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MAY 17 1993

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

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OFFICE OF THE SECRETARY

MAY 19 1993

OFFICE OF CHIEF  
DOMESTIC FACILITIES DIVISION  
COMMON CARRIER BUREAU

COPY

23-DSS-STA-96

\_\_\_\_\_ )  
 In the Matter of )  
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 ORBITAL COMMUNICATIONS CORPORATION )  
 )  
 Request For Waiver Under Section )  
 319(d) to Commence Construction )  
 of a Low-Orbit Mobile )  
 Satellite System )  
 \_\_\_\_\_ )

OPPOSITION TO PETITION TO RESCIND

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Counsel for Orbital  
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Dated: May 17, 1993

## SUMMARY

ORBCOMM strenuously objects to the petition filed by Starsys seeking rescission of the Section 319(d) waiver granted to ORBCOMM. Starsys' pleading consists of nothing beyond a combination of speculation and misrepresentation of established Commission practice and precedent. Indeed, Starsys' request is merely a thinly-veiled attempt to use the regulatory processes to harass and delay a competitor, and should be summarily dismissed.

The grant of the waiver to ORBCOMM was not "tainted" by impermissible ex parte contacts. The waiver request was an adjudicative proceeding that was not opposed, so it never became restricted. There is no merit to Starsys' attempts to develop a new concept of derivative opposition, which would convert filings on the application into an opposition to a Section 319(d) waiver request. Commission precedent makes clear that the issues in the underlying application are separate from the issues in any related Section 319(d) request. The one case cited by Starsys in support of its novel theory is not on point, ambiguous at best, and nothing more than dicta.

There is also no merit to Starsys' substantive attacks on the Section 319(d) waiver granted to ORBCOMM. Starsys' general attack on Section 319(d) waivers is inconsistent with the Communications Act and vast Commission precedent. In effect, Starsys challenges the integrity of the Commission by asserting that the Commission cannot be unbiased once it grants a Section 319(d) waiver.

In addition, in this case the Commission properly found that the public interest would be furthered by allowing ORBCOMM to begin construction at its own risk: valuable services can be brought to the public expeditiously after final action on the ORBCOMM application; ORBCOMM will enjoy cost savings that can be passed on to its customers; and the U.S. can maintain its preeminence in the face of increased low-Earth orbit satellite activity in foreign countries.

Finally, Starsys' challenge to the validity of the grant, based on sheer speculation regarding a contemplated arrangement between ORBCOMM and Teleglobe, is without merit. ORBCOMM has done nothing, and will do nothing, to jeopardize its licenses. Moreover, the provision cited by Starsys that limits the delegated authority of the Common Carrier Bureau is not implicated in this case. For all of these reasons, the Commission should reject Starsys' not so subtle attempts to abuse the regulatory processes as a means of stifling competition.

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OPPOSITION TO PETITION TO RESCIND

Orbital Communications Corporation ("ORBCOMM"), by its attorneys, hereby responds to the petition recently filed by Starsys Global Positioning, Inc. ("Starsys") seeking a rescission of the Commission's grant of a Section 319(d) waiver to ORBCOMM.<sup>1/</sup> The waiver permits ORBCOMM, at its own risk and without prejudice to a decision on the application, to spend up to \$40 million to begin construction of low-Earth orbiting satellites to be used for Non-Voice, Non-Geostationary (NVNG) satellite services. In granting the request, the Commission recognized the public interest benefits that will likely arise from allowing ORBCOMM to begin constructing the satellites prior to final action on the application.

Cutting through the rhetoric in the petition --  
rhetoric consistent with Starsys' frequent attempts to delay the

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<sup>1/</sup> The waiver was granted in a Letter from James R. Keegan to Albert Halprin, dated November 24, 1992.

