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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | Call Sign S2150 |
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| FINAL ANALYSIS COMMUNICATION SERVICES, INC. | ) | File Nos. 25-SAT-P/LA-95<br>76-SAT-AMEND-96<br>79-SAT-AMEND-96 |
| Authorization to Construct, Launch and Operate a Non-Voice, Non-Geostationary Mobile Satellite System in the 148-150.5 MHz, 400.14-401 MHz, and 137-138 MHz Bands | ) | 151-SAT-AMEND-96<br>7-SAT-AMEND-97<br>SAT-MOD-20020329-000245<br>SAT-AMD-20030606-00112 |

To: The Commission



**APPLICATION FOR REVIEW**

FINAL ANALYSIS COMMUNICATION SERVICES, INC.

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April 16, 2004

## TABLE OF CONTENTS

**Page**

## SUMMARY

In this Application for Review, Final Analysis Communication Services, Inc. ("FACS") asks the Commission to reinstate FACS's authorization to construct, launch and operate a Little LEO system, grant FACS's request to extend the time to complete construction and launch of its system, and reverse the recent decision by the International Bureau that revoked FACS's license.

A series of intertwined and unseverable events – having nothing to do with the financial stability or business decisions of FACS – that were unforeseeable and entirely beyond FACS's legal control interrupted progress toward the construction and launch of FACS's first two satellites, making it necessary for FACS to ask for an extension of its milestones. These events included (a) the initiation by creditors of an involuntary Chapter 7 bankruptcy proceeding against FAC's former parent and then-prime contractor, (b) the time necessary thereafter to receive Bureau approval to transfer control of FACS to its new parent, and (c) the time necessary after the Bureau acted to register with and obtain State Department approval of a replacement Technical Assistance Agreement to permit FACS to engage in technical discussions with its foreign spacecraft bus manufacturer.

FACS demonstrates in this Application that the Bureau erred in finding that FACS had not made sufficient progress on system implementation to demonstrate an "intention to proceed" under settled precedent. Indeed, the Bureau improperly developed and applied, for the first time, a new standard for intent to proceed that violates the APA. The Bureau also failed to address the bulk of FACS's arguments, and misconstrued the law and misstated the factual record, raising serious questions whether the Bureau adequately and fairly considered the reasons offered by FACS to justify its extension.

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To: The Commission

## APPLICATION FOR REVIEW

Final Analysis Communication Services, Inc. ("FACS"), by its attorneys, submits this Application for Review pursuant to Section 1.115(d) of the Commission's Rules, 47 C.F.R. § 1.115(d). FACS demonstrates herein that under settled, long-standing precedent and for substantial, compelling public policy considerations, the Commission must reinstate FACS's authorization to construct, launch and operate a non-voice, non-geostationary mobile satellite service system in low Earth orbit ("Little LEO"),[1] grant FACS's request to extend the time to complete construction and launch of its system, and accordingly reverse the March 17, 2004 *Memorandum Opinion and Order*[2] adopted on delegated authority by the International Bureau (the "Bureau") in the above-referenced proceeding.

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[1] Final Analysis Communication Services, Inc. Application for Authorization to Construct, Launch and Operate a Non-Voice, Non-Geostationary Mobile Satellite System in the 148-150.05 MHz, 400.15-401 MHz and 137-138 MHz Bands, *Order and Authorization*, 13 FCC Rcd 6618 (Int'l Bur. 1998); *Memorandum Opinion and Order*, 16 FCC Rcd 21463 (2001) ("*FACS License*").

[2] Final Analysis Communication Services, Inc., *Memorandum Opinion and Order*, DA 04-727 (released Mar. 17, 2004) ("*FACS Order*").

## INTRODUCTION

The FACS license – one of five licenses for Little LEO systems issued by the Commission in 1998 – required that construction of the first two commercial satellites in the FACS constellation be completed by March 2002 and launched by September 2002. The *FACS License* declared that the license would become null and void if FACS failed to meet the milestone schedule, unless the Commission were to extend the schedule for good cause shown.[3] Recognizing that it would not be able to meet these milestones, FACS informed the Bureau that it would seek an extension[4] and promptly thereafter petitioned for a waiver of the milestone schedule in 2002.[5]

Section 25.117(e) of the Rules permits extension of a required date for milestone completion when the licensee demonstrates either that (1) additional time is required due to "unforeseeable circumstances" beyond the licensee's control, or (2) there are unique and overriding "public interest concerns" that justify an extension.[6] The FACS request explained that the need for an extension arose because of a series of intertwined and unseverable events

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[3] *See FACS License*, 13 FCC Rcd 6618, 6649 (¶ 93).

[4] The Order implies that the 2002 waiver request was somehow tardy and came as a surprise to the Commission. *FACS Order* ¶ 7. However, representatives of FACS met with Bureau staff on January 17, 2002, to discuss the sale, assignment and transfer of the assets and properties of FAI, the former parent of FACS and then-prime contractor, to New York Satellite Industries, LLC. (The transfer of control was subsequently granted.) During that meeting, FACS informed the Bureau of its need to submit a request to obtain an extension of its milestones.

[5] Final Analysis Communication Services, Inc. Petition for Waiver, SAT-MOD-20020329-00245 (filed Mar. 29, 2002) ("*Milestone Extension Request*"). FACS amended the *Milestone Extension Request* in June 2003, clarifying its reasons for requesting an extension of time to complete construction and launch of the system. Final Analysis Communications Services, Inc. Amendment to Petition for Waiver and Modification to Extend Milestones, SAT-AMD-20030606-00112 (filed Jun. 6, 2003) ("*Amendment*").

[6] 47 C.F.R. § 27.117(e). In 2003, the Commission renumbered Section 25.117(e) as Section 25.117(c). Amendment of the Commission's Space Station Licensing Rules and Policies and Mitigation of Orbital Debris, *Third Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 13486 (2003). To avoid confusion with earlier citations in the record, the subsection will continue to be referenced as Section 25.117(e).

that were unforeseeable and entirely beyond FACS's legal control – having nothing to do with the financial stability or business decisions of FACS – which in combination interrupted progress toward construction and launch of the first two satellites for a period of more than 20 months. These events included (a) the initiation by creditors of involuntary Chapter 7 bankruptcy dissolution proceedings against FACS's former parent and then-prime contractor, Final Analysis Inc. ("FAI"), (b) the time necessary thereafter to obtain Bureau approval to transfer control of FACS to its new parent, and (c) the time necessary after the Bureau finally acted to register with and obtain State Department approval of a replacement Technical Assistance Agreement ("TAA") to permit FACS (rather than the bankrupt FAI) to engage in technical discussions with its foreign spacecraft bus manufacturer (Polyot of Russia).

