

**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.

**MOTION TO DISMISS AND RESPONSE TO
SPECTRUM FIVE LLC'S MOTION FOR SUMMARY REVERSAL
OR, IN THE ALTERNATIVE, FOR EXPEDITION**

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INTRODUCTION

The Federal Communications Commission moves to dismiss Spectrum Five’s challenge to an FCC order granting special temporary authority (“STA”) to EchoStar Satellite Operating Company (“ESOC”) to relocate a satellite from one orbital location to another. *EchoStar Satellite Operating Co.*, FCC 13-93 (released July 9, 2013) (“*Order*”) (Pet. Add. 126). As we explain below, the Court lacks jurisdiction for several reasons.

First, Spectrum Five’s alleged injury is too speculative to establish Article III standing. Spectrum Five claims that the *Order* will adversely affect its ability to operate a satellite that it has not yet built to provide a service that it has no license to provide. *Second*, Spectrum Five cannot show that a ruling by this Court will remedy its injury. Redress in this case depends on the actions of the International Telecommunication Union (“ITU”), a non-party international organization. *Finally*, the relief requested by Spectrum Five intrudes into foreign policy judgments that are beyond the Court’s power to make. Spectrum Five asks the Court to direct the FCC to take action that would violate an international agreement. The Court lacks authority to adopt such an extraordinary remedy. For all of these reasons, the Court should dismiss this case for lack of jurisdiction.

Even if the Court had jurisdiction, Spectrum Five cannot justify the extraordinary remedy of summary reversal. Spectrum Five has failed to show that it is certain to prevail on the merits of its challenge to the *Order*—a prerequisite for summary reversal. *See Handbook of Practice and Internal Procedures* at 36 (D.C. Cir. Dec. 1, 2011) (“*D.C. Cir. Handbook*”). In the *Order*, the FCC determined that

an STA was necessary to secure the long-term benefits of a coordination agreement between the United States and the United Kingdom (“U.K.”). Those benefits—including future interference protection for DIRECTV’s service to millions of Americans—were obtained with the grant of the STA. Under these “extraordinary circumstances,” the Commission concluded that any delay in granting an STA “would seriously prejudice the public interest” in the certainty of future interference protection for U.S.-licensed operations. *Order* ¶ 13 (Pet. Add. 131) (citing 47 C.F.R. § 25.120(b)). Spectrum Five has given the Court no good reason to disturb—much less summarily reverse—that reasonable finding.

BACKGROUND

A. Regulatory Background

Direct broadcast satellite (“DBS”) service is “[a] radiocommunication service in which signals transmitted or retransmitted by space stations” in the 12.2-12.7 GHz frequency band “are intended for direct reception by the general public.” 47 C.F.R. § 25.201; *see also id.* § 25.202(a)(7). DBS providers such as DIRECTV and DISH Network compete with cable operators by offering multichannel video programming to consumers “via direct-to-home satellites.” *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 700 (D.C. Cir. 2011).

The FCC has adopted rules governing the provision of DBS and other satellite communication services in the United States. *See* 47 C.F.R. §§ 25.101-25.701. After this Court ruled in *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145 (D.C. Cir. 2005), that the FCC had unreasonably construed the ORBIT Act to permit the auction of DBS licenses, the agency imposed a freeze on all new

applications to provide DBS in the United States. Public Notice, *Direct Broadcast Satellite (DBS) Service Auction Nullified*, 20 FCC Rcd 20618, 20619 (2005) (“Freeze Notice”). This freeze, which remains in effect, does not apply to modifications to existing licenses or “requests for special temporary authority.” *Id.*

Under the FCC’s rules, any provider of satellite communication services (including DBS) may apply to the Commission for an STA “to install and/or operate new or modified equipment.” 47 C.F.R. § 25.120(a). “The 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 in the institution of these temporary operations would seriously prejudice the public interest.” *Id.* § 25.120(b)(1).

DBS, which is known internationally as “broadcasting-satellite service” or “BSS,” is also subject to international regulations administered by the ITU, the United Nations specialized agency responsible for international administration of geosynchronous orbital slots and frequencies for satellite communications.¹ “ITU regulations apportion spectrum and orbit locations” for BSS “in various geographic regions in certain planned frequency bands on a regional basis among all nations through agreements reached at Regional and World Radiocommunication Conferences.” *Amendment of the Commission’s Policies and Rules for Processing*

¹ For a discussion of the ITU’s history and functions, see Lawrence D. Roberts, *A Lost Connection: Geostationary Satellite Networks and the International Telecommunication Union*, 15 BERKELEY TECH. L.J. 1095, 1105-14 (2000).

Applications in the Direct Broadcast Satellite Service, 21 FCC Rcd 9443, 9444-45 ¶ 3 (2006). The ITU regulations cover eight orbital locations assigned to the United States for providing DBS. *Id.* at 9445 ¶ 3; *see also Northpoint*, 412 F.3d at 147-48.

Each nation (or, in ITU terminology, “Administration”) may seek a modification to the existing BSS plan by filing a request with the ITU. Any such filing will lapse unless the orbital location is “brought into use” within eight years of the filing. ITU Radio Regs., App. 30, Art. 4.2.6 (2012). To bring the filing into use, a satellite capable of providing service must be deployed and maintained at the relevant orbital position for at least 90 consecutive days. *Id.*, Art. 11.44B.

