

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

FACSIMILE

(202) 955-9792

www.kelleydrye.com

DIRECT LINE (202) 955-9606

EMAIL rsifers@kelleydrye.com

JUN 6 2003

FCC/MELLON

June 6, 2003

S2150 SAT-AMD-20030606-00112
Final Analysis Communication Services, Inc.
S2150

NEW YORK, NY
TYSONS CORNER, VA
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ
BRUSSELS, BELGIUM
HONG KONG

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MUMBAI, INDIA
TOKYO, JAPAN

VIA OVERNIGHT COURIER

Federal Communications Commission
International Bureau - Satellites
P.O. Box 358210
Pittsburgh, PA 15251-5210

Re: Final Analysis Communication Services, Inc., Amendment to Petition for Waiver and Modification to Extend Milestones (IBFS File No. SAT-MOD-20020329-00245)

Dear Madam or Sir:

Transmitted herewith, on behalf of Final Analysis Communication Services, Inc., is an original and nine copies FCC Form 312 to amend the pending the pending petition for waiver (IBFS File No. SAT-MOD-20020329-00245). Remittance FCC Form 159 with a check in the amount of \$4,885.00 is also enclosed to cover the application processing fee. An additional copy of this submission is enclosed for date-stamp and return to the delivering courier. If there are any questions regarding this application, please contact the undersigned at (202) 955-9606.

Very truly yours,

Randall W. Sifers

Randall W. Sifers
Counsel to
Final Analysis Communication Services, Inc.

Enclosures

Federal Communications Commission

June 6, 2003

Page Two

cc: Bryan Tramont
Sam Feder
Jennifer Manner
Paul Margie
Barry Ohlson
Don Ableson
Tom Tycz
Anna M. Gomez
Jackie Ruff
Cassandra Thomas
Robert Nelson
Mark Young

READ INSTRUCTIONS CAREFULLY
BEFORE PROCEEDING

FEDERAL COMMUNICATIONS COMMISSION
REMITTANCE ADVICE

Approved by OMB
3060-0589
Page No 1 of 1

(1) LOCKBOX # **358210**

SPECIAL USE

FCC USE ONLY

SECTION A - PAYER INFORMATION

(2) PAYER NAME (if paying by credit card, enter name exactly as it appears on your card)

Final Analysis Communication Services, Inc.

(3) TOTAL AMOUNT PAID (U.S. Dollars and cents)

\$4,885.00

(4) STREET ADDRESS LINE NO. 1

9701-E Philadelphia Ct.

(5) STREET ADDRESS LINE NO. 2

(6) CITY

Lanham

(7) STATE

MD

(8) ZIP CODE

20706

(9) DAYTIME TELEPHONE NUMBER (include area code)

301 459-0100

(10) COUNTRY CODE (if not in U.S.A.)

301 459-0101

FCC REGISTRATION NUMBER (FRN) AND TAX IDENTIFICATION NUMBER (TIN) REQUIRED

(11) PAYER (FRN)

0003-73-2583

(12) PAYER (TIN)

52-1900790

IF PAYER NAME AND THE APPLICANT NAME ARE DIFFERENT, COMPLETE SECTION B
IF MORE THAN ONE APPLICANT, USE CONTINUATION SHEETS (FORM 159-C)

(13) APPLICANT NAME

(14) STREET ADDRESS LINE NO. 1

(15) STREET ADDRESS LINE NO. 2

(16) CITY

(17) STATE

(18) ZIP CODE

(19) DAYTIME TELEPHONE NUMBER (include area code)

(20) COUNTRY CODE (if not in U.S.A.)

FCC REGISTRATION NUMBER (FRN) AND TAX IDENTIFICATION NUMBER (TIN) REQUIRED

(21) APPLICANT (FRN)

(22) APPLICANT (TIN)

COMPLETE SECTION C FOR EACH SERVICE. IF MORE BOXES ARE NEEDED, USE CONTINUATION SHEET

(23A) CALL SIGN/OTHER ID

S2150

(24A) PAYMENT TYPE CODE

CAW

(25A) QUANTITY

1

(26A) FEE DUE FOR (PTC)

\$4,885.00

(27A) TOTAL FEE

\$4,885.00

FCC USE ONLY

(28A) FCC CODE 1

(29A) FCC CODE 2

(23B) CALL SIGN/OTHER ID

(24B) PAYMENT TYPE CODE

(25B) QUANTITY

(26B) FEE DUE FOR (PTC)

(27B) TOTAL FEE

FCC USE ONLY

(28B) FCC CODE 1

(29B) FCC CODE 2

SECTION D - CERTIFICATION

(30) CERTIFICATION STATEMENT

I, RANDALL W. SIFERS, certify under penalty of perjury that the foregoing and supporting information is true and correct to the best of my knowledge, information and belief.

SIGNATURE Randall W. Sifers

DATE 6/6/03

SECTION E - CREDIT CARD PAYMENT INFORMATION

(31)

MASTERCARD/VISA ACCOUNT NUMBER:

EXPIRATION
DATE:

MASTERCARD

VISA

I hereby authorize the FCC to charge my VISA or MASTERCARD for the service(s)/authorization herein described.

SIGNATURE _____ DATE _____

FCC 312		Approved by OMB 3060-0678		FCC Use Only
Main Form		Est. Avg Burden Hours Per Response: 11 Min.		File Number:
				Call Sign:
				Fee Number:

FEDERAL COMMUNICATIONS COMMISSION
APPLICATION FOR SATELLITE SPACE AND EARTH STATION AUTHORIZATIONS

APPLICANT INFORMATION

1. Legal Name of Applicant Final Analysis Communication Services, Inc.		2. Voice Telephone Number 301 459-0100	
3. Other Name Used for Doing Business (if any)		4. Fax Telephone Number 310 459-0101	
5. Mailing Street Address or P.O. Box 9701-E Philadelphia Court		6. City Lanham	8. Zip Code 20706
ATTENTION: Jan Friis		7. State / Country (if not U.S.A.) MD	
9. Name of Contact Representative (if other than applicant) Randall W. Sifers		10. Voice Telephone Number 202 955-9606	
11. Firm or Company Name Kelley Dye & Warren LLP		12. Fax Telephone Number 202 955-9792	
13. Mailing Street Address or P.O. Box 1200 19th St., N.W., Suite 500		14. City Washington	16. Zip Code 20036
ATTENTION:		15. State / Country (if not U.S.A.) DC	

CLASSIFICATION OF FILING

17. Place an "X" in the box next to the classification that applies to this filing for both questions a. and b. Mark only one box for 17a and only one box for 17b.	
<input type="checkbox"/> a1. Earth Station <input checked="" type="checkbox"/> a2. Space Station	<input type="checkbox"/> b1. Application for License of New Station <input type="checkbox"/> b2. Application for Registration of New Domestic Receive-Only Station <input checked="" type="checkbox"/> b3. Amendment to a Pending Application <input type="checkbox"/> b4. Modification of License or Registration <input type="checkbox"/> b5. Assignment of License or Registration <input type="checkbox"/> b6. Transfer of Control of License or Registration <input type="checkbox"/> b7. Notification of Minor Modification <input type="checkbox"/> b8. Application for License of New Receive-Only Station Using Non-U.S. Licensed Satellite <input type="checkbox"/> b9. Letter of Intent to Use Non-U.S. Licensed Satellite to Provide Service in the United States <input type="checkbox"/> b10. Other (Please Specify):
18. If this filing is in reference to an existing station, enter: Call sign of station:	19. If this filing is an amendment to a pending application enter: (a) Date pending application was filed: (b) File number of pending application:
S2150	03-29-02 SAT-MOD-20020329-00245

TYPE OF SERVICE

20. NATURE OF SERVICE: This filing is for an authorization to provide or use the following type(s) of service(s): Place an "X" in the box(es) next to all that apply.

