Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
THE BOEING COMPANY	)	IBFS File Nos. SAT-AMD-20171206-
	)	00167 & SAT-AMD-20171206-00168
Amendments to Substitute SOM1101, LLC	)	
as the Applicant	)	Call Signs: S2966 & S2977

To: Chief, International Bureau

OPPOSITION OF THE BOEING COMPANY

Andrew G. McBride
Dwayne D. Sam
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
(202) 654-6268

Bruce A. Olcott
Jones Day
51 Louisiana Ave. NW
Washington, D.C. 20001
(202) 879-3630

Its Attorneys

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SUMMARY

Pursuant to the Commission's statutory public interest mandate, the Commission should approve Boeing's request to substitute SOM1101 as the applicant for authority to launch and operate the proposed non-geostationary satellite orbit ("NGSO") satellite systems operating in the Ka- and V-bands. SOM1101 is fully qualified to maintain the applications: it is controlled by Greg Wyler, who has a proven record in the development of NGSO satellite systems and who shares Boeing's vision of making very high data rate broadband satellite service available to every individual, regardless of location.

Nor would substitution of SOM1101 as the applicant violate Section 25.159(b)'s rule against a single applicant maintaining multiple applications. Although Mr. Wyler holds a holds an interest in OneWeb (which has filed a separate application), that interest – a relatively small equity stake and one of many board seats – does not amount to a "controlling interest" under Commission rules and precedent. Even if a controlling interest was presumed, moreover, good cause exists to waive Section 25.159(b) in order to permit Mr. Wyler to be involved in multiple NGSO satellite systems. He has a history of successful contributions to the development of broadband NGSO systems and the other NGSO system applicants or operators will not be adversely affected by this substitution. Their objections should be rejected as attempts to reduce competition in an emerging market to the ultimate detriment of consumers.

Petitioners' arguments against allowing the substitution of SOM1101 for Boeing on the applications are unpersuasive. This is not a case of an application being filed opportunistically as an act of speculation. Boeing filed its Ka- and V-band applications in good faith, with the intent to construct, launch, and operate the NGSO satellite systems described in those applications.

Indeed, Boeing *initiated* the application processing round that other applicants have joined by being the first party in recent history to propose an NGSO satellite system in the V-band.

Further, the substitution of SOM1101 as the applicant is not a major amendment under the Commission's rules and, therefore, does not necessitate removing the applications from the current processing rounds. In 2003, the Commission expressly removed transfers of control from the definition of major amendments. Efforts by competing applicants to unwind that repeal are based on misinterpretations of other regulatory provisions that cannot survive even modest scrutiny. Instead, Boeing and SOM1101 are seeking the Commission's approval for a legitimate business transaction that would serve the public interest by facilitating the continued development of the proposed broadband satellite systems. Therefore, even if the substitution were to be considered a major amendment, the Commission should permit the amendments in the public interest while allowing the applications to remain in the current processing rounds.

Once the substitution is approved, the Commission should promptly grant both applications in order to permit the launch and operation of these critically important broadband satellite systems.

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OPPOSITION OF
THE BOEING COMPANY

The Boeing Company ("Boeing"), hereby opposes the petitions to deny filed by O3b, SpaceX, Iridium, and Telesat (the "Petitioners") in the above-referenced licensing dockets.

In their filings, Petitioners object to Boeing's proposed substitution of SOM1101, LLC ("SOM1101") as the applicant for authority to launch and operate two non-geostationary satellite orbit ("NGSO") fixed-satellite service ("FSS") systems, one operating in the Ka-band and the other in the V-band (the "NGSO Satellite Systems") (the "Applications").[1] Petitioners' arguments should be rejected: granting the substitution is consistent with the Commission's rules and furthers its policy goals. It also serves the public interest and will not encourage future speculation. Boeing filed the Applications in good faith and has no agreement with SOM1101

