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WASHINGTON, D.C. 20554

JUN 3 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OFFICE OF CHIEF
DOMESTIC FACILITIES DIVISION
COMMON CARRIER BUREAU

In the Matter of)
ORBITAL COMMUNICATIONS CORPORATION)
Request for Section 319(d) Waiver)
To Construct A Low-Earth Orbit)
Mobile Satellite System)

File No. 22-DSS-P-90(20)

To: The Commission

REPLY TO OPPOSITION TO PETITION TO RESCIND

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SUMMARY

STARSYS Global Positioning, Inc. ("STARSYS") replies to the "Opposition to Petition to Rescind" filed by Orbital Communications Corporation ("Orbcomm") relating to an ex parte waiver of the Commission's construction permit requirement granted to Orbcomm under Section 319(d) of the Communications Act. The waiver permits Orbcomm to spend up to \$40 million to construct approximately one-third of a non-voice, non-geostationary mobile satellite service system, the application for which has been opposed by STARSYS and others and remains mutually exclusive with an application filed by STARSYS.

Contrary to Orbcomm's assertions in its opposition, STARSYS does not oppose the grant of 319(d) waivers and, indeed, it has its own 319(d) waiver request pending. Rather STARSYS objects to the size and procedural infirmity of the waiver granted to Orbcomm, upon which there was no opportunity for public comment.

Orbcomm attempts to excuse its failure to serve any of the parties that had petitioned to deny or commented upon its application by claiming that a request for a waiver of the construction permit requirement, where the construction permit application has been formally opposed, is nevertheless a proceeding entirely separate from the underlying application proceeding, unaffected by the Commission's ex parte rules. Despite the fact that an application and a related waiver may involve different issues, this does not make them two separate

proceedings. Cases cited by Orbcomm support the former proposition, but not the latter.

Moreover, the waiver request was never placed on public notice or otherwise acknowledged by the Commission prior to the waiver grant, confirming that the waiver request was simply part of the application proceeding. Therefore, the Commission should rescind the grant and permit the requisite public comment and deliberation that was lacking in the waiver grant to Orbcomm.

Cases cited by Orbcomm also highlight the inadequacy of its showing in support of the waiver. First, most of the cases cited deal with waivers for construction of domestic satellite earth stations, where the dollar amounts to be spent were small and the policies and rules relating to the service already established; neither is the case here. Second, these cases make clear that waivers are not to be lightly granted, but must be based on "sufficient justification" amounting to "exceptional circumstances." Orbcomm's alleged public interest showing does not come close to meeting this standard.

In addition, Orbcomm seriously mischaracterizes other arguments made by STARSYS. For example, contrary to Orbcomm's assertion, STARSYS did not challenge either the Commission's integrity or the workability of the proposal advanced by the negotiated rulemaking committee by stating that the waiver grant was prejudicial. Finally, Orbcomm should be required to declare whether it continues to propose a common carrier service.

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To: The Commission

REPLY TO OPPOSITION TO PETITION TO RESCIND

STARSYS Global Positioning, Inc. ("STARSYS"), by its attorneys, hereby replies to the "Opposition to Petition to Rescind" filed by Orbital Communications Corporation ("Orbcomm") on May 17, 1993, which opposes STARSYS's May 6, 1993 Petition to Rescind a Section 319(d) waiver granted to Orbcomm. The waiver allows Orbcomm to expend up to \$40 million to begin construction of low-Earth orbiting satellites to be used for its proposed Non-Voice, Non-Geostationary ("NVNG") mobile satellite service ("MSS") system.

I. INTRODUCTION

In its Opposition, Orbcomm maintains that it did not violate the Commission's ex parte rules when, in October 1992, it renewed its request for waiver under Section 319(d) of the Communications Act without serving any of the parties that had petitioned to deny or commented upon its application to provide NVNG MSS service. Orbcomm contends that a request for a Section 319(d) waiver is a proceeding fully independent from the

319(d) waiver is a proceeding fully independent from the construction permit application proceeding to which the waiver request pertains and, therefore, is free of any constraints on ex parte presentations. This contention is completely without merit.

