Spectrum Five's use of frequencies and orbital locations, including that slot.

3. Spectrum Five has long planned to introduce competitive Direct Broadcast Satellite ("DBS") service to the United State. It has patiently waited for the Commission to lift its freeze on applications for authority to provide DBS services using new orbital and spectrum resources, which has been in effect since 2005. In the meantime, Spectrum Five is developing a hybrid Broadcast Satellite Service ("BSS")/reverse band platform that would enable it to provide highly spectrum-efficient video, broadband, and other services to the United States and the Americas from the 95° W.L. orbital location after the freeze is lifted.

4. I understand that the IB's Order and Authorization grants EchoStar Satellite Operating Corporation ("ESOC") Special Temporary Authority ("STA") to relocate the EchoStar 6 satellite from the 76.8° W.L. orbital location to the 96.2° W.L. orbital location, and to operate at 96.2º W.L. using the 12.2-12.7 GHz (space-to-Earth) and 17.3-17.8 GHz (Earth-to-space) frequency bands.

5. The Bureau's decision places Spectrum Five at a competitive disadvantage vis-à-vis incumbent U.S. DBS operators (EchoStar/DISH and DIRECTV) because it substantially hinders the company's ability to offer a competitive service. The mere location of EchoStar 6 at the 96.2° W.L. orbital slot for a minimum of 90 days, commencing by April 14, 2013, will enable ESOC to cement permanently the modifications to the Region

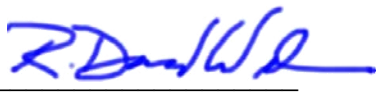
2 BSS Plan set forth in the United Kingdom's BERMUDASAT-1 ITU filing in the ITU Master Register. The Netherlands' BSSNET3-95W filing on behalf of Spectrum Five was submitted *after* the BERMUDASAT-1 filing; accordingly, under ITU regulations, if the BERMUDASAT-1 filing is perfected, then Spectrum Five—and any other new entrant—forever will be required to protect the BERMUDASAT-1 modifications to the Region 2 BSS Plan. Thus, the STA grant is the first step in an inevitable chain of events that effectively will force any new entrant that would technically "affect" BERMUDASAT-1 to secure permission from the United Kingdom and the BERMUDASAT-1 operator before offering new competitive service to the U.S. public. Once the BERMUDASAT-1 filing is permanently installed in the ITU Master Register, ESOC (and its partner SES) will wield the preclusive power of the international protection available from the filing to preserve for themselves alone the ability to enter the U.S. DBS market using satellite slots short spaced to 96.2 degrees WL along the geostationary arc when the Commission lifts the freeze on new DBS applications.

6. The Bureau's decision will prevent Spectrum Five from offering a BSS hybrid service to United States consumers because it affords the incumbent DBS operator ESOC enormous leverage over Spectrum Five's offering of this service. If allowed to stand, the decision thus will necessarily impair Spectrum Five in its ongoing efforts to attract and retain investors to fund its hybrid BSS/reverse band platform, which would otherwise be able to provide highly spectrum-efficient (and thus extremely valuable) video, broadband and other services to the U.S. and the Americas from the 95° W.L. orbital location. If ESOC can block Spectrum Five's entry into the DBS market, Spectrum Five's value as a company will be substantially diminished because its ability to attract investors will be

significantly reduced if the Commission does not protect the rights of its licensees and overturn the Bureau's decision.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: April 5, 2013
Washington, D.C.



David Wilson

13-1231 & 13-1232

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Spectrum Five LLC,
Appellant,

v.

Federal Communications Commission
& United States of America,
Appellee.

CERTIFICATE OF SERVICE

I, Matthew Dunne, hereby certify that on September 23, 2013, I electronically filed the foregoing Reply in Support of Motion to Dismiss with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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