<input type="checkbox"/> a. Fixed Satellite	<input type="checkbox"/> c. Radiodetermination Satellite	<input type="checkbox"/> e. Direct to Home Fixed Satellite
<input checked="" type="checkbox"/> b. Mobile Satellite	<input type="checkbox"/> d. Earth Exploration Satellite	<input type="checkbox"/> f. Digital Audio Radio Service
<input type="checkbox"/> g. Other (please specify)		

21. STATUS: Place an "X" in the box next to the applicable status. Mark only one box.

<input type="checkbox"/> a. Common Carrier	<input type="checkbox"/> b. Non-Common Carrier
--	--

22. If earth station applicant, place an "X" in the box(es) next to all that apply.

<input type="checkbox"/> a. Using U.S. licensed satellites	<input type="checkbox"/> b. Using Non-U.S. licensed satellites
--	--

23. If applicant is providing INTERNATIONAL COMMON CARRIER service, see instructions regarding Sec. 214 filings. Mark only one box. Are these facilities:

<input type="checkbox"/> a. Connected to the Public Switched Network	<input type="checkbox"/> b. Not connected to the Public Switched Network
--	--

24. FREQUENCY BAND(S): Place an "X" in the box(es) next to all applicable frequency band(s).

<input type="checkbox"/> a. C-Band (4/6 GHz)	<input type="checkbox"/> Lower: 137-138 MHz Upper: 400.15 - 401 MHz
<input type="checkbox"/> b. Ku-Band (12/14 GHz)	<input checked="" type="checkbox"/> c. Other (Please specify)

TYPE OF STATION

25. CLASS OF STATION: Place an "X" in the box next to the class of station that applies. Mark only one box.

<input type="checkbox"/> a. Fixed Earth Station	<input type="checkbox"/> b. Temporary-Fixed Earth Station	<input type="checkbox"/> c. 12/14 GHz VSAT Network	<input checked="" type="checkbox"/> d. Mobile Earth Station	<input checked="" type="checkbox"/> e. Space Station	<input type="checkbox"/> f. Other (Specify)
---	---	--	---	--	---

If space station applicant, go to Question 27.

26. TYPE OF EARTH STATION FACILITY Mark only one box.

<input type="checkbox"/> a. Transmit/Receive	<input type="checkbox"/> b. Transmit-Only	<input type="checkbox"/> c. Receive-Only
--	---	--

PURPOSE OF MODIFICATION OR AMENDMENT

27. The purpose of this proposed modification or amendment is to: Place an "X" in the box(es) next to all that apply.

<input type="checkbox"/>	a -- authorization to add new emission designator and related service
<input type="checkbox"/>	b -- authorization to change emission designator and related service
<input type="checkbox"/>	c -- authorization to increase EIRP and EIRP density
<input type="checkbox"/>	d -- authorization to replace antenna
<input type="checkbox"/>	e -- authorization to add antenna
<input type="checkbox"/>	f -- authorization to relocate fixed station
<input type="checkbox"/>	g -- authorization to change assigned frequency(ies)
<input type="checkbox"/>	h -- authorization to add Points of Communication (satellites & countries)
<input type="checkbox"/>	i -- authorization to change Points of Communication (satellites & countries)
<input type="checkbox"/>	j -- authorization for facilities for which environmental assessment and radiation hazard reporting is required
<input checked="" type="checkbox"/>	k -- Other (Please Specify) amend the pending application to specify milestone schedule

ENVIRONMENTAL POLICY

28. Would a Commission grant of any proposal in this application or amendment have a significant environmental impact as defined by 47 CFR 1.1307? If YES, submit the statement as required by Sections 1.1308 and 1.1311 of the Commission's rules, 47 C.F.R. §§ 1.1308 and 1.1311, as an exhibit to this application.

A Radiation Hazard Study must accompany all applications as an exhibit for new transmitting facilities, major modifications, or major amendments. Refer to OET Bulletin 65.

YES NO

ALIEN OWNERSHIP

29. Is the applicant a foreign government or the representative of any foreign government?	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
30. Is the applicant an alien or the representative of an alien?	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
31. Is the applicant a corporation organized under the laws of any foreign government?	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
32. Is the applicant a corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country?	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
33. Is the applicant a corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country?	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
34. If any answer to questions 29, 30, 31, 32 and/or 33 is Yes, attach as an exhibit, the identification of the aliens or foreign entities, their nationality, their relationship to the applicant, and the percentage of stock they own or vote.		

BASIC QUALIFICATIONS

35. Does the applicant request any waivers or exemptions from any of the Commission's Rules? If Yes, attach as an exhibit, copies of the requests for waivers or exceptions with supporting documents.	<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO
36. Has the applicant or any party to this application had any FCC station authorization or license revoked or had any application for an initial, modification or renewal of FCC station authorization, license, or construction permit denied by the Commission? If Yes, attach as an exhibit, an explanation of the circumstances.	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
37. Has the applicant, or any party to this application, or any party directly or indirectly controlling the applicant ever been convicted of a felony by any state or federal court? If Yes, attach as an exhibit, an explanation of the circumstances.	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
38. Has any court finally adjudged the applicant, or any person directly or indirectly controlling the applicant, guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communication, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement or any other means or unfair methods of competition? If Yes, attach as an exhibit, an explanation of the circumstances.	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
39. Is the applicant, or any person directly or indirectly controlling the applicant, currently a party in any pending matter referred to in the preceding two items? If Yes, attach as an exhibit, an explanation of the circumstances.	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
40. If the applicant is a corporation and is applying for a space station license, attach as an exhibit the names, addresses, and citizenship of those stockholders owning of record and/or voting 10 percent or more of the Filer's voting stock and the percentages so held. In the case of fiduciary control, indicate the beneficiary(ies) or class of beneficiaries. Also list the names and addresses of the officers and directors of the Filer.		
41. By checking Yes, the undersigned certifies, that neither the applicant nor any other party to the application is subject to a denial of Federal benefits that includes FCC benefits pursuant to Section 5301 of the Anti-Drug Act of 1988, 21 U.S.C. Section 862, because of a conviction for possession or distribution of a controlled substance. See 47 CFR 1.2002(b) for the meaning of "party to the application" for these purposes.	<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO
42a. Does the applicant intend to use a non-U.S. licensed satellite to provide service in the United States? If yes, answer 42b and attach an exhibit providing the information specified in 47 C.F.R. § 25.137, as appropriate. If no, proceed to question 43.	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
42b. What administration has licensed or is in the process of licensing the space station? If no license will be issued, what administration has coordinated or is in the process of coordinating the space station?		

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Final Analysis Communication Services, Inc.