These roadblocks entirely prevented FACS, as both a legal and practical matter, from proceeding with system construction from September 2001 through May 2003. During this period, FACS nonetheless continued its efforts toward system implementation by actively participating in WRC-03 activities to obtain additional global allocations, which were successful. On March 17, 2004, however, the Bureau denied the extension request and revoked the FACS license. In the *FACS Order,* the Bureau concluded that FACS failed to demonstrate an intention to proceed with construction of its system, that the reasons offered by FACS were neither unforeseeable nor beyond its control, and that FACS had not justified a waiver of the milestone deadlines.

For the reasons demonstrated in detail below, the Bureau erred in finding that FACS had not made sufficient progress on system implementation to demonstrate an "intention to proceed" under the Commission's settled precedent. Indeed, the Bureau has developed and applied, for the first time in this proceeding, a standard for intent to proceed that requires licensees to have

*completed* satellite construction and launch prior to the milestone date in order to qualify for an extension. Such a rule is not only irrational, because it presumes away the need for an extension, but violates the Administrative Procedure Act because it was adopted without prior notice and cannot be reconciled with the Commission's past milestone extension decisions. The Bureau also failed to address the bulk of FACS's arguments, misconstrued or misrepresented the law, and misstated the factual record, calling into question whether the Bureau fairly considered the reasons offered by FACS to justify its extension.

In sum, since it was awarded a license, FACS has worked ceaselessly to develop and implement its system, despite a series of interrelated, cascading legal impediments. These roadblocks were initiated by a bankruptcy proceeding not of FACS, the licensee, but of its parent company, and not a voluntary Chapter 11 reorganization but an *involuntary* Chapter 7 proceeding wherein the Trustee was charged with dissolving FAI and selling-off its assets. The Bureau's analogy of this situation to a bankruptcy reorganization initiated because of financial mismanagement or any other sort of *voluntary* business strategy is therefore flatly wrong as a matter of both fact and law. Furthermore, the Bureau's analysis of the resulting delays, such as the issue of issuance of a new TAA by the State Department, is likewise flatly wrong, legally and factually.

But perhaps the Bureau's most serious error was in treating these several issues *seriatim,* without recognizing or analyzing the connections between them. Each of what the Bureau considers to be separate issues were, in fact, component parts of what is properly viewed as a single "unforeseeable circumstance" beyond FACS's control that justifies the extension. These

include the need to obtain Bureau approval to transfer control of FACS to its new parent[7] and to register with and obtain State Department approval of a new TAA to permit FACS to engage in technical discussions with its foreign spacecraft bus manufacturer and launch services provider. The delay from these legal impediments was exacerbated by the legal requirement that Commission approval for the transfer of control and the State Department registration and TAA approval had to be obtained sequentially.

Viewed in isolation, it may be that none of these impediments arose from requirements that were unusual, nor did any of them individually take an extraordinarily long time to complete. Under the unique circumstances of this complex situation, however, it simply is not defensible to consider these legal impediments as independent and severable events. Indeed, it is clear that in denying the extension, the Bureau misunderstood the undeniable fact that FACS would not have been required to obtain any of these approvals *at the points in the system implementation process at which they became necessary* absent the FAI involuntary bankruptcy. This critical fact makes these connected events an unforeseeable circumstance outside FACS's control, manifestly justifying an extension of the milestone schedule.

## I. THE BUREAU ERRED IN FINDING THAT FACS FAILED TO DEMONSTRATE INTENTION TO PROCEED

The *FACS Order* recognizes that in every prior instance where the Commission has denied a milestone extension request, construction of the satellites either had not begun or was

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[7] Although the need to obtain Commission approval for transfer of control of a license obviously is a foreseeable event, what was not foreseeable that it would take *seven months* for the Bureau to grant the *pro forma* request occasioned by the involuntary bankruptcy of the licensee's parent. *See* Part II *infra.* Moreover, until the transfer was approved by the FCC, FACS could not register with, let alone seek approval of, a new TAA from the State Department so that FACS could engage in technical discussions with Polyot.

not continuing, thus raising questions regarding the licensee's intention to proceed.[8] That is plainly not the situation here. Yet rather than apply this settled "intention to proceed" standard to FACS's request, the Bureau instead focused exclusively in this case on whether actual construction occurred (disregarding that ground stations have been constructed and a launch services agreement has been executed).[9] While actual system construction is a factor that can indicate intention to proceed, it has never been deemed a mandatory requirement under governing precedent. Indeed, decisions show that the Commission looks much more broadly to determine whether a licensee has indicated a commitment, *i.e.*, an "intention," to proceed with system construction and implementation.

Numerous decisions identify the kinds of efforts that have been found to be sufficient for purposes of a milestone extension request to demonstrate concrete progress toward construction and operation of a satellite system, in other words, a licensee's intention to proceed. For example, in the *Advanced Order*, the Commission found that arranging for financing for completion and launch of the system, contracting with suppliers for user terminal equipment, and contracting for satellite launch services were the kinds of efforts that would justify an extension request.[10] In the *AMSC Order*, the Commission found that construction and implementation was proceeding sufficient to warrant an extension after finding that a construction contract had been signed for procurement of the satellite, that *basic* technical parameters had been finalized and that the licensee had actively participated in the international coordination process for its

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[8] *FACS Order* ¶ 18, *citing* GE American Communications, Inc., *Order and Authorization*, 16 FCC Rcd 11038, 11041 (¶ 10) (Int'l Bur. 2001); AMSC Subsidiary Corp., *Memorandum Opinion and Order*, 8 FCC Rcd 4040, 4042 (¶ 13) (1993) ("*AMSC Order*").

[9] *FACS Order* ¶ 35.

[10] Advanced Communications Corp., *Memorandum Opinion and Order*, 11 FCC Rcd 3399, 3412 (¶¶ 32-33) (1995) ("*Advanced Order*").

satellite.[11] In the *GE Americom Order*, the Commission found that the licensee had demonstrated intention to proceed despite the fact that design of the satellite had not been finalized.[12] In the *2000 EarthWatch Order*, the Commission found intention to proceed through its reliance on the licensee's representations made in the extension request.[13] The Commission also has held that a licensee demonstrates intention to proceed sufficient to warrant a milestone extension merely by signing of a non-contingent contract for construction of the system.[14]

### A. FACS's Demonstration of Intention to Proceed is Consistent with Governing Precedent

In this case, the record is replete with evidence showing that FACS made substantial progress on system development that amply demonstrates, pursuant to governing precedent, intention to proceed in a far more concrete way than executing a construction contract.

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[11] AMSC Subsidiary Corp., *Memorandum Opinion and Order*, 8 FCC Rcd 4040, 4042 (¶ 14) (1993) ("*AMSC Order*") (emphasis added). AMSC had requested extensions of the construction completion and launch dates for a satellite. The Commission noted that "AMSC is proceeding with construction of AMSC-1 and its plans for the satellite, while continuing to undergo some refinement, are essentially completed." *Id.* ¶ 10. However, the Commission granted AMSC's request to construct the AMSC-1 satellite with operational capability in additional frequency bands, which required AMSC to complete additional design work. Thus, the Order makes clear that design of the AMSC-1 satellite was not at post-CDR stage. The Commission granted AMSC an 18-month extension of its construction completion milestone, finding that, in addition to other reasons, an extension was justified because it was continuing to construct its satellites, and because extension furthered the public interest by making new and needed mobile satellite services available. *Id.* ¶ 14.

