

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

*S.V.*  
*Don Facel*

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MAY 11 1993

OFFICE OF CHIEF  
DOMESTIC FACILITIES DIVISION  
COMMON CARRIER BUREAU  
File No. 22-DSS-P-90(2)

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

To: The Commission

PETITION TO RESCIND WAIVER GRANTED TO ORBITAL COMMUNICATIONS CORPORATION PURSUANT TO SECTION 319(d) OF THE COMMUNICATIONS ACT

STARSYS GLOBAL POSITIONING, INC.

Raul R. Rodriguez  
Stephen D. Baruch  
David S. Keir

Leventhal, Senter & Lerman  
2000 K Street, N.W.  
Suite 600  
Washington, D.C. 20006  
(202) 429-8970

May 6, 1993

Its Attorneys

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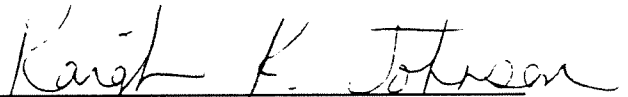
STARSYS Global Positioning, Inc. ("STARSYS"), by its attorneys, hereby requests that the Commission immediately rescind the waiver of the statutory construction permit requirement granted to Orbital Communications Corporation ("ORBCOMM") on November 24, 1992 pursuant to Section 319(d) of the Communications Act of 1934, as amended (the "Act"). See Letter from James R. Keegan, Chief, Domestic Facilities Division, to Albert Halprin, Counsel for ORBCOMM, dated November 24, 1992. As detailed, herein, the ORBCOMM waiver was impermissibly tainted by ORBCOMM's ex parte contacts -- indeed, both ORBCOMM's October 14, 1992 renewal of its waiver request and the Bureau's grant thereof constituted prohibited ex parte contacts. Moreover, should recently announced changes in ORBCOMM's capital structure and marketing plan lead it to change to noncommon carrier status, ORBCOMM would not be eligible for a

Linda M. Wellstein, Esq.  
COMSAT Corporation  
950 L'Enfant Plaza  
Washington, D.C. 20024  
Counsel for Communications Satellite  
Corporation, World Systems Division

Albert Halprin, Esq.  
Stephen L. Goodman, Esq.  
Halprin, Temple & Goodman  
1301 K Street, N.W.  
Suite 1020 East  
Washington, D.C. 20005  
Counsel for Orbital Communications  
Corporation

Henry Goldberg, Esq.  
Jonathan L. Wiener, Esq.  
Goldberg, Godles, Wiener & Wright  
1229 Nineteenth Street, N.W.  
Washington, D.C. 20036  
Counsel for Volunteers in Technical  
Assistance

Brent Weingardt, Esq.  
Consultants, Inc.  
4500 West Virginia Avenue  
Bethesda, Maryland 20814  
Counsel for LEOSAT Corporation

  
Raigh K. Johnson

CERTIFICATE OF SERVICE

I, Kaigh K. Johnson, do hereby certify that a copy of the foregoing "Petition to Rescind Waiver Granted To Orbital Communications Corporation Pursuant To Section 319(d) Of The Communications Act" was mailed by United States first-class postage prepaid this 6th day of May 1993, to the following:

\*Kathleen Levitz  
Acting Chief  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 500  
Washington, D.C. 20554

\*Gerald P. Vaughn  
Deputy Bureau Chief (Operations)  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 500  
Washington, D.C. 20554

\*James R. Keegan  
Chief, Domestic Facilities Branch  
Common Carrier Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 6010  
Washington, D.C. 20554

\*Kristi Kendall  
Satellite Radio Branch  
Common Carrier Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 6324  
Washington, D.C. 20554

Mr. Joseph Roldan  
President  
LEOSAT Corporation  
1819 Tufa Terrace  
Silver Spring, MD 20904

\*Via Hand Delivery

### Summary

STARSYS Global Positioning, Inc. hereby requests rescission of the waiver of the Commission's statutory construction permit requirement granted to Orbital Communications Corporation on November 24, 1992. Rescission of the waiver is appropriate for two reasons.

First, the initial waiver was granted based upon clandestine submissions to the Commission's staff, and is tainted irretrievably by the ex parte nature of these contacts. ORBCOMM's underlying application to provide low Earth orbit satellite services has been formally opposed by STARSYS and others. When ORBCOMM renewed its waiver request on October 14, 1992, it did not serve on these parties a copy of its letter to the Chief of the Common Carrier Bureau. In addition, the request was never placed on public notice, and the Bureau's letter granting the waiver was issued on an unpublished ex parte basis. Thus, the initial waiver grant was procedurally infirm.

