**Before the**
# FEDERAL COMMUNICATIONS COMMISSION
**Washington, D.C. 20554**

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| Application of | ) | |
| | ) | Call Signs: S2966 and S2977 |
| **THE BOEING COMPANY** | ) | |
| | ) | File Nos. SAT-AMD-20171206-00167 |
| For Amendment to Sell NGSO | ) | and SAT-AMD-20171206-00168 |
| Applications to SOM1101, LLC | ) | |
| | ) | |

## PETITION TO DENY OF SPACE EXPLORATION HOLDINGS, LLC


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## SUMMARY

Space Exploration Holdings, LLC ("SpaceX") hereby petitions to deny two applications by The Boeing Company ("Boeing") and SOM1101, LLC ("SOM1101") under which SOM1101 would aim to purchase two of Boeing's pending applications for authority to launch and operate non-geostationary orbit ("NGSO") satellite systems operating in the Ka- and V-bands. SOM1101 is an entity indirectly wholly-owned by Gregory T. Wyler ("Wyler"), the founder, Chairman of the Board, and Executive Director of WorldVu Satellites Limited (also known as "OneWeb"), an entity that also proposes to launch and operate two NGSO systems in the same Ka- and V-bands. Wyler's multiple and ongoing managerial positions with OneWeb constitute an attributable interest in OneWeb as defined under the Commission's rules. Thus, the proposed sale of the Boeing applications to Wyler would clearly violate the Commission's rule explicitly prohibiting one party from holding an interest in multiple NGSO applications or unbuilt systems operating in the same frequency band.

The applicants belatedly seek a waiver of this crystal clear prohibition. However, they have failed to satisfy the heavy burden that any party seeking a waiver must meet in order to justify a departure from the well-established rule. Contrary to Boeing and Wyler's assertion, their proposed transaction raises significant concerns about spectrum speculation and trafficking. Although Boeing claims that the compensation it will receive from Wyler for the transaction will not include a profit, Boeing and SOM1101 propose "to implement an arrangement in which SOM1101 serves as the licensee and Boeing remains available to provide manufacturing and advisory service." Simply put, this suggests that Boeing stands to benefit far more from the proposed arrangement through implied future sales of spacecraft, launch services, and advisory services. The scope of such implied benefit for manufacturing and launch services would range

in the hundreds of millions, and likely billions of dollars, well in excess of the compensation the applicants cite as offsetting Boeing's technical, legal, and regulatory work to date to support the filings. The parties provide no further information on whether or not the proposed transaction includes up-front payments from which Boeing would profit today or other future inducements, much less the kind of detailed submission that could enable the Commission to determine the full scope of compensation involved. Moreover, Boeing appears to believe that the sale of these two applications to Wyler would remove a bar to a third NGSO application it has filed, allowing it to lay claim to more orbital and spectrum resources. Based on the law, practice, and good public policy, the Commission must deny the waiver.

Boeing and Wyler also claim that waiving the Commission's rule would benefit competition. However, given his significant interests in OneWeb, there certainly is no guarantee that, if a waiver were granted, Wyler would actually use the Boeing applications to compete with OneWeb – indeed, Wyler's ongoing fiduciary duties to OneWeb presumably would preclude such competition. The Commission's rules are crafted specifically to avert singular and undue control over significant orbital and spectrum resources. Just by being granted control of the two large Boeing NGSO constellations, in addition to his controlling interests in OneWeb, Wyler could distort competition, disrupt or delay the Commission's ongoing administrative processing of NGSO applications in pending processing rounds, and in doing so, unfairly disadvantage other NGSO operators and the broadband connectivity they promise to deliver. These disruptive risks exist even if neither of the Boeing systems in question were ultimately developed.

Wholesale denial of a waiver here is consistent with past Commission decisions, which have distinguished between legitimate transactions (such as a merger) in which a pending application is merely incidental, as opposed to speculative transactions like this one in which the

entire objective of a transaction is to acquire the advantages of a pending application's status in a processing queue. In addition, OneWeb under Wyler's control has a history of taking extreme positions on spectrum sharing and orbital coordination with other NGSO systems, underscoring the harm to competition overall and the disadvantage to the other NGSO applicants in the two affected processing rounds that would result from the proposed transaction. A waiver would thus undermine the purpose of the rule and would not serve the public interest, and the Commission should therefore deny both applications.

However, should the Commission decide to give any substantive consideration to the requested waivers, it must fully investigate the complete extent of compensation between the parties, and also require Wyler to state clearly whether the Boeing systems will compete or cooperate with OneWeb, as the answers should be of decisional significance in the competitive impact of these petitions. Any grant of the proposed sales should include a condition requiring Wyler to provide periodic reports to demonstrate both (1) that Boeing has not received any additional compensation in any form whatsoever – explicit or implied – and that Boeing will not receive such compensation, and (2) that the Boeing NGSO systems are competing with (rather than cooperating with) OneWeb. In addition, any eventual grant of the proposed assignment should not be exempted from the processing round rules regarding the "cut-off" date applicable to each underlying application. Rather, as required under Section 25.116(b) of the Commission's rules, the applications if amended should be considered to be newly filed and removed from their respective current NGSO processing rounds. This would at least deter other spectrum speculation by devaluating a pending application in the hands of a successor applicant seeking to game the system.