When the ITU determines that an Administration’s filing has been brought into use and that certain additional requirements are met, it records the filing in the ITU’s Master International Frequency Register. ITU Radio Regs., App. 30, Art. 4.2.19. This recording gives operations consistent with the filing a right to international recognition and interference protection. *Id.* Notwithstanding this right, ITU rules require all Administrations—including those with ITU-recorded filings—to negotiate coordination agreements in good faith in an effort to ensure rational, efficient, and economical use of the geostationary orbit and radio frequencies. *Id.*, Arts. 0.3, 9.4, App. 30, Arts. 4.2.19, 4.2.20.

B. The Proceeding Below

On February 20, 2013, ESOC filed an application with the FCC for special temporary authority to move the EchoStar 6 satellite from the 76.8° West

Longitude (“W.L.”) orbital location to the 96.2° W.L. orbital location.² ESOC explained that it made this request “to accommodate the needs of its customer and development partner, SES Satellites (Bermuda) Ltd.” Pet. Add. 2. Bermuda has authorized SES to operate a satellite network at 96.2° W.L. pursuant to a U.K. filing with the ITU known as BERMUDASAT-1. Pet. Add. 87. That filing was scheduled to expire in April 2013. Letter from E. Grant Gibbons, Bermuda Minister of Economic Development, to Julius Genachowski, FCC Chairman, March 29, 2013, at 1 (FCC Add. 6). In its STA application, ESOC stated that SES planned “to use EchoStar 6 at 96.2° W.L. to evaluate and develop commercial service opportunities” for providing “video programming and other services, including international maritime services, to consumers in Bermuda” and other “markets outside of the United States.” Pet. Add. 2.

Initially, DIRECTV opposed ESOC’s STA application. In a letter dated February 25, 2013, DIRECTV complained that “neither Bermuda nor any party authorized to operate under the BERMUDASAT-1 filing” had “made any serious effort to coordinate with the U.S. or DIRECTV’s operating systems at 101° W.L.” Pet. Add. 28. DIRECTV expressed concern that “the proposed relocation and operation of EchoStar 6 at 96.2° W.L.” would give SES “leverage to demand

² ESOC requested FCC approval of the move because the EchoStar 6 satellite is registered as a U.S. space object under relevant international treaties and was operating under an FCC special temporary authorization at 76.8° W.L. at the time of ESOC’s request. *See EchoStar Satellite Operating Co.*, 28 FCC Rcd 4229, 4229-30 ¶ 3 (Int’l Bur. 2013) (Pet. Add. 87-88) (“*Bureau Order*”).

[interference] protection that would compromise [DIRECTV's] U.S. networks," which provide "service to millions of Americans." Pet. Add. 30.

One month later, DIRECTV and SES entered into a coordination arrangement. SES informed the FCC that this "operator-to-operator coordination arrangement ... fully resolves any concern about the impact of Bermuda DBS operations at 96.2° W.L. on existing and future U.S. DBS services at ... 101° W.L." Letter from Daniel C.H. Mah, SES, to Marlene Dortch, FCC, March 29, 2013 (FCC Add. 4). Contingent upon U.K. and U.S. ratification of this arrangement (which has since occurred), DIRECTV withdrew its objection to the STA request. Pet. Add. 88.

Spectrum Five also opposed ESOC's STA application. It pointed out that the BERMUDASAT-1 filing "substantially overlap[s]" with a filing made by the Netherlands on behalf of Spectrum Five for the operation of satellites at 95° W.L. Pet. Add. 44. Spectrum Five argued that if "the EchoStar 6 satellite is located at the 96.2° W.L. orbital slot for at least 90 days, ITU rules would ... compel Spectrum Five to 'protect'" from interference any services offered under the BERMUDASAT-1 filing. *Id.* For that reason, Spectrum Five asserted, a grant of ESOC's STA application would give ESOC "the ability to exercise enormous leverage over Spectrum Five's competitive operations." Pet. Add. 45.

The Netherlands also expressed concern about the impact of ESOC's STA request on the Netherlands ITU filing. Pet. Add. 88-89. Spectrum Five plans to provide BSS "over both the 12/17 GHz Ku band and the 17/24 GHz 'Reverse Band.'" Wilson Decl. ¶ 15 (Pet. Add. 139-40). The Netherlands ITU filing is for

operations in the 12/17 GHz band, and the Netherlands recently filed with the ITU to specify operations at 95.15° W.L., rather than the previously specified 95.0° W.L. location. Spectrum Five has an FCC license for a satellite at 95.15° W.L., but that license only authorizes a satellite to operate in the 17/24 GHz “Reverse Band.” *Id.* (Pet. Add. 140). Spectrum Five plans to combine Netherlands-authorized 12/17 GHz service and FCC-licensed 17/24 GHz “Reverse Band” service on a single satellite. *Id.* (Pet. Add. 139-40). This plan has not been approved by the FCC.

Spectrum Five has not begun operating a satellite. Although it has stated that it “intends to launch an innovative ‘dual-band’ satellite at 95.15° W.L.,” Wilson Decl. ¶ 15 (Pet. Add. 139), the company has not yet begun to build that satellite. It “had planned to commence construction of the dual-band satellite this summer,” *id.* ¶ 15 (Pet. Add. 140), but it now says that it “expects construction to begin in Fall 2013,” *id.* ¶ 31 (Pet. Add. 146).