For Authority 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

Petition for Waiver

IBFS File Nos. SAT-LOA-19941116-00088
SAT-AMD-19950224-00033
SAT-AMD-19960223-00031
SAT-AMD-19960819-00107
SAT-AMD-19971030-00175

IBFS File No. SAT-MOD-20020329-00245

**Amendment to Petition for Waiver and Modification To Extend
Milestones**

FINAL ANALYSIS COMMUNICATION SERVICES, INC.

James S. Gilmore, III
Glenn B. Manishin
Randall W. Sifers
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9606

June 6, 2003

Its Attorneys

TABLE OF CONTENTS

	Page
I. BACKGROUND	3
A. FACS' License and Initial System Progress	3
B. Involuntary Chapter 7 Bankruptcy of FAI and NYS Acquisition of FACS	4
C. TAA Processing at State Department	6
D. FACS' Recent and Substantial Progress on Development of the FAISAT System	7
II. MODIFICATION OF FACS' AUTHORIZATION TO EXTEND MILESTONES IS WARRANTED	8
A. Unforeseeable Circumstances Beyond the Control of FACS Justify Granting the Extension	9
1. The Involuntary Bankruptcy of FAI Impeded FACS' Progress on the FAISAT System	10
2. Approval for a Technical Assistance Agreement Presented Unforeseen and Uncontrollable Delay, Which Prevented FACS From Providing New Milestone Dates Until Now	14
B. Unique and Overriding Public Interest Concerns Justify Granting the Extension	16
C. Alternatively, the Commission Should Waive Section 25.117(e)(1)	18
III. CONCLUSION	20

SUMMARY

Final Analysis Communication Services, Inc. ("FACS") submits this amendment to its petition for waiver filed in March 2002 with respect to the completion of construction and launch milestones of the first two satellites of its licensed Little LEO constellation. This purpose for this amendment is to amend the previous filing to clarify the reasons supporting an extension of time to complete construction and launch of its licensed system and to provide a proposed schedule of milestones, namely that construction of the first two satellites will be completed in September 2004, launch of the first two satellites will occur in December 2004, and construction and launch of the remaining satellites will occur in December 2006.

FACS filed its waiver petition to seek an extension of the March 2002 construction completion milestone and the September 2002 launch milestone for the first two satellites of its constellation. In its waiver petition, FACS explained that the involuntary bankruptcy of its former parent and prime contractor, Final Analysis Inc. ("FAI"), prevented FACS from meeting those milestones. FACS did not specify new milestones, however, because it remained unclear when the Bureau would approve the transfer of control of the FACS license from the bankruptcy trustee to the winning bidder for the assets of FAI.

In this amendment, FACS provides further clarification of the unforeseen legal impediments beyond the control of FACS that made it impossible for FACS to meet the milestone schedule established in its license. There were two specific factors, completely beyond the legal or practical control of FACS, that made it impossible for FACS to complete construction of its first two satellites by March 2002, to launch those satellites in September 2002, and to provide a new schedule of milestone dates until now.

First, in September 2001, a petition for *involuntary* Chapter 7 bankruptcy was filed against FAI, FACS' former parent and former prime contractor. FACS was financially solvent at

the time that FAI was forced into the involuntary bankruptcy. However, because of the automatic stay imposed at the initiation of the bankruptcy, FACS was unable to compel FAI's performance under the prime contract to continue construction of the satellite constellation. Moreover, the bankruptcy Trustee, under threat of legal action, prevented FACS from doing anything outside the normal course of business. FACS could not spend additional money or make any new contractual commitments, including engaging new contractors to continue construction. These circumstances paralyzed FACS' ability to continue system progress.

Second, because FACS' spacecraft bus manufacturer, Polyot, is a foreign entity, FACS is required under the International Traffic in Arms Regulations to obtain approval from the U.S. State Department's Directorate of Defense Trade Controls ("DDTC") of a Technical Assistance Agreement ("TAA"). Approval of the TAA authorizes FACS to export technical data and have technical discussions with Polyot regarding the construction of the spacecraft bus. FACS had planned, pursuant to the DDTC's direction, to request the transfer of the existing approval for the TAA between FAI and Polyot. Pursuant to that directive, in September 2002, FACS submitted its request to transfer FAI's approval. However, despite its earlier direction, the DDTC decided, in December 2002, that the approval of the TAA, which had been given to FAI, could not be transferred to FACS. Consequently, FACS was required to seek approval for a new TAA, which it did on December 11, 2002. FACS' received DDTC approval for the new TAA on May 14, 2003. Approval of the TAA has enabled FACS to determine a schedule for construction and launch of the satellite constellation, and to propose a new schedule of milestones.

Notwithstanding these events, FACS has made substantial progress on the development of its Little LEO system. FACS has acquired final launch vehicles and negotiated firm fixed-price contracts for the communications payload and to complete spacecraft bus construction, as

well as obtained substantial additional third-party financing. Given the considerable obstacles that FACS has faced, progress on system development has been diligent and timely. This progress is fully compliant with the Commission's basic policy concern underlying satellite system milestones, namely that licensees are building their systems in a timely manner and that the spectrum is not being held by licensees unable or unwilling to proceed with their plans. Moreover, because FACS shares its spectrum with other users, any delay in the implementation of FACS' full constellation will not harm any other user or potential user of spectrum.

These unique circumstances coupled with the public interest in the achievement of the Commission's longstanding objective of fostering a competitive Little LEO marketplace through new entry and in the introduction of additional low-cost data service applications, provide ample and compelling justification for the Bureau to grant FACS additional time in which to complete construction of and launch its Little LEO system.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Final Analysis Communication Services, Inc.

For Authority 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

Petition for Waiver

IBFS File Nos. SAT-LOA-19941116-00088
SAT-AMD-19950224-00033
SAT-AMD-19960223-00031
SAT-AMD-19960819-00107
SAT-AMD-19971030-00175

IBFS File No. SAT-MOD-20020329-00245

Amendment to Petition for Waiver and Modification To Extend Milestones

Final Analysis Communication Services, Inc. (“FACS”), by its attorneys and pursuant to Sections 25.116 and 25.117 of the Commission’s Rules, 47 C.F.R. §§ 25.116 and 25.117, hereby amends its March 2002 Petition for Waiver¹ (“*Waiver Petition*”) seeking a waiver of Section 25.161 of the Commission’s Rules, 47 C.F.R. § 25.161, and requests an extension of the milestones for completion of construction and launch of satellites for its licensed constellation, set forth in the above-referenced license for Non-Voice, Non-Geostationary Mobile Satellite Service (“NVNG MSS”) in low-Earth orbit (“Little LEO”).²

¹ Final Analysis Communication Services, Inc., *Petition for Waiver*, File No. SAT-MOD-20020329-00245 (filed Mar. 29, 2002) (“*Waiver Petition*”).

² Final Analysis Communication Services, Inc., *Order and Authorization*, 13 FCC Rcd 6618 (Int’l Bur. 1998); *Memorandum Opinion and Order*, 16 FCC Rcd 21463 (2001) (“*FACS License*”).

More specifically, FACS files this amendment to modify its license to extend the schedule of milestone dates specified therein. FACS proposes the following new milestones:

Completion of construction of first two satellites:	September 2004
Launch of first two satellites:	December 2004
Completion of construction and launch of remaining satellites:	December 2006.