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**PETITION TO DENY OF SPACE EXPLORATION HOLDINGS, LLC**

Space Exploration Holdings, LLC ("SpaceX") hereby petitions to deny the above referenced applications by The Boeing Company ("Boeing") and SOM1101, LLC ("SOM1101") to amend two of Boeing's pending applications for authority to launch and operate non-geostationary orbit ("NGSO") satellite systems operating in the Ka- and V-bands.[1] Boeing proposes to convey these applications by substituting SOM1101, an entity indirectly wholly-owned by Gregory T. Wyler ("Wyler"), as the applicant in place of Boeing.

Wyler is the founder, Chairman of the Board, and Executive Director of WorldVu Satellites Limited ("OneWeb"), an entity that also proposes to launch and operate two NGSO systems in the same Ka- and V-bands.[2] Accordingly, the proposed conveyance by Boeing would clearly violate the Commission's prohibition on one party holding an interest in multiple NGSO systems operating in the same frequency band.[3] The public interest would not be served by allowing Wyler to control the significant orbital and spectrum resources of two additional large

[1] *See* IBFS File Nos. SAT-LOA-20161115-00109 (Ka-band) and SAT-LOA-20160622-00058 and SAT-AMD-20170301-00030 (V-band).

[2] *See* IBFS File Nos. SAT-LOI-20160428-00041 (Ka-band) and SAT-LOI-20170301-00031 (V-band).

[3] *See* 47 C.F.R. § 25.159(b).

NGSO constellations. To do so would undermine the Commission's longstanding policies targeting spectrum speculation and trafficking in and warehousing of such valuable assets, and facilitate strategic behavior to disrupt the Commission's ongoing NGSO processing rounds and distort competition for other NGSO applicants, contrary to the public interest.

Should the Commission nonetheless decide to consider the merits of the request to waive this prohibition, it must require considerable additional information on the arrangements made or implied between the two companies for manufacture, launch and advisory services in order to assess the full range of inducements involved in the proposed transaction. Further, any grant of the proposed amendments should be governed by the processing round rules for "cut-off" dates applicable to each underlying application in their respective NGSO processing round. Accordingly, as required under the Commission's rules, the applications, if amended, should be considered to be newly filed and removed from their current NGSO processing rounds.[4]

## BACKGROUND

Boeing has filed three applications seeking authority to launch and operate NGSO satellite constellations. The first Boeing NGSO system ("Application 1") would use Ka-band spectrum for 60 highly inclined, mid-Earth orbit ("MEO") satellites operating in three figure-eight constellations (over the Americas, Africa/Europe, and Asia/Australia).[5] Application 1 was filed in a Ku-/Ka-band NGSO processing round that the Commission initiated with the July 2016 acceptance of OneWeb's market access application for a system of 720 low-Earth orbit ("LEO") satellites.[6] A total of twelve NGSO applications were filed in that Ku-/Ka-band processing round prior to the established November 2016 cut-off date. While Application 1 remains

4 *See id.* at § 25.116(c).

5 *See* IBFS File No. SAT-LOA-20161115-00109.

6 *See* Public Notice, "OneWeb Petition Accepted for Filing," 31 FCC Rcd. 7666 (IB 2016).

pending, the Commission has granted OneWeb's request for U.S. market access, along with two other U.S. market access grants.[7] OneWeb's system, though authorized, has not yet been built.

The application for Boeing's second NGSO system ("Application 2"), composed of 2,956 LEO satellites operating with V-band spectrum, was accepted for filing in November 2016 , triggering a V-band NGSO processing round.[8] In response, a total of nine applications were filed in this processing round prior to the established cut-off date of March 2017. Among these, Boeing filed an additional application for its third NGSO system ("Application 3"), composed of 132 LEO and 15 HEO satellites.[9] In the same V-band round, OneWeb filed a market access application for an NGSO constellation composed of 720 LEO satellites and 1,280 MEO satellites.[10] This OneWeb application and Boeing Applications 2 and 3 remain pending; however, Application 3 has not been accepted by the Commission.

In these proceedings, Wyler's SOM1101 proposes to buy Applications 1 and 2 from Boeing, and substitute itself for Boeing as the applicant in their respective pending processing rounds. SOM1101 is reported to be indirectly wholly-owned by Wyler. Wyler is also the founder of OneWeb and its Chairman of the Board and Executive Director, and he holds a significant equity interest in OneWeb – one of only three shareholders with a reportable ownership stake.[11] The applicants report that Boeing will receive some immediate compensation

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7 *See WorldVu Satellites Limited*, 32 FCC Rcd. 5366 (2017).

8 *See* Public Notice, "Boeing Application Accepted for Filing in Part," 31 FCC Rcd. 11957 (IB 2016).

