

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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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)

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OFFICE OF CHIEF
DOMESTIC FACILITIES DIVISION
COMMON CARRIER BUREAU

To: The Commission

**REPLY TO OPPOSITION TO
PETITION FOR EXPEDITED DECLARATORY RULING**

STARSYS Global Positioning, Inc. ("STARSYS"), by its attorneys, replies to LEOSAT Corporation's Opposition to STARSYS' September 30, 1992 "Petition for Expedited Declaratory Ruling," which was placed on Public Notice on December 16, 1992 (FCC Report No. DS-1263). STARSYS seeks such a ruling regarding the possible exercise by Hughes STX Corporation ("Hughes STX") of a previously-granted option to purchase the interest in STARSYS currently owned by ST Systems Corporation ("STSC"). In particular, STARSYS petitioned the Commission to determine that the purchase by Hughes STX of the controlling interest in STARSYS would not be considered a "major amendment" to STARSYS's above-captioned application for authority to construct, launch and operate a low-Earth orbit ("LEO") satellite system in frequency bands below 1 GHz.

I. LEOSAT Has Failed To Rebut STARSYS's Showing That Its Request For Declaratory Ruling Is Fully Compliant With Long-Standing Commission Policies and Recently-Codified Rules With Respect To Application Processing.

LEOSAT's Opposition appears to be a product of confusion concerning both the import of STARSYS's request for declaratory ruling and LEOSAT's own status as an "applicant" to provide LEO satellite services. In particular, LEOSAT is fundamentally in error when it claims that STARSYS "seeks to transform a proposed agreement to divide LEO spectrum [among STARSYS, Orbital Communications Corporation and Volunteers in Technical Assistance] into reality." Opposition at 2. To quote LEOSAT, "nothing could be farther from the truth." Id. STARSYS merely seeks to preserve its status as an applicant vis à vis the other timely filed applicants that are part of the initial LEO processing group.

Ironically, for all its protests concerning mutual exclusivity and the ongoing rulemaking proceeding, LEOSAT fails to respond to the merits of STARSYS's demonstration that grant of its Petition (and approval of the proposed amendment) is fully warranted on the basis of long-standing and directly applicable Commission policies. All LEOSAT does is state, without providing any support whatsoever, that Section 25.116 of the Commission's rules is inapplicable. See Opposition at 3.

LEOSAT's contention is patently absurd. First of all, Section 25.101(b) confirms that "[t]he rules and regulations in this part supplement, and are in addition to the rules and

regulations contained in or to be added to, other parts of this chapter currently in force, or which may be subsequently promulgated, and which are applicable to matters relating to communications by satellites." 47 C.F.R. § 25.101(b) (emphasis added). Indeed, Section 25.116 applies on its face to all "pending" space and earth station applications, regardless of whether applications are mutually exclusive or specific service rules have been established.

In addition, even though the rules and exceptions embodied in Section 25.116 were not officially codified until 1991, they have been consistently and pervasively applied through similar rules and policies across virtually all services regulated by the Commission -- including satellites. When it proposed what is now Section 25.116 in 1987, the Commission expressly stated that the rule was intended to codify existing procedures and policies already applicable to satellite applications. See Notice of Proposed Rule Making in CC Docket No. 86-496, 2 FCC Rcd 762, 766 (1987).

It is clear, therefore, that STARSYS's request for declaratory ruling premised on the satellite processing rules is fully in accord both with the policies that existed at the time that its application was filed, and also with the rules that currently apply to its application. LEOSAT's curious assertion that the Commission's general space station application filing

requirements (as codified in 47 C.F.R. Part 25, Subpart B) do not apply to STARSYS's pending application is wrong.

Contrary to LEOSAT's somewhat confusing insinuation (see LEOSAT Opposition at 2-3), this conclusion is not affected in any way by the fact that STARSYS and the other current applicants for MSS systems in the frequency bands below 1 GHz have jointly proposed to resolve any mutual exclusivity that may exist between their applications. See STARSYS Petition at 3, 10-11. As STARSYS's application is currently "pending," its proposed amendment would have to be evaluated pursuant to Section 25.116 regardless of whether it is mutually exclusive with Orbital Communications Corporation's application, LEOSAT's future application, or any other proposal.^{1/} Therefore, STARSYS's observation that it and the other current applicants have proposed a spectrum utilization scheme where all three companies could be licensed has no direct bearing on STARSYS's showing that the proposed transfer to Hughes STX falls within a recognized exception to the "major amendment" rule. Rather, it was intended only to show that no current applicant would suffer prejudice as a result of the proposed amendment. Id. at 11.

^{1/} Curiously, while LEOSAT maintains that the Commission has not yet determined "what is a 'mutually-exclusive' application in the LEO satellite service," it simultaneously argues that STARSYS might achieve a comparative advantage. Opposition at 3 and n.5. It is self-evident that there would be no need for comparative evaluation under any circumstances if no mutual-exclusivity existed.

Although LEOSAT claims to seek to prevent adverse impact to future or even current applicants (LEOSAT Opposition at 2-3),^{2/} the Commission need not reach this contention. The fact that LEOSAT has failed even to attempt to rebut STARSYS's showing that the proposed amendment is eligible for exclusion from the draconian impact of the "major amendment" rule requires the rejection of LEOSAT's Opposition.^{3/}

II. The Common Carrier Bureau's Recent Decision In Pan American Satellite Confirms That STARSYS's Ownership Structure Is In Full Compliance With Section 310(a) Of The Communications Act of 1934, And That STARSYS Is Legally Qualified To Be A Commission Licensee.