STARSYS initially wishes to emphasize that it does not contend, as Orbcomm asserts, that no Section 319(d) waiver of any scope is permissible. See Opposition at 9. STARSYS is not opposed in principle to grant of a Section 319(d) waiver to Orbcomm, but rather objects to the procedural infirmity of the waiver granted based upon its ex parte nature, and the attendant lack of opportunity for any public comment on the request.

Indeed, STARSYS itself has filed a Section 319(d) waiver request which it expects to renew in the near future (a renewal which it will serve on all the parties to its application). However, as further described below, in the absence of any opportunity for public comment, Orbcomm received a waiver which was not supported by the anemic public interest showing it made. Cases cited by Orbcomm itself highlight the inadequacy of its showing in support of the waiver.

Moreover, the amount of spending permitted by the waiver may exceed the Common Carrier Bureau's delegated authority to grant waivers under Section 319(d). Because the STARSYS and Orbcomm applications remain mutually exclusive, both the size and

the secrecy of the Orbcomm waiver are prejudicial to STARSYS. The Commission can remedy this situation by rescinding the waiver, following appropriate procedures to solicit public comment, and placing appropriate conditions or limitations upon any waiver subsequently granted to Orbcomm.

II. DISCUSSION

A. **A Request For A Section 319(d) Waiver Is Not Severable From The Application To Which It Pertains; Ex Parte Restrictions Apply To Both.**

In its Petition to Rescind, STARSYS demonstrated that Orbcomm had violated the Commission's ex parte rules by renewing its Section 319(d) waiver request for its formally opposed NVNG MSS application without serving STARSYS or other parties to that proceeding. Orbcomm now seeks to justify its evasion of the Commission's ex parte rules by claiming that a request for a waiver of the construction permit requirement, which enables Orbcomm to construct a substantial portion of the system applied for in a formally opposed and pending application, is nevertheless an entirely separate proceeding. See Opposition at 3-4. To state the proposition is to refute it.

1. The Waiver Request Is Not A Separate Proceeding For Ex Parte Purposes.

Orbcomm relies heavily on the fact that the waiver request itself was not separately opposed by STARSYS. See Orbcomm Opposition at 3-4. Though true, this fact fails to tell the whole story. What Orbcomm omits is that until the Bureau's November 1992 grant of the waiver request, there was no indication of any kind from the Commission of the waiver's existence -- and even then, the letter granting the waiver was not published.

Following the receipt of Orbcomm's application (and the associated waiver request), the Commission released a Public Notice soliciting comments on the application. See Public Notice, Report No. DS-953 (released April 11, 1990). Although the Public Notice referenced a petition for rule making that Orbcomm had filed with its application, and that had separately been placed on public notice (see Public Notice Report No. 1814, released April 4, 1990), there was no mention whatsoever of a waiver request. Thus, the Commission did not acknowledge the existence of the waiver request separate from the application, and there was no opportunity for STARSYS, or any other interested party, to oppose the waiver request.

Moreover, in April 1991, following the filing of the NVNG MSS application of LEOSAT Corporation ("LEOSAT"), the

Commission released another Public Notice in which it stated that the Orbcomm, LEOSAT, and STARSYS applications might be mutually exclusive on the grounds of electrical interference. That notice stated:

The processing of these applications is therefore considered to be a restricted proceeding adjudicative proceeding (sic) . . . [s]pecifically, all ex parte contacts are prohibited with respect to these proposals. An ex parte contact is a message (spoken or written) concerning the merits or outcome of any aspect of this proceeding made to a Commissioner, a Commissioner's assistant or other decision-making staff member, other than comments filed at the Commission or oral presentations made with an opportunity for all parties to be present.

Public Notice, Report No. DS-1067 (released April 23, 1991)

(emphasis added). At a minimum, in the absence of any separate public acknowledgement of the Orbcomm waiver request, the Public Notice's reference to "any aspect" of the proceeding encompasses the waiver request as well as the application.