Commission's efforts to permit the rapid implementation of NVNG service -- Starsys apparently makes three claims: the Section 319(d) matter was restricted, so that the renewal request and the grant were tainted ex parte contacts; the FCC improperly issued this 319(d) waiver, because the Commission will thereby be prejudiced; and ORBCOMM, through entering into a memorandum of understanding with a foreign corporation, cannot be eligible for common carrier licensing, rendering the 319(d) waiver beyond the Bureau's delegated authority. As demonstrated below, there is no merit to any of these assertions, which are supported only by a combination of speculation and misrepresentation of established Commission practice and precedent.

The Grant of the Waiver Was In Accordance  
with Well Established Commission Rules, and  
Was Not Tainted by any Impermissible Contacts

Starsys erroneously argues that ORBCOMM's request for a 319(d) waiver was a restricted proceeding, by virtue of opposition filed to the underlying application. The Commission's Rules, as well as precedent, do not support such a strained reading. Under Section 1.1202(d) of the Commission's Rules, ORBCOMM's request for waiver under Section 319(d) is an "adjudicative proceeding."<sup>2/</sup> Section 1.1204(a)(1) provides that no ex parte restrictions apply to an "adjudicative proceeding"

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<sup>2/</sup> That section defines 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, or a complaint or similar pleading that involves the determination of rights and responsibilities of specific parties."

unless it is formally opposed (referring to Section 1.1202(e)), involves mutually exclusive applications, or has been designated for hearing.

None of these three factors that would transfer the waiver request into a restricted matter had occurred in this case. The request for a Section 319(d) waiver has not been designated for hearing. The Section 319(d) waiver request does not involve mutually exclusive applications, since the request (and the grant) were both explicitly premised on not prejudicing the underlying application. Finally, no party, including Starsys, has ever formally opposed ORBCOMM's request for waiver under Section 319(d).<sup>3/</sup> Starsys did file a "PETITION TO DENY SUBJECT TO AMENDMENT TO APPLICATION" directed to ORBCOMM's application, but Starsys nowhere in that pleading even mentioned, much less "unmistakably" (47 C.F.R. § 1.1202(e)(ii)) opposed, the ORBCOMM request for waiver under Section 319(d). Because the waiver request was not opposed, it never was subject to ex parte restrictions, so that ORBCOMM's renewal of its request was a

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<sup>3/</sup> The Commission's Rules in Section 1.1201(e) define a "formal opposition" as:

A pleading opposing the grant of a particular application, waiver request, petition for special relief or other request for Commission action . . . which meets the following requirements:

- (i) The caption and text of a pleading make it unmistakably clear that the pleading is intended to be a formal opposition or formal complaint;
- (ii) The pleading is served upon the other parties to the proceeding . . . ; and
- (iii) The pleading is filed within the time period, if any, prescribed for such a pleading.  
(emphasis added)

perfectly proper filing, not some impermissible "clandestine" (Starsys Petition at p. 2) contact as asserted by Starsys.

Starsys apparently seeks to evade the clear language of the Commission's Rules with regard to transforming an adjudicative proceeding into a proceeding where ex parte contacts are limited through a novel theory of "derivative" formal opposition, whereby an opposition to the application becomes an opposition to the waiver request. Starsys' theory, however, is inconsistent with Commission precedent, which makes clear that the issues in the underlying application are separate from the issues in any related Section 319(d) request. As the Commission indicated in a decision affirming a Bureau grant of a Section 319(d) waiver upon an application for review filed by a competitor:

In the Satellite Business Systems case, cited above, we determined that the existence of significant policy questions in the underlying application would not be considered during our evaluation of a Section 319(d) waiver request.<sup>4/</sup>

Given the substantive distinctions between the issues in the application and the Section 319(d) waiver request, opposing the application cannot be considered as derivatively opposing the Section 319(d) waiver request, and so cannot comprise the "unmistakable" opposition that the Rules require to trigger ex parte limitations.

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<sup>4/</sup> RCA American Communications, Inc., 65 FCC 2d 351, 352 (1977). See also, American Satellite Corporation, 67 FCC 2d 127, 128 (1977); American Satellite Corporation, et al., 64 FCC 2d 889, 890 (1977); Satellite Business Systems, 61 FCC 2d 315, 317 (1976).