In response to Spectrum Five’s objections, ESOC and SES made specific commitments that the BERMUDASAT-1 operation would not constrain “the FCC-authorized transmissions of the Spectrum Five satellite at 95.15° W.L. in the 17.3-17.8 GHz band.” Letter from Bryan N. Tramont, Counsel for EchoStar, and Daniel Mah, Counsel for SES, to Marlene Dortch, FCC, March 28, 2013, at 2 (FCC Add. 2). Those commitments ensure that SES will not raise any future claims requiring Spectrum Five to curtail any “Reverse Band” service it may someday offer in order to accommodate SES’s operations at 96.2° W.L.

On April 1, 2013, the FCC's International Bureau granted ESOC's application for an STA. *Bureau Order* ¶ 1 (Pet. Add. 87).³ In assessing the public interest, the Bureau found that there were "extraordinary circumstances, within the meaning of [the FCC's] rules, for a grant of ESOC's request." *Bureau Order* ¶ 9 (Pet. Add. 90). The Bureau explained that such circumstances were provided by the licensee's "need ... to move a geostationary satellite ... 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." *Id.* The Bureau further noted that its "practice has been to address similar requests through the mechanism of STAs, as they provide an appropriate short term licensing mechanism to address the transit of a satellite from one location to another, and, in some circumstances, to establish operations at the new location." *Id.*

On April 5, 2013, Spectrum Five filed an application for review and a request for an administrative stay of the *Bureau Order*. On April 23, 2013, the Bureau denied the request for stay. *EchoStar Satellite Operating Co.*, 28 FCC Rcd 5475 (2013) (Pet. Add. 95) ("*Stay Denial Order*").

³ The Bureau 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." *Bureau Order* ¶ 8 (Pet. Add. 89). In the Bureau's view, however, "the motivations of non-U.S. commercial operators related to their tactical approach to ITU filing matters" had no bearing on "whether an STA would serve the public interest" in this case. *Id.* (Pet. Add. 89-90).

Spectrum Five did not seek a judicial stay under 28 U.S.C. § 1651. The EchoStar 6 satellite has now been deployed at 96.2° W.L. for more than 90 consecutive days. As noted above, this deployment period was a precondition for bringing the BERMUDASAT-1 filing into use under ITU regulations. *See* ITU Radio Regs., Art. 11.44B.

Shortly after the *Bureau Order* was issued, the United States and the U.K. ratified the operator-to-operator arrangement between DIRECTV and SES. In addition, on the basis of SES's commitments regarding Spectrum Five, the United States and the U.K. agreed to protection of Spectrum Five's U.S.-licensed satellite at 95.15° W.L. *Order* ¶ 9 (Pet. Add. 129-30).

C. The Order On Review

In an order issued on July 9, 2013, the Commission denied Spectrum Five's application for review. *Order* ¶ 1 (Pet. Add. 126). It rejected Spectrum Five's argument that the Bureau had failed to find extraordinary circumstances justifying the grant of an STA.

The Commission explained that the extraordinary circumstances justifying an STA in this case involved the significant interference protections for existing U.S. operations and for Spectrum Five's potential future operations that would be secured by approving the STA. The Commission noted that "the operator-to-operator arrangement between DIRECTV and SES," which "[t]he United States and the U.K. have now ratified," "insures that DIRECTV's established U.S. operations at [101° W.L.] will be fully protected on an ongoing basis." *Order* ¶ 9 (Pet. Add. 129). "Similarly," the Commission observed, "the United States and the

U.K. have also agreed to protection of Spectrum Five’s U.S.-licensed satellite” at 95.15° W.L., “based on assurances provided by SES.” *Id.* (Pet. Add. 129-30). The FCC concluded: “Taken together, these Administration-to-Administration agreements provide the United States with protections of operations at orbital locations from which the U.S. public receives service.” *Id.* (Pet. Add. 130).

The FCC determined that the grant of an STA in this case “will serve the public interest” by “providing assurance of U.K.-backed interference protections for service provided to the United States population by U.S.-licensed satellites from nearby orbital locations.” *Order* ¶ 9 (Pet. Add. 130). The Commission noted that “there are no [other] operator-to-operator or Administration-to-Administration agreements in place at this time that would comparably protect” DIRECTV’s and Spectrum Five’s U.S.-licensed operations from interference. *Id.* Therefore, it concluded: “Without the grant of the STA, the benefits accruing from the certainty of interference protection could be lost, thereby substantially diserving the public interest.” *Id.* In light of these considerations, the Commission found that “there were extraordinary circumstances” justifying an STA, “and that delay would seriously prejudice the public interest.” *Id.* ¶ 13 (Pet. Add. 131).

ARGUMENT

I. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF JURISDICTION.

Spectrum Five has not established that it will suffer a concrete injury as a result of the FCC’s action. Nor has it shown that the relief it seeks from the Court will redress the injury it claims. Finally, the Court lacks authority to order the

relief requested by Spectrum Five—the abrogation of an international agreement between the U.S. and the U.K. For all of these reasons, the Court should grant the FCC’s motion and dismiss this case for lack of jurisdiction.

A. Spectrum Five’s Injury Is Conjectural And Uncertain.

“[A]llegations of possible future injury are not sufficient” to establish standing; a “threatened injury” must be “certainly impending.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted). When alleging future injury, “petitioners must show that there is a substantial ... probability of injury.” *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (internal quotation marks omitted).