[12] GE American Communications, *Memorandum Opinion and Order*, 7 FCC Rcd 5169, 5169 (¶¶ 5, 8) (1992) ("*GE Americom*").

[13] In the *2000 EarthWatch Order*, the Bureau relied on representations made by the licensee in its extension request to find that there was no basis for questioning whether the licensee intended to proceed with its system. EarthWatch Incorporated, *Order and Authorization*, 15 FCC Rcd 13594, 13597-98 (¶ 10) (2000) ("*2000 EarthWatch Order*").

[14] *See, e.g.*, Columbia Communications Corp., *Memorandum Opinion and Order*, 15 FCC Rcd 15566, 15572 (¶ 16) (Int'l Bur. 2000) (once a licensee has met its construction commencement milestone, the Commission can be more certain that it will proceed with its proposed system); Norris Satellite Communications, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 22299, 22306 (¶ 17) (by failing to commence construction or request extension within milestone deadline, licensee did not demonstrate a commitment to proceed with its proposed system); *GE Americom*, 7 FCC Rcd at 5169 n.7. (the signing of a noncontingent construction contract satisfies the commencement of construction milestone).

- First, FACS has represented that it commenced construction of its first two satellites.[15]

- Second, FACS previously demonstrated that it had met its commencement of construction milestone,[16] which, as discussed above, the Commission has found demonstrates a licensee's commitment to proceed with its proposed system.

- Third, FACS has expended considerable time and in excess of $70 million on its commercial system implementation,[17] including making significant progress on spacecraft design and construction, ground station implementation[18] and launch arrangements.[19]

In view of this evidence, the Bureau's conclusion that there is no basis to conclude that the expenditures represent progress toward system implementation[20] raises serious questions whether the Bureau adequately and fairly considered the record. FACS voluntarily elected to submit additional documentation as evidence illustrating the demonstrable progress it had made on system implementation, including evidence of construction efforts at CDR stage.[21] Nevertheless, despite this documentation, the fact that operational ground stations had been

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15 *Milestone Extension Request* at 3.

16 *Id.*

17 *Milestone Extension Request* at i. To eliminate doubt that these expenditures were for implementation of its licensed commercial system, FACS provides with this Application a letter from its forensic auditor, Thomas J. Raffa, to confirm that approximately $77 million (in payments of approximately $21 million in cash and $56 million in stock transfers) were expended on the design, development, construction and launch of the FACS system. The disbursements do not include costs associated with R&D programs or with domestic and international regulatory efforts or other legal costs. *See* Exhibit 1.

18 The record shows that FACS has constructed and continues to maintain fully implemented and operational ground systems, including ground stations in Logan, Utah, and a ground station and control center in Lanham, Maryland. *Milestone Extension Request* at 12. FACS stated that the launch services agreement included four dedicated Cosmos launch vehicles. Moreover, during its May 8, 2003 *ex parte* presentation to Bureau staff, FACS made a PowerPoint presentation that included a video clip with footage showing the actual launch vehicles, with the Final Analysis logos painted on each side. The presentation was made for the express purpose of visually demonstrating specific progress on system implementation.

19 It is undisputed that FACS entered into a final, non-contingent launch services agreement for the launch of its commercially licensed constellation.

20 *FACS Order* ¶ 15.

21 The documents were not submitted to show that the design of any particular system was at a certain stage because such showing is not required.

constructed, and the fact that certain components had been built to permit testing so that studies could be completed for submission to WRC-03, the Bureau found that "construction efforts never advanced to the preliminary design review ("PDR") stage, much less to critical design review ("CDR") or to actual construction work."[22] Yet, as discussed above, it is settled that the stage of design is not dispositive of progress on system implementation.[23] Moreover, FACS met with Bureau staff on numerous occasions to respond to questions Bureau staff might have regarding its request and the record. The Bureau *never* indicated that it had *any* questions about FACS's intent to proceed, and, in fact, refused to answer questions about what concerns, if any, it may have been harboring. Given the importance of this issue, as a matter of basic procedural fairness the Bureau should have made FACS aware of its concerns so that any lingering questions could have been answered and the Bureau's misinterpretations of the record avoided.

At bottom, given this unequivocal evidence, the Bureau's findings that the record is devoid of any construction efforts and that implementation never got to the stage where "metal was being bent"[24] are both incredible and irrelevant. Accordingly, there is no basis on this record for questioning whether FACS intends to proceed with its Little LEO satellite system.

### B. The Bureau Erred By Not Giving Due Consideration to FACS's WRC-03 Activities in Ascertaining Progress Toward System Implementation

The Bureau erred in concluding that the basis for adopting the rule giving FACS first priority to apply for additional internationally allocated spectrum was merely because of

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22 *FACS Order* ¶ 13.

23 The Bureau also erred in finding that "most of the documents were undated and unsigned." In fact, most of the documents are dated. That some documents are not signed is irrelevant. That finding is refuted by Document #34 (dated Jan. 16, 2001), which states that design varies between pre-PDR and CDR and specifies that many systems were, in fact, at CDR stage. As further example of design work that had passed the CDR-stage, FACS attaches hereto as Exhibit 2, a signed statement, dated September 16, 2002, certifying that the Earth Horizon Sensor Subsystem had satisfied CDR requirements.

24 *FACS Order* ¶ 14.

agreement reached among the other second processing round applicants.[25] That the FACS license was issued without sufficient spectrum is beyond dispute.[26] Consequently, FACS takes strong exception to the Bureau's *ad hominem* conclusion that the FACS expenditures dedicated to pursuing an international spectrum allocation were "a misallocation of resources."[27] Given that the Commission specifically recognized that FACS would need to obtain additional spectrum to "complete system implementation," it was not only appropriate, but essential, that FACS expend resources to seek additional global allocations. Accordingly, the Bureau's refusal to consider FACS's efforts at WRC-03 to obtain additional spectrum allocations in determining whether FACS was proceeding to implement its system undercuts any claim that the Bureau has adequately considered the facts of this case.[28]

### C. The Bureau Improperly Adopted a New Standard for Demonstrating Intent to Proceed in Violation of the APA

Rather than deciding whether FACS had demonstrated intention to proceed under governing precedent, the Bureau adopted and applied a new standard that would effectively

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[25] *FACS Order* ¶ 17.

[26] *See* Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service, *Report and Order*, 13 FCC Rcd 9111, 9126 (paras. 35-36) (1997) ("*Second Processing Round Order*") (In explaining why it adopted a rule granting System 2 a first priority to apply for and use a limited amount of future allocated spectrum, the Commission stated: "[m]aking available a limited amount of future downlink spectrum allocated for the Little LEO service solely to System 2 for the purpose of completing the implementation of its second round system is likely to result in three large systems capable of providing a wide range of Little LEO services.").