Ironically, Orbcomm's contention that the Commission is not required to place a Section 319(d) waiver request on public notice because such waivers "are not designated in Section 25.151(a) as necessitating public notice . . ." (Orbcomm Opposition at 6) confirms that a Section 319(d) waiver is part and parcel of the construction permit application to which it pertains. Because the application itself is required to be placed on public notice, there is opportunity for public comment and formal opposition by interested parties. Once such a formal

opposition is filed, subsequent filings are subject to the ex parte rules and must be served -- obviating the need for additional public notice unless a major amendment is filed. See 47 C.F.R. § 25.151(a) (1992).^{1/} The Commission, of course, retains discretion under Section 25.151(a)(7) to include other filings on a public notice, if warranted.^{2/}

2. The Commission Decisions Cited By Orbcomm Are Inapposite, While The PanAmSat Decision Cited By STARSYS Is Squarely On Point.

To support its contention that its ex parte waiver renewal did not violate the Commission's ex parte rules, Orbcomm cites four Commission decisions allegedly supporting the proposition that Section 319(d) waivers are wholly separate

^{1/} STARSYS notes that in a proceeding involving issues similar to this one, a recent request for a Section 319(d) waiver was served properly upon all parties to the application. See Satellite CD Radio, Inc. Request for Waiver of Section 319(d), filed May 17, 1993.

^{2/} Orbcomm's attempted reliance on the language of the ex parte rules (See Opposition at 3-4 and n.3) is also unavailing. The rules define an "adjudicative proceeding" as "any proceeding initiated upon the Commission's own motion or upon the filing of an application, a petition for special relief or waiver . . . that involves the determination of rights and responsibilities of specific parties." 47 C.F.R. § 1.1202(d) (1992). While Orbcomm filed both an application and a waiver request, it initiated but one proceeding; both filings are intended to determine Orbcomm's "rights" to construct NVNG MSS space stations. The formal oppositions filed by STARSYS and LEOSAT claiming that Orbcomm lacks technical qualifications to build its systems unmistakably address the "right" Orbcomm seeks in both its application and waiver.

proceedings from the applications they pertain to and, therefore, that ex parte restrictions in the application proceeding have no bearing on the waiver request. See Opposition at 3-4.

Unfortunately, none of these cases stands for the proposition that Orbcomm seeks to draw from them. Instead, while the Commission stated in each case that "the existence of policy questions in the underlying application" need not be considered during the evaluation of a request for waiver under Section 319(d); it in no way stated or held that the ex parte rules do not apply when Section 319(d) waivers are sought with respect to formally opposed applications.^{3/} These cases merely suggest that the opponent of a waiver may not rely solely on the grounds raised in opposition to the underlying application as sufficient to defeat the waiver. This does not mean that an opponent of the application is precluded from an opportunity to oppose the waiver or, as Orbcomm apparently believes, from the right to be informed of a request for waiver.

In this regard, it is instructive that each of the four cases cited by Orbcomm is a Commission decision, each bearing only the file number(s) of the underlying application(s), with no

^{3/} See RCA American Communications, Inc., 65 F.C.C.2d 351, 352 (1977); American Satellite Corporation, 67 F.C.C.2d 127, 128 (1977); American Satellite Corporation, et al., 64 F.C.C.2d 889, 890 (1977); Satellite Business Systems, 61 F.C.C.2d 315, 317 (1976). As discussed, infra, these cases are factually distinguishable from the instant case as well.

separate identifier for the waiver request. In three of the cases, the matter reached the Commission on an Application for Review of a staff action publicly released as a Memorandum Opinion and Order.^{4/} Moreover, it is clear that in each case, at the very least, the Commission afforded the public both notice of the grant at issue and an opportunity to seek review.^{5/} In the instant case, STARSYS was not afforded even that opportunity, having learned of the ex parte waiver request and the ex parte grant thereof only fortuitously. See Petition to Rescind at 5.