Spectrum Five cannot meet this burden. Its purported injury depends on several intervening factual predicates that have not yet occurred, and may never occur. Ultimately, it is concerned that transmissions from the EchoStar 6 satellite at 96.2° W.L. will interfere with the provision of DBS service at 95.15° W.L. by a satellite that Spectrum Five intends to launch someday. Mot. at 14; Wilson Decl. ¶¶ 38-41 (Pet. Add. 149-50). But Spectrum Five has not even begun to build such a satellite. See Wilson Decl. ¶ 31 (Pet. Add. 146). Indeed, Spectrum Five has yet to meet its target of raising 25 percent of the funding needed to construct and launch the satellite. *Id.* ¶ 29 (Pet. Add. 145).⁴

⁴ Although Spectrum Five states that it has an FCC license to provide service at the 95° W.L. location (Mot. at 3), it is presumably referring to its “Reverse Band” license to provide service in the 17.3-17.8 GHz band. The U.S.-U.K. coordination agreement already protects any service provided under that license. See Wilson Decl. ¶¶ 39-40 (Pet. Add. 149-50). Insofar as Spectrum Five hopes to

Even if Spectrum Five does manage to build and launch a satellite, there is no guarantee that the company will obtain FCC approval to provide Ku-DBS service in the United States. Yet the crux of Spectrum Five's alleged injury is that SES's service at 96.2° W.L. will preclude Spectrum Five from ever offering Ku-DBS service in the U.S. See Wilson Decl. ¶ 38 (Pet. Add. 149). Spectrum Five does not have the necessary FCC approval to offer such service in the U.S., though it apparently plans to apply for approval. *Id.* ¶ 32 (Pet. Add. 146). And as Spectrum Five acknowledges, *id.*, the FCC has instituted a freeze on such applications. See *Freeze Notice*, 20 FCC Rcd at 20619.

In sum, Spectrum Five claims that SES's operations at 96.2° W.L. will interfere with a Spectrum Five satellite that has yet to be built (let alone launched) and will prevent Spectrum Five from providing a service for which it has not sought FCC approval (and for which such approval is not now available). Such speculative assertions do not establish that the STA or SES's operations will cause Spectrum Five injury, "only that [they] *could* do so" if several events transpire as Spectrum Five anticipates. *Chlorine Inst., Inc. v. Fed. R.R. Admin.*, 718 F.3d 922, 928 (D.C. Cir. 2013). Such a showing is insufficient to establish standing.⁵

provide Ku-DBS using the 12 GHz band (a different part of the spectrum), it will need separate FCC approval to do so.

⁵ Spectrum Five also asserts in passing that the *Order* has "damaged [its] ability to raise financing" for its satellite (Mot. at 14), purportedly because the resulting "regulatory uncertainty" "undermines the capital markets' confidence" in Spectrum Five's venture. Wilson Decl. ¶ 42 (Pet. Add. 151). If Spectrum Five is indeed struggling to find financing—as it asserts without record support—it has not carried its burden to demonstrate that its difficulty stems from the *Order*, as

B. Redress Is Contingent On Action By The ITU, A Non-Party.

Even if Spectrum Five could establish injury, this Court's ability to provide redress is uncertain because it depends on the actions of a non-party international organization, the ITU. This Court is "loath to find standing when redress depends largely on policy decisions yet to be made by government officials." *U.S. Ecology, Inc. v. United States Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). Redress in such cases "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict." *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)); *see also Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 739 (D.C. Cir. 2008); *Miami Bldg. & Constr. Trades Council v. Sec'y of Def.*, 493 F.3d 201, 205-06 (D.C. Cir. 2007).

Spectrum Five is concerned that the ITU will deem the BERMUDASAT-1 filing "brought into use" under ITU rules, giving SES's operations a right to interference protection. Mot. at 19. As Spectrum Five concedes, *id.*, the ITU—not the FCC—will ultimately make this determination. The EchoStar 6 satellite has been deployed at 96.2° W.L. for more than the 90 days required by ITU rules, *see* ITU Radio Regs. Art. 11.44B, and the U.K. has notified the ITU of this development. After the ITU's staff records the BERMUDASAT-1 filing as "brought into use," Spectrum Five will presumably urge the Netherlands to contest

opposed to the manifold other obstacles to its plans, which we have described above. *See New England Power Generators Ass'n v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013) ("broad-based market effects stemming from regulatory uncertainty are quintessentially conjectural").

that recording before the ITU Radio Regulations Board, and the U.K. will undoubtedly ask the Board to reaffirm that the U.K.'s filing has been brought into use. It is uncertain what influence, if any, a ruling by this Court would have on the ITU's resolution of this matter. It is equally uncertain what difference it would make if the Court ordered the FCC to oppose the U.K.'s filing before the ITU.⁶ The ITU may well find that the U.K.'s filing has been brought into use despite any action taken by this Court (and regardless of the FCC's position on this matter). The ultimate decision is one "only [the ITU] can make. What its decision [will] be...is beyond the court's control or ken." *Miami Bldg.*, 493 F.3d at 206. Because Spectrum Five cannot show that the ITU will treat the U.K.'s filing "in such manner as to ... permit redressability," Spectrum Five has failed to establish standing. *See U.S. Ecology*, 231 F.3d at 25 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)).

C. The Requested Relief Is Beyond The Court's Power.

Spectrum Five concedes that "[a] decision by this Court vacating [the *Order*] as unlawful may not, without more," provide sufficient relief. Mot. at 19. It therefore seeks an extraordinary remedy: an order directing the FCC to oppose the recording of the BERMUDASAT-1 filing before the ITU. *Id.* As we explained in Part I.B above, it is unclear what effect (if any) a Court-ordered FCC opposition to the recording would have on the ITU. In any event, such relief lies beyond the

⁶ As discussed below, such an action by the FCC before the ITU would be contrary to a U.S.-U.K. international agreement. *See Order* ¶¶ 8-9 (Pet. Add. 129-30).