[27] *Id.*

[28] The only rational explanation for why a small company would expend resources for the purpose of being able to obtain access to that spectrum is that the company was demonstrating its intention to proceed. Moreover, given that the Bureau was a partner with FACS in the WRC-03 activities, it is unconscionable that the Bureau disregard those efforts in the calculus of intent to proceed. In addition, the U.S. Government accepted four delegates to WRC-03, which FACS paid for, who were used to further U.S. positions, and now the Bureau has the audacity to claim it was a misallocation of resources. Finally, FACS observes that WRC-03 represented the first occasion since 1992, that additional spectrum had been globally allocated to LEO systems. The Bureau's refusal to give due consideration to FACS's WRC-03 activities in ascertaining progress toward system implementation is a slap in the face, particularly in light of these efforts.

preclude the grant of any request to extend construction completion and launch milestones under any circumstance. Specifically, the Bureau announced that the only way in which FACS could establish intent to proceed would be "by completing construction of the first two commercial system satellites and launching those satellites into orbit."[29] The Bureau did not provide any rationale for applying the new standard, which as explained above directly conflicts with Commission precedent. It is also self-evident that if FACS had built and launched the first two satellites, no extension would be required, so that the new standard is circular and inconsistent with the basic purpose of a milestone extension. Moreover, applying the new standard to FACS's request constitutes retroactive rulemaking, disapproved by the Supreme Court in *Bowen*, and violates the notice requirements of the APA.[30] Indeed, the Commission itself recently affirmed that it is obligated not to apply newly-announced policies retroactively.[31]

## II. THE BUREAU ERRED BY NOT PROPERLY CONSIDERING THE INVOLUNTARY BANKRUPTCY OF FAI (FACS'S FORMER PARENT AND PRIME CONTRACTOR) AS JUSTIFICATION FOR AN EXTENSION

The Bureau's analysis of the bankruptcy issues presented in this case, involving the Chapter 7 bankruptcy of a parent of the licensee, initiated involuntarily, is erroneous as a matter of law. The *FACS Order* is wrong because it (a) confuses FACS and FAI, (b) assumes a different set of facts than those in the record, (c) misstates the arguments advanced by FACS as to how the FAI bankruptcy legally prevented FACS from proceeding with system

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29 *FACS Order* ¶ 35.

30 *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 209, 219-20 (1988); 5 U.S.C. § 553(b)(3), (c). The Commission recently adopted new milestones and certain standards for determining milestone compliance in the *First Space Station Reform Order*, 18 FCC Rcd 10760, 10827-38 (2003). However, the new rules and standards apply to all satellite licensees on a going-forward basis, *see id.* at 10833 (¶ 189), including NGSO licenses granted after September 11, 2003; s*ee also* 68 Fed. Reg. 51499, 51507 (Aug. 27, 2003). Accordingly, the new standards do not govern the FACS extension request.

31 *See* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, *Memorandum Opinion and Order*, FCC 04-43, ¶ 15 (released Mar. 18, 2004).

implementation, and (d) misinterpreted bankruptcy law and the Chapter 7 Trustee's instructions.[32]

*First,* the Bureau erred in citing to the *Globalstar Order* as precedent for a legal analysis rejecting bankruptcy as a justification for milestone extensions that was not discussed in that decision.[33] Globalstar did not claim that it needed an extension based on its bankruptcy.[34] Moreover, the Bureau did not base its decision to deny Globalstar's request on the rationale that bankruptcy was not a justification for failure to meet milestones.[35]

*Second,* the Bureau's reliance on the Iridium and ICO bankruptcies[36] is inapposite because, to the best of FACS's knowledge, neither company sought a milestone extension. In neither case was the Bureau ever confronted with having to make a decision on extending milestones, nor was a record developed that would have enabled the Bureau to do so.[37]

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[32] FACS is engaged in litigation against General Dynamics Corp. ("GD") in which FACS alleges that GD and one of its affiliates breached two "strategic partnership" contracts requiring substantial equity investments (more than $30 million in stock purchases) in FACS in 1999 and 2000, prior to the FAI bankruptcy. *Final Analysis Communication Services, Inc. v. General Dynamics Corp., et al.*, No. PJM 03-307 (D. Md.). The expressed objective of this relationship was to provide strategic capital to FACS in order to support a $150 million bond offering originally planned for the fourth quarter of 1999. FACS has not raised these financial issues, or the resulting damage to its capital position and financing opportunities, in the milestone extension proceedings before the Commission because it is apparent that such business relations do not qualify for regulatory purposes as unforeseeable circumstances warranting a milestone extension.

[33] Globalstar, L.P., *Memorandum Opinion and Order*, 18 FCC Rcd 1249 (Int'l Bur. 2003) ("*Globalstar Order*").

[34] The Bureau explained that "[i]n summary, Globalstar seeks an extension because, in evaluating the lower than expected subscriber levels and MSS business generally, it has modified its business plan in an effort to avoid a 'substantial premature expansion of the capacity [that] would be uneconomic and wasteful of resources.'" *Globalstar Order*, 18 FCC Rcd at 1252 (¶ 7).

[35] *Id.* at 1252 (¶ 8).

[36] *FACS Order* ¶¶ 22-23.

[37] It is disingenuous and highly inappropriate for the Bureau to infer that it had reached any decision on extending a particular licensee's milestones based on the bankruptcy of the licensee's parent when, in fact, no extension request has been made. Moreover, the statements that "the Bureau held licensees to their implementation milestone deadlines despite ongoing bankruptcy proceedings" and "[t]hese recent International Bureau decisions are consistent with earlier Commission decisions involving Commission licensees in federal bankruptcy proceedings," *FACS Order* ¶ 24, are misplaced because neither case

*Third*, the Bureau erred in relying on the *Geostar*,[38] *JET-TEL*,[39] and *Nextwave*[40] cases as precedent for rejecting FACS's claim that the bankruptcy of FACS's parent, FAI, was part of an unforeseeable circumstance beyond FACS's control. In *Geostar*, the Common Carrier Bureau did not address the bankruptcy issue as it related to the milestone extension request. In stark contrast to the Bureau's claim here that Geostar's "bankruptcy was not considered a justification for its failure to meet its milestones,"[41] the Common Carrier Bureau had dismissed Geostar's extension request as moot because the extension had been sought in conjunction with applications seeking to make major modifications to the licensee's satellite system, which had been denied.[42] In fact, Geostar had not missed any milestones.

The *JET-TEL* case also is inapposite because, unlike FACS, JET-TEL had argued that the bankruptcy of its principal financing source created an economic hardship that impeded JET-TEL's ability to meet its construction milestones. **To be clear, FACS was not part of the FAI bankruptcy and was not insolvent.**[43] And, the Bureau's reliance on the *Nextwave* case to FACS's request is equally unavailing given that *NextWave* is limited to cases where an agency has revoked a license for non-payment of a debt that is dischargeable in bankruptcy. There is no debt at issue here.

