

**Before the
Federal Communications Commission
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)	

MEMORANDUM OPINION AND ORDER

Adopted: April 23, 2013

Released: April 23, 2013

By the Chief, International Bureau:

I. INTRODUCTION

1. With this Memorandum Opinion and Order, we deny the request of Spectrum Five LLC (Spectrum Five), filed April 5, 2013, for a stay of the International Bureau's April 1, 2013, grant of special temporary authority (STA) to EchoStar Satellite Operating Company (ESOC).¹ That grant authorized ESOC for 60 days, commencing April 1, 2013, to operate tracking, telemetry, and command frequencies necessary to move the EchoStar 6 satellite from the 76.8° W.L. orbital location to the 96.2° W.L. orbital location, and to operate at 96.2° W.L. using the 12.2-12.7 GHz (space-to-Earth) and 17.3-17.8 GHz (Earth-to-space) frequency bands. Spectrum Five sought the stay pending action on its contemporaneously filed application for review of the *ESOC STA Grant*. Applying the well-established framework for analysis of requests for stay, we find that a stay is not warranted. We conclude that Spectrum Five has not established that it is likely to prevail on the merits, that it will be irreparably harmed absent a stay, or that public interest considerations warrant a stay.

II. BACKGROUND

2. The *ESOC STA Grant* addressed ESOC's request to operate EchoStar 6 at 96.2° W.L. in order to accommodate the needs of its customer and development partner, SES Satellites (Bermuda) Ltd. (SES Bermuda), which has been authorized by Bermuda to operate a satellite network at 96.2° W.L. pursuant to the United Kingdom (U.K.) filing with the International Telecommunication Union (ITU) known as BERMUDASAT-1.² ESOC indicated in its application for STA that SES Bermuda intends to use EchoStar 6 at 96.2° W.L. to evaluate and develop commercial service opportunities in the Caribbean, Latin American, and North Atlantic markets outside of the United States. Such opportunities, according to ESOC, include the provision of video programming and other services, including international

¹ EchoStar Satellite Operating Company, *Order and Authorization*, DA 13-593 (April 1, 2013) (*ESOC STA Grant*).

² Published in ITU Special Section AP30-30A/E/389 of IFIC 2553 (20 Sept. 2005), indexed at: http://www.itu.int/net/ITU-R/space/snl/bresult/radvance.asp?q_reference=AP30-30A%2FE&q_ref_numero=389&sel_adm=G.

maritime services, to consumers in Bermuda and elsewhere.

3. Two parties opposed the request. DIRECTV Enterprises LLC (DIRECTV) raised concerns about the impact of the proposal on the ITU filings under which its established Direct Broadcast Satellite (DBS) service at 101° W.L. operates.³ DIRECTV subsequently concluded an operator-to-operator arrangement with SES Bermuda, and withdrew its opposition, contingent upon U.K. and U.S. ratification of the arrangement.⁴ Spectrum Five raised concerns about the impact of the proposal on the U.S.-licensed Broadcasting-Satellite Service (BSS) satellite that it plans to operate in the future using 17/24 GHz frequencies at the 95.15° W.L. orbital location. Spectrum Five also raised concerns about the potential impact of ESOC's proposal on an ITU filing in the 12.2-12.7/17.3-17.8 GHz frequency bands made on Spectrum Five's behalf by the Netherlands.⁵ The Netherlands Administration also raised concerns related to the same ITU filing.⁶ The Government of Bermuda (Bermuda), through its Ministry of Economic Development, filed a letter supporting grant of ESOC's request.⁷ Bermuda, noting its longstanding relationship with the U.S., emphasized the importance of the 96.2° W.L. orbital location to Bermuda's social and economic development, as the location will result in the first direct service by broadcasting satellite to Bermuda.⁸

4. In the *ESOC STA Grant*, we concluded that grant of an STA would serve the public interest. We found that allowing satellite operations at an unused orbit location on a temporary basis would be in the public interest because it would permit the public to receive services that would otherwise not be available.⁹ We also observed that at the 77° W.L. orbital location, the EchoStar 6 satellite was being used only as a secondary back-up satellite, and with a grant of the STA could be put to use for communications.¹⁰ We also concluded that there were extraordinary circumstances, within the meaning of our rules, for a grant of ESOC's request.¹¹ We found that, with the completion of an operator-to-

³ Letter from William M. Wiltshire, counsel for DIRECTV Enterprises LLC, to Marlene H. Dortch, Secretary, FCC (Feb. 25, 2013). See also letters and notifications of *ex parte* presentations dated March 4, 12, 18, 19, and 21, 2013, from William M. Wiltshire, counsel for DIRECTV Enterprises LLC, to Marlene H. Dortch, Secretary, FCC. The Direct Broadcast Satellite service is the term used in the United States to denote what is identified internationally as the Broadcasting-Satellite Service operating in the 12.2-12.7 GHz (space-to-Earth) and 17.3-17.8 GHz (Earth-to-space) frequency bands.