Article III powers of this Court. “Disputes involving foreign relations ... are quintessential sources of political questions,” and this Court is “not a forum for reconsidering the wisdom of discretionary decisions” made by U.S. officials “in the realm of foreign policy.” *El-Shifa Pharm. Indus. Co. v. U.S.*, 607 F.3d 836, 841-42 (D.C. Cir. 2010) (en banc) (internal quotation marks omitted); *see also Haig v. Agee*, 453 U.S. 280, 292 (1981) (matters of foreign policy “are rarely proper subjects for judicial intervention”). In particular, questions concerning the termination of international agreements fall outside the Court’s authority, “since on that question [unified] governmental action ... must be regarded as of controlling importance.” *Baker v. Carr*, 369 U.S. 186, 212 (1962) (internal quotation marks omitted).

As part of the agreement between the U.S. and the U.K. that secured guarantees from the U.K. to protect certain U.S. DBS operations from interference, the FCC (on behalf of the United States) has committed to the U.K. that it will not “object to the U.K. Administration notifying the ITU that the BERMUDASAT-1 [filing] was brought into use.” *Order* ¶¶ 8-9 (Pet. Add. 129-30). Spectrum Five seeks an order from this Court directing the FCC unilaterally to rescind that agreement with the U.K., despite the Commission’s judgment that this international agreement is in the best interests of the U.S. “For the [C]ourt to disregard that judgment” on this question of foreign policy “would be imprudent to a degree beyond [the Court’s] power.” *Hwang Geum Joo v. Japan*, 413 F.3d 45, 53 (D.C. Cir. 2005). Spectrum Five cites no precedent for such an extraordinary remedy. Where (as here) a party asks a court “to set aside agreements which are

the product of delicate and extensive international negotiation,” the “‘possible consequences of judicial action’ render the case nonjusticiable.” *Cranston v. Reagan*, 611 F. Supp. 247, 253 (D.D.C. 1985) (quoting *Baker*, 369 U.S. at 211-12).

In sum, Spectrum Five alleges only conjectural injuries that this Court lacks the power to redress. Therefore, the Court lacks jurisdiction, and the case should be dismissed.

II. IN ANY EVENT, SPECTRUM FIVE HAS NOT SHOWN THAT SUMMARY REVERSAL IS WARRANTED.

The extraordinary remedy of summary reversal is “rarely granted.” *D.C. Cir. Handbook* at 36. Motions for summary reversal will be granted only “where the merits of the appeal or petition for review are *so clear* that plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court’s] decision.” *Cascade Broad. Group, Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (emphasis added; internal quotation marks omitted).

As a threshold matter, Spectrum Five cannot obtain summary reversal because, as we explained in Part I above, the Court lacks jurisdiction to review this case. At the very least, the serious questions concerning the Court’s jurisdiction preclude summary reversal.

In any event, even assuming that the Court has jurisdiction, summary reversal would be unjustified here because Spectrum Five has failed to show that it is entitled to relief on the merits, much less that it is “so clear[ly]” entitled to relief as to justify the extraordinary remedy of summary reversal. This case involves a challenge to the FCC’s reading of its own rule governing STA for satellite

services. “The Commission’s interpretation of its own regulations is due deference,” and the Court “will accept it ‘unless the interpretation is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.’” *Rural Cellular Ass’n v. FCC*, 685 F.3d 1083, 1093 (D.C. Cir. 2012) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011)). Because the FCC’s reading of its STA rule was reasonable in this case, it is unlikely that Spectrum Five’s challenge will succeed.

Section 25.120 of the FCC’s rules provides that the Commission “may grant a temporary authorization” of satellite services “only upon a finding that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of these temporary operations would seriously prejudice the public interest.” 47 C.F.R. § 25.120(b)(1). The agency reasonably applied that rule when it granted ESOC’s STA request.

The Commission determined that the recently consummated “Administration-to-Administration agreements” between the United States and the U.K., “which remove any significant concern about potential interference to other operational satellites or planned U.S.-licensed satellites,” presented “extraordinary circumstances” that warranted the grant of an STA to ESOC. *Order* ¶ 13 (Pet. Add. 131). “Without the grant of the STA,” the Commission explained, “the benefits accruing from the certainty of interference protection could be lost, thereby substantially disserving the public interest.” *Id.* ¶ 9 (Pet. Add. 130). Those benefits are substantial. SES’s coordination arrangement with DIRECTV “insures

that DIRECTV's established U.S. operations" at 101° W.L. "will be fully protected on an ongoing basis." *Id.* ¶ 9 (Pet. Add. 129). This will plainly benefit the millions of Americans who subscribe to DIRECTV's service.

The benefits flowing from the U.S.-U.K. agreement would be short-lived unless ESOC received an STA. If SES failed to bring the BERMUDASAT-1 filing into use by April 14, 2013, the filing would have expired. At that point, any interference protection offered by the arrangements with the U.K. and SES would be worthless because SES would not be providing service anytime soon (if ever) at 96.2° W.L. Thus, if the FCC denied ESOC's STA request, it would have lost the benefit of the ongoing interference protection guaranteed by the U.S.-U.K. coordination arrangements. To replicate that sort of comprehensive interference protection, the Commission would have to start all over again to negotiate coordination agreements with any other nation that claimed a right to use the nearby spectrum. Under these "extraordinary circumstances," the FCC reasonably found that "delay" in granting ESOC's request "would seriously prejudice the public interest." *Order* ¶ 13 (Pet. Add. 131).