9 *See* IBFS File No. SAT-LOA-20170301-00028. This application has not been accepted for filing.

10 OneWeb's V-band application has been accepted for filing. *See* Public Notice, "Satellite Space Applications Accepted for Filing," Rep. No. SAT-01245 (IB, rel. June 16, 2017).

11 *See* Officers, Directors, and Ten Percent or Greater Shareholders, IBFS File No. SAT-AMD-20180104-00004 (filed Jan. 4, 2018) (Wyler indirectly holds an 11.94% interest in OneWeb). Wyler's interest in OneWeb has remained essentially constant since it first filed for access to the U.S. market in April 2016. *See* Petition for Declaratory Ruling, Response to Question 40, IBFS File No. SAT-LOI-20160428-00041 (Apr. 28, 2016) (Wyler indirectly holds an 11.84% interest).

from SOM1101 to cover a portion of its expenses in maintaining its NGSO applications.[12] In addition, it appears that Wyler and Boeing have "an arrangement in which SOM1101 serves as the licensee and Boeing remains available to provide manufacturing and advisory services, as needed."[13] The application provides no further information as to the nature of that arrangement or any compensation that Boeing can expect from it in the future.

## DISCUSSION

### I. WYLER HAS AN ATTRIBUTABLE INTEREST IN BOTH ONEWEB AND SOM1101 FOR PURPOSES OF THE PROHIBITION ON OWNERSHIP OF MULTIPLE NGSO SYSTEMS

Section 25.159(b) of the Commission's rules prohibits a party from applying for an NGSO-like satellite system authorization if that party has a pending application for or an authorized-but-unbuilt NGSO system involving the same frequency band.[14] The Commission adopted this rule in order to restrain speculation in orbital and spectrum resources.[15] At that time, the Commission recognized that it would also need to adopt attribution rules, and extend its prohibition on multiple system filings to attributable-interest holders, because otherwise applicants "could evade the limit simply through corporate restructuring."[16] It therefore decided to define such an attributable interest as either (1) aggregate equity or debt interests in excess of 33 percent in another entity, or (2) a controlling interest in another entity.[17] In doing so, the Commission made clear that it was adopting the control standard that had previously been

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12 Public Interest Statement, IBFS File No. SAT-AMD-20171206-00167, at 3 (Dec. 6, 2017) ("PI Statement").

13 *Id.*

14 *See* 47 C.F.R. § 25.159(b).

15 *Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd. 10760, ¶ 230 (2003) ("*2003 Licensing Reform Order*").

16 *Id.* ¶ 236.

17 47 C.F.R. § 25.159(c)(1) and (2).

adopted in its competitive bidding rules, codified in Section 1.2110 of the Commission's rules.[18] Those rules provide that the officers and directors of an applicant "shall be considered to have a controlling interest in the applicant."[19] The Commission's rules consider any pending NGSO applications and licensed-but-unbuilt NGSO satellite systems to have been filed by each of its attributable-interest holders for the purpose of these rules.[20]

Wyler indirectly owns all of the interests in SOM1101, and thus has *de jure* control over that entity.[21] Because Wyler is the Chairman of the Board and Executive Director of OneWeb, he has a "controlling interest" in that entity as well under the Commission's attribution rules. Thus, for purposes of the multiple ownership prohibition of Section 25.159(b), Wyler has an attributable interest in the pending applications and licensed-but-unbuilt systems of OneWeb and, if the Commission were to allow the conveyance from Boeing to SOM1101, also in any such applications or systems acquired by SOM1101.

This should come as no surprise to anyone. Wyler is not just the Chairman, Executive Director, and a substantial shareholder of OneWeb. He founded the company and has led its NGSO business efforts to pursue his oft-stated mission to achieve the delivery of broadband

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[18] *See 2003 Licensing Reform Order*, ¶ 237 n.564.

[19] *See* 47 CFR § 1.2110(c)(2)(ii)(F). *See also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, 15 FCC Rcd. 15293, ¶ 63 (2000) ("under the controlling interest standard, the officers and directors of any applicant will be considered to have a controlling interest in the applicant")).

[20] *See* 47 C.F.R. § 25.159(c). The rule specifically refers to a controlling interest "within the meaning of 47 C.F.R. 1.2110(b)(2)." That section, in turn, provides that two entities will be treated as though they were the same entity if they either (1) are "affiliates" of each other, or (2) have an identity of interests identified in Section 1.2110(c)(5)(iii). The definition section of this rule identifies an "affiliate" as an entity that directly or indirectly controls or has the power to control that party, and further explains that "[c]ontrol can arise through . . . occupancy of director, officer, or key employee positions." *Id.* at § 1.2110(c)(5)(i) and (ii)(B). This is consistent with the rule's overarching definition of a "controlling interest," which provides that "[o]fficers and directors of the applicant shall be considered to have a controlling interest in the applicant." *Id.* at § 1.2110(c)(2)(ii)(F).