⁴ Letter from William M. Wiltshire, counsel for DIRECTV Enterprises LLC, to Marlene H. Dortch, Secretary, FCC (March 27, 2013).

⁵ Letter from Todd M. Stansbury, counsel for Spectrum Five LLC, to Marlene H. Dortch, Secretary, FCC (March 12, 2013) (*Spectrum Five Opposition*). See also letters and notifications of *ex parte* presentations dated March 20, 28, and 29, and April 1, 2, and 3, 2013 from Todd M. Stansbury, counsel for Spectrum Five LLC, to Marlene H. Dortch, Secretary, FCC.

⁶ Letter from R. Agema, Head of the Market Access Department, Radio Communications Agency Netherlands, on behalf of the Minister of Economic Affairs, to Roderick K. Porter, Deputy Chief, FCC International Bureau (Mar. 28, 2013) (Netherlands Views).

⁷ Letter from Dr. the Honorable E. Grant Gibbons, JP MP, Minister of Economic Development, Government of Bermuda, to Julius Genachowski, Chairman, FCC (filed April 1, 2013).

⁸ *Id.*

⁹ *ESOC STA Grant* at 4, ¶9, citing Columbia Communications Corp., *Memorandum Opinion and Order*, 7 FCC Rcd 122, 123, ¶ 16 (1991). See also SES Americom, Inc., *Memorandum Opinion and Order*, 20 FCC Rcd 436, 439-40, ¶8 (Int'l Bur., Sat. Div. 2005); PanAmSat Licensee Corp., *Order and Authorization*, 19 FCC Rcd 2012, 2014, ¶11 (Int'l Bur., Sat. Div. 2004).

¹⁰ *ESOC STA Grant* at 4, ¶ 9.

¹¹ In reaching this conclusion, we interpreted the term "extraordinary circumstances" in light of the unique features of the Commission's licensing rules, procedures and practices for geostationary satellites. Under ordinary

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operator arrangement between DIRECTV and SES Bermuda, and, based on ESOC and SES Bermuda's assurances concerning Spectrum Five's U.S.-licensed satellite, the proposed EchoStar 6 operations will have no foreseeable adverse impact on U.S.-licensed operations or related U.S. ITU filings.¹² Furthermore, we found, based on information provided by ESOC,¹³ that no operating satellite would experience harmful interference from EchoStar 6's proposed operations as a result of the STA grant. We also agreed with Spectrum Five that ESOC's motivation for seeking expedited action was to permit the U.K., on behalf of SES Bermuda, to "bring into use" the BERMUDASAT-1 filing prior to an ITU deadline of April 14, 2013, but concluded that such motivations did not provide an appropriate basis for decision-making.¹⁴ We concluded that, in light of the DIRECTV/SES Bermuda operator-to-operator arrangement, delay could place the Commission in the position of resolving, through inaction, a potential dispute between other Administrations concerning the application of the ITU Radio Regulations to their respective filings. Considering all of the circumstances, we found that delay would seriously prejudice the public interest.¹⁵ In addition, in the course of discussing Spectrum Five and the Netherlands Administrations' concerns, we observed that any determination concerning "perfecting" the BERMUDASAT-1 filing is for the ITU and not the Commission.