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concerns the impact of bankruptcy on a milestone extension request. In fact, in both cases the Bureau was addressing bankruptcy in the context of applications for assignment and transfer of control.

[38] Geostar Positioning Corp., *Memorandum Opinion and Order*, 6 FCC Rcd 2276 (Comm. Car. Bur. 1991) ("*Geostar*").

[39] JET-TEL Group Limited Partnership Air-Ground Station KNKG802, *Order*, 11 FCC Rcd 21215 (Wireless Bur. 1996) ("*JET-TEL*").

[40] *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003) ("*NextWave*").

[41] *FACS Order* ¶ 24.

[42] *Geostar*, 6 FCC Rcd at 2278 (¶ 17).

[43] Indeed, the Bureau's remark that *JET-TEL* stands for the proposition that "lack of financing cannot be used as a basis for granting an extension of time to construct," *FACS Order* ¶ 25, clearly demonstrates the Bureau's failure to comprehend and address the actual arguments made in FACS's request.

*Fourth,* the Bureau has misunderstood and misstated key facts, misinterpreted bankruptcy law as it applies to this case, and misconstrued the Trustee's instructions directing FACS not to take any action outside the "normal course of business." With regard to misunderstanding key facts, the Bureau failed to distinguish between FACS and FAI when it made critical findings about FACS's ability to control the course of the FAI bankruptcy proceeding. For example, while the Bureau correctly notes that in a Chapter 7 proceeding, the debtor has the right to oppose the petition when it is filed and has a one-time right to convert the case into a Chapter 11 reorganization at any time,[44] its finding that "the decision to resort to bankruptcy, or to fail to contest a bankruptcy initiated by creditors is a business decision"[45] makes clear that it has mistakenly identified FACS as the debtor.[46] Further evidence of the Bureau's confusion as to FACS's identity is the statement that "debtors cannot use bankruptcy to obtain a competitive advantage by exempting themselves from regulatory obligations that their competitors must bear."[47] FACS was not the debtor. The Bureau's inference, therefore, is inappropriate and misplaced.

The Bureau's complete disregard of the fact that FACS and FAI are and were distinct legal entities is evident from its misinterpretation of the Trustee's specific instructions. FACS had argued that it was prohibited by the bankruptcy Trustee from taking actions to further implement its system and provided documentary evidence showing that the Trustee directed FACS not to take any action outside the normal course of business and, in fact, had threatened to

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44 *FACS Order* ¶¶ 28-29.

45 *FACS Order* ¶ 30.

46 As explained in the record, equal ownership of FAI created a decision-making deadlock which prevented FAI from opposing the bankruptcy. *See FACS Order* ¶ 4.

47 *FACS Order* ¶ 36.

institute legal proceedings in the event that FACS took such actions.[48] The Bureau concluded that this was not a "reasonable interpretation" of the Trustee's instructions because it mistakenly thought that the ordinary course of FACS's business was to construct and launch communications satellites.[49] But it was FAI, the bankrupt entity and the prime contractor, that was the party responsible for constructing and launching satellites – not FACS. The Bureau then opines that FACS should have done more, including asking the court to intervene and overrule the Trustee's judgments.[50]

Given that through persistent efforts, FACS was able to convince the Trustee, despite significant opposition, to expedite the sale of the FAI assets in a remarkably three short months,[51] the Bureau's speculation about what FACS "should have" or "could have" done is unavailing, particularly given that the institution of additional legal proceedings against the Trustee undoubtedly would have caused further delay. In any event, the Bureau's unilateral

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[48] *Amendment* at p.12. Moreover, the Bureau misinterpreted bankruptcy law when it found that the automatic stay in the parent's bankruptcy does not apply to "actions by" a subsidiary. *FACS Order* ¶ 30. The cited case, *In re Winer*, restates the bright-line principle that the automatic stay does proscribe actions "brought against" a nondebtor affiliate of a bankrupt entity. *In re Winer*, 158 B.R. 736, 743 (Bankr. N.D. Ill. 1993) (the automatic stay "does not proscribe actions brought against nondebtor entities"). In other words, for example, a nonbankrupt subsidiary of a bankrupt parent cannot use the automatic stay (which protects the parent against third party actions) to protect the subsidiary from actions brought by third parties. However, that principle does not apply to or otherwise affect or relate to *actions by* the subsidiary. For further background on the FAI Chapter 7 bankruptcy and the impact of that bankruptcy on FACS's ability to operate its business, including the execution of new contracts while the bankruptcy was pending, see the May 15, 2003 *ex parte* Letter from Patricia J. Paoletta, counsel to New York Satellite Industries, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission.

[49] *FACS Order* ¶ 33. Indeed, the Bureau's finding completely disregards the fact that the reason that the Trustee found it necessary to send written instructions to FACS was precisely in response to FACS attempts to move system implementation forward during the pendency of the FAI bankruptcy. The Bureau's conclusion also disregards the fact that the principal contracts were held by FAI, not FACS.

[50] *FACS Order* ¶ 33.

[51] The *FACS Order* simply fails to acknowledge record evidence demonstrating that FACS moved swiftly to convince the Trustee to expedite the sale of the FAI assets, precisely to preserve the value of the FACS license. *See* January 28, 2004 *ex parte* Letter from Patricia J. Paoletta, counsel to New York Satellite Industries, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission.

interpretation of the applicability of bankruptcy law to this case and its construction of the Trustee's instructions is not dispositive and, more importantly, is controverted by the record.[52]

## III. THE BUREAU ERRED BY NOT PROPERLY CONSIDERING THE NEED TO OBTAIN APPROVAL FOR THE TECHNICAL ASSISTANCE AGREEMENT ("TAA") AS JUSTIFICATION FOR AN EXTENSION AND BY MISINTERPRETING RULES ON ITAR LICENSING REQUIREMENTS

In light of the undeniable need for FACS to register with and obtain approval from the State Department for a new TAA, necessary only due to the involuntary bankruptcy against FAI, the Bureau erred by treating it as a discrete and severable event. FAI, as prime contractor, already had obtained approval for a TAA years earlier. Accordingly, that FACS would ever need approval for a TAA was not a circumstance that was reasonably foreseeable and certainly not within its control. It was therefore improper for the Bureau to examine the need to obtain approval for a new TAA separately from the chain of events which, in combination, created the unforeseeable circumstance beyond the control of FACS.[53]

Apart from its error in treating the TAA matter separately as justification for a milestone extension, the Bureau's conclusion that the events related to needing approval for a TAA in the first instance (*i.e.*, due to the nationality of the spacecraft bus manufacturer) resulted from a business decision, which cannot be used to justify a milestone extension, is flawed.[54] The Bureau's flawed conclusion is based, in part, on its misinterpretation of the International Traffic in Arms Regulations ("ITAR") requirements and, in part, on a logical fallacy.