This additional time is required due to unforeseen circumstances outside FACS' control, including the involuntary Chapter 7 bankruptcy of Final Analysis Inc. ("FAI"), FACS' former prime contractor and former parent company, and processing delays in obtaining approval from the U.S. Department of State, Directorate of Defense Trade Controls ("DDTC"), for a Technical Assistance Agreement ("TAA") between FACS and P.O. Polyot ("Polyot") of Russia, the spacecraft bus manufacturer for the FACS' satellite system. Although now resolved, these unforeseen and uncontrollable circumstances made it impossible for FACS to complete construction of its first two satellites by March 2002, to launch those satellites in September 2002, and to provide a new schedule of milestone dates. FACS believes that the public interest in the achievement of the Commission's longstanding objective of fostering a competitive Little LEO marketplace through new entry and in the introduction of additional low-cost data service applications – including for fleet management, shipping container security, and pipeline, utility, and environmental monitoring, and other homeland security applications – more than amply justify granting the requested extension and modification.

Alternatively, pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, FACS requests a waiver of Section 25.117(e)(1) to grant additional time in which to complete construction of and launch of its system. Good cause for waiver exists because the involuntary bankruptcy of FACS' former parent and former prime contractor and the delay in obtaining approval for the TAA are unique and special circumstances that warrant deviation from the

general rule. Grant of FACS' request will not result in the warehousing of any spectrum and will not undermine any Commission policies regarding construction milestones. Moreover, since FACS shares its spectrum with other users and that spectrum will continue to be available to those other users, the grant of additional time will not preclude new entrants. Given these circumstances, the denial of FACS's request could not be justified as serving the public interest.

I. BACKGROUND

A. FACS' License and Initial System Progress

On April 1, 1998, FACS received authorization to launch and operate a Little LEO satellite system (the "FAISAT system") in accordance with the milestone schedule established in the *FACS License*.³ A year later, on April 1, 1999, FACS notified the Commission that it had satisfied the initial construction milestone specified in its license by entering into a non-contingent construction agreement with its then parent company, FAI, to construct its first two satellites.⁴ The next milestone was March 2001, by which time FACS was obligated to have entered into a non-contingent agreement for the commencement of construction of the remaining satellites in the constellation. The construction agreement between FAI and FACS obligated FAI to construct both FACS' experimental satellites and its full commercial constellation, which satisfied the March 2001 milestone. Having already designed, constructed, launched and operated the two FAISAT experimental satellites, FAI had fully demonstrated its capabilities to construct the commercial constellation.

Over the years since its licensing, FACS had been raising money and making payments to its prime contractor, FAI, to fund the FAISAT system. Using the raised capital, FACS paid

³ *FACS License* at para. 93.

⁴ See Letter dated April 1, 1999 from Aileen A. Pisciotto, Counsel for FACS, to Roderick K. Porter, Acting Chief, FCC International Bureau.

for construction progress on the initial satellites, including initiation of the architecture design process, development of statements of work for numerous components, and firm fixed-price contracts with various subcontractors for the production of major subsystems.

In addition, in connection with its experimental satellite program, FACS constructed fully operational ground systems, including a ground station in Logan, Utah, and a ground station and control center in Lanham, Maryland.⁵ In sum, there is substantial, uncontested evidence in the record demonstrating that FACS was proceeding with system implementation and had contracts in place that would have allowed it to comply with its construction (March 2002) and launch (September 2002) milestones, were it not for the bankruptcy of its prime contractor and parent. The record also demonstrates unequivocally that FACS has diligently developed its commercial Little LEO system and is not merely warehousing spectrum.

B. Involuntary Chapter 7 Bankruptcy of FAI and NYS Acquisition of FACS

In September 2001, a petition for *involuntary* Chapter 7 bankruptcy was filed against FAI. A trustee was appointed in October 2001 to preserve the assets of the bankrupt entity and to dispose of them in a manner that would maximize return to the creditors.⁶ FACS was financially solvent at the time that FAI was forced into the involuntary bankruptcy. However, the Trustee, acting as the controlling shareholder of FACS, directed FACS not to take any actions outside the normal course of business.⁷ Specifically, the Trustee directed FACS not to spend additional money or make any new contractual commitments and threatened to institute

⁵ FACS plans to request approval to operate these same facilities as the ground segment for its commercial constellation.

⁶ See 11 U.S.C. § 704.

⁷ See correspondence between counsel for FACS and the counsel to the Trustee for FACS' former parent and former prime contractor, FAI, during FAI's involuntary Chapter 7 bankruptcy. See Attachment 1. This correspondence has been submitted under a request for confidential treatment pursuant to 47 C.F.R. §§ 0.457(d) and 0.459.

legal proceedings in the event that FACS took such actions.⁸ Shortly after the appointment of the Trustee, FACS filed, and the Bureau subsequently granted, an application for consent to the involuntary transfer of control of FACS' license to the Trustee.⁹

During the period of Trustee control, FACS filed its *Waiver Petition* seeking modification of the March 2002 construction completion milestone and the September 2002 launch milestone for the first two satellites of the FAISAT system. In the *Waiver Petition*, FACS explained that the involuntary bankruptcy prevented FACS from meeting its milestones. FACS did not specify new milestones, however, because it remained unclear when the Bureau would approve transfer of control of the FACS license from the bankruptcy Trustee to the winning bidder for the assets of FAI, including the controlling interest in FACS.¹⁰

New York Satellite Industries, LLC ("NYS") won the bankruptcy bid for the assets of FAI, including the controlling interest in FACS. In an effort to expedite and gain control of FAI's assets and continue deployment of the FAISAT system, NYS had made a bid for the assets of FAI in November 2001. This bid was rejected by the Trustee, but did lead to the Trustee's expedition of the notice of sale within a few weeks and the subsequent sale in January 2002. Pursuant to the terms of the January 14, 2002 sale to NYS, the Trustee retained control over the FCC license until such time as the Bureau granted an order approving the transfer.

⁸ *Id.*

⁹ Final Analysis Communication Services, Inc., Application for Consent to Involuntary Transfer of Control, File No. SAT-T/C-20011105-00094 (filed Nov. 5, 2001; granted Feb. 7, 2002).

¹⁰ Moreover, as discussed *infra*, FACS could not register with the U.S. State Department to gain approval as a potential exporter of technical data to its foreign system construction partners until such time as its ownership was clarified and approved. Nor could it seek approval of its TAA with Polyot until the Bureau granted the transfer of control of FACS from the Trustee to New York Satellite Industries, LLC ("NYS"). Until it had approval from the U.S. State Department for its TAA, FACS could not provide firm, extended milestones for the construction, launch and operation of its system.

After meeting with the Bureau on January 17, 2002, FACS filed an application with the Bureau to transfer control to NYS.¹¹ On August 19, 2002, the Bureau approved the transfer of control of the FACS license from FAI to NYS, finding that the transfer was in the public interest.¹² The transaction was consummated on September 9, 2002, when the Trustee endorsed the stock certificate in favor of NYS.

C. TAA Processing at State Department

The International Traffic in Arms Regulations (“ITAR”)¹³ required FACS to obtain approval from the DDTC of a TAA with Polyot, the foreign manufacturer of the spacecraft bus, to continue manufacturing. Such approval would authorize FACS to export technical data and have technical discussions with Polyot regarding the construction of the spacecraft bus.¹⁴

Before FACS could seek approval of a TAA, it was required to first register with the DDTC.¹⁵ On August 19, 2002, the same day that the Bureau released the order approving the transfer of control, FACS registered with the State Department’s DDTC. FACS could not register with the DDTC before that date because the DDTC registration requires identification of the registrant’s parent company, which was not definitive prior to the Bureau’s approval of the transfer of control.¹⁶

¹¹ Final Analysis Communication Services, Inc., Application for Transfer of Control, File No. SAT-T/C-20020135-00010 (filed Jan. 25, 2002).