5. Spectrum Five argues that a stay is warranted.¹⁶ Spectrum Five contends that the *ESOC STA Grant* conflicts with statutory and regulatory requirements for granting STAs, and disagrees with our findings of extraordinary circumstances and serious prejudice to the public interest from delay.¹⁷ Spectrum Five also argues that the *ESOC STA Grant* will result in harm to the public interest by suppressing competition.¹⁸ It argues that, as a result of the *ESOC STA Grant*, the U.K. will be able to "perfect a non-U.S. ITU filing to the detriment of U.S. national interests and U.S. consumers,"¹⁹ and require "competitors to forever protect the operational parameters set forth in the BERMUDASAT-1 filing"²⁰ Spectrum Five indicates that this will severely impact its plans to provide service to the United States, but that a stay would not cause harm to third parties.²¹ Spectrum Five also argues that grant of a stay would promote competition and further national policy favoring spectrum efficiency.²²

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circumstances, such satellites operate and are maintained at regularly authorized orbital locations within the geostationary arc, through the use of propulsion systems ultimately controlled using radio commands. We viewed a need on the part of a licensee to move a geostationary satellite, in this context, and in light of the DIRECTV/SES Bermuda operator-to-operator arrangement and ESOC/SES Bermuda commitments concerning Spectrum Five's U.S. licensed 17/24 BSS satellite, as providing the necessary extraordinary circumstances. We noted our practice of addressing similar requests through the mechanism of STAs, observing that STAs provide an appropriate short term licensing mechanism to address the transit of a satellite from one location to another. *ESOC STA Grant* at 4, ¶ 9.

¹² *ESOC STA Grant* at 4, ¶ 10.

¹³ ESOC STA Request, Narrative at Exhibit 2.

¹⁴ *ESOC STA Grant* at 3, ¶ 8.

¹⁵ *ESOC STA Grant* at 4, ¶ 10. *See also* n. 29 *infra*.

¹⁶ Spectrum Five LLC's Emergency Request for Stay, filed April 5, 2013 (Spectrum Five Stay Request). *See also* Letter from Todd M. Stansbury, counsel for Spectrum Five LLC, to Marlene H. Dortch, Secretary, FCC (April 18, 2013).

¹⁷ *Id.* at 11-16.

¹⁸ Spectrum Five Stay Request at 18-22.

¹⁹ Spectrum Five Stay Request at 27.

²⁰ *Id.*

²¹ Spectrum Five Stay Request at 22-28.

²² *Id.* at 27-28.

6. ESOC opposes the issuance of a stay.²³ ESOC argues that grant of the STA is consistent with numerous cases in which the Bureau authorized satellite moves, including cases in which the move resulted in bringing into use the ITU filings of other countries, and that Spectrum Five is therefore unlikely to prevail on the merits.²⁴ ESOC also argues that Spectrum Five's claimed harms are not supported, purely theoretical, and not imminent.²⁵ ESOC also argues that it, SES Bermuda and future consumers would be harmed by a stay, because of the adverse impact upon the BERMUDASAT-1 filing, ESOC and SES Bermuda's related business interests, and their future service offerings.²⁶ ESOC also notes that it is unclear how a stay would be implemented and how it might impact the operations and remaining useful life of EchoStar 6.²⁷ ESOC concludes that a stay would disserve the public interest by departing from established precedent, precluding the substantial benefits of fully utilizing satellite capacity, precluding the expansion of the presence of U.S. satellite operators in non-U.S. markets, and inviting gaming of the U.S. regulatory system to subvert the ITU process.²⁸

III. DISCUSSION

7. This case at its core involves a simple question: is the public interest served by allowing a currently unused satellite to provide communications services at an otherwise unoccupied orbital location with otherwise unused radio spectrum? The backdrop of ITU deadlines that can alter the relative postures of competing commercial operators and sovereign nations in the ITU agreement-seeking process, can allow this otherwise simple question to become obscured.²⁹ However, because we were in a position to conclude prior to one such deadline that there would be no harm to U.S.-licensed operations or ITU filings from favorable action, and some benefit from possible new services, we believe it was appropriate to act favorably on ESOC's STA request. We also continue to believe it would have been inappropriate, under the circumstances, to resolve, purely through delay, a matter which at this point primarily involves the potentially competing interests of other ITU Administrations. Bearing the foregoing in mind, we turn to a more detailed analysis of Spectrum Five's stay request.

8. In analyzing a request for stay we apply the four-prong test established in *Virginia Petroleum Jobbers Ass'n. v. FPC*³⁰ and examine 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.

²³ Opposition of EchoStar Satellite Operating Company to Emergency Request for Stay, filed April 10, 2013 (ESOC Opposition).

²⁴ ESOC Opposition at 6-8.

²⁵ ESOC Opposition at 8-10.

²⁶ ESOC Opposition at 11-12.

²⁷ ESOC Opposition at 12.

²⁸ ESOC Opposition at 12-14.

