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May 2, 1991

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

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FEDERAL COMMUNICATIONS COMMISSION
SATELLITE RADIO DIVISION

RE: Public Notice of Acceptance
of Satellite Applications,
Reports Nos. DS-1068, -1071

Dear Ms. Searcy:

Reference is made to order DA 91-407, adopted April 1, 1991, giving notice of the acceptance for filing of the applications of Motorola and Ellipsat for low-earth-orbit satellite systems and providing, pursuant to Section 25.392(b) of the rules, for a June 3, 1991, cut-off for applications of others for satellite systems to provide RDSS service in the 1610-1625.5 MHz and 2483.5-2500 MHz bands to be considered concurrently with Motorola's and Ellipsat's applications. The April 1, 1991, notice was corrected by DA 91-438, released April 18, 1991.

Applicant Ellipsat Corporation submits that the order fails to reflect a correct application of Section 25.392(b) of the Rules, in that the window governing Ellipsat's application had already closed. As recited in the Bureau's order in Geostar Positioning Corporation, DA 91-528 (released April 30, 1991) at ¶ 6, "In May 1990, Geostar filed a set of applications seeking more extensive modifications to the system." These applications proposed major changes in Geostar's authorized system. As the recent Geostar order notes,

Geostar's proposal radically changes its RDSS system design and significantly reduces its capacity. In fact, the satellite system as modified is so at variance with Geostar's licensed system and with our

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RDSS licensing policies that it is tantamount to a "new" RDSS system and all four applications must be processed as such.

* * *

[T]he modified system is so significantly different from the system as authorized that it must be considered as a new system and should not become the new "baseline" for coordination purposes without the benefit of a new RDSS processing group.^{30/}

^{30/} Section 25.392(b) of the Commission's rules states that when an application for a new RDSS system is filed, it will be placed on public notice and a 60 day cut-off will be established for the filing of applications to be considered in conjunction with it. 47 C.F.R. § 25.392(b).

Geostar, supra, at ¶¶ 11, 15 (emphasis supplied). Only where "no other potential applicants were adversely affected" would such modifications be considered outside of a new processing group. Id. at ¶ 16.

The Geostar order vindicates the procedural analysis set forth in Ellipsat's application. Ellipsat's application was filed in early November, 1990,

in response to the Commission's Public Notice, Report No. DS-999, released September 4, 1990, in which applications of Geostar Positioning Corporation ("Geostar") were accepted for filing. In that the Geostar applications involve substantial and material modifications of its authorized system, Geostar has effectively applied for a new satellite system. Accordingly, pursuant to Commission Rule 25.392(b), the September 4, 1990 Public Notice establishes a sixty day cut-off period for the filing of applications to be considered in conjunction with the Geostar applications. The subject application is timely filed and entitled to be considered concurrently with the Geostar applications. * * *

Application of Ellipsat Corporation, file no. 11-DSS-P-91(6), at 3 n. 3.

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Section 25.392(b), in turn, mandated a sixty-day cut-off period with reference to the Geostar applications of May, 1990. The rule itself uses the word "shall."

The Commission was bound to process the RDSS applications in accord with the rule. In another case involving the question of which applications were entitled to comparative consideration, Reuters Ltd. v. FCC, 251 U.S.App.D.C. 93, 781 F.2d 946 (1986), the Court identified as "a precept which lies at the foundation of the modern administrative state", the proposition "that agencies must abide by their rules and regulations." Id. at 94, 781 F.2d at 947. In Maxcell Telecom Plus v. FCC, 259 U.S.App.D.C. 350, 359, 815 F.2d 1551, 1560 (1987), the Court held that a major amendment triggered a sixty-day window under the Commission's rules.

Accordingly, the Bureau is requested to recognize the priority of Ellipsat's application and to modify accordingly its order DA 91-407 to conform to Section 25.392(b) of the rules.

Respectfully submitted,


William Malone

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Ellipsat Corporation

cc: Philip L. Stern, Esquire
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