¹² Final Analysis Communication Services, Inc., *Order and Authorization for Authority to Transfer Control*, 17 FCC Rcd 16062 (Intl. Bur. 2002). As discussed *infra*, on the same day that FACS received approval of the transfer of control to NYS, FACS filed its registration application with the U.S. State Department, the necessary precursor to an approved TAA, and firm milestones.

¹³ See ITAR Regulations, codified at 22 C.F.R. §§ 120-130.

¹⁴ See 22 C.F.R. § 124.

¹⁵ See 22 C.F.R. § 122.1.

¹⁶ See 22 C.F.R. § 122.2 and DDTC Form DS-2032.

In September 2002, the DDTC directed FACS to submit a request to transfer the approval for the original TAA, between FAI and Polyot, to FACS. On September 26, 2002, FACS submitted its request to DDTC to transfer the original TAA from FAI to FACS. On December 10, 2002, despite its earlier direction, the DDTC decided that the TAA, which had been approved for FAI, could not be transferred to FACS. Consequently, FACS was required to obtain approval for a new TAA. On December 11, 2002, FACS submitted an application seeking approval for a TAA between FACS and Polyot that was substantially identical to the original TAA between FAI and Polyot. The DDTC approved FACS' TAA on May 14, 2003. Approval of the TAA has enabled FACS to determine a schedule for construction and launch of the satellite constellation, as requested herein.¹⁷

D. FACS' Recent and Substantial Progress on Development of the FAISAT System

Notwithstanding these events, FACS has made substantial progress on the development of the FAISAT system. Despite significant obstacles, FACS' parent company, NYS, has acquired final launch vehicles and negotiated firm fixed-price contracts for the communications payload and to complete spacecraft bus construction, as well as obtained substantial third-party financing. Given the considerable impediments that FACS has faced, progress on system development has been diligent and timely.

Following the Bureaus' approval of the transfer of control, for example, FACS' new parent company, NYS, acquired FAI's launch and spacecraft bus contracts with Polyot through the FAI bankruptcy proceeding. NYS soon thereafter raised an additional \$10 million to

¹⁷ See correspondence between FACS and the Office of Defense Trade Controls, U.S. Department of State, which demonstrates the significant delay in obtaining approval of the TAA. See Attachment 2. Attachment 2 contains sensitive commercial and financial information and has been submitted under request for confidential treatment pursuant to 47 C.F.R. §§ 0.457(d) and 0.459.

continue the development of the FAISAT system and commenced negotiations with Polyot to complete development and construction of the spacecraft bus. NYS took these steps in good faith and at its own risk pending Bureau approval to assume control of FACS and U.S. State Department approval of the TAA. In February 2003, FACS entered into a service provider and investment agreement with a foreign entity to invest a significant sum in FACS and to provide FACS services in certain parts of the world.

On May 12, 2003, FACS provided to the Bureau numerous confidential technical documents to demonstrate that FACS was proceeding with system implementation before the FAI bankruptcy.¹⁸ The documents clearly demonstrate FACS' intent to proceed and that FACS has spent millions of dollars on the development of the FAISAT system.

FACS has also been an active participant in the WRC-03 process, working very closely with staff from the Bureau, as well as briefing legal advisors to the Chairman and Commissioners on the WRC progress. FACS has devoted substantial resources to support the adoption of WRC-03 Agenda Items 1.16 and 1.20.¹⁹ The FCC, including staff from the Bureau, provided leadership on this issue, with the full support of FACS, to champion it through multiple government agencies. The result of this effort was a U.S. Proposal on Agenda Item 1.16, which was recently submitted to the ITU for consideration at WRC-03.

II. MODIFICATION OF FACS' AUTHORIZATION TO EXTEND MILESTONES IS WARRANTED

¹⁸ FACS requested that this information be treated confidentially and that under no circumstances it be released or discussed with individuals outside the Commission without the prior express written consent of FACS.

¹⁹ FACS has spent and is spending considerable resources to advocate for additional feeder link spectrum for Little LEOs. See discussion *infra* at page 17.

Section 25.117 of the Commission’s rules permits the Bureau to modify a license to specify extended milestone dates when: (1) additional time is required due to unforeseen circumstances beyond the applicant’s control; or (2) there are unique and overriding public interest concerns justifying the extension.²⁰ The Bureau has found that unanticipated legal impediments can justify a milestone extension.²¹

In this case, the Commission should grant FACS’s extension request because unforeseen legal impediments beyond the control of FACS have made it impossible to satisfy the construction completion and launch milestones specified in FACS’ license. In addition, as explained in the *Waiver Petition*, the unique and overriding public interest in the achievement of the Commission’s longstanding objective of fostering a competitive Little LEO marketplace and the introduction of additional low-cost data service applications for fleet management, shipping container security, and pipeline, utility, and environmental monitoring, and homeland security applications justify granting the extension. Alternatively, however, “good cause” exists under Section 1.3 of the Commission’s Rules to waive Section 25.117(e)(1) and grant FACS additional time to complete construction and launch the FAISAT system. The Bureau grants such extensions where, as here, the licensee is not warehousing spectrum and the additional time will not preclude new entrants.²²

²⁰ 47 C.F.R. § 25.117.

²¹ See NetSat 28 Company, L.L.C., *Memorandum Opinion and Order*, 16 FCC Rcd 11025 at para. 20 (Intl. Bur. 2001).

²² See Earth Watch Incorporated, *Order and Authorization*, 15 FCC Rcd 13594 (Intl. Bur. 2000) (“*EarthWatch*”).

A. Unforeseeable Circumstances Beyond the Control of FACS Justify Granting the Extension

Two specific factors, beyond the legal or practical control of FACS, have prevented FACS from meeting its original milestones and from providing a schedule of new milestone dates until this month. The uncontrollable, unforeseen delay began in September 2001 with the *involuntary* bankruptcy proceedings of FAI, FACS' former parent and former prime contractor, and continued until May 14, 2003, when the State Department approved FACS' TAA.

1. The Involuntary Bankruptcy of FAI Impeded FACS' Progress on the FAISAT System

The involuntary bankruptcy of FACS' former prime contractor and parent company, together with the resulting business restrictions imposed on FACS by the bankruptcy Trustee, were uncontrollable and unforeseen circumstances that impeded FACS' progress on the FAISAT system. On September 14, 2001, certain creditors of FAI petitioned the U.S. Bankruptcy Court for the involuntary dissolution of FAI, a separate and distinct legal entity from FACS, pursuant to Chapter 7 of the Bankruptcy Code. FAI was a privately-held, for-profit Maryland corporation that held the controlling voting stock of FACS, and was FACS' prime contractor.

Under Chapter 7 of the Bankruptcy Code, a trustee is appointed to administer the estate that is to be liquidated. In a Chapter 7 case, the trustee has a fiduciary duty to preserve the assets of the debtor and to dispose of them in a manner that maximizes return to the creditors. A Chapter 7 case is administered very differently from a case filed under Chapter 11. In a Chapter 7 case, the trustee is vested with title to and control over all of the property of the debtor. The trustee is charged with liquidating the property of the debtor and distributing the proceeds to creditors.²³

²³ See 11 U.S.C. § 704.