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[52] The Bureau's statement that "there is no support for this view in the record," *FACS Order* ¶ 12, is particularly bizarre, given that FACS's view is the only view supported by the record.

[53] That it took seven and one-half months to get approval for the new TAA is not in dispute. *See FACS Order* n.98. The fact that approval for a new TAA would not have become necessary but for the bankruptcy of FAI is what is relevant because that makes it part of the unforeseeable circumstance, not the length of time needed to obtain the approval.

[54] *FACS Order* ¶ 40.

First, the Bureau's conclusion "that the ITAR requirements do not apply to trade with North Atlantic Treaty Organization allies or major non-NATO allies of the United States"[55] is false. A license is required for export of all items on the United States Munitions List, including satellites,[56] regardless of country destination, unless a license exception applies. License exceptions are most commonly permitted, for example, for exports to Canada or exports to the U.S. military abroad. Thus, unless FAI or FACS had made arrangements with a Canadian entity for launch services[57] and to manufacture the spacecraft bus and an exception received, approval of a TAA would have been required. In addition, Section 124.15(a) of the ITAR rules[58] provides that exports of certain satellites or related items to a non-NATO country or a country that is not a major non-NATO ally require "special export controls," which the Bureau correctly notes. However, the special export controls, which include making arrangements with the DOD to monitor satellite exports and acquiring National Security Agency ("NSA") approval for a technology transfer control plan, are *in addition to* the regular licensing requirements required by ITAR, including approval for a TAA. In other words, while FACS or FAI *might have avoided* the need for special export controls by arranging for launch services and the manufacture of the spacecraft bus with a company from a NATO country, it still would have been required to obtain approval for a TAA to export technical data to a company in a NATO country or a major non-NATO ally of the U.S. The Bureau's conclusion that "the converse is that the ITAR requirements do not apply to trade with the North Atlantic Treaty Organization allies or major

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55 *FACS Order* ¶ 39.

56 *See* 22 C.F.R. ¶ 121.1.

57 To the best of FACS's knowledge, there is no Canadian company that provides launch services.

58 22 C.F.R. § 124.15(a).

non-NATO allies of the United States," is simply incorrect and does not follow from the statement in the preceding sentence.[59]

Second, the Bureau engages in a logical fallacy as a basis for disallowing the need to obtain approval for a new TAA as justification for a milestone extension. The Bureau argues that if it is reasonable to assume that the decision to make arrangements with a company in a foreign country that is subject to ITAR requirements[60] is a business decision (which, under Commission precedent, cannot be used to justify a milestone extension), then it is reasonable to assume that the need to obtain approval for a new TAA is also a business decision. The fallacy with this argument is that the events relating to the need to obtain approval for a new TAA were not based on any business decision by FACS. To the contrary, the events that led to the need for approval of a new TAA were the initiation of the involuntary bankruptcy proceeding against FAI and the subsequent requirement to obtain Bureau approval to transfer control of FACS from the bankruptcy Trustee to its new parent. Indeed, the *FACS Order* explicitly makes such avowal.[61]

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[59] Moreover, pursuant to Section 124.15(c) of the ITAR rules, 22 C.F.R. § 124.15(c), although application of "special export controls" to NATO and major non-NATO allies is not required, "such export controls may nonetheless be applied, in addition to any other export controls required under this subchapter, as appropriate in furtherance of the security and foreign policy of the United States. Further, the export of any article or defense service controlled under this subchapter to any destination may also require that the special export controls identified in paragraphs (a)(1) and (a)(2) of this category be applied in furtherance of the security and foreign policy of the United States." Therefore, even if FAI or FACS had made arrangements for launch services and manufacture of the spacecraft bus with a company in a NATO country or major non-NATO ally, transfer of its satellite-related technical data to that company could have been subjected to export controls equivalent to those required by export to Polyot.

[60] Additionally, FACS takes exception to the apparent inference in the *FACS Order* that FACS would not have encountered a large part of the delay had it not made arrangements with a Russian company. *FACS Order* ¶¶ 39-40. FACS notes that its decision to use a Russian company for launch services and to manufacture the spacecraft bus is consistent with U.S. policy. For example, the U.S. Civilian Research and Development Foundation ("CDRF"), a nonprofit organization that the U.S. Department of Defense helped establish, seeks to advance the transition of foreign weapons scientists to civilian work and to avoid proliferation by fostering collaborative research and development projects between the U.S. and the Newly Independent States through a variety of programs, including linking U.S. businesses with NIS counterparts to pursue commercial ventures. *See* www.crdf.org/mission.html.

[61] *See FACS Order* ¶ 38, stating that "[a]bsent the bankruptcy proceeding, the State Department's first technical assistance agreement would not have expired until late 2005."

## IV. THE BUREAU'S CLAIM THAT ENTRY INTO THE MARKET HAS BEEN PRECLUDED IS REFUTED BY THE RECORD

Contrary to the Bureau's claim,[62] FACS's failure to meet its milestones has not precluded new entrants into the market. The following facts support this conclusion. First, no comments were filed in response to FACS's extension request.[63] Second, while FACS filed its *Milestone Extension Request* on March 29, 2002, the Bureau did not place it on public notice until June 30, 2003.[64] Third, although the System 1 licensee filed a request to extend its milestones on February 28, 2002, the Bureau *never* placed the System 1 request on public notice. On March 19, 2004, the System 1 licensee voluntarily submitted its license for cancellation[65] and the Bureau subsequently cancelled the license.[66] Fourth, on April 23, 2003, the Bureau issued an order denying E-SAT, Inc.'s request to extend its milestones and declaring the E-SAT license null and void.[67] Fifth, to the best of FACS's knowledge, the Bureau has not received nor acted upon any applications seeking authority to use the E-SAT or other Little LEO spectrum.

The above facts strongly support the conclusion that parties were not interested in using the Little LEO spectrum. Such interest would be evidenced by the Bureau acting promptly to put the extension requests on public notice and then taking action, and by comments filed in response to the extension requests. Certainly, if such interest existed, the Bureau would not have waited so long to put the requests on public notice and to act (indeed, more than two years in the

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62 *See, e.g., FACS Order* ¶ 45.

63 *FACS Order* ¶ 7.

64 Public Notice, Report No. SAT-00154 (released Jun. 30, 2003).

65 Letter from Robert A. Mazer, counsel for Leo One USA Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Mar. 19, 2004).

66 Leo One Worldwide, Inc., *Memorandum Opinion and Order*, DA 04-792 (released Mar. 25, 2004)

67 E-SAT, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 7662 (2003). No comments were filed in response to E-SAT's milestone extension request. *Id.* at ¶ 5.

case of System 1). Such interest also would be evidenced by parties filing applications to use the E-SAT spectrum. However, such interest apparently does not exist. Accordingly, based on the above facts, it is reasonable to conclude that, in this instance, warehousing of spectrum has not occurred. In fact, how can there be warehousing if there is no interest?