As STARSYS demonstrated in its response to Orbcomm's recent reiteration of its earlier assault on the lawfulness of

^{2/} Regardless of whether LEOSAT has any standing to pursue this objective, it is noteworthy that Orbital Communications Corporation -- whose application was and may still be mutually exclusive with STARSYS application -- does not oppose the grant of STARSYS Petition.

^{3/} STARSYS does wish to comment on one other aspect of LEOSAT's filing. LEOSAT contends that STARSYS might unfairly benefit from the substitution of Hughes STX for STSC because "[i]t may very well be that the Commission would decide to use the financial resources and satellite operational experience of the satellite system applicant as a comparative criterion." Opposition at 3. There is absolutely no basis for this imagined scenario because the Commission has never viewed the relative depth of an applicant's pockets or operational experience as significant factors to be weighed in considering satellite applications. To the extent that financial resources are relevant to threshold eligibility, this is a basic, not a comparative, qualification factor. LEOSAT appears to have confused the two.

STARSYS's two-tiered ownership structure, STSC (the sole owner of STARSYS's Class A common stock) possesses exclusive control of STARSYS. See STARSYS Reply Comments at 2-5 (filed October 21, 1992).^{4/} STARSYS's corporate by-laws, which cannot be modified without prior Commission consent, specify that the Class A shareholders have the absolute right to appoint a majority of the corporation's board of directors, and that the board itself has exclusive responsibility for the management of the property, affairs, and business of the corporation. *Id.* at 2-3 (citing STARSYS By-Laws at Article III, Sections 1 and 2). Because Delaware judicial and statutory precedents establish unequivocally that it is the directors (rather than the shareholders) who control the business and affairs of a corporation, STSC, as the entity in control of STARSYS's board of directors, is in de jure control of STARSYS. *Id.* at 3-4.

STARSYS also noted that for purposes of Section 310(a) of the Communications Act, the Commission itself had recently ruled that actual foreign ownership of equity in a Commission licensee is not disqualifying where U.S. citizens remain in "'full control of the business and policy decisions' of the company." STARSYS Reply Comments at 4 (quoting Orion Satellite Corporation, 5 FCC Rcd 4937, 4940 & n.40 (1990)). Because STARSYS's by-laws guarantee that STARSYS's Class A shareholders will control the corporation by

^{4/} STARSYS respectfully requests that these Reply Comments be incorporated herein by this reference.

virtue of their absolute right to elect a majority of the corporation's board of directors, STARSYS showed that the Commission should determine that Section 310(a) poses no bar to a finding that STARSYS is legally qualified to be a Commission licensee. Id. at 4-5.

Now, in a decision that requires rejection of the legal qualifications challenge that Orbcomm has directed against STARSYS, the Common Carrier Bureau has effectively confirmed that control of a Delaware corporation rests with the party or parties who control the corporation's board of directors. In Alpha Lyracom, d/b/a Pan American Satellite, DA 92-1758 (Common Carrier Bur., released December 31, 1992) ("Pan American Satellite"), the Bureau approved over objection the pro forma assignment of satellite licenses from a sole proprietorship owned 100 percent by a U.S. citizen to a limited partnership where the former sole owner would be one of two general partners, with the other general partnership interest to be owned by an alien entity. Affiliates of the two general partners would each own 49.5 percent of the total equity of the limited partnership. Pan American Satellite, DA 92-1758, slip op. at 2.

The Bureau observed that the partnership entity holding the license would be managed by a "Managing Committee" that "governs the partnership with the same authority to manage the business and affairs of the Partnership as the board of directors has under the Delaware General Corporation Law." Pan American Satellite, DA 92-1758, slip op. at 2. Three of the Committee's

five members would be designated by the former sole owner, with the other two membership slots to be filled by the new 50 percent alien owner. Id. (Likewise, the STARSYS Class A shareholders elect three of STARSYS' five directors.)

The Bureau held that despite the proposed assignment of 50 percent of the licensees' equity, effective control remained with the former owner. Pan American Satellite, DA 92-1758, slip op. at 6. It based this conclusion on the former owner's control of the majority of the Management Committee, which in turn is in charge of directing and overseeing the partnership's day-to-day operations and implementation of its business plan. Id. Finally, because it found that effective control remained in the former owner, the Bureau was "satisfied that the proposed assignment will not result in any violation of Section 310(a) of the [Communications] Act." Id. at 6 n.21.

Under these circumstances, the Bureau's decision in Pan American Satellite mandates a favorable determination on the lawfulness of STARSYS's ownership structure. Because the Class A shareholder has the exclusive power to control the majority of the board of directors (and thus to control the day-to-day operations and business affairs of the corporation), it is in "effective control" of STARSYS. As a result, STARSYS's ownership structure is fully compliant with Section 310(a), irrespective of the makeup of the ownership of STARSYS's Class B common stock. STARSYS is legally qualified to be a Commission licensee.

III. Conclusion

For the foregoing reasons, STARSYS urges the Commission to reject the unfounded Opposition filed by LEOSAT, as well as the attack on STARSYS' two-tiered ownership structure interposed by Orbcomm, and to grant expeditiously the declaratory relief requested by STARSYS. This action will permit STSC and Hughes STX to complete a business transaction initiated well over a year ago, while also advancing the public interest in the ultimate realization of the benefits to be provided by small LEO satellite systems.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kaigh K. Johnson, do hereby certify that a copy of the foregoing "Reply to Opposition to Petition for Expedited Declaratory Ruling" was mailed by United States first-class postage prepaid this 6th day of January 1993, to the following:

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