Spectrum Five asserts that if the FCC had denied ESOC's STA request "and the U.K. filing had expired, the FCC could have made its own ITU filing and claimed the slot and spectrum for the U.S." Mot. at 10. In March 2013, however, the U.K. made another filing with the ITU regarding the 96.2° W.L. orbital location. This U.K. filing would take precedence over any subsequent filing. Thus, Spectrum Five is wrong to suggest that an FCC filing with the ITU at this point would enable the U.S. to claim priority for the 96.2° W.L. orbital slot.

Likewise, there is no merit to Spectrum Five's suggestion (Mot. at 15) that the FCC could not properly find "extraordinary circumstances" under its STA rule in the absence of an "emergency." Spectrum Five bases that claim on this Court's 1968 ruling that under 47 U.S.C. § 309(f), "the Commission's authority to grant interim operating authority" to broadcast licensees "is apparently limited to 'emergency' situations." *Consolidated Nine, Inc. v. FCC*, 403 F.2d 585, 589-90 (D.C. Cir. 1968). At the time of that ruling, section 309(f) expressly referred to "emergency operations." *See id.* at 590 n.6 (quoting 47 U.S.C. § 309(f) (1964)). In a 1982 amendment to section 309(f), however, Congress replaced the phrase "emergency operations" with "temporary operations." The FCC has reasonably construed that amendment to give the agency "broader authority." *L.P. Media, Inc.*, 102 FCC 2d 1276, 1282 ¶ 10 (1985). Like the current version of section 309(f), the FCC rule governing STA for satellite services refers to "temporary" operations; it does not contain the word "emergency." 47 C.F.R. § 25.120(b)(1).

Spectrum Five principally bases its motion for summary reversal on this Court's decision in *NetworkIP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008). That case is plainly distinguishable from this one. To begin with, that case involved the waiver of an FCC rule regarding filing deadlines. *See id.* at 125-28. Unlike *NetworkIP*, where the FCC *waived* one of its rules, the agency in this case *applied* its rule governing STAs.

In any event, even assuming that the Court's analysis in *NetworkIP* is relevant, it would not require reversal of the FCC's action here. In *NetworkIP*, the FCC waived the filing deadline for a complaint by a payphone service provider

(“PSP”) seeking fair compensation. Although the tardiness of the complaint was the result of counsel’s negligence, the Commission found that the public interest in ensuring fair compensation for PSPs justified the waiver. *NetworkIP*, 548 F.3d at 125-26. In the Court’s judgment, this rationale—which could have supported a waiver for any late-filed complaint by a PSP—did not place sufficient “restraint” on the agency’s discretion: “There must also be a sufficiently unique ... situation” to justify a waiver. *Id.* at 127 (internal quotation marks omitted).

Here, by contrast, as the Commission found, extraordinary circumstances unique to the particular facts of this case warranted the grant of an STA. Unless ESOC obtained an STA, the U.S. would lose “the certainty of interference protection” from its coordination agreement with the U.K., including the assurance that “DIRECTV’s established U.S. operations at [101° W.L.] will be fully protected on an ongoing basis.” *Order* ¶ 9 (Pet. Add. 129-30). This is precisely the sort of “special circumstance” that can justify an exception to the Commission’s standard procedures. *See NetworkIP*, 548 F.3d at 127 (citing *Keller Communications, Inc. v. FCC*, 130 F.3d 1073, 1076-77 (D.C. Cir. 1997)).

Unlike the waiver in *NetworkIP*, which was primarily designed to relieve a single private party of the consequences of a lawyer’s error, the FCC here found that the grant of an STA would secure substantial benefits for the American public (including millions of DIRECTV subscribers). “[T]he Commission’s judgments on the public interest are ‘entitled to substantial judicial deference.’” *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 558 (D.C. Cir. 2009) (quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)).

Spectrum Five argues that the FCC cannot base its finding of “a public interest benefit” on coordination arrangements that were designed to “mitigate the harmful effects of the grant” of ESOC’s STA because “denial of the STA would have avoided those harmful effects entirely.” Mot. at 18. But even if the FCC had denied the STA, it could not have avoided the prospect of future interference to DIRECTV’s and Spectrum Five’s U.S.-licensed services from any service provider that subsequently used the 96.2° W.L. orbital location. In the Commission’s reasoned judgment, it made sense to resolve these interference issues now rather than put them off until later. The coordination agreements in this case benefited the American public by ensuring long-term interference protection for the future U.S.-licensed operations of Spectrum Five and DIRECTV. It was entirely reasonable for the FCC to choose the regulatory certainty of a “bird in the hand” (in this case, guaranteed interference protection for existing U.S.-licensed service) over “two in the bush” (the approach advocated by Spectrum Five, which is concerned with protecting a potential service that may never get off the ground).⁷

Spectrum Five’s assertion that the FCC’s action harms “U.S. consumers” by impeding “competition” in the U.S. DBS market (Mot. at 3-4) rests on speculation about future events that may not occur. Before Spectrum Five can provide competitive DBS service from its orbital location, the FCC will first need to determine “whether [Spectrum Five’s] DBS ‘tweener’ operations can feasibly be

⁷ Cf. *Marsh v. FCC*, 436 F.2d 132, 137 (D.C. Cir. 1970) (the FCC acted reasonably in taking action that favored an existing broadcast service over a service proposal that was “contingent on several unknowns”).

implemented with technical parameters that adequately protect current service to U.S. customers.” *Stay Denial Order* ¶ 15 (Pet. Add. 100). Spectrum Five will also need to obtain FCC approval to provide Ku-DBS service; but the “licensing process has not yet been initiated.” *Id.* And of course, Spectrum Five will need to construct and launch its satellite. Given the uncertainty surrounding Spectrum Five’s proposed service, it was reasonable for the FCC to give greater priority to protecting existing services from interference.

