

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

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OCT 21 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of )  
STARSYS GLOBAL POSITIONING, INC. )  
For Authority to Construct, )  
Launch and Operate a )  
Low Earth Orbit Communications )  
Satellite System )

File No. 33-DSS-P-90(24)

OCT 25 1992

To: Chief, Common Carrier Bureau

REPLY COMMENTS

STARSYS Global Positioning, Inc. ("STARSYS"), by its attorneys, hereby replies to the comments of Orbital Communications Corporation ("ORBCOMM") concerning STARSYS' Petition for Expedited Declaratory Ruling (the "Petition"). ORBCOMM does not oppose the Petition, by which STARSYS seeks a Commission determination that the pendency of its application to provide low-Earth orbit ("LEO") mobile satellite services ("MSS") in the frequency bands below 1 GHz would not be adversely affected by an amendment to reflect a potential change in ownership of STARSYS' Class A Common Stock.<sup>1/</sup> Indeed, ORBCOMM recognizes that it would be contrary to the Commission's stated goal of fostering multiple entry in the LEO MSS services if Commission regulatory processes were to nip competition in the bud. ORBCOMM Comments at 1. As the balance of ORBCOMM's

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<sup>1/</sup> Under STARSYS' by-laws, the holders of STARSYS' Class A common stock have the absolute right to appoint three of the five directors of the company. All of the authorized shares of STARSYS' Class A common stock are outstanding, and are currently held by ST Systems Corporation ("STSC").

Comments were limited to the single matter discussed below, and as no other comments or objections were received, STARSYS urges the Commission to grant the Petition for the reasons set forth therein.

Although it does not oppose the Petition, ORBCOMM asserts that STARSYS' ownership structure does not comply with Section 310(a) of the Communications Act of 1934, as amended. Essentially, ORBCOMM claims that STSC does not control STARSYS, despite its ownership of 100% of STARSYS' Class A Common Stock, because other entities hold 95% of the equity in the company. See ORBCOMM Comments at 2. As STARSYS has explained before, ORBCOMM's claim -- which ignores the clear restrictions of STARSYS' by-laws, the particulars of Delaware corporation law, and prior Commission decisions -- is incorrect.<sup>2/</sup>

First, STARSYS' by-laws at Article III, Section 2 specify the following with regard to the number and qualifications of STARSYS' directors:

The board of directors shall consist of five (5) members. Three of the five directors shall be elected by the holders of the Class A Common Stock. Two of the five directors shall be elected by the holders of the Class B Common Stock. Three of the five directors shall be citizens of the United States. Four of the five directors shall have no business or financial relationship with (i.e., shall not be officers, directors, shareholders or employees of) North American CLS, Inc., its

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<sup>2/</sup> STARSYS previously demonstrated the compliance of its ownership structure with Section 310(a) of the Communications Act in its September 4, 1990 Reply Comments in the instant proceeding (at 19-24).

direct or indirect parents or any of their direct or indirect subsidiaries (other than STARSYS, Inc.) and shall not be representatives of a foreign government. So long as the corporation has an application pending before, or is operating a telecommunications facility pursuant to an operating permit or any other authorization (including any waiver or temporary special authorization) from the Federal Communications Commission ("FCC"), this Section of the by-laws may not be amended without the consent of the FCC or its delegate.

The by-laws also specify that the STARSYS board of directors has exclusive responsibility for the management of the property, affairs, and business of the corporation. Id. at Article III, Section 1.<sup>3/</sup>

Thus, there can be no question that whomever owns the Class A Common Stock of STARSYS is in control of STARSYS. That person or persons has the absolute right to elect a majority of the company's directors -- a right that cannot be altered without prior Commission consent -- and the STARSYS board of directors has exclusive responsibility for the management of the property, affairs, and business of the corporation.

The power of corporate directors under the laws of Delaware (where STARSYS is incorporated) are substantial. Delaware corporate law provides that "the business and affairs of every corporation . . . shall be managed by or under the

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<sup>3/</sup> Delaware's corporation laws explicitly endorse by-law provisions "not inconsistent with law or with the certificate of incorporation" which define specific "rights or powers of its stockholders, directors, officers or employees." Del. Code Ann. tit. 8, §109(b).

direction of a board of directors . . . ." Del. Code Ann. tit. 8, § 141(a). Case law interpreting this statute unequivocally establishes that it is the directors, rather than the shareholders, who control the business and affairs of a corporation. See Levine v. Smith, 591 A.2d 194, 200 (Del. Supr. 1991) (citing Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. Supr. 1990)). Thus, under Delaware law, the person who controls a corporation's board of directors is in de jure control of the corporation.<sup>4/</sup>

Finally, the Commission itself has made clear that for purposes of Section 310(a) of the Communications Act, actual foreign ownership of equity in a Commission licensee is not disqualifying where, as here, U.S. citizens remain in "full control of the business and policy decisions" of the company. See Orion Satellite Corporation, 5 FCC Rcd 4937, 4940 and n.40 (1990). As explained above, STARSYS' by-laws guarantee that the holders of STARSYS's Class A Common stock will, through their absolute right to elect a majority of STARSYS's board of directors, maintain full control of these matters.

For these reasons, the Commission should determine that STARSYS is legally qualified to be a Commission licensee and that Section 310(a) poses no impediment to the processing and granting

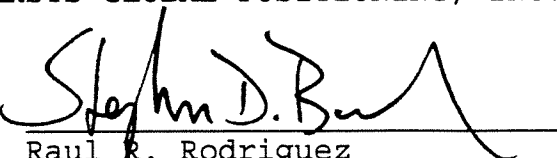
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<sup>4/</sup> ORBCOMM does not seriously contend that STSC is not in de facto control of STARSYS. Its contentions are based exclusively on the fact that two French government agencies collectively (and indirectly) own 70% of STARSYS's Class B stockholder. ORBCOMM Comments at 2 & n.2

of its pending license application. In this last regard, the Commission should grant STARSYS' Petition and, as ORBCOMM urges, proceed expeditiously to resolve the outstanding regulatory obstacles that remain to the inauguration of LEO MSS services.

Respectfully submitted,

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October 21, 1992

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CERTIFICATE OF SERVICE

I, Kaigh K. Johnson, hereby certify that a copy of the foregoing "Reply Comments" was mailed by United States first-class postage prepaid this 21st day of October, 1992, to the following:

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