Second, recently announced changes in ORBCOMM's capital structure, through which a Canadian company will become its majority equity holder and market the capacity worldwide, appear to make ORBCOMM ineligible to be licensed as a common carrier under Section 310(b) of the Act. Thus, under the Commission's Rules, ORBCOMM also would not be eligible to continue operating under its \$40 million waiver, because the Common Carrier Bureau is specifically prohibited from granting waivers to noncommon carriers under delegated authority where the expenditures authorized would exceed \$10 million.

the construction of the [applied for but formally opposed] satellites." Letter from Albert Halprin, Counsel for ORBCOMM, to Cheryl Tritt, dated October 14, 1992, at 1 ("October 14 Letter"). Notwithstanding the ex parte rules, ORBCOMM did not serve its request on STARSYS or on any of the other parties in the NVNG LEO proceeding that had opposed or filed comments concerning its application. Moreover, the Commission failed to place the request on public notice (as is its practice in situations where satellite applicants request waivers of Section 319(d)). Nevertheless, the Chief of the Domestic Facilities Division granted it just a little more than a month later. See Letter from James R. Keegan, Chief, Domestic Facilities Division, to Albert Halprin, Counsel to ORBCOMM, dated November 24, 1992 ("Waiver Grant Letter").

Subsequently, Orbital Sciences Corporation ("Orbital"), ORBCOMM's current parent company, and Teleglobe, Inc. ("Teleglobe") of Canada announced that Teleglobe had agreed to provide a major portion of the equity capital required to finance the ORBCOMM NVNG MSS system. Specifically, an Orbital news release dated April 20, 1993 announced a Memorandum of Understanding by which "Teleglobe will provide \$80 million in ORBCOMM funding, with the remaining \$55 million coming from Orbital." Attachment, Orbital News Release, dated April 20, 1993, at 1. David W. Thompson, Orbital's President and CEO, was quoted as stating that "[t]he ORBCOMM equity financing defined in this agreement will mark the achievement of one of the largest remaining milestones on the path to full global service." Id. at 2 (emphasis added).

waiver of the magnitude granted by the Bureau, as such a grant would exceed the scope of the authority delegated to the Bureau.

## I. INTRODUCTION

STARSYS and ORBCOMM, along with Volunteers in Technical Assistance, are the current applicants for authority to establish new non-voice, non-geostationary ("NVNG") low Earth orbit ("LEO") mobile satellite service ("MSS") systems. STARSYS and ORBCOMM each formally opposed the other's application, and the applications remain pending. Thus, each application is a restricted proceeding under the Commission's ex parte rules. See 47 C.F.R. § 1.1204(a)(1) and § 1.1208(c)(1) (1992).

At the time it filed its application, ORBCOMM also requested a waiver of Section 319(d) of the Act in order that it might begin construction of satellites for its proposed LEO satellite system. No dollar figure was provided, and only the most generic of "policy" rationales was given. See ORBCOMM Request for Waiver Under Section 319(d) of the Communications Act at 2 (filed February 28, 1990) ("ORBCOMM Waiver Request"). With the filing of formal oppositions by STARSYS and others on technical and policy grounds, however, the associated waiver request was placed on the back burner.

On October 14, 1992, however, ORBCOMM clandestinely renewed its request for waiver of the construction permit requirement. It filed a letter with the Chief of the Common Carrier Bureau asking for authority to spend up to \$40 million "on



Based on these facts, rescission of the waiver is appropriate for two reasons. First, the initial waiver grant to ORBCOMM was tainted irretrievably by prohibited ex parte contacts. Because ORBCOMM's underlying application to provide low Earth orbit satellite services remains formally opposed by STARSYS and others, ORBCOMM's failure to serve a copy of its request on STARSYS, the lack of opportunity for any public comment on the waiver request, and the Bureau's issuance of the waiver on an unpublished ex parte basis, made the initial waiver grant procedurally infirm.

Second, the recently announced changes in ORBCOMM's capital structure, together with its announced marketing plans, appear to make it ineligible to be licensed as a common carrier under Section 310(b) of the Act. Thus, ORBCOMM would not be eligible for the \$40 million waiver of Section 319(d) that it received from the Bureau in November 1992, because the Commission's Rules specifically withhold from the Bureau the authority to grant Section 319(d) waivers to noncommon carriers where the expenditures authorized would exceed \$10 million. See 47 C.F.R. §0.291(d) (1992). Because Teleglobe's participation as a majority equity owner would require that ORBCOMM be licensed as a noncommon carrier, the \$40 million waiver would exceed the Bureau's delegated authority to grant such waivers.