Additionally, unlike a Chapter 11 case, where the norm is for the debtor company (*i.e.*, the debtor-in-possession) to continue operating the company while it reorganizes or sells its assets, in a Chapter 7 case all business operations cease upon entry of the order for relief.²⁴ For example, employees are automatically terminated and all bank accounts are turned over to the trustee.

Moreover, during a Chapter 7 proceeding, claims against the debtor are subject to an automatic stay. The purpose of the stay is to give the trustee the protection necessary for administering the assets of the estate. Thus, parties having contractual relationships with the debtor have no ability to compel performance by the debtor or the trustee, and become unsecured creditors holding claims against the estate for damages resulting from the debtor's failure to perform.²⁵

On October 16, 2001, a Trustee was appointed in the FAI case. Upon entry of the order for relief, title to and control over all of the property of FAI, including controlling voting stock of FACS, vested with the Trustee and all of FAI's business operations ceased. From that point on, FACS had no ability to compel performance by FAI under its prime construction agreement. The automatic stay prevented FACS from forcing FAI to perform under the construction agreement. FACS thus could not sue FAI for specific performance, or breach, of the

²⁴ The Bankruptcy Code does provide that the court may authorize the trustee to operate the business of the debtor for a limited period of time, if such operation is in the best interest of the estate and is consistent with the orderly liquidation of the estate. *See* 11 U.S.C. § 721. The Trustee in the FAI proceeding did not request such authority from the Bankruptcy Court.

²⁵ As discussed *infra*, because FAI was both the prime contractor to FACS and its parent – a circumstance unique in the Commission's consideration of milestone extensions – FACS could neither compel its prime contractor to perform, nor find an alternate contractor. Had FAI merely been FACS' prime contractor when FAI went into Chapter 7 bankruptcy, then FACS could have found an alternative prime contractor and filed a claim against the FAI estate for non-performance. Since FACS was prevented by the Trustee, who controlled FAI through its holding of the controlling voting shares of FACS, from seeking an alternative prime contractor during the bankruptcy proceedings, the Chapter 7 bankruptcy of its prime contractor and parent was an uncontrollable circumstance that justifies an extension.

construction contract. These circumstances, which were outside the legal and practical control of FACS, paralyzed FACS' ability to continue system progress.

At the time of the bankruptcy filing, the primary assets of FAI were its office equipment, its controlling stock interest in FACS, and its contracts, including the contracts with Polyot. The Trustee, consistent with Chapter 7, was presumably concerned with retaining the value of the FACS stock during the pendency of the liquidation of FAI. The Trustee interpreted her obligations by strictly maintaining the *status quo*.

Specifically, as the controlling shareholder of FACS, the Trustee directed FACS not to take any action outside the normal course of business and threatened to institute legal proceedings in the event that FACS took such actions.²⁶ FACS was prohibited by the Trustee from entering into new contracts, hiring additional employees, selling assets, incurring debt, or taking any action which would affect FACS' balance sheet, or which might make the controlling stock interest less attractive to a potential investor. Between the Trustee's appointment on October 16, 2001, and the sale of the assets in January 2002, the only action that the Trustee authorized for FACS was negotiation of a brief extension of its office lease. Thus, as a matter of law, FACS was prohibited from directing FAI's subcontractors or to engage any new contractors.²⁷

²⁶ See letter from James M. Hoffman, counsel to the Trustee, to George Grammas, counsel for FACS (dated Jan. 9, 2002), included in Attachment 1 under Tab C. Attachment 1 contains sensitive commercial and financial information and has been submitted under a request for confidential treatment pursuant to 47 C.F.R. §§ 0.457(d) and 0.459.

²⁷ In an effort to ensure that FACS would not encounter further delays in contract negotiations, FACS did continue to solicit proposals and entered into negotiations for new replacement contracts for launch services, communications payload, and spacecraft bus construction. However, FACS could not conclude negotiations or execute such contracts while the bankruptcy was still pending, and in advance of the Trustee transferring the controlling shares of FACS to NYS. NYS did attempt to expedite its acquisition of FACS by making an unsolicited bid in November 2001. Although not accepted by the Trustee, the unsolicited bid did have the effect of expediting the sale notice in December 2001 and the sale in January 2002.

Under these circumstances, the only thing that FACS could do to minimize the time period in which FACS's business discretion would be constrained was to undertake aggressive efforts to make the Trustee aware of the urgent need to accelerate the sale of FAI. To that end, counsel for FACS first met with the Trustee soon after she was appointed to urge her to take expedited action to sell the FAI assets. The Trustee also had been contacted by other parties expressing an interest in purchasing FAI's assets, which gave the Trustee reason to believe that there might be competing bids. This FACS action, in conjunction with NYS' November 2001 unsolicited bid for FAI's assets, resulted in the Trustee deciding in November 2001 to notice an expedited sale of the assets of FAI to occur in December 2001.

However, other parties opposed attempts to expedite the sale. In response to the opposition, counsel for FACS contacted the Trustee by letter in early December to explain why it was imperative that the sale process be expedited. Additionally, on December 21, 2001, counsel for FACS testified at a hearing before the U.S. Bankruptcy Court for the District of Maryland concerning a motion to extend the bidding period to explain to the court why it was imperative that the sale process be expedited.

On January 7, 2002, the Trustee accepted sealed bids for the purchase of FAI's assets. On January 14, 2002, the Trustee sold, assigned and transferred the assets and properties of FAI, including the stock of FACS, to NYS, the highest bidder. Under the terms of the sale, the Trustee retained control over the FACS stock and the FCC license until such time as the Bureau issued an order approving the transfer to NYS.

The involuntary bankruptcy of FAI and the subsequent decisions of the Trustee that prevented FACS from entering into new contracts were legal circumstances beyond FACS' control that delayed FACS' progress on developing the FAISAT system. The bankruptcy-related

legal impediments existed from the time the Trustee was appointed, through the period that the Trustee liquidated FAI, and ultimately until such time as the Bureau approved transfer of control of FACS from the Trustee to NYS in August 2002.²⁸ Immediately upon approval of the transfer of control application in August 2002, substantial activity on the FACS system resumed.

Importantly, FACS is not claiming that circumstances of financial hardship, mistaken or modified business projections, failure to attract investors, or internal company reorganization justify an extension in this case.²⁹ FACS was never in bankruptcy. Indeed, while many other licensed and operating satellite systems have been unable to obtain funding, FACS has secured significant additional funding and has been moving forward aggressively. Moreover, FACS was not a debtor-in-possession. Instead, the involuntary bankruptcy of FAI caused FACS to fall under the control of the Trustee in the involuntary bankruptcy proceeding. Absent the involuntary Chapter 7 bankruptcy of its former parent company and prime contractor, FACS would have been in a position to complete its construction and launch obligations.

2. Approval for a Technical Assistance Agreement Presented Unforeseen and Uncontrollable Delay, Which Prevented FACS From Providing New Milestone Dates Until Now

The involuntary bankruptcy also caused an unforeseen and uncontrollable delay in FACS obtaining approval from the State Department's DDTC for a TAA between FACS and Polyot.