[21] *See, e.g.*, 47 C.F.R. § 1.2110(c)(2) ("*De jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation").

services around the world.[22] OneWeb asserts that Wyler himself has attracted additional funding for the company from shareholders who "support [his] vision," and that the company is operating "under Mr. Wyler's experienced leadership."[23] He often has claimed to be the driving force behind the company and its very public face. It is only appropriate that the Commission's attribution rules would cover a person so intimately related to and self-identified with that company.

Accordingly, if the Commission were to grant the applications at issue in these proceedings, Wyler would have an attributable interest in two inchoate NGSO systems in each of the Ka- and V-bands, contrary to the prohibition in Section 25.159(b).

## II. THE PARTIES' REQUEST FOR A WAIVER OF THE MULTIPLE OWNERSHIP PROHIBITION IN SECTION 25.159(b) WOULD NOT SERVE THE PUBLIC INTEREST AND SHOULD BE DENIED

Several weeks after filing their original amendment applications, Boeing and SOM1101 jointly filed a belated request for a waiver of Section 25.159(b), which prohibits one investor from holding an attributable interest in two pending NGSO applications or licensed-but-unbuilt NGSO systems in a single frequency band.[24] The Commission's standard for evaluating any such waiver request is well established. "An applicant for waiver faces a high hurdle even at the starting gate."[25] The party petitioning the Commission for a waiver bears the burden of showing

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[22] *See, e.g.*, Mark Holmes, "Wyler: OneWeb ready to solve the ultimate connectivity problem," Via Satellite (Sep./Oct. 2017) ("With Wyler, it always comes back to the mission, and that mission is to bring about an end to digital inequality, which Wyler believes is the root cause of many of society's problems."), *available at* http://interactive.satellitetoday.com/via/september-october-2017/wyler-oneweb-ready-to-solve-the-ultimate-connectivity-problem/.

[23] *See* Opposition and Response of WorldVu Satellites Limited, IBFS File No. SAT-LOI-20160428-00041, at 3 (Aug. 25, 2016).

[24] *See* Waiver of Section 25.159(b), IBFS File Nos. SAT-LOA-20160622-00058, SAT-LOA-20161115-00109, and SAT-AMD-20170301-00030 (filed Dec. 29, 2017) ("Waiver Request").

[25] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

good cause for the requested departure from the rule,[26] and waiver will only be granted where particular facts would make strict compliance inconsistent with the public interest.[27] Thus, in order to satisfy this public interest requirement, the waiver cannot undermine the purposes of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule. If a waiver is to be granted, "[t]he agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation."[28] Moreover, in the specific context of processing rounds, "[t]he Commission will waive deadlines only in extreme circumstances involving extraordinary circumstances."[29]

Notably, the applicants do not cite a single case in which the Commission has waived the prohibition in Section 25.159(b). Instead, they make three arguments in support of their waiver request, which are discussed, in turn, below. As this discussion demonstrates, the applicants have failed to meet the heavy burden the Commission places on justifying the waiver they seek.

### A. Grant of the Requested Waiver Would Promote Speculation in NGSO Orbital and Spectrum Resources

While Boeing and Wyler recognize that the rule against multiple NGSO interests was adopted in order to deter speculation and trafficking in spectrum, the applicants argue that the rule is no longer necessary. They point to the fact that the Commission recently eliminated the parallel rule applicable in the GSO satellite context, which they argue was no longer necessary in light of other safeguards, such as the performance bond and milestone requirements, which also

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[26] *See* 47 C.F.R. § 1.3.

[27] *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio*, 418 F.2d at 1159).

[28] *Id.* (citing *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 2970)).

[29] *See EchoStar Satellite Corp.*, 16 FCC Rcd. 14300, ¶ 5 (IB 2001), *recon. denied*, 17 FCC Rcd. 8305 (IB 2002) ("*EchoStar*").

apply in the NGSO context.[30] However, their argument ignores the fact that the revisions to the GSO rules occurred against the backdrop of an additional safeguard that specifically prohibits GSO applicants from assigning or otherwise permitting any other party to assume their place in a processing queue.[31] The Commission did *not* eliminate the same multiple ownership rule applicable to NGSO applications and licensed-but-unbuilt systems at the same time it did so for GSO applications – a clear sign that the Commission intended a different approach in the NGSO context.[32]

In addition, the applicants argue that there should be no concern about speculation in this case.[33] To the contrary, recent history lends ample cause for concern with respect to both Boeing and Wyler. First, Boeing's space business is primarily as a manufacturer of commercial and military satellites and spacecraft, not as an operator of commercial communications satellites. By its own admission, Boeing views its NGSO applications as falling outside the norm within the satellite industry.[34] Indeed, in the entire history of the company, Boeing has only held a single space station authorization, issued in 2001 for an NGSO system to provide Mobile-Satellite Service ("MSS").[35] It similarly surrendered that authorization over a decade ago before launching a single satellite, while stating that it still "hope[d] to participate in the development of

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30 *See* Waiver Request at 3.

31 *See 2003 Licensing Reform Order*, ¶ 242; 47 C.F.R. § 25.158(c).