## II. DISCUSSION

### A. The Waiver Grant Resulted From ORBCOMM's Improper Ex Parte Contacts.

As noted above, ORBCOMM did not serve STARSYS or any other party that filed comments concerning ORBCOMM's NVNG MSS application with a copy of its renewed request for a Section 319(d) waiver.<sup>1/</sup> This occurred despite the fact that STARSYS had formally opposed ORBCOMM's system application. Indeed, it was not until STARSYS reviewed a Securities and Exchange Commission filing made by ORBCOMM's parent company after the waiver had been granted that it first learned that ORBCOMM had even renewed its Section 319(d) waiver request. See Orbital Sciences Corporation, Form 10-K, filed March 31, 1993, at 6.

There is no question that competing applicants and other interested parties have a strong interest in responding to a filing by which the proponent of a contested application seeks to begin construction of the facility at issue. Despite ORBCOMM's assertion in its waiver request that "any work undertaken . . . will be at

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<sup>1/</sup> To make matters even worse, in a footnote to its ex parte waiver request, ORBCOMM also made an oblique, yet obvious, attack on STARSYS, citing press reports of French efforts in the NVNG LEO arena as a reason for the Commission to grant its request for waiver of the construction permit requirement. See ORBCOMM Waiver Request at 2-3 n.2. This sly reference continues ORBCOMM's pattern of attacks on STARSYS's ownership structure -- several French companies hold non-controlling equity interests in STARSYS. These attacks are particularly graceless now that ORBCOMM itself is poised to enter into an agreement with Teleglobe, a French Canadian company, through which Teleglobe apparently will obtain a substantial equity interest in the ORBCOMM enterprise. See Section B, infra.

its own risk, and will not prejudice final Commission action on its low-Earth orbit satellite system application" (see ORBCOMM Waiver Request at 3), it is well established by Commission and judicial precedent that the time, effort, and/or money that is spent on pre-permit construction may prejudice decisionmakers in subtle ways, despite the lack of any conscious intent to award a decisional preference to such an applicant. See, e.g., Consolidated Nine, Inc. v. FCC, 403 F.2d 585, 594-595 (D.C. Cir. 1968); Community Broadcasting Co. v. FCC, 274 F.2d 753, 759 (D.C. Cir. 1960). This concern recognizes that decisionmakers are human beings who may be unconsciously swayed by such factors even though they sincerely attempt to be impartial. Applicants themselves, of course, are under no obligation to remain dispassionate, and can be expected to use de facto incumbency, expenses incurred, and development efforts as potential leverage to obtain a permanent license. See TeleSTAR, Inc., 61 R.R.2d 1418, 1440 (1987), aff'd 64 R.R.2d 1444 (1988) (quoting WJIV, Inc. v. FCC, 231 F.2d 725 (D.C. Cir. 1956) ("If facilities are constructed prior to authorization, the fact that facilities have been built could be used to pressure the Commission in its decision to grant permits or licenses"))).

Moreover, in Pan American Satellite Corp. 60 R.R.2d 398 (1986) ("PanAmSat"), the Commission determined that a party lacked standing to file an application for review of a Bureau order granting a waiver of Section 319(d) to a satellite construction permit holder, because that party had failed to participate in the

underlying construction permit application proceeding. Id. at 414.<sup>2/</sup> It is thus clear under Commission precedent in the satellite area that the ex parte restrictions that attached upon the filing of oppositions to the ORBCOMM application simultaneously attached to the ORBCOMM Waiver Request. Clearly, STARSYS's pending formal opposition to ORBCOMM's application barred both ORBCOMM's ex parte October 14 Letter, and the Bureau's ex parte response thereto.

In light of the contested nature of the ORBCOMM application proceeding, the magnitude of the requested waiver, and the fact that spectrum had not been allocated and service rules had not even been proposed for the NVNG MSS service, the Bureau's rapid favorable action on the request is puzzling. Indeed, in its letter granting the requested waiver, the Bureau observed that it "generally does not waive the construction permit requirement for space station facilities, particularly when concerns have been raised regarding the underlying application." Waiver Grant Letter at 1 (emphasis added). Nevertheless, the Bureau determined that the circumstances in this particular instance justified the waiver, in part because the completion of the negotiated rulemaking appeared "to obviate concerns raised by other parties that the technology chosen by ORBCOMM will preclude multiple entry." Id.

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<sup>2/</sup> Section 1.115(a) of the Commission's rules requires parties filing applications for review to demonstrate good cause for filing if they had not participated in the earlier stages of the proceeding. 47 C.F.R. § 1.115(a).