Spectrum Five also contends that there was no need for the United States to enter into coordination arrangements with SES and the U.K. because the FCC could have “demanded” the same sort of interference protection “from any lower priority ITU filing based on U.S. rights under international law.” Mot. at 18. As the FCC recognized, however, resolving these interference issues here and now serves the public interest by removing any future uncertainty. Obviously, DIRECTV—the company with the biggest stake in preventing interference at 101° W.L.—concurred in the Commission’s assessment. Once it negotiated a coordination arrangement with SES, DIRECTV dropped its opposition to ESOC’s STA application. Both DIRECTV and the FCC understood that millions of Americans who subscribe to DIRECTV will benefit from the commitments secured to protect DIRECTV’s service from future interference. Spectrum Five thus has no basis for claiming (Mot. at 17-18) that the STA does not serve “the U.S. public interest.”

III. EXPEDITION IS NOT WARRANTED.

As an alternative to summary reversal, Spectrum Five moves for expedited review. Because this Court lacks jurisdiction to review Spectrum Five's complaints (*see* Part I above), there is no need for expedition. But if the Court disagrees and chooses to set the matter for plenary briefing, the Commission stands ready to comply with any briefing schedule that the Court adopts.

CONCLUSION

The Court should dismiss the petition for review and notice of appeal for lack of jurisdiction. In any event, it should deny the motion for summary reversal.

Respectfully submitted,

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Peter Karanjia
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Jacob M. Lewis
Associate General Counsel

/s/ James M. Carr

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Federal Communications Commission
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August 29, 2013

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, James M. Carr, hereby certify that on August 29, 2013, I electronically filed the foregoing Motion to Dismiss and Response to Spectrum Five's LLC's Motion for Summary Reversal or, in the alternative for Expedition 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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/s/ James M. Carr

**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.

**ADDENDUM OF EXHIBITS TO
MOTION TO DISMISS AND RESPONSE TO
SPECTRUM FIVE LLC'S MOTION FOR SUMMARY REVERSAL
OR, IN THE ALTERNATIVE, FOR EXPEDITION**

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AUGUST 29, 2013

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March 28, 2013

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation
SAT-STA-20130220-00023

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the FCC's rules, 47 C.F.R. § 1.1206,¹ EchoStar Satellite Operating Corporation ("EchoStar") and SES Satellites (Bermuda) Ltd. ("SES") submit this letter (i) summarizing telephone calls on March 27, 2013, between Roderick Porter, Deputy Chief, International Bureau, and Bryan N. Tramont, Counsel for EchoStar; and (ii) responding to an *ex parte* letter, dated March 28, 2013, from Spectrum Five LLC.²

During the calls, EchoStar reiterated its request for immediate grant of its request for special temporary authorization ("STA"), consistent with FCC precedent and based upon demonstrated public interest benefits, including (1) preserving and maximizing U.S. investment in an existing in-orbit, but underutilized satellite; (2) allowing for use of a vacant orbital location and new spectral resources not currently in use without causing harmful interference; (3) facilitating new international satellite services to maritime markets and to Bermuda, the Caribbean, and Central America; and (4) maintaining the flexibility of licensees to manage their satellite fleets. EchoStar further stressed the urgent need for FCC action by no later than Monday, April 1, in order to commence drifting the EchoStar 6 satellite on April 2 and ensure that commercial development can begin at the 96.2° W.L. orbital location by April 15.

Spectrum Five's continued opposition to the STA request provides no basis for delay. Despite EchoStar's best efforts to satisfy Spectrum Five's multiple requests for information (including information that has been publicly available since February 20, when the STA request was filed)

¹ On March 4, 2013, the Satellite Division designated the above-referenced proceeding as "permit-but-disclose" for purposes of the FCC's *ex parte* rules. See *Policy Branch Information*, Public Notice, DA No. 13-366 (Mar. 8, 2013).

² See Letter from Todd M. Stansbury, Counsel for Spectrum Five, to Marlene H. Dortch, Secretary, FCC, File No. SAT-STA-20130220-0002 (Mar. 28, 2013).

WILKINSON) BARKER) KNAUER) LLP

Marlene H. Dortch

March 28, 2013

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and to reach a mutually acceptable solution, Spectrum Five continues to seek additional proprietary information (well beyond what DIRECTV requested to conduct its technical analysis) without articulating its technical issues or proposing any solution that would resolve those issues. Spectrum Five effectively is using the FCC regulatory process in order to frustrate its competitor EchoStar's business plans and the valid ITU filing of another country, the United Kingdom.

In any event, to address any potential interference issues with Spectrum Five, EchoStar agrees to accept, as a condition of its STA, the pfd levels produced by the FCC-authorized transmissions of the Spectrum Five satellite at 95.15° WL in the 17.3-17.8 GHz band into the EchoStar 6 satellite's feeder links at 96.2 ° WL.³³ If the ITU coordination request for USABSN-24 uses similar technical parameters and results in the same pfd level, then SES also agrees to accept the pfd levels and that no further coordination with BERMUDASAT-1 would be necessary for any satellite operating within those parameters.