32 *See, e.g., Dean v. U.S.*, 556 U.S. 568, 573 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Indeed, as the Commission found when it first adopted the prohibition against multiple attributable NGSO interests, such a rule is but one important component of the layered protections against speculation. *See 2003 Licensing Reform Order*, ¶ 230 (the prohibition "does not totally prevent speculation, [but] it does provide, *together with* strict milestone enforcement and the new bond requirement we adopt above, some protection against speculation" (emphasis added)).

33 Waiver Request at 3.

34 *See* PI Statement at 3.

35 *See The Boeing Company*, 16 FCC Rcd. 13691 (IB 2001).

integrated MSS/ATC networks as a leading manufacturer of MSS spacecraft."[36] Less than one year later, Boeing announced a contract to build three satellites and ground infrastructure for one of the remaining MSS operators – at that time, Boeing's largest contract in nine years.[37]

Here, Boeing appears to have entered into "an arrangement in which SOM1101 serves as the licensee and Boeing remains available to provide manufacturing and advisory service."[38] There is a very real possibility that Boeing is hopeful of future profits as a satellite manufacturer, launch supplier, and/or advisory service provider to Wyler's SOM1101 – a natural expectation, given that Boeing presumably has designed its own NGSO system architectures to be optimized for its own spacecraft manufacturing capabilities. Further, Boeing holds a 50 percent interest in the United Launch Alliance, a U.S. launch provider, and could hope to receive further compensation through the launch of any satellites that Wyler or even OneWeb may ultimately produce for deployment. Boeing could anticipate a clear path to a very lucrative partnership with benefits in the range of hundreds of millions, if not billions, of dollars, well beyond the simple offset of technical, legal and regulatory work to develop the applications cited by the applicants.

The applicants have failed to provide full information on the nature of their "arrangement," and thus the Commission has insufficient information to consider the merits of their waiver request. However, should the Commission nonetheless decide to do so, it should, consistent with other contexts in which the Commission seeks to prevent speculative spectrum filings, require the parties to supply details of any and all "arrangements" they have already entered into or have agreed to enter into. This should include "a copy of the agreement" and

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[36] *See* Letter from Joseph P. Markoski to Marlene H. Dortch, IBFS File Nos. SAT-LOA-19970926-00149, *et al.*, at 2 (Mar. 28, 2005).

[37] *See* Press Release, "Boeing Announces Largest Satellite Contract in Nine Years with Mobile Satellite Ventures" (Jan. 11, 2006), *available at* http://boeing mediaroom.com/2006-01-11-Boeing-Announces-Largest-Satellite-Contract-in-Nine-Years-with-Mobile-Satellite-Ventures.

[38] PI Statement at 3.

"any ancillary agreements," an affidavit describing "the exact nature and amount of any consideration paid or promised," "an itemized accounting of the expenses for which it seeks reimbursement," and "the terms of any oral agreement" related to these applications.[39] Absent such definitive information, the Commission cannot fully assess the scope of consideration involved in this transaction and its potential speculative implications, and should deny the amendments.[40]

Moreover, in addition to Applications 1 and 2 that Boeing proposes to sell to Wyler's SOM1101, Boeing also filed Application 3 in the V-band NGSO processing round.[41] At present, that application is subject to the multiple ownership prohibition in Section 25.159(b) and should already have been dismissed. Should SOM1101 become the applicant for one of Boeing's V-band applications, Boeing could argue that this prohibition would no longer apply.[42] That argument would enable Boeing to breathe life into an application that otherwise should have been dismissed, and allow it to pursue yet another application in the current processing round or sell that application to yet another substitute applicant. Given Boeing's recent request to amend Application 3 in order to seek even more spectrum,[43] it would seem that Boeing intends to continue to pursue, either for its own benefit or in speculation for yet another third party, some measure of NGSO assets even after conveying the other two applications to Wyler. In light of

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[39] *See* 47 C.F.R. § 73.3525(a) (regarding agreements for resolution of conflicting applications in comparative renewal proceedings for broadcast licenses). *See also id.* § 73.3588(a) (requiring similar showings when a party seeks to withdraw a petition to deny or informal objections to a broadcast application).

[40] In addition, any grant of the proposed sales should include a condition requiring Wyler to provide periodic reports to demonstrate both (1) that Boeing has not received any additional compensation in any form whatsoever – explicit or implied – and that Boeing will not receive such compensation, and (2) that the Boeing NGSO systems are competing with (rather than cooperating with) OneWeb.

[41] *See* IBFS File No. SAT-LOA-20170301-00028. The Commission has not accepted this application for filing.

[42] Indeed, the applicants assert that "Boeing will no longer require a waiver of Section 25.159(b)" for Application 3 if the Commission authorizes the sale of Application 2 to Wyler. *See* Waiver Request at 5 n.12.

[43] *See* Amendment, IBFS File No. SAT-AMD-20180131-00013 (Jan. 31, 2018).