Orbcomm also attempts to explain away the Commission's decision in Pan American Satellite Corp., 60 R.R.2d 398 (1986) ("PanAmSat") as, alternatively, not on point, ambiguous, and nothing more than dicta. See Opposition at 5. Notwithstanding Orbcomm's attempt at obfuscation, the fact remains that the PanAmSat case -- which deals with a Section 319(d) waiver in a satellite service context -- clearly stands for the proposition that a Section 319(d) waiver request is an inseparable aspect of its underlying application proceeding. See PanAmSat, 60 R.R.2d

^{4/} See RCA American Communications, Inc., 65 F.C.C.2d 351; American Satellite Corporation, 67 F.C.C.2d 127; American Satellite Corporation, et al., 64 F.C.C.2d 889.

^{5/} The cases are of a vintage that precludes ready determination of whether public notice was given of the waiver requests themselves. In several of the cases cited by Orbcomm, however, public notice of the waiver requests was clearly given. See Communications Satellite Corp., 40 F.C.C.2d 496 (1973); Satellite Business Systems, 61 F.C.C.2d at 315-316 (four oppositions filed).

at 414. A party was held not to have standing to file an application for review of a Section 319(d) waiver grant because it had not participated in the underlying application proceeding. Since filing in the application proceeding would have afforded standing to oppose the waiver grant, the waiver and application are both unmistakably aspects of a single proceeding.

Orbcomm's attempt to distinguish the PanAmSat case by maintaining that party status with respect to an application does not necessarily make an opponent of the application "a party to the 319(d) waiver proceeding" (see Opposition at 3) ignores the fact that the Commission did not view the application and the waiver as separate proceedings, but as part of one proceeding in which the petitioner failed to participate. See PanAmSat, 60 R.R.2d at 414. Thus, there is no basis for Orbcomm's contention that the application and the waiver can be viewed as distinct adjudicative proceedings for purposes of the ex parte

rules.^{6/} There being just one proceeding, the ex parte restrictions are applicable to all aspects of it.^{7/}

B. Orbcomm Failed To Make Any Showing That Would Justify The Grant Of A Waiver That Will Enable It To Construct Nearly One-Third Of Its 26-Satellite NVNG MSS System.

It is noteworthy that all four cases cited by Orbcomm as support for the waiver grant involved earth station applications in an established service, rather than applications for costly and unproven space stations in a new service that had no spectrum allocation and no proposed service rules. In particular, in Satellite Business Systems, the applicant had specifically argued as justification for the waiver grant "that

^{6/} Orbcomm also is confused in its portrayal of the holding on standing in PanAmSat as dicta. Orbcomm bases this conclusion on the fact that the Commission exercised its discretion to address the merits of the petitioners substantive arguments in PanAmSat "notwithstanding the presumed lack of standing." Opposition at 5. However, Orbcomm has it backwards; it is the discussion of the merits that is dicta, not the conclusion regarding standing -- only the conclusion regarding standing was necessary to the resolution of the case.

^{7/} Confronted with its own complete failure to provide notice to petitioners to deny and other commenters in the restricted application proceeding, Orbcomm attempts to attack the sufficiency of STARSYS's filings pursuant to Section 1.1206(a)(2) (1992) (summarizing ex parte presentations in non-restricted rulemaking proceedings). See Opposition at 6 n.6. Apparently, Orbcomm is grasping for some basis to accuse STARSYS of an ex parte violation. In fact, the emptiness of the accusation only highlights STARSYS's scrupulous compliance with the Commission's rules, in contrast to Orbcomm's utter disregard for the integrity of the Commission's processes.

its request is quite limited; it wishes to conduct site preparation work not involving actual installation of the earth stations or the construction of high cost satellites." Satellite Business Systems, 61 F.C.C.2d at 316 (emphasis added).

These cases also make clear that a waiver under Section 319(d) must be based on "sufficient justification" that amounts to "exceptional circumstances." See Satellite Business Systems, 61 F.C.C.2d at 317; RCA American Communications, 65 F.C.C.2d at 353. Orbcomm's showing in this instance falls far short of that standard -- indeed its showing was almost non-existent.