It is clear that both the Big LEO and Little LEO industries never developed as the Bureau had originally envisioned. In the meantime, the market has changed dramatically. Apparently, there has been little, if any, interest in putting the Little LEO spectrum to use. However, as demonstrated by its efforts discussed herein, FACS is very interested in putting this spectrum to use. Yet the Bureau insists that the only way that FACS can now follow through on that interest is submitting a completely new application, which will cause FACS to incur substantial additional expense, including a substantial processing fee (more than $320,000) and a bond in the amount of $7.5 million.[68] In light of the above, denying FACS's milestone request would only result in FACS incurring significant and unnecessary additional expense without any countervailing benefits.

## V. THE BUREAU ERRED BY FAILING TO ADEQUATELY CONSIDER THE PUBLIC INTEREST REASONS OFFERED FOR GRANTING FACS'S REQUEST

The Bureau also could have granted FACS's request for extension under Section 25.117(e)(2) of the Rules by finding that FACS had demonstrated unique and overriding public interest concerns to justify the extension. Alternatively, the Bureau could have concluded that FACS had shown good cause for a waiver of its milestone schedule.[69] Waiver is appropriate

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[68] *FACS Order* ¶ 47.

[69] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. *See also WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (WAIT Radio); *GE American Communications Inc.*, 16 FCC Rcd 11038, 11041 (Int'l Bur. 2001). Generally, the Commission grants a waiver of its rules only if the relief requested would not undermine the policy objectives of the rule in question, and would otherwise serve the public interest. *WAIT Radio*, 418 F.2d at 1157.

where special circumstances warrant a deviation from the rules, and where such deviation would better serve the public interest than strict adherence to the general rule.[70] Circumstances that justify a waiver include considerations of hardship, equity, or more effective implementation of overall policy.[71]

However, the Bureau gave inadequate consideration to the public interest reasons offered for granting FACS's request. For example, the Bureau rejected FACS's assertion that the public interest in competitive, affordable data services justified FACS's extension, citing to its *NEXSAT* decision.[72] However, the Bureau's reliance on *NEXSAT* is misplaced because, unlike FACS, NEXSAT had argued that milestones were a barrier to entry for small competitors.[73] Moreover, in *NEXSAT*, the Bureau determined that active competition already existed in the marketplace. In contrast, FACS argued that if milestones were strictly enforced in this instance, then there only would be one operational Little LEO system. Moreover, FACS argued that granting its extension was the most effective way to ensure a competitive Little LEO industry. Commission precedent provides support for FACS's assertion. In the *Second EarthWatch Modification Order*, the Bureau granted a request to extend the dates for completing satellite construction launch by two years after finding that grant of the request "is likely to promote competition in the market" and that given the early stages of develop of the industry, "a more lenient approach [to the extension request] was appropriate."[74] Similar circumstances exist here. In fact, the Commission has determined that the Little LEO service provides a variety of valuable low cost

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70 *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990).

71 *WAIT Radio*, 418 F.2d at 1159.

72 *FACS Order* ¶ 42.

73 *NEXSAT*, 7 FCC Rcd at1991 (¶ 10).

74 EarthWatch Incorporated, *Order and Authorization*, 12 FCC Rcd 19556, 19559 (¶ 10) (Int'l Bur. 1997) ("*Second EarthWatch Modification Order*").

data service to the public and that the public interest in availability of such services would best be served by a competitive industry. To date, there is only one operational Little LEO system in the market. FACS wants to succeed in achieving the Commission's goal of providing a truly competitive industry. With the problems causing delay behind it, and with so much progress already made, it would be contrary to all notions of equity, as well as to the public interest to deny FACS's request and eliminate the opportunity for FACS to succeed.[75]

Second, failure to extend FACS's milestones will critically undermine the credibility of U.S. positions at future WRCs. Many administrations, particularly those from developing countries, supported the U.S. position seeking additional allocations for Little LEOs at the last three WRCs. These countries believed that Little LEO service was viable and would provide substantial benefits to their respective countries at low cost, based in large part on the strength of U.S. advocacy. Revoking the license of the commercial party that fought hardest and had first priority to apply for the spectrum, at best, will be viewed as inconsistent, and more likely, as a betrayal. The practical impact will be to adversely effect the ability of the U.S. to obtain support in the future for U.S. positions.

## CONCLUSION

In view of the considerable effort and money expended to establish its system, the progress attained, and the overall success that FACS drove at WRC-03 toward securing additional international spectrum allocations, the compelling interest of service to the public argues for granting the requested extension. Moreover, extending FACS's milestone schedule would also serve important Commission objectives, including advancing competition in the

[75] This is further underscored by the fact that FACS will be able to provide competitive service as soon as its first commercial satellites are successfully place in orbit. Due to the technical characteristics of Little LEO operations and the nature of the services offered, service may be initiated, and the public may enjoy the benefits of competition, even before the entire constellation is deployed.

Little LEO market, consistent with the mandate of Section 10 of the Communications Act,[76] and ensuring that U.S. positions at future WRCs are treated with credibility.

For all the reasons stated in this Application for Review, FACS respectfully requests that the Commission reverse the *Memorandum Opinion and Order* released by the International Bureau (the "Bureau") in the above-referenced proceeding, to reinstate FACS's authorization to construct, launch and operate a non-voice, non-geostationary mobile satellite service system in low Earth orbit ("Little LEO"), and to grant FACS's request to extend the time to complete construction and launch of its system.

Respectfully submitted,

FINAL ANALYSIS COMMUNICATION SERVICES, INC.

By: Randall W. Sifers

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*Its Attorney*

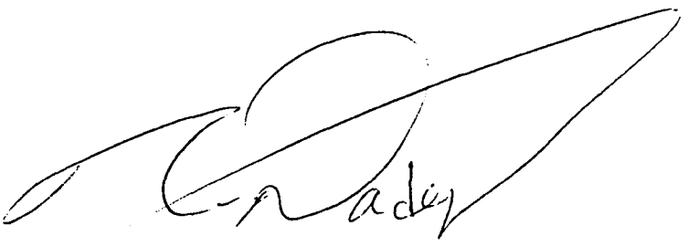
April 16, 2004

[76] 47 U.S.C. § 160.

**DECLARATION**

Pursuant to Section 1.16 of the Commission's Rules, 47 C.F.R. § 1.16, I, Nader Modanlo, Chairman and President of Final Analysis Communication Services, Inc., hereby submit this declaration in support of the foregoing Application for Review ("Application") dated April 16, 2004. I have read the Application and declare that the statements contained therein are true of my own knowledge, except as to matters which are therein stated on information and belief, and as to those matters, I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 2004.



Nader Modanlo
Chairman and President
Final Analysis Communication Services, Inc.