Because Polyot, FACS' manufacturer of its spacecraft bus and launch vehicles is a foreign entity,

²⁸ The U.S. State Department approval process, discussed above and below, was an unforeseen legal circumstance also beyond FACS' control that now justifies FACS' milestone extension request.

²⁹ See, e.g., *Advanced Communications Corp., Memorandum Opinion and Order*, 11 FCC Rcd 3399, 3417 (para. 45) (1995) (delays related to negotiations with potential investors do not constitute adequate justification for extension of milestones); *United States Satellite Broadcasting Company, Inc. and Dominion Video Satellite, Inc., Memorandum Opinion and Order*, 3 FCC Rcd 6858, 6859 (para. 11) (1988) (failure to attract investors, an uncertain business situation, or an unfavorable business climate in general have never been adequate excuses for failure to meet a construction timetable); *MCI Communications Corp., Memorandum Opinion and Order*, 2 FCC Rcd 233, 234 (para. 7) (1987); *AT&T and Ford Aerospace Satellite Services Corp., Memorandum Opinion and Order*, 2 FCC Rcd 4431, 4433-34 (paras. 21-23) (1987) (delay due to construction contract negotiation does not constitute adequate justification for extension of milestones).

FACS is required under the International Traffic in Arms Regulations to obtain approval from the DDTC of a TAA.³⁰ Such approval authorizes FACS to export technical data and have technical discussions with Polyot regarding construction of the spacecraft bus.³¹ Before a company can obtain approval for a TAA, it must first register with the DDTC.³²

Registration is not itself an approval process. Registration is a process through which the DDTC gathers the requisite information on a party who is involved in certain manufacturing or exporting activities, including the export of covered technical information.³³ DDTC issues a registration to any entity who is eligible to register and who has provided the requisite information. One registration requirement is the identification of the registrant's parent company.³⁴ After the DDTC confirms that a company has satisfied the registration requirements, the company may begin to receive export authorizations. In the case of FACS' registration, all information necessary to submit the registration was available in the first half of 2002 except the identification of its parent company, which could not be provided until the Bureau approved the application to transfer of control of FACS from the bankruptcy Trustee to NYS.

On August 19, 2003, the very day that the Bureau released the order transferring control of FACS to NYS, FACS submitted its registration form to the DDTC. DDTC will not transfer the registration from one company to another. In September 2002, the DDTC directed FACS to submit a request to transfer FAI's existing approval for the TAA, between FAI and Polyot, to FACS. On September 26, 2002, FACS submitted its formal request to the DDTC to transfer

³⁰ See 22 C.F.R. § 124.

³¹ *Id.*

³² See 22 C.F.R. § 122.1.

³³ See 22 C.F.R. § 122.1(c).

³⁴ See 22 C.F.R. § 122.2 and DDTC for DS-2032.

FAI's approved TAA to FACS. On December 10, 2002, despite its earlier direction, the DDTC determined that the TAA, which had been approved for FAI, could not be transferred to FACS.³⁵ Consequently, FACS was required to obtain approval for a new TAA. On December 11, 2002, FACS submitted an application to DDTC seeking approval for a TAA between FACS and Polyot. The DDTC approved FACS' TAA on May 14, 2003, enabling FACS to determine a schedule for construction and launch of the satellite constellation and provide firm milestones to the Bureau in this instant Amendment.

B. Unique and Overriding Public Interest Concerns Justify Granting the Extension

FAI was both FACS' prime contractor and parent. Had FAI merely been FACS' prime contractor, when FAI's creditors forced it into Chapter 7 bankruptcy, FACS could have sought an alternative prime contractor or multiple contractors to continue deployment of the FAISAT system. However, because FAI was also FACS' parent and held the controlling voting shares of FACS, upon appointment of a bankruptcy Trustee, FACS was prevented from doing anything outside of the course of normal business. Abrogating FAI's contracts by finding an alternate contractor was outside the course of normal business. Thus because the Trustee controlled FACS, as the approved holder of FAI's assets, including the controlling voting shares of FACS, FACS was legally precluded from entering into alternate contracts with other systems developers. This unique set of facts, coupled with the public interest in competitive, affordable

³⁵ The DDTC stated that the reason that FACS' request to transfer FAI's TAA approval could not be processed was because:

The original authorization (TA 576-99) is for Final Analysis, Inc., not for Final Analysis Communication Services (FACS). Therefore, FACS cannot amend this agreement, as it is not theirs to amend.

See Letter dated December 10, 2002, from Janet Rishel, Office of Defense Trade Controls, U.S. Department of State, included in Attachment 2 under Tab M. Attachment 2 contains sensitive commercial and financial information and has been submitted under a request for confidential treatment pursuant to 47 C.F.R. §§ 0.457(d) and 0.459.

data services useful in a broad array of applications, including homeland security, as explained in the *Waiver Petition*, justifies this extension.

Little LEO services in a competitive environment, can offer a unique, low-cost data solution, particularly for remote, underserved areas, and for communications needs that do not require voice services. The Administration also has emphasized the importance of new business and new job creation. If FACS is not permitted to build its satellite system, it will mean the immediate elimination of jobs, contracts, services, and the businesses and opportunities that will be a natural outcome of this venture.

Moreover, if the Commission does not extend FACS' milestones, the revocation of FACS' license will be yet another blow to the communications industry and to the satellite industry, in particular. FACS has been an active participant in the WRC-03 process, working very closely with staff from the Bureau, as well as briefing legal advisors to the Chairman and Commissioners on the WRC-03 progress. Three FACS representatives were on the U.S. Conference Preparatory Meeting ("CPM") delegation. FACS representatives also actively worked with Commission staff at the CPM to resolve issues and correct problems in CPM text. Two FACS representatives attended the ITU Working Party 7C and 8D international meetings. FACS has devoted substantial resources to support the adoption of WRC-03 Agenda Item 1.16, which will consider allocations on a worldwide basis for feeder links in bands 1390 – 1392 MHz (Earth-to-space) and 1430-1432 MHz (space-to-Earth) for the non-geostationary MSS with service links operating below 1 GHz. FACS is also funding four members of the U.S. WRC-03 delegation to advocate adoption of Agenda Item 1.16 during the four-week conference. Upon the urging of the Commission and other U.S. government agencies, FACS spent significant

resources to retain Aerospace Corporation to conduct and complete L-band tests to support the U.S. Proposal for WRC-03 Agenda Item 1.16.

C. Alternatively, the Commission Should Waive Section 25.117(e)(1)

Alternatively, FACS respectfully requests that the Commission waive Section 25.117(e) and grant FACS additional time in which to complete construction and launch of its Little LEO system. Pursuant to Section 1.3 of the Commission's rules, the FCC may waive rules if it finds "good cause" to do so.³⁶ Waivers are appropriate where special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than strict adherence to the general rule.³⁷ The courts and the Commission have recognized that regulatory policy will be undercut if administrative rules do not "in some way take into account considerations of hardship, equity or more effective implementation of overall policy."³⁸

The FCC has previously held that a waiver of Section 25.117(e) is appropriate when there is no evidence that an applicant is warehousing spectrum and granting the waiver will not preclude new entrants from entering the market.³⁹ In addressing concerns about warehousing, the Commission has considered whether the applicant has demonstrated intent to proceed with its licensed system, and the Commission has waived Section 25.117(e)(1) when the applicant has done so.⁴⁰

³⁶ 47 C.F.R. §1.3. See *WAIT Radio v. Federal Communications Comm'n*, 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT Radio*"); *Northeast Cellular Radio Tel. Co. v. Federal Communications Comm'n*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

³⁷ See *NetSat28 Company, L.L.C.*, 16 FCC Rcd 11025, 11027 (2001) (Memorandum Opinion and Order ("*NetSat28 Waiver*").