Specifically, in its initial request Orbcomm merely recapitulated the alleged public interest benefits of the Orbcomm system and asserted that "the public interest would clearly be served by the availability of these services as quickly as possible." Orbcomm Request for 319(d) Waiver, dated February 28, 1990, at 2. The only other attempt to justify the waiver was the vague statement that foreign countries were already developing similar capabilities and might "catch up with Orbcomm." Id. at 3. On renewing the request in October 1992, Orbcomm added virtually nothing to this showing. See Letter dated October 14, 1992 from Albert Halprin to Cheryl Tritt; but see footnote 10, infra.

By contrast, in PanAmSat, the waiver applicant (which already held a construction permit conditioned only on the

demonstration of full financial qualifications) gave specific details necessitating the waiver, including the benefit of meeting an anticipated launch date. It also gave an estimate of the cost savings that would result from its ability to launch at that time, as well as an estimate of when the waiver would permit it to initiate service. See PanAmSat, 60 R.R.2d at 400.

Orbcomm provided none of this information. The paucity of information (much less compelling justifications) supplied by Orbcomm, combined with continuing technical oppositions to Orbcomm's proposal and the absence of service rules for the NVNG MSS should have precluded Orbcomm from being authorized to build nearly one-third of its system under an ex parte waiver. At the least, further scrutiny and public comment were called for. The waiver should be rescinded until the proper steps are taken.

C. Orbcomm Distorts STARSYS's Arguments Concerning The Prejudicial Impact Of The Waiver

Orbcomm also attempts to deflect STARSYS's arguments concerning the prejudicial impact of the \$40 million waiver by asserting that STARSYS has, in effect, challenged the Commission's integrity. See Opposition at 9. The challenge STARSYS made was not to the Commission's integrity. Indeed, the D.C. Circuit disposed of the contention raised by Orbcomm in the decision initially cited by STARSYS. See Community Broadcasting Co. v. FCC, 274 F.2d 753, 759 (D.C. Cir. 1960) (rejecting

argument that suggestions of prejudice engendered by an interim grant questioned the Commission's good faith). The actual argument raised is that agency decisionmakers may be unconsciously swayed in a licensing proceeding where an applicant has already spent large sums of money. Id. See also Petition to Rescind at 6. Such a disposition is not indicative of a lack of integrity, but rather of empathy for a party that has already expended substantial funds.

Orbcomm also is incorrect in asserting that Section 319(d) waivers could never be granted under STARSYS's interpretation. See Opposition at 9. STARSYS recognizes that limited waivers may be appropriate in certain circumstances -- e.g., in the cases cited by Orbcomm, where limited expenditures were authorized to enable applicants to begin preliminary site work on earth stations in an established service.^{8/} That does not mean, however, that the Commission is obligated to grant such a waiver without benefit of public comment, a well-supported public interest determination, or even public disclosure. This deviation from the Commission's rules is compounded by the fact that no allocation had been made, no service rules had been

^{8/} See, e.g., Satellite Business Systems, 61 F.C.C.2d at 315. Although the costs are not enumerated, the relatively small nature of the expenditures is apparent from the type of preliminary work sought to be performed under the waivers requested, e.g., clearing sites, installing utilities, building fences and foundations, etc.

proposed, the sums involved (\$40 million) represented nearly one-third of Orbcomm's stated capital requirements, and other applicants were prejudiced by the grant.

In its Petition to Rescind, STARSYS observed that the Common Carrier Bureau ("Bureau") had erred in its statement that the negotiated rulemaking proceeding was "complete," and its conclusion that the concerns related to the initial mutual exclusivity of the applicants had thus been obviated.

See Petition to Rescind at 7-9. Orbcomm seized on this point to assert that STARSYS is implying that the joint technical solution achieved through the negotiated rulemaking proceeding "may not now be workable." Opposition at 10. In fact, STARSYS cast no doubt on the viability of the technical proposal contained in the report of the negotiated rulemaking committee. STARSYS's complaint was that the Bureau simply assumed that the adoption of this proposal was a fait accompli when, in fact, it is still being considered by the Commission. Absent official Commission sanction of the negotiated rulemaking committee's proposal via adoption of a report and order in that proceeding, STARSYS cannot simply assume that the committee report will be adopted in its entirety. Until that time, the STARSYS and Orbcomm applications remain mutually exclusive, and STARSYS must protect its interests accordingly. Orbcomm's gratuitous implication that STARSYS may be seeking to undermine the accommodation reached through the

committee process is mere smoke blowing. Nevertheless, if the NVNG MSS applicants in the current round are no longer mutually exclusive, the Commission should make this clear to the applicants.