RAFFA

CONSULTING
ACCOUNTING
TECHNOLOGY

April 15, 2004

Mr. Jan Friis
Final Analysis Communication Services, Inc.
9701-E Philadelphia Court
Lanham, MD 20706

Dear Mr. Friis:

At your request, the enclosed information is meant to give you a summary of our understanding of total costs incurred by Final Analysis Communication Services, Inc. (FACS) from 1998-2001 related to the design, development, construction and launch of the FACS System, a global constellation of non-voice, non-geostationary low earth orbit satellites. The enclosed results are a byproduct of our prior work relative to services performed under previous engagements.

**General Involvement with FACS**
My firm and I were employed by the law firm of Stein, Sperling, Bennett and DeJong to provide certain specific forensic auditing services. The basic scope of our assignment was initially to review and analyze the transactions of FACS for 2001 and 2002 to assess the general condition of the records of the company and of the company, itself. If any exceptions were noted or any fraud was uncovered during this process, we were to report it.

More recently, we were asked to expand our testing to include January 1, 1995 through 2001. In so doing, we recognized that much of the details of transactions would be supported from charges from the parent company of FACS, Final Analysis, Inc. (FAI). As such, we performed a review of the cash receipts and disbursements from 1995 through December of 2001, (although very few transactions occur in FAI after September of 2001 as it became subject of an involuntary bankruptcy proceeding).

In general, our work encompassed what is known as a ***proof of cash*** for this period. These are procedures in which the deposits and disbursements from the bank statements for a certain period of time are agreed to the books of record of a business to ensure that everything that flowed through the bank has been included in the books of record and everything in the books of record have been recorded by the bank.

**Some Definitions**
However, as forensic or fraud auditing is typically much more detailed than standard audit procedures, our review of the documentation supporting such transactions extended to a much greater number of transactions.

To be clear, ***auditing*** is a systematic process of objectively obtaining and evaluating evidence regarding assertions about economic actions and events to ascertain the degree of correspondence between those assertions and established criteria and communicating the results to interested users. This is typically done through financial statements.

In a ***financial audit***, the assertions about which the auditor seeks objective evidence relate to the reliability and integrity of financial and, occasionally, operating information. The examination of the objective evidence underlying the financial data as reported is called an audit.

Analytics, inquiries of management and the verification of information through evidential matter (support) external to the company (i.e., "other audit procedures") are required.

A ***forensic audit or fraud investigation*** is a process in which specific and detailed audit procedures are performed with the intent of determining if a fraud has been committed. Fraud encompasses an array of irregularities and illegal acts characterized by intentional deception and can be perpetrated for the benefit or detriment of an organization.

As fraud by its nature involves falsehood and deception, those who commit fraud attempt to conceal their acts so as to escape detection and its consequences. As such, even those who specialize in fraud detection and investigation cannot guarantee that fraud will be detected as a result of a forensic audit. From our testing, we did not note any direct evidence of fraud.

***Disbursements and Stock Transfer***

From our work we were able to determine that between January 1, 1998 through May 31, 2001, FACS made payments of approximately $21 million in cash and $56 million in stock transfers (for a total of about $77 million) related to the design, development, construction and launch of the FACS System. This includes all funds disbursed inclusive of payroll, vendor charges, loan repayments, transfers to others, etc. The $21 million amount did not appear to include any cost associated any R&D programs nor does it include any cost associated with Company's domestic and international regulatory efforts or other legal costs. However, this amount did include approximately $2.2 million of payroll costs related to the design and development of the FACS System.

In order to arrive at the total population of cash disbursements, we downloaded a schedule of cash disbursements for each year from the accounting system(s) of FACS. The schedule generally included check number with date, vendor and amount listing a brief description of the invoice. We sorted the amounts into one of 8 categories of disbursement including payroll and related benefits, overhead, satellite costs, business development, regulatory costs, loan repayments, transfers to FACS and transfer to others.

We selected from this population any vendor/payee that was paid in excess of $10,000 for the period from January 1, 1995 through September 2001.

For each of these disbursements:

- ✓ We reviewed the original invoices or other supporting documents received from the vendor/payee.
- ✓ We reviewed the cancelled checks noting authorized signatories and reasonable endorsement/deposit information on the back of the check.
- ✓ We noted that the disbursement agreed to the bank statement.
- ✓ We noted that the vendor was a part of FAI and FACS master vendor's list.
- ✓ If it was a wire transfer or a cash withdrawal, we noted that it cleared the bank statement and (in most cases) who initiated the transfer/withdrawal. For bank transfers, we were able to determine the destination bank.

For the stock transfers:

- ✓ We reviewed several constructions and launch contracts between and among FACS former parent company and prime contractor and other third parties.

As for payroll disbursements, those were confirmed by taking the payroll for each of the calendar years and agreeing it to the amounts reported on the Federal payroll forms including the Forms w-2/w-3 and Forms 1099/1096 annual filing/reconciliation and Federal Forms 941 and 940; thus covering 100% of the disbursements made for payroll.

**Restrictions**

This report is intended solely for use of the management of FACS and the law firm of Kelley Drye and Warren, LLP and should not be used for any other purpose.

Sincerely,

Thomas J. Raffa

TJR/kh

**FAISAT**
**Global Telecommunications System**

**Acceptance of Requirements for Milestone CDR**
**For the**
**Earth Horizon Sensor Subsystem**
**By**
**SERVO CORPORATION OF AMERICA**

**Date: September 16, 2000**

**On September 16, 2000 I reviewed CDR documentation submitted by SERVO CORPORATION OF AMERICA . The documentation received is very extensive and complete. The documentation satisfies the requirements of the CDR milestone, and is accepted by FAI.**

**The documentation contains 36 B-size drawings and 143 A-size drawings, descriptions, analyses, specifications and procedures. From this documentation it is apparent that the design is complete and ready for manufacture.**

**The documentation contains:**

**a. Unit performance specifications**
**b. Descriptions of the Item Design**
**c. Functional Block Diagrams (and 38 pages of math models)**
**d. Design analyses (IR performance)**
**e. Performance characteristics and other documentation**
**f. Requirements compliance**
**g. Mechanical and Electrical ICD**
**h. Full set of engineering drawings**

**While the above satisfies the requirements of a CDR, when available, FAI would like to review the parts derating analyses, the test results obtained to date and the test plans.**

**The CDR Milestone is successfully satisfied,**

George Sebestyen

Dr. George Sebestyen
Chief technical Officer (Acting)

## CERTIFICATE OF SERVICE

I, Beatriz Viera-Zaloom, hereby certify that a true and correct copy of the foregoing Application for Review, on behalf of Final Analysis Communication Services, Inc., was delivered via hand delivery or via e-mail, this 16th day of April, to the individuals below.

The Honorable Michael K. Powell *
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

The Honorable Kathleen Q. Abernathy *
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

The Honorable Michael Copps *
Commissioner
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The Honorable Kevin Martin *
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The Honorable Jonathan S. Adelstein *
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Beatriz Viera Zaloom

* Via hand delivery