²⁹ We have consistently viewed a party's motivation with respect to bringing into use ITU filings as a neutral factor in our public interest analysis. Such motivation and the related change in the status of the ITU filing establishes neither a public interest benefit nor a public interest detriment. See, e.g., SES Americom, Inc., *Memorandum Opinion and Order*, 20 FCC Rcd 436 (Int'l Bur., Sat. Div. 2005).

³⁰ 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

The relative importance of the four criteria will vary depending on the circumstances of the case.³¹

A. Likelihood of Success on the Merits

9. *Extraordinary Circumstances/Prejudice to the Public Interest.* We disagree with Spectrum Five's contention that the *ESOC STA Grant* conflicts with statutes, rules and precedents. As we indicated in the *ESOC STA Grant*, the movement of a satellite³² outside of the regularly authorized orbital locations at which most geostationary satellites operate is appropriately addressed through the short term licensing mechanism of STAs. The Communications Act permits issuance of short term STAs, such as the one issued in this case, without a public notice establishing a petition to deny deadline.³³ In any event, Spectrum Five was aware of ESOC's request, and provided comments numerous times prior to action. Furthermore, ESOC correctly observes that there are numerous cases in which STAs have been granted for such movements, without a public notice establishing a petition to deny deadline.³⁴ Because Spectrum Five's interpretation would effectively require reversal of numerous precedents in which we have interpreted statutory requirements and our rules in light of the specific technical and operational characteristics of geostationary satellites, and concluded that an STA is warranted, we find that Spectrum Five's contention on this point is unlikely to succeed on the merits.

10. We also disagree with Spectrum Five's contention that the procedures followed in this case resulted in a materially deficient record and consequently an improperly issued decision. Spectrum Five contends that expedited action prevented the Commission from considering Spectrum Five's April 1 technical showing that identified more Administrations affected by ESOC's proposed operations than ESOC had identified.³⁵ The difference appears to be based on differences in assumptions used for a software-based analysis using the ITU's MSPACE program. The differences are not material, however. The *ESOC STA Grant* was based upon a finding that the proposed operations would not interfere with any operational system, and we noted the absence of any information suggesting imminent commencement of operations by a satellite that would receive such interference.³⁶ The information provided by Spectrum Five in no way contradicts these findings.

11. *Harm to Competition.* As discussed more fully below, we consider Spectrum Five's contentions concerning harm to competition in the United States to be speculative, and based on numerous unsupported assumptions with respect to the actions of the ITU, the parties to this proceeding, and the various Administrations involved. As we specifically indicated in the *ESOC STA Grant*, our action did not grant authority for service to the United States.³⁷ We therefore conclude that Spectrum Five has not established a likelihood of success on the merits.

³¹ *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

³² We would also note that, as a technical matter, a satellite is defined as a "body which revolves around another body of preponderant mass and which has a motion primarily and permanently determined by the force of attraction of that other body" and is thus by definition constantly in motion. See ITU Radio Regulation 1.179 (2012 Edition). We therefore disagree with Spectrum Five's characterization of our holding in the *ESOC STA Grant* as one that "the movement of a satellite, which ordinarily requires an application subject to public notice and comment procedures, is itself grounds for circumventing public notice and comment procedures." Spectrum Five Stay Request at 12-13. Our holding was limited to movements outside of *regularly authorized* locations in the geostationary arc.

³³ Communications Act of 1934, as amended, 47 U.S.C. § 309(c)(2)(G).

³⁴ ESOC Opposition, at 6-8.

³⁵ Spectrum Five Stay Request at 16-18.

³⁶ *ESOC STA Grant* at 4, ¶ 10, and 7, ¶ 17.

³⁷ *ESOC STA Grant* at 2, n.1, and 4-5.

B. Irreparable Harm

12. For an injury to be considered an irreparable harm justifying a stay, the injury “must be both certain and great; it must be actual and not theoretical.”³⁸ Spectrum Five’s allegation of irreparable harm in the absence of a stay is based on its assertion that as a result of the STA grant the U.K. will be able to perfect the BERMUDASAT-1 filing and thus enable SES Bermuda to require competitors to protect the operational parameters set forth in the BERMUDASAT-1 filing. This, according to Spectrum Five, will result in foreclosing its planned future service to the United States. Spectrum Five’s allegations of irreparable harm in the absence of a stay are based on numerous assumptions.