The one case cited by Starsys in support of its argument is ambiguous, and not even on point. The PanAmSat case<sup>5/</sup> addressed an issue of a competitor's standing to appeal a grant of a Section 319(d) waiver, and did not concern whether opposing an application automatically triggers ex parte limitations on any related Section 319(d) waiver request. In that case, the Commission merely indicated that the competitor was not a "party" for purposes of Section 405 of the Communications Act or Section 1.115(a) of the Commission's Rules, because it had not participated in the application proceeding (and presumably had not participated in the Section 319(d) proceeding either). The Commission did not hold the converse, that if the challenger had participated in the application proceeding, that such participation would have necessarily made it a party to the 319(d) waiver proceeding, much less that any such participation in the application would have created ex parte limitations in the 319(d) proceeding. Moreover, the particular holding in PanAmSat is dicta, since the Commission addressed the merits of the competitor's challenge notwithstanding the presumed lack of standing.

In sum, ORBCOMM's request for waiver was never formally opposed by Starsys or anyone else, so that the Commission's grant of the 319(d) waiver, conducted in accordance with the

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<sup>5/</sup> Pan American Satellite Corporation, 60 RR 2d 398 (1986).

Commission's Rules, was not tainted by any impermissible ex parte contacts.<sup>6/</sup>

#### The Section 319(d) Waiver Was Properly Granted

The Starsys petition also challenges the Commission's Section 319(d) process itself. Starsys refers to the failure to place the request on public notice, which it asserts is the Commission's "practice in situations where satellite applicants request waivers of Section 319(d)", Starsys Petition at p. 3. While on occasion the Commission does place Section 319(d) requests of satellite applicants on public notice for comment, Section 25.151 of the Commission's Rules, which addresses the items that are required to go out on public notice, does not require such notice for these requests. Section 319(d) waivers are not designated in Section 25.151(a) as necessitating public notice, but instead fall under Section 25.151(a)(7), which makes

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<sup>6/</sup> ORBCOMM also finds it ironic that Starsys would attempt to raise an issue concerning alleged noncompliance with the Commission's ex parte rules, in light of its own conduct with respect to those requirements. As an initial matter, ORBCOMM observes that despite Starsys' claims that the waiver and application proceedings are restricted, its Petition was not served on all of the other parties that commented on the ORBCOMM application, so that under Starsys' theory, its Petition would itself be a prohibited ex parte filing. In a similar vein, Section 1.1206(a)(2) requires that when a party makes an oral ex parte presentation, it must file with the Secretary a written memorandum which summarizes any new data or arguments presented. Attached as Exhibit 1 are copies of the Starsys filings purportedly in fulfillment of their Section 1.1206(a)(2) obligations with respect to March 1, 1993 meetings, which do no more than cryptically allude to the general nature of the meetings. Such an ex parte filing hardly provides other interested parties with an opportunity to respond or otherwise satisfies the Commission's Rules.

their placement on public notice subject to the discretion of the Commission.<sup>7/</sup>

In addition to questioning the particular procedures applied in this case, Starsys also more broadly complains about the potential impact of Section 319(d) waivers and their ability to prejudice the Commission. ORBCOMM agrees that a purpose of the two step procedure incorporated into Section 319 of the Communications Act (whereby a construction permit must be issued before construction can begin, with the operating license to follow completion of construction) was to prevent an applicant from leveraging expenditures into pressure for grant of a license. The cases cited by Starsys address such a general concern. On the other hand, recognizing that early service availability can produce important societal benefits, the Commission was also explicitly provided authority in the Communications Act to waive the construction permit requirement on a case-by-case basis to allow construction prior to action on the application.