³⁸ *WAIT Radio*, 418 F.2d at 1159.

³⁹ See *EarthWatch Incorporated*, 15 FCC Rcd 13594.

⁴⁰ See *id.*; *GE American Communications, Inc., Order and Authorization*, 16 FCC Rcd 11038, 11041 (para. 10) (2001) (stating that "[i]n every instance where the Commission has denied a milestone extension request, construction of the satellite either had not begun or was not continuing, thus raising questions regarding the licensee's intention to proceed").

FACS believes that the unique set of facts here present a compelling case for granting a waiver. FACS has made substantial progress in the development of the FAISAT system, including meeting its first two construction commencement milestones by entering into a non-contingent construction contract with FAI.⁴¹ Moreover, firm fixed-price launch and spacecraft bus contracts have been signed with Polyot.

Despite substantial obstacles, including the bankruptcy of its former parent, FACS, through its new parent company has acquired final launch vehicles, negotiated firm fixed-price contracts for spacecraft bus and payload construction, and obtained substantial third-party financing. Some of the satellite subsystems are at post critical design review level. Subcontractors are “bending metal.” Given the considerable and unforeseen, uncontrollable legal impediments that FACS has faced, progress on system development has been timely and substantial. In short, FACS has spent and continues to spend substantial amounts of real money on a real system to develop competitive services that will serve important public interest needs, including homeland security applications for U.S. allies in combating terrorism.

The Commission has previously explained that where a licensee has begun construction, there is less doubt as to whether the licensee will proceed with its business plan.⁴² FACS’ commitment to construction and launch of the FAISAT system has been unwavering. FACS has taken significant steps to bring the FAISAT system to completion, including the investment of a substantial amount of money. This investment, coupled with actual construction, and its substantial commitment of resources to obtaining additional international spectrum allocations,

⁴¹ See *EchoStar Satellite Corporation, Memorandum Opinion and Order*, 17 FCC Rcd 23489, 23489 (para. 1) (Int’l Bur. 2001) (reinstating a license based on evidence that the licensee was “constructing and implementing an operational Ka-band system”).

⁴² See *EarthWatch* at 13598 n.29; see also *Columbia Communications Corporation, Memorandum Opinion and Order*, File No. SAT-MOD-20000208-00058, DA 00-702 (para. 16) (released Apr. 5, 2000).

evidences that FACS intends to complete its business plan, and provide the FAISAT system services as authorized. In short, FACS has commenced construction, continued to demonstrate diligence despite unavoidable and uncontrollable obstacles, and is ready and willing to proceed immediately with the remaining steps to complete implementation of its system.⁴³ Therefore, should the Bureau not find unforeseen, uncontrollable circumstances or unique and overriding public interest concerns, the Bureau should waive Section 25.117(e)(1) and grant the milestone extension.

Waiver of Section 25.117(e)(1) is also appropriate because extending FACS' milestones will not preclude new entrants from entering the market or going forward with their business plans. As explained in detail in the *Waiver Petition*, Little LEO spectrum allocation and assignment is unique, based on industry agreement. FACS shares its spectrum with other users, and even if the Commission extends FACS' milestones, that spectrum will continue to be available to other users. Thus there is not preclusive effect on new entrants. Even if the Commission extends FACS' milestones, competitors can still enter the market to complete their own business plans.

III. CONCLUSION

The unique set of facts presented here, which have not previously been considered in detail by the Bureau, require the Bureau under the Commission's settled milestone rules to grant FACS additional time in which to complete construction of and launch its Little LEO system. Despite very real impediments arising from legal constraints beyond its control – and having

⁴³ See *Mobile Communications Holdings, Inc., Memorandum Opinion and Order*, FCC 03-122, para. 24 (rel. Jun. 4, 2003) (noting that the FCC has granted requests for postponement of later milestones where “the licensees had met the requirement to commence satellite construction, had continued to demonstrate diligence thereafter, and were ready and willing to proceed immediately with the remaining steps to complete implementation of their systems”).

nothing to do with the financial stability or business decisions of FACS – FACS has made remarkable progress in designing and developing its system. This demonstrable progress is fully compliant with the Commission’s basic policy concern underlying satellite system milestones, namely that licensees are building their systems in a timely manner and that the spectrum is not being held by licensees unable or unwilling to proceed with their plans.⁴⁴ Moreover, grant of an extension will further the public interest in competitive low-cost data services offered by Little LEO providers. FACS therefore respectfully requests that the Bureau modify the FACS license to conform with the schedule of milestone dates as specified above.

Respectfully submitted,

FINAL ANALYSIS COMMUNICATION SERVICES, INC.

By: Randall W. Sifers

James S. Gilmore, III
Glenn B. Manishin
Randall W. Sifers
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9606

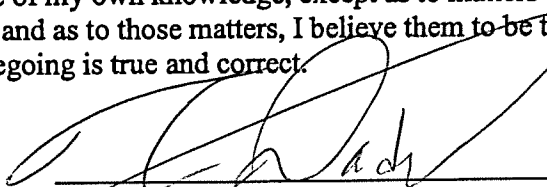
June 6, 2003

Its Attorneys

⁴⁴ See, e.g., Columbia Communications Corp., *Memorandum Opinion and Order*, 15 FCC Rcd 15566, 15571 (para. 11) (Int’l Bur. 2000).

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 Amendment to Petition for Waiver and Modification to Extend Milestones ("Amendment") dated June 6, 2003. I have read the Amendment 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 June 6, 2003



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

This attachment includes correspondence between counsel for FACS and the counsel for the Trustee for FACS' former parent and former prime contractor, FAI. This correspondence has been submitted under a request for confidential treatment pursuant to Sections 0.457(d) and 0.459 of the Commission's rules, 47 C.F.R. §§ 0.457(d) and 0.459.

This attachment includes correspondence between FACS and the Office of Defense Trade Controls, U.S. Department of State. This correspondence has been submitted under a request for confidential treatment pursuant to Sections 0.457(d) and 0.459 of the Commission's rules, 47 C.F.R. §§ 0.457(d) and 0.459.

EXHIBIT D

FINAL ANALYSIS COMMUNICATION SERVICES, INC.

Waiver Request

In this application, which amends the pending Petition for Waiver (File No. SAT-MOD-20020329-00245), Final Analysis Communication Services, Inc. (“FACS”), FACS seeks, among other things, a waiver of Section 25.161 of the Commission’s Rules, 47 C.F.R. § 25.161, with respect to the completion of construction and launch milestones for its first two satellites, and, in the alternative, a waiver of Section 25.117(e)(1) of the Commission’s Rules, 47 C.F.R. § 25.117(e)(1).

The justifications for waiver of these rules are explained in the Petition for Waiver (File No. SAT-MOD-20020329-000245), and in the Amendment to Petition for Waiver and Modification to Extend Milestones which is included with this application as Attachment A, and are hereby incorporated by reference.