Boeing's decision not to pursue a license with respect to Application 1 and Application 2, the Commission should dismiss Application 3 even if the pending assignments to SOM1101 are granted.

As for Wyler, he proposes to take control of two additional NGSO systems that, unlike OneWeb, were not designed by him and do not reflect his "vision." Wyler has started satellite ventures before and moved on from them. When transitioning from acting as founder and CEO of the NGSO satellite operator O3b, he cut all ties to O3b before pursuing his new vision with the formation of OneWeb. However, in this instance, Wyler does not propose to leave behind his conflicting interests in another similarly-situated NGSO system before moving on. There is no explanation for Wyler's interest in the Boeing applications and the particular NGSO systems they propose, other than acquiring their status in the current NGSO processing rounds. The ongoing Wyler/OneWeb relationship naturally raises the question of whether the Boeing systems will be competitors of OneWeb (as they would be in Boeing's hands) or will instead be used in a coordinated manner with OneWeb to undermine legitimate competition.[44] Here again, if the Commission does not reject the applications, the answer to that question should play an important role in its deliberations. Therefore, Wyler should, at a minimum, be required to declare his intentions with respect to this important issue before the Commission makes any ruling on the merits of the waiver request.

As discussed below, Wyler's ownership in and executive leadership of OneWeb would incentivize coordination of the activities of the Boeing filings to advantage OneWeb while disadvantaging other NGSO operators. Such anti-competitive posturing is precisely the kind of scenario the Commission's rules are designed to prevent. As the Commission has explained,

[44] Wyler's ongoing fiduciary duties as Chairman of the Board of OneWeb suggest that he will not be able to use the Boeing applications to compete.

"[s]uch unused authorizations for spectrum-orbit resources can create unnecessary coordination burdens and uncertainty for other operators," and they "may deter an operator that is able to proceed with its authorized satellite system."[45] Thus, contrary to the applicants' assertions, the proposed transaction raises significant concerns about speculation, with respect to both Wyler and Boeing.

### B. Grant of a Waiver Would Disadvantage Other NGSO Applicants

Next, the applicants argue that granting a waiver would not have a negative impact on other NGSO applicants, because the change of applicant does not affect the nature of the proposed NGSO system or the number of applications in each processing round.[46] This argument assumes that in the absence of this transaction, Boeing would continue to pursue two licenses it patently no longer wants, whether due to absence of financing, a revised business analysis, or some other reason. If instead Boeing were to withdraw its NGSO system applications, there simply would be two fewer licensees from the V-band and Ka-band processing rounds with which other licensees would have to coordinate the use of spectrum and orbital resources.

By contrast, there is every reason to believe that allowing Wyler to unduly combine his current OneWeb interests with Boeing's two pending applications would exacerbate an already complex coordination landscape among NGSO systems. For example, Boeing's proposed V-band NGSO system would operate at altitudes of 970 km, 1,030 km, and 1,082 km. These altitudes are close to the 1,110 km altitude at which SpaceX proposes to operate, which will necessitate coordination of physical operations. This should be technically achievable if both

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[45] *Update to Parts 2 and 25 Concerning Non-Geostationary, Fixed-Satellite Service Systems and Related Matters*, 32 FCC Rcd. 7809, ¶ 66 n.146 (2017).

[46] *See* Waiver Request at 4.

operators take a reasonable approach. Unfortunately, OneWeb (under Wyler's control) has taken the position that its system should be afforded 125 km of altitudinal separation from any other NGSO system.[47] The Commission has rejected OneWeb's call to impose this restriction on other systems,[48] and no other applicant in any ongoing NGSO processing round has found cause to demand such a large exclusion area around its system.

In this regard, it is instructive to review the historical interplay between Boeing and OneWeb on physical coordination of their respective systems. Boeing's original V-band application proposed operations at the same 1,200 km altitude at which OneWeb proposes to operate its NGSO system. OneWeb filed comments on Boeing's application asserting that "[e]stablishing greater than 100 km separation between the nominal orbital heights of large constellations is prudent to ensure safe operating margins."[49] In response, Boeing reiterated its belief that the two systems could coordinate the safe and efficient operation of their systems, even at the same nominal altitude, if only OneWeb would disclose the operational details for its orbital parameters.[50] Moreover, Boeing questioned "whether the suggested separation distance between the altitudes of different NGSO systems is actually needed for safe operation and whether it would constitute an efficient use of orbital resources."[51] Boeing also noted that OneWeb's position "would obviously limit the number of [NGSO] constellations (potentially to one) that could be maintained in operationally useful altitudes within the range from 1100 to

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47 *See, e.g.*, Comments of WorldVu Satellites Limited, IBFS File No. SAT-LOA-20161115-00118, at 11-12 (June 26, 2017); Letter from Brian D. Weimer to Marlene H. Dortch, IBFS File Nos. SAT-LOA-20161115-00118 and SAT-LOA-20170301-00027, at 8-10 (Nov. 17, 2017).

48 *See Telesat Canada*, 32 FCC 9663, ¶ 12 (2017).