[1] *See Petition to Deny of Iridium Satellite LLC*, IBFS File Nos. SAT-AMD-20171206-00167 & SAT-AMD-20171206-00168 (Feb. 12, 2018); ("*Iridium Petition*") *Petition to Deny of O3b Limited*, IBFS File Nos. SAT-AMD-20171206-00167 & SAT-AMD-20171206-00168 (Feb. 12, 2018) ("*O3b Petition*"); *Petition to Deny of Space Exploration Holdings, LLC*, IBFS File Nos. SAT-AMD-20171206-00167 & SAT-AMD-20171206-00168 (Feb. 12, 2018) ("*SpaceX Petition*"); *Petition to Deny and Opposition of Telesat Canada*, IBFS File Nos. SAT-AMD-20171206-00167 & SAT-AMD-20171206-00168 (Feb. 12, 2018) ("*Telesat Petition*").

concerning these applications beyond the processing of their transfer. Boeing's understanding is that SOM1101's vision for the proposed satellite systems is entirely consistent with Boeing's original purpose to bring 5G broadband service with higher speed and reduced latency to market.

Petitioners' objections to the substitution are based on a misreading of the Commission's rules and a mischaracterization of the effects of the proposed substitution. Far from advancing the Commission's goals of greater competition and service to the public, Petitioners would exclude a proven figure in the industry from prosecuting the Applications.[2] Reducing competition in the processing round, and the number of potential options available for consumers, cannot be in the public interest – particularly where the Applications serve the critical goal of bringing high speed broadband internet access to underserved areas of the United States.

The proposed substitution is consistent with the text and intent of the Commission's rules and does not qualify as a major or significant amendment to the Applications. And substituting SOM1101 as the applicant causes no injury whatsoever to the Petitioners: whether Boeing or SOM1101 is a named applicant, Petitioners' position for this processing round is unchanged.

Granting the proposed substitution would serve the public interest and the Commission's goals of increasing competition in the NGSO FSS markets and expanding access to high speed broadband. The Commission should reject Petitioners' attempts to undermine these policy goals.

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[2] Petitioners' anticompetitive motivations are perhaps most apparent in the extraordinary request of one Petitioner that the FCC dismiss *all* NGSO applications filed by Boeing in the V-band, even those not subject to the transfer application. *O3b Petition* at 18. Not surprisingly, Petitioner cites no authority for this request, and none exists.

I. THE PROPOSED SUBSTITUTION IS CONSISTENT WITH SECTION 25.159(b)'S RULE AGAINST ONE PARTY MAINTAINING MULTIPLE APPLICATIONS

Boeing's proposed substitution of SOM1101 as the applicant in its Applications would not violate Section 25.159(b)'s limitation on pending applications and unbuilt systems.[3] Petitioners contend that allowing substitution of SOM1101 for Boeing on the Applications would result in Mr. Wyler's effective control of two separate applications – the Applications originally filed by Boeing and the applications filed by OneWeb. But Petitioners argument fails because Mr. Wyler does not have a controlling interest in OneWeb.

As set forth in Section 1.2110(c)(2)(i), individuals or entities have a controlling interest if they have "either *de jure* or *de facto* control of the applicant."[4] Mr. Wyler's 11.89% stake in OneWeb falls far short of the 50% percent required for *de jure* control, so Petitioners are left to argue that he nevertheless exercises *de facto* control. "*De facto* control is determined on a case-by-case basis."[5] As the Commission explained in *Intermountain Microwave*, the Commission's test for whether a single officer or director exercises *de facto* control takes into account the totality of the circumstances to examine whether an individual exercises *actual control* over the entity. In making this determination, the Commissions looks to such factors as whether the applicant controls daily operations, has supervisory authority over personnel, pays the entity's financial obligations or determines and carries out policy decisions of the entity.[6]

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[3] 47 C.F.R. § 25.159(b).

[4] 47 C.F.R. § 1.2110(c)(2)(i).