In view of EchoStar's and SES' specific commitments with regard to Spectrum Five, and based upon the demonstrated public interest benefits that an STA grant would provide without adverse impact on other services and the costs of further delay, EchoStar urges an immediate grant of the requested STA by no later than April 1. Failure to act by this date would deny new services to consumers, undercut spectrum efficiencies, undermine the cooperative process with DIRECTV, and deny the fleet management flexibility traditionally afforded to licensees.

Sincerely,

/s/

Bryan N. Tramont
Counsel for EchoStar

/s/

Daniel Mah
Regulatory Counsel
SES Satellites (Bermuda) Ltd.

³³ Spectrum Five's authorized transmissions at 95.15° WL would produce a pfd level at 96.2° W.L. that is well below the level needed to trigger coordination under Section 25.264(e)(2) of the Commission's rules. See 47 C.F.R. § 25.264(e)(2).

WILKINSON) BARKER) KNAUER) LLP

Marlene H. Dortch
March 28, 2013
Page 3

cc: For FCC:

Mindel De La Torre
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Rod Porter
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Robert Nelson
Karl Kensinger
Kathryn Medley
Fern Jarmulnek
Stephen Duall
Alan Thomas
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For DIRECTV:

William M. Wiltshire

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For Spectrum Five:

Todd Stansbury



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VIA IBFS

March 29, 2013

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation
SAT-STA-20130220-00023

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the FCC's rules, 47 C.F.R. § 1.1206,¹ SES Satellites (Bermuda) Limited ("SES Bermuda") submits this letter summarizing voicemail messages left on March 28, 2013, by Gerson Souto, Chief Development Officer, SES S.A. (on behalf of SES Bermuda) with Zachary Katz, Chief of Staff to Chairman Julius Genachowski, and Roderick Porter, Deputy Chief, International Bureau

On those voicemails, SES Bermuda confirmed that it had concluded an operator-to-operator coordination arrangement with the U.S. DBS operator at 101° W.L. that fully resolves any concern about the impact of Bermuda DBS operations at 96.2° W.L. on existing and future U.S. DBS services at the nominal 101° W.L. orbital location. As a result, SES Bermuda looked forward to a prompt grant of EchoStar's request for Special Temporary Authority ("STA") to move the EchoStar 6 satellite to 96.2° W.L. SES Bermuda reiterated that this was an important commercial opportunity for both SES Bermuda and EchoStar, and indicated that it was available to discuss this matter further with Commission staff.

Yours sincerely,

/s/

Daniel C.H. Mah
Regulatory Counsel
for SES Satellites (Bermuda) Ltd.

¹ On March 4, 2013, the Satellite Division designated the above-referenced proceeding as "permit-but-disclose" for purposes of the FCC's *ex parte* rules. See *Policy Branch Information*, Public Notice, DA No. 13-366 (Mar. 8, 2013).

cc: For FCC:
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For DIRECTV:
William M. Wiltshire

For SES:
Karis A. Hastings
Daniel Mah

For Spectrum Five:
Todd Stansbury



Government of Bermuda
Ministry of Economic Development
Office of The Minister

Friday, April 29th 2013

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Ref: 13-03-29 Letter to Chair of FCC

Dear Chairman Genachowski,

Re: Orbital slot, 96.2°W

I have the honour of writing to you in respect of an issue of great importance to Bermuda. It is a matter that we believe affects the economic development of the United States, Bermuda and the Caribbean.

For the past ten years, Bermuda has worked to develop its orbital slot, 96.2°W. Commercialization of this slot is critical for Bermuda's social and economic development, as it will be the first time that Bermuda is directly served by a broadcasting satellite, and would also open up opportunities to serve the Caribbean and the Americas.

As you may know, Bermuda's authorized operator (SES) is arranging for a US satellite to be deployed to 96.2°W to begin commercial services. Unfortunately, there is very limited time left for Bermuda to achieve this goal because the ITU filing is set to expire on April 15th 2013. To avoid missing this deadline, the satellite in question must begin moving by April 1st 2013, and your assistance in this endeavor would be greatly appreciated.

We understand that the FCC may have had concerns that the activation of BERMUDASAT-1 could have impacted future US Direct Broadcast Satellite operations at 101°W. Please note that that SES has successfully addressed concerns of the operator of the DBS services at 101°W, fully protecting service to millions of US consumers and resolving all concerns about any affect on future US DBS operations at 101°W.

It seems that the recent concerns raised by Spectrum Five suggest that they simply want the Bermuda filing to expire. This is likely because their filing has a lower ITU priority than Bermuda's.

We need a quick resolution of this matter. Should this opportunity lapse Bermuda would not only lose the ability to serve the island, but also a broader Caribbean market as well as the opportunity to partner productively with US satellite operators.

It is important to note Bermuda's long-standing relationship with the US. We have worked closely with NASA and other US agencies over the years to provide a base from which to track space objects and also more strategic undertakings. We see development of 96.2°W as another opportunity to cooperate for the mutual benefit of the US and Bermuda.

I appreciate your consideration of this request for support and I look forward to your reply,

Sincerely,

pp



Dr the Hon. E Grant Gibbons, JP MP
Minister of Economic Development

pp by **Ross D. Webber**
Permanent Secretary on behalf of the Minister

cc: Commissioner Clyburn
Commissioner McDowell
Commissioner Pai
Commissioner Rosenworcel
Ms. Mindel De La Torre, Chief, International Bureau
Mr. Roderick Porter, Deputy Chief, International Bureau