49 *See* Comments of WorldVu Satellites Limited, IBFS File No. SAT-LOA-20160622-00058, at 5 (Dec. 1, 2016).

50 Opposition and Response of The Boeing Company, IBFS File No. SAT-LOA-20160622-00058, at 32 (Dec. 12, 2016).

51 *Id.* at 33.

1300 km."[52] Ultimately, Boeing agreed to amend its application by moving its proposed operating altitude in order to appease OneWeb, while OneWeb made no concession whatsoever.[53] Clearly, allowing the conveyance of an NGSO system from a reasonable coordination partner to one that has a history of making unreasonable demands and no concessions would have a dramatic negative effect on other NGSO system applicants.

### C. Denying the Waiver Would Not Deter Legitimate Business Plans

Lastly, the applicants argue that the failure to grant a waiver of Section 25.159(b) in this case would be contrary to the Commission's intent not to deter legitimate business plans.[54] In this context, the Commission has been careful to distinguish between transactions in which control over an applicant changes hands as the result of a larger transaction (such as a merger or acquisition) as opposed to those in which all that changes hands is the application itself. Thus, for example, although the Commission adopted an outright prohibition on assigning an applicant's place in a processing queue, it specifically determined that a transfer of control would be treated differently and would not cause the application to be moved to the end of the queue.[55] When one party sought reconsideration based on the apparent inconsistency of this approach, the Commission explained that "an applicant's transfer of control is less likely to be used as an ongoing abusive strategy than the sale of places in the queue."[56]

The Commission applied this distinction in denying a satellite applicant's request to substitute another party. It explained that "[t]he Commission eliminated the rule classifying

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[52] *Id.* Notably, by insisting upon 125 km of altitudinal separation for the Boeing V-band system, Wyler would seek to preclude other NGSO systems in an additional 550 km swath of space available for LEO operations – including the 1,110 km, 1,130 km, and 1,150 km altitudes at which SpaceX proposes to operate.

[53] *See* Letter from Brian D. Weimer and Bruce A. Olcott to Marlene H. Dortch, IBFS File Nos. SAT-LOI-20160428-00041, SAT-LOA-20160622-00058, and SAT-AMD-20170301-00030 (Mar. 23, 2017).

[54] *See* Waiver Request at 4.

[55] *See 2003 Licensing Reform Order*, ¶ 140.

[56] *Amendment of the Commission's Space Station Licensing Rules and Policies*, 31 FCC 9398, ¶ 19 (2016).

transfer of control applications as 'major amendments' because it did not want to discourage certain larger transactions, such as the acquisition of one entity by another entity, by requiring an application involved in the transaction to be moved to the end of the first-come, first-served licensing queue."[57] It then went on to explain why the proposed substitution of one applicant for another did not fall within this exception.

> The substitution of Pegasus for DIRECTV is not part of a larger transaction envisioned by the Commission when it eliminated the rule classifying transfer of control applications as "major amendments." Rather, DIRECTV's substitution request is driven by an interest in preserving status in the first-come, first-served licensing processing queue. . . . In other words, the request to substitute Pegasus for DIRECTV as the applicant is an arrangement that would not have occurred but for the first-come, first-served licensing process. ***This is not the type of transaction the Commission contemplated in eliminating the major amendment rule for transfer of control applications.***[58]

Accordingly, the Commission denied the request to substitute a new applicant.

Boeing and Wyler do not propose a merger or other transfer of control; rather, Boeing simply proposes to sell its status in the Commission's Ku-/Ka- and V-band NGSO processing rounds to Wyler. Such a naked sale is not the type of "legitimate business plan" that the Commission worried about discouraging by imposing the multiple ownership prohibition. It is, instead, specifically the type of transaction that the Commission recognized can be used as an ongoing abusive strategy. Therefore, the Commission should reject the proposed substitution as it has done in similar cases in the past.

As the Commission explained when it adopted Section 25.159(b), this rule should not preclude legitimate applications from consideration. "Rather, it simply requires satellite operators to prioritize their business plans."[59] Wyler previously made such a prioritizing choice

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[57] *DIRECTV Enterprises, LLC*, 24 FCC Rcd. 9408, ¶ 11 (IB 2009).

[58] *Id.* ¶ 12 (emphasis added).

[59] *2003 Licensing Reform Order*, ¶ 230.

when he left O3b to pursue his vision by founding OneWeb. Now, Wyler can choose to retain his controlling interest in OneWeb, or he can acquire the applications filed by Boeing – but he must make that choice and cannot hold an attributable interest in all of these large NGSO systems operating in the same frequency bands.