In a footnote, however, Orbcomm does raise a relevant point concerning possible prejudice resulting from experimental license grants. See Opposition at 9 n.10. Although Orbcomm erroneously maintains that STARSYS's "theory" would preclude Commission grant of any experimental licenses, there is a strong argument that some experimental applications should be denied based upon the concerns raised by STARSYS, e.g., in those situations where the experimental facility is costly, could be used as part of a permanent facility, and there is another competing applicant. See Southern California Rapid Transit District, 67 R.R.2d 328, 330 (1990) ("experience teaches that the very act of constructing and operating even a temporary or experimental facility often creates equities in its retention"). Indeed, the Commission has, in at least one instance, treated an experimental license application proceeding as restricted under the Commission's ex parte rules, based on the similarity of the experimental authority sought and an underlying service application that was formally opposed.^{2/} For this reason, to

^{2/} See Public Notice, "Ex Parte Status of Request for New Experimental License Filed By Satellite CD Radio, Inc., DA 91-1494 (released November 27, 1991).

the extent that Orbcomm may be contemplating use of facilities constructed pursuant to its experimental license to prematurely implement service, its activities may be prejudicial to this proceeding, and it would be prudent for the Commission to revisit its grant of the Orbcomm experimental license (File No. 2420-EX-ML-91, Call Sign KE2XER).^{10/}

D. Orbcomm Has Mischaracterized STARSYS's Observations Concerning Orbcomm's Announced Business Arrangement With A Canadian Company.

Finally, Orbcomm decries STARSYS's observation that newly proposed financing arrangements could make Orbcomm ineligible to be a common carrier under the Commission's Rules -- and therefore ineligible for a waiver of the magnitude it received. Contrary to Orbcomm's characterization, STARSYS did not conclude that Orbcomm had already given up its eligibility to be a common carrier, it merely observed that the deal described in Orbcomm's own news releases, if completed, could result in that outcome.

To the extent that STARSYS relied upon the accuracy of Orbcomm's press releases to describe its tentative financing arrangements, a reasonable question was raised as to whether

^{10/} STARSYS notes that one of the "justifications" cited by ORBCOMM for its Section 319(d) waiver was the ability to achieve economies of scale in constructing simultaneously its experimental satellites and satellites authorized pursuant to the waiver. See Letter dated October 14, 1992 from Albert Halprin to Cheryl Tritt at 3.

Orbcomm would continue to be eligible for a \$40 million waiver under Section 319(d) granted under delegated authority following consummation of the arrangement announced by Orbcomm.

See 47 C.F.R. 0.291(d) (1992).^{11/}

For this reason, the Common Carrier Bureau should request that Orbcomm declare whether it still plans to offer its proposed services on a common carrier basis or whether, in light of its anticipated arrangement with its "equity investor," it now intends to function as a non-common carrier.

III. CONCLUSION

For the foregoing reasons, as well as the reasons initially articulated in its Petition to Rescind, STARSYS respectfully requests that the Commission immediately rescind the \$40 million Section 319(d) waiver granted to Orbcomm as not in accordance with Commission policy and rules. This action should

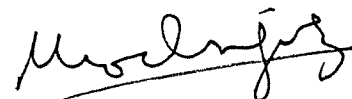
^{11/} Orbcomm's contention that the limitation upon the Common Carrier Bureau's delegated authority with respect to construction permits is inapplicable to waivers of the construction permit requirement simply defies logic. See Opposition at 13.

be taken without prejudice to Orbcomm's right to refile a waiver request consistent with the Commission's rules and an adequate opportunity for public comment.

Respectfully submitted,

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