The Commission has determined that it can utilize other means, including express conditions in the waiver, to preclude prejudice as a result of the construction of the facilities prior to final action on the application, and so has granted numerous

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<sup>7/</sup> See also, Revision of Part 21 of the Commission's Rules, 2 FCC Rcd 5713, 5720 (1987), which addresses the parallel public notice provisions for Part 21, wherein the Commission indicated that Section 319(d) waiver requests fall into the "discretionary" category.

waivers pursuant to Section 319(d).<sup>8/</sup> As the Commission indicated in the Satellite Business Systems decision:

As was pointed out above, one of the purposes of Section 319 of the Communications Act is to shield the Commission from pressure to grant an application based on expenditures made before Commission action on the application. If this shield can be maintained in another way, and if sufficient justification for a waiver is presented, the waiver may be granted. We find, based on the facts in this case, that the public interest would be served by a grant of the requested waiver.

SBS has requested a limited waiver, whose grant will serve to reduce future expenditures, if its applications are granted. It recognizes that it is risking the funds to be expended under the waiver, for it will not be able to recapture that money should its applications be denied. SBS and the Commission each recognize that in granting the waiver, there is no prejudice nor prejudgment on any feature of any of the SBS applications. For these reasons, we find that there is an effective shield against the application of pressure by SBS in the future.<sup>9/</sup>

In this case, ORBCOMM similarly made clear in its request (and renewal) that the construction would be at its own risk. Moreover, as the Commission indicated in its letter granting the request:

This limited waiver should in no way, however, be construed as evidence of Commission inclination regarding ORBCOMM's pending application. . . . This action is

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<sup>8/</sup> E.g., Hughes Communications Galaxy, Inc., 6 FCC Rcd 72 (1991) at n.11; American Telephone and Telegraph Co., 5 FCC Rcd 7101 (1990) at ¶ 5; Communications Satellite Corporation, 4 FCC Rcd 2488 (1989); Communications Satellite Corporation, 86 FCC 2d 712 (1981); Communications Satellite Corporation, 40 FCC 2d 496 (1973).

<sup>9/</sup> Satellite Business Systems, 61 FCC 2d 315, 317 (1976).

without prejudice to future Commission action on the [ORBCOMM] application.

ORBCOMM understands the limited nature of the waiver it received, and it is willing to assume fully the risk that its application will not be granted. Likewise, the Commission has indicated that it will not be prejudiced by ORBCOMM's expenditures.

Starsys, however, challenges the integrity of the Commission, in essence asserting that the Commissioners cannot be trusted to decide the application issues on the merits if a Section 319(d) waiver is granted, since Commissioners are "human beings who may be unconsciously swayed by such factors even though they sincerely attempt to be impartial." (Starsys Petition at p. 6) Under Starsys' theory, the Commission could never grant a Section 319(d) waiver, notwithstanding statutory provision and the vast precedent.<sup>10/</sup> ORBCOMM believes, and precedent confirms, that Starsys is plainly wrong.

Starsys also challenges the merits of the grant, raising concerns with regard to policy issues it claims remain with respect to the underlying application, Starsys Petition at pp. 8-9. As previous Commission decisions indicate, because the Section 319(d) waiver is without prejudice to the application, such issues need not be addressed in acting on the Section 319(d)

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<sup>10/</sup> Under Starsys' theory, the Commission would also have to be precluded from granting experimental/developmental licenses, since those expenditures could also unconsciously sway the Commission. However, Starsys' actions belie its words in this Petition. Starsys has received such licenses, and presumably is accepting the risk that its expenditures on the experimental program would be for naught if its application is not granted. Similarly, Starsys has not, to our knowledge, withdrawn its own request for a Section 319(d) waiver, despite its now apparent belief that any such waivers are improper.

waiver request.<sup>11/</sup> Nonetheless, ORBCOMM is troubled that Starsys may now be implying that the technical solution jointly signed and presented to the Commission by ORBCOMM, Starsys and VITA during the negotiated rulemaking proceeding, which resolved mutual exclusivity issues, may not now be workable. Certainly, Starsys did not express such reservations to ORBCOMM during the course of the negotiated rulemaking or subsequently. Should Starsys now have concerns about the feasibility of its technical plan, ORBCOMM is willing to meet with Starsys (and VITA) to resolve Starsys' problems.<sup>12/</sup>

Finally, ORBCOMM believes the Commission properly found that the public interest would be advanced by grant of the waiver to ORBCOMM for the reasons explained in the letter. Initiating construction at this stage will allow valuable services to be brought to the public expeditiously after final action on the application occurs; ORBCOMM will enjoy cost savings that can be passed on to its customers; and the U.S. can maintain its preeminence in the face of increased low-Earth orbit satellite activity in foreign countries.<sup>13/</sup>

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<sup>11/</sup> See n. 4, supra.