The Bureau's explanation does not withstand scrutiny. Not only had the rulemaking not been completed in November 1992, the Commission had not even proposed technical rules that would, inter alia, establish the parameters for multiple entry, nor had it allocated spectrum for the NVNG LEO service. Furthermore, the grant was not consistent with the standard set forth for Bureau granted waivers in PanAmSat, wherein the Commission approved, on review, a limited (\$10 million) waiver because it conformed with the Commission's financial standards policy, and was "supported by cogent public interest considerations." PanAmSat, 60 R.R.2d at 415.

Here, the Commission has not yet adopted any financial standard for the NVNG MSS, and the Bureau provided only the most perfunctory public interest findings. See Waiver Grant Letter at 1-2 ("Preventing ORBCOMM from beginning construction until final action is taken on its application may add substantially to its costs, and could delay the ultimate availability of NVNG mobile-satellite services.") (emphasis added). Finally, the rules recommended in the report of the advisory committee allow applicants to elect common carrier or noncommon carrier status, yet the Bureau never discussed the possibility that ORBCOMM might become a noncommon carrier, nor did it demand an election from ORBCOMM. Given the fact that the Bureau lacks delegated authority to authorize noncommon carriers to spend more than \$10 million on satellite system construction (see 47 C.F.R. § 0.291(d)), it was,

at a minimum, incumbent upon the Bureau to inquire as to ORBCOMM's common carrier/noncommon carrier status.

Thus, the Bureau's initial action appears to have been based on the premise that the proposed frequency sharing plan that resulted from the negotiated rulemaking, by its mere existence, had removed all barriers to multiple entry, settled the applicants' objections to each other's proposals, and extinguished the mutual exclusivity among the applicants. If indeed this is the case, the Commission, at a minimum, should state this as the justification and apply the same principle to the other pending NVNG MSS applications.

**B. If The Changes To ORBCOMM's Capital And Marketing Structures Are Made As Announced, ORBCOMM Would Likely Become A Noncommon Carrier, And Thus Would Be Ineligible For A Bureau Granted Section 319(d) Waiver Of More Than \$10 Million.**

As indicated in the Orbital press release announcing Teleglobe's participation in the ORBCOMM venture, upon receipt of the necessary approvals, Teleglobe intends to provide nearly sixty percent of the capital funding initially required for construction and launch of the ORBCOMM satellite system. See Attachment, Orbital News Release at 1. Orbital's President describes the arrangement with Teleglobe as "equity financing." Id. at 2. The Orbital/Teleglobe arrangement, in combination with the parties' plan to make a new "ORBCOMM" entity operated by Teleglobe responsible for all non-U.S. ORBCOMM activities, is likely to lead ORBCOMM to change to noncommon carrier status.

As a Canadian company, Teleglobe's ownership of a substantial equity stake in ORBCOMM could preclude ORBCOMM from being regulated as a common carrier under Section 310(b) of the Act. See 47 U.S.C. § 310(b) (1991). ORBCOMM's plan to allow its space segment to be marketed outside of the U.S. by a Teleglobe-controlled entity may also precipitate a change to noncommon carrier status.<sup>3/</sup>

If ORBCOMM were to become a noncommon carrier, this change in status would have a significant impact upon its eligibility for the sizable Section 319(d) waiver granted by the Bureau. The waiver, which authorized ORBCOMM to spend up to \$40 million on construction of its system prior to Commission action on its application, was granted pursuant to Section 0.291(d) of the Commission's Rules. However, this section specifically withholds from the Bureau the "authority to determine whether a construction permit shall be granted for a non-common carrier satellite system, or any part thereof, where the construction costs are in excess of \$10 million." 47 C.F.R. § 0.291(d) (1992) (emphasis added). As such a change in ORBCOMM's regulatory status would render ORBCOMM ineligible for the waiver that it was granted by the Bureau, there

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<sup>3/</sup> STARSYS notes in this regard, that ORBCOMM no longer states that it wishes to be regulated as a common carrier. See Comments of Orbital Communications Corp., CC Docket No. 92-76, at 10 (filed April 26, 1993).

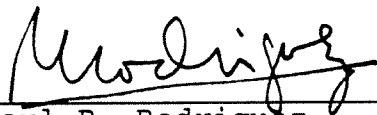
is yet an additional reason for the Commission to rescind the waiver.

**III. CONCLUSION**

Because the Common Carrier Bureau granted ORBCOMM a waiver of Section 319(d) on an entirely ex parte basis, the Commission should rescind the waiver immediately as not in accordance with its rules and policies. Furthermore, ORBCOMM's likely change to noncommon carrier status clearly will render it ineligible for a waiver of the magnitude granted by the Bureau, under which ORBCOMM is currently authorized to expend up to \$40 million to prematurely construct its proposed NVNG MSS system.