## III. THERE IS NO BASIS FOR EXEMPTING THIS APPLICATION FROM THE PROCESSING ROUND "CUT-OFF" RULES

Even if the Commission were to grant a waiver of the multiple ownership prohibition, it should still enforce the separate rule applicable to a change of applicant. Specifically, Section 25.116(c) of the Commission's rules provides that if a major amendment to an application pending in an NGSO processing round is submitted after a cut-off date, the application will be considered to be newly filed, and will lose its status in the processing group.[60] In this case, both of the Boeing applications at issue were filed as part of NGSO processing rounds with cut-off dates that have long since passed. Nonetheless, Boeing and Wyler assert that this rule is inapplicable because the proposed substitution of SOM1101 for Boeing as the applicant is not a major amendment. However, they seek a waiver of this rule or an exemption from the applicable processing round cut-off date to the extent necessary.[61]

An amendment will be considered "major" if it is determined by the Commission to be substantial pursuant to Section 309 of the Communications Act.[62] That statute lists examples of non-substantial applications that do not require public notice prior to grant, which include applications for a minor change in facilities, consent to an involuntary assignment or transfer, or special temporary authority in certain circumstances.[63] In this case, by contrast, Boeing and

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60 *See* 47 C.F.R. § 25.116(c).

61 *See* PI Statement at 4.

62 *See* 47 C.F.R. § 25.116(b)(4).

63 *See* 47 U.S.C. § 309(c)(2).

Wyler seek a far more substantive result that would allow one party to fully replace another in two ongoing NGSO processing rounds in a way that violates the Commission's prohibition on one party holding attributable interests in multiple NGSO systems. This amendment is clearly substantial under the Communications Act, and thus constitutes a major amendment for purposes of the rule.

Major amendments inject significant issues into processing rounds long after cut-off dates have passed, and thus undermine the integrity of the processing round regime.

> The Commission's processing round procedures require applicants to file proposals prior to the established deadline to ensure orderliness, expedition and finality in the licensing process. In addition, these procedures serve important public purposes, including fairness among applicants and permits the rapid dispatch of Commission business. The Commission will waive deadlines only in extreme cases involving extraordinary circumstances.[64]

Nonetheless, Section 25.116(c) identifies a very limited number of exceptions to the general rule that a major amendment will result in loss of status in an ongoing processing round. These exceptions include cases in which "the amendment reflects only a change in ownership or control found by the Commission to be in the public interest and for which a requested exemption from a 'cut-off' date is granted."[65] At the outset, as noted above, the applications at issue here do not propose "a change in ownership or control" of the current applicant, but rather an outright sale of two applications and their status in two ongoing NGSO processing rounds to another party. Accordingly, this exception is not applicable by its own terms in the instant circumstances.[66]

Even putting this aside, the Commission should deny applicants' request for relief. The Commission has made clear that it will consider waiving processing round deadlines only in

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64 *EchoStar*, ¶ 5.

65 47 C.F.R. § 25.116(c)(2).

66 In addition, the applicants only requested this exemption with respect to Boeing's proposed V-band NGSO system, but not its Ka-band system. In the absence of such a request and the supporting public interest showing, there is no basis for granting relief based upon this exception with respect to Boeing's Ka-band application.

"extreme circumstances involving extraordinary circumstances."[67] The only justification for a waiver provided by the applicants is the assertion that Wyler has the experience to bring NGSO services to market quickly and efficiently.[68] The Commission has not found such arguments compelling, because all applicants who are licensed through processing rounds will be required to deploy their systems within the period established under the milestone rules.[69] Moreover, as discussed above, the proposed transaction, if approved, would also give Wyler an attributable interest in four NGSO systems – contrary to the public interest underlying the Commission's prohibition on holding attributable interests in multiple NGSO applications and licensed-but-unbuilt systems. It would disrupt the Commission's laudable focus on expeditiously processing NGSO applications and developing NGSO framework rules, harm other applicants in the ongoing NGSO processing rounds as discussed above, and provide a template for future applicants interested in speculating in NGSO orbital and spectrum resources here and abroad. Denying the requested waiver would deter future speculation by significantly reducing the value of a pending NGSO application in the hands of a new applicant, discourage the commoditization of U.S. spectrum resources, and signal the Commission's seriousness about enforcing a regulatory environment that fosters competitive NGSO systems to extend and enrich the nation's broadband availability. In these circumstances, the Commission should find that grant of a waiver and exemption from the cut-off dates would not serve the public interest.

## CONCLUSION

The applicants face a high hurdle to demonstrate that the two waivers they seek of the Commission's rules would not undermine the purpose of those rules and would better serve the

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67 *EchoStar*, ¶ 5.

68 *See* PI Statement at 2-3.

69 *See, e.g.*, *EchoStar*, ¶ 9 (in light of milestone requirements, the value of applicant's promises of increased competition is "negligible" and its "alleged efficiencies are not compelling in this context").

public interest than would enforcement of the rules. They have failed to carry that heavy burden with respect to either the multiple NGSO interest prohibition of Section 25.159(b) or the NGSO processing round cut-off rule of Section 25.116(c). For the foregoing reasons, SpaceX respectfully requests that the Commission deny the Boeing/SOM1101 applications, or at a minimum find that any grant results in the underlying NGSO applications being treated as newly filed.

Respectfully submitted,

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February 12, 2018

## CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of February, 2018, a copy of the foregoing Petition to Deny was served by First Class mail upon:

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