<sup>12/</sup> To the extent that Starsys is merely seeking similar treatment (Starsys Petition at p. 9), ORBCOMM has not filed any objection to the Commission granting Starsys a Section 319(d) waiver to commence construction at its own risk. We note, however, that the Commission has not as yet ruled on the legal qualifications of Starsys to hold an FCC license. Starsys Global Positioning, Inc., DA 93-213, released March 8, 1993 at n. 9.

<sup>13/</sup> In its renewal request, ORBCOMM referred to recent developments in Mexico and France. ORBCOMM quoted a representative of CNES, the French space agency, who had described their soon-to-be-launched Taos low-Earth orbit  
(continued...)

In sum, the Commission appropriately considered the relevant factors in granting ORBCOMM the Section 319(d) waiver when it determined that the waiver, expressly issued without prejudice to the application, would advance the public interest. ORBCOMM believes that decision was correct, and fully expects the Commission to continue to act in a proper, unbiased manner with respect to ORBCOMM's application.

Starsys' Speculation with Regard to ORBCOMM's  
Contemplated Business Arrangements Is Wrong,  
and the Waiver Did Not Exceed Delegated Authority

Starsys' final argument is that in light of a recently announced agreement concerning investment by Teleglobe, ORBCOMM is no longer eligible to be licensed as a common carrier, so that the waiver that allows ORBCOMM to expend up to \$40 million exceeds the Bureau's delegated authority. Starsys' argument is wrong in every respect. First, as the press release makes clear, Orbital Sciences Corporation (ORBCOMM's parent) and Teleglobe Inc. at this point have simply entered into a Memorandum of Understanding. Closing of the transaction is contingent upon the execution of definitive agreements and the receipt of necessary approvals. Thus, no change has occurred yet with respect to

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<sup>13</sup>/ (...continued)

satellite system and contrasted that with the American systems that he characterized as mired in regulatory procedures. These legitimate concerns regarding U.S. interests have now been trivialized by Starsys as "an oblique, yet obvious, attack on Starsys", (Starsys Petition at n. 1).

ORBCOMM's ownership or its status as a common carrier applicant,<sup>14/</sup> and certainly no change had occurred as of last October when ORBCOMM filed its renewal request.

While the contemplated arrangement with Teleglobe has not been finalized, Orbital Sciences and ORBCOMM (as well as Teleglobe) are fully conscious of the U.S. regulatory issues, and did not and would not enter into any agreement that might jeopardize ORBCOMM's licenses. Thus, while no definitive capital structures have been finalized, Starsys' speculation as to ownership shares, or the specific nature of any investment, is simply wrong.

Moreover, Starsys' assertion that a Teleglobe investment would preclude ORBCOMM from being regulated as a common carrier under Section 310(b) is incorrect. There are numerous legitimate arrangements that allow a licensee to remain in control of its license despite investments by others, including debt arrangements, separated operating and marketing entities, and even indirect equity ownership in excess of 25% with the approval of the Commission.<sup>15/</sup>

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<sup>14/</sup> ORBCOMM has indicated in its comments on the licensing and service rules NPRM that it supports the Commission's proposal to allow an applicant to choose whether to operate as a common carrier or a private carrier (or a combination of both).

<sup>15/</sup> E.g., Teleport Transmission Holdings, Inc., File No. I-T-V-92-036-T/C, released May 4, 1993; GCI Liquidating Trust, 7 FCC Rcd 7641 (1992), allowing Canadian companies to indirectly own 60% of licensees. Such legitimate arrangements are to be distinguished from mere shams created to evade the requirements of Section 310 of the Communications Act. E.g., Satellite Transmission and Reception Specialists Co., 5 FCC Rcd 4131 (1991).