13. First, Spectrum Five assumes favorable action by the ITU with respect to the recording of the BERMUDASAT-1 filing. As we indicated in the ESOC STA Grant, issues related to the conformity of the U.K. submissions to the ITU Radio Regulations are matters on which we will express no views.³⁹ There is no evidence to indicate, however, that the Netherlands Administration agrees with Spectrum Five’s assumption.

14. Second, assuming, for purposes of analyzing the stay request, recording of the BERMUDASAT-1 filing, we do not agree with Spectrum Five’s assertion that this necessarily requires competitors to forever protect the operational parameters of the BERMUDASAT-1 filing in a manner that forecloses other operations.⁴⁰ Simply stated, Spectrum Five appears to assume an ITU process that will not result in agreement. We do not share this assumption. The EchoStar 6 satellite represents an interim step in commercial development, and therefore, there may be flexibility as to technical parameters of yet-to-be-designed successor satellites. Furthermore, we have no reason to believe and will not assume that the U.K. Administration, or any other Administration involved, would in any way disregard its obligation in the ITU agreement seeking process “to bear in mind that radio frequencies and the geostationary-satellite orbit are limited natural resources and that they must be used rationally, efficiently and economically . . . so that countries or groups of countries may have equitable access to both, taking into account the special needs of the developing countries and the geographical situation of particular countries.”⁴¹

15. Third, Spectrum Five bases its allegation of harm upon assumed access to the U.S. market once the current freeze on applications for new U.S. DBS service is lifted. The question of whether DBS “tweener” operations can feasibly be implemented with technical parameters that adequately protect current service to U.S. customers is the subject of a separate rule making proceeding and at this time is unresolved.⁴² Furthermore, Spectrum Five assumes a favorable outcome to a licensing process that has not yet been initiated, as well as a favorable outcome with respect to its ability to protect established Canadian operations and other future non-U.S. operations. Accordingly, we decline to premise a finding of irreparable harm on assumed access to the U.S. market.

³⁸ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir., 1985) (*per curiam*) (*Wisconsin Gas*), quoted in *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir., 2006) (*Full Gospel Churches*).

³⁹ *ESOC STA Grant* at 6, ¶ 15.

⁴⁰ This assertion is simply incorrect as a legal matter. The ITU Radio Regulations provide for cancellation of recorded but unused frequency assignments. See Appendix 30, Article 5.3.2.

⁴¹ ITU Constitution, Article 44, No. 196.

⁴² In the Matter of Amendment of the Commission’s Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service, and Feasibility of Reduced Orbital Spacing for Provision of Direct Broadcast Satellite Service in the United States, *Notice of Proposed Rulemaking*, IB Docket No. 06-160, 21 FCC Rcd 9443, 71 FR 56923 (Sept. 28, 2006).

16. In summary, the harms Spectrum Five alleges are based on assumptions that are not sufficiently supported to warrant a finding of irreparable harm. As such, the alleged harms are speculative and do not warrant the grant of a stay.

C. Harm to Third Parties

17. Our conclusion concerning a lack of demonstrated irreparable harm to Spectrum Five renders unnecessary any extended inquiry into harms to third parties. However, if we were to consider the harms arising from the adjustment of the parties' procedural posture in the ITU agreement seeking process, as Spectrum Five requests, we would also be required to consider ESOC's similar claims of harm.⁴³

D. Public Interest Considerations

18. With respect to Spectrum Five's argument that issuance of a stay will promote competition, for the same reasons discussed in connection with Spectrum Five's allegations concerning irreparable harm, we conclude that Spectrum Five has not established that competitive services will be foreclosed as a result of the *ESOC STA Grant*. With respect to Spectrum Five's argument that grant of a stay will further the public interest in spectrum efficiency, we consider use of radio spectrum as generally advancing the public interest. Because the ESOC STA Grant authorizes use and facilitates commercial development potentially leading to greater use, we believe it serves the public interest in spectrum efficiency, particularly given that there are no other imminent uses during the period of operations authorized.

IV. CONCLUSION AND ORDERING CLAUSES

19. Based on the foregoing, we conclude that Spectrum Five has not established that grant of a stay is warranted. Accordingly, Spectrum Five LLC's Emergency Request for a Stay IS DENIED.

20. This Memorandum Opinion and Order is issued pursuant to Section 0.261 of the Commission's rules on delegated authority, 47 C.F.R. §0.261, and is effective on release.

FEDERAL COMMUNICATIONS COMMISSION

Mindel De La Torre
Chief, International Bureau

⁴³ ESOC Opposition at 11-12.