In order to protect its own interests, as well as the Commission's interest in the fairness and integrity of its processes, STARSYS hereby requests that the Commission expeditiously rescind the waiver that the Bureau granted to ORBCOMM.

Respectfully submitted,  
STARSYS GLOBAL POSITIONING, INC.

By:   
\_\_\_\_\_  
Raul R. Rodriguez  
Stephen D. Baruch  
David S. Keir

Leventhal, Senter & Lerman  
2000 K Street, N.W.  
Suite 600  
Washington, D.C. 20006  
(202) 429-8970

May 6, 1993

Its Attorneys



**ATTACHMENT**

# NEWS RELEASE

Orbital  
Sciences  
Corporation



FOR IMMEDIATE RELEASE

FOR MORE INFORMATION CONTACT:

LAURA AYRES-ORBITAL

(703) 406-5000

GILLES QUENNEVILLE-TELEGLOBE

(514) 868-7765

## ORBITAL AND TELEGLOBE SIGN PRELIMINARY AGREEMENT TO FINANCE AND OPERATE \$135 MILLION ORBCOMM GLOBAL SATELLITE COMMUNICATIONS SYSTEM

(DULLES, VA, 20 APRIL 1993) -- Orbital Sciences Corporation (ORBI NASDAQ) and Teleglobe Inc. (TGO MB and TSE) today announced that they have signed a Memorandum of Understanding (MoU) for the proposed joint financing and operation of the ORBCOMM™ global digital satellite communications system. Under the MoU, the two companies would commit \$135 million to fund the construction, launch and start-up costs of ORBCOMM's low-Earth orbit satellite network and related ground-based elements of the system. Closing of the transaction is expected to take place in June, following the completion of due diligence reviews, the execution of definitive agreements and the receipt of necessary approvals.

Under the terms of the MoU, Teleglobe will provide \$80 million of the required \$135 million in ORBCOMM funding, with the remaining \$55 million coming from Orbital. Funds will be used by Orbital and its ORBCOMM subsidiary for the manufacture and launch of the satellites, construction of the satellite control center and U.S. network ground stations, and domestic marketing activities. Managed by Orbital, ORBCOMM will continue to be responsible for the operation and control of the satellite constellation, for obtaining the Federal Communications Commission operational license, and for marketing communications services in the United States. A new company, ORBCOMM International Corporation, to be operated by Teleglobe, will be responsible for establishing and operating licensee-based ORBCOMM system networks outside the United States. J.P. Morgan is advising Orbital in the transaction.

The ORBCOMM system is designed to provide virtual full-time, low-cost, two-way data communications to users worldwide through a constellation of up to 26 small satellites. The first two ORBCOMM satellites are expected to be launched late this year, with the remaining 24 satellites to be put in service in 1994. Customers will be able to send and receive short but vital messages for only a few cents each, using pocket-sized ORBCOMM communicators, which are expected to be priced between approximately \$50 and \$400 depending on their features. Potential applications include global two-way messaging, emergency automotive communications, remote industrial asset monitoring, stolen vehicle recovery and two-way E-mail communications for palm-top computers.

"We are proud to have Teleglobe as our strategic partner in the revolutionary ORBCOMM project," said Mr. David W. Thompson, Orbital's President and Chief Executive Officer. "Teleglobe's market position and financial stature in the communications industry and Orbital's demonstrated leadership in microspace

-- more --

systems technologies will make a powerful combination. With Teleglobe's tremendous experience in similar communications services, we are confident of the successful introduction of ORBCOMM service in international markets. The ORBCOMM equity financing defined in this agreement will mark the achievement of one of the largest remaining milestones on the path to full global service."

Teleglobe Inc., headquartered in Montreal, Canada, is the world's fifth largest international communications service provider. It provides telecommunications services through three key subsidiaries: Teleglobe Canada, the sole authorized operator of international telecommunications facilities linking Canada with all countries other than the United States; Teleglobe International, a worldwide provider of telecommunications products and related services; and Teleglobe Marine, a submarine cable installation, maintenance and repair services provider. In 1992, Teleglobe's consolidated revenues were approximately \$1,045 million (Canadian \$1,263 million).

Orbital, located in Dulles, Virginia, is a space technology company that designs, manufactures, operates and markets a broad range of space products and services. The company develops and produces space transportation systems, which include space and suborbital launch vehicles and orbit transfer vehicles; spacecraft systems and payloads; space support products; and satellite services, which include satellite-based mobile data communications and Earth observation services. Orbital's consolidated revenues in 1992 were \$175 million.

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