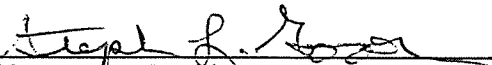
Finally, it is far from clear that the cited Rule limiting the Bureau's delegated authority is even relevant, since Section 0.291(d) applies to construction permits, not to waiver requests under Section 319(d). Because the waiver is granted without any prejudice to the underlying application (and any investment is at ORBCOMM's own risk), the Bureau has not made any decision with respect to the issuance of a construction permit. Thus, by its own terms the limitation of that provision is inapplicable to Bureau action on a Section 319(d) waiver request.

#### CONCLUSION

ORBCOMM is deeply disappointed that it has become necessary to respond to what is merely a thinly-veiled attempt by Starsys to use the regulatory processes to harass and delay a competitor, an attempt apparently triggered by ORBCOMM's bringing to the Commission's attention comments of representatives of the French government (the undisputed owner of a majority interest in Starsys) contrasting its ability to move quickly with the more cumbersome regulatory processes of the United States. As this response demonstrates, there is no merit whatsoever to any of Starsys' arguments. The waiver was not tainted by impermissible ex parte contacts, the grant of the waiver advances the public interest in compliance with the statute and precedent, and the contemplated arrangement with Teleglobe does not and will not affect the validity of the waiver. ORBCOMM urges the Commission to summarily deny the Starsys petition, and hopes that the FCC

(as well as ORBCOMM) will not need to expend any more of its limited resources addressing Starsys' baseless accusations.

Respectfully submitted,

By   
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1301 K, N.W.  
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Counsel for Orbital  
Communications Corporation

Dated: May 17, 1993



Two-Way Remote Positioning System

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

1 March 1993

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554


Re: Oral Ex Parte Presentation  
in ET Docket No. 92-76

Dear Ms. Searcy:

In accordance with Section 1.1206 of the Commission's rules, the undersigned hereby states that representatives of STARSYS Global Positioning, Inc. met this day with Harry Ng of the Common Carrier Bureau, with respect to the above - referenced proceeding. The presentation concerned a provision contained in the Commission's February 10, 1993 Notice of Proposed Rulemaking in CC Docket 92-76.

An original and one copy of this letter are being filed with the Office of the Secretary.

Respectfully submitted,

  
Alan B. Renshaw  
Program Manager

cc: Mr. Harry Ng (By Hand)



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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

1 March 1993

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554


Re: Oral Ex Parte Presentation  
in ET Docket No. 91-280

Dear Ms. Searcy:

In accordance with Section 1.1206 of the Commission's rules, the undersigned hereby states that representatives of STARSYS Global Positioning, Inc. met this day with Raymond LaForge of the Office of Engineering and Technology with regard to the Report and Order in the above - referenced proceeding. The presentation concerned a provision contained in the Commission's February 5, 1993 Report and Order in ET Docket No. 91-280.

An original and one copy of this letter are being filed with the Office of the Secretary.

Respectfully submitted,

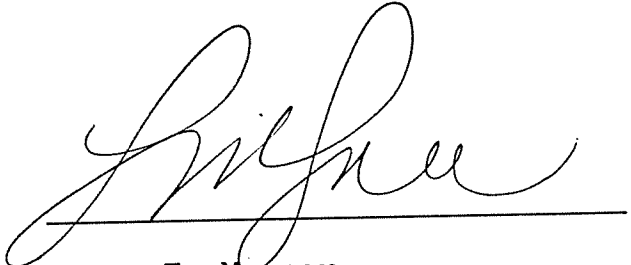
  
Alan B. Renshaw  
Program Manager

cc: Mr. Raymond LaForge (By Hand)

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CERTIFICATE OF SERVICE

I, Laura E. Magner hereby certify that on the 17th day of May, 1993, a true copy of the foregoing Opposition to Petition to Rescind of Orbital Communications Corporation was mailed, postage prepaid, to Mr. Raul Rodriguez, Leventhal, Senter & Lerman, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1809.



---

Laura E. Magner