[5] *Id.*

[6] *Intermountain Microwave*, 12 FCC 2d 559 (1963) (*Intermountain Microwave*). The Intermountain Microwave factors are: (1) Who controls daily operations?; (2) Who is in charge of employment, supervision, and dismissal of personnel?; (3) Does the licensee have unfettered

As explained in the Opposition of SOM1101, Mr. Wyler does not exercise *de facto* control over OneWeb under these standards.[7] Mr. Wyler owns a relatively small equity interest, along with numerous other well-funded partners in the venture. Moreover, as more fully described by SOM1101, the many checks on his oversight role in OneWeb make clear that he does not have a "controlling interest" for purposes of the Commission's attribution rules.

Petitioners take the extreme view that any officer or director has a "controlling interest" in the entity in which he or she holds any one of those positions.[8] They argue that this result is compelled by the Commission's attribution rules, one of which is cross referenced in Section 25.159(c).

But there is no rule that any individual officer or director is *ipso facto* deemed to have a controlling interest in the company he or she serves. Such a rule would make no sense – one director on a board of twelve does not a "controlling interest" make. Nor can a lone and independent director be said to have a controlling interest when his or her decisions are subject to the collective action of the full board.

That is why the Commission has long applied a case-specific, fact-based inquiry into the role and responsibility of particular officers and directors to determine whether, in fact, they have *controlling* interests. This flexible, case-by-case standard is further cemented by the examples

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use of all facilities and equipment?; (4) Who is in charge of the payment of financing obligations, including expenses arising out of operating?; (5) Who receives monies and profits from the operation of the facilities?; and (6) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?

[7] *See* Opposition of SOM1101, LLC to Petitions to Deny, File Nos. SAT-AMD-2017-00167 and SAT-AMD-2017206-00168, at Section II (filed Feb. 27, 2018).

[8] *Iridium Petition* at 2-3; *O3b Petition* at 4-6; *SpaceX Petition* at 4-5; *Telesat Petition* at 7-9.

given in § 1.2110. Specifically, the example to the provision governing "Nature of Control in Determining Affiliation" states that: "Control *can arise* through stock ownership [or] occupancy of director, officer or key employee positions[.]"[9]

Section 1.2110(c)(2)(ii)(F) does not alter this analysis. That provision states that "[o]fficers and directors of the applicant shall be considered to have a controlling interest in the applicant."[10] Petitioners fundamentally misread this provision. First, it is part of a definitional section that follows the statement of the general rules for *de facto* control. A definition within a rule cannot change the substance of the rule itself.[11] Second, the provision speaks in the plural, not in the singular. The provision means that the officers and directors *collectively* have control of an entity. If the provision said "*each* officer and director" Petitioners might have a better argument. But that is not how the Commission drafted the regulation.

The Commission should reject Petitioners' attempts to misconstrue Mr. Wyler's participation in OneWeb and support for its mission as *de facto* control.

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[9] 47 C.F.R. § 1.2110(c)(ii)(A) (Example B) (*emphasis added*).

[10] 47 C.F.R. § 1.2110(c)(2)(ii)(F).

[11] *W.U. Tel. Co. v. F.C.C.*, 665 F.2d 1126, 1136–37 (D.C. Cir. 1981) (holding that a statute's definitional language did not trump or limit its substantive provisions); *see also Johnson v. Transp. Agency, Santa Clara Cty.*, Cal., 480 U.S. 616, 628 & n.6 (1987) ("While public employers were not added to the definition of "employer" in Title VII until 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct."); *United States v. All Assets Held at Bank Julius*, 251 F. Supp. 3d 82, 103 & n.16 (D.D.C. 2017) (declining to find that a definitional statute preempts other substantive provisions).

II. IF THE COMMISSION RULES THAT THE PROPOSED SUBSTITUTION OF SOM1101 AS THE APPLICANT VIOLATES SECTION 25.159(b), A WAIVER WOULD BE APPROPRIATE TO PERMIT SOM1101 TO CONTINUE TO DEVELOP THE NGSO SATELLITE SYSTEMS

Even if the Commission were to conclude that Mr. Wyler has a controlling interest in OneWeb, good cause exists to grant a waiver of Section 25.159(b) in order to permit the launch and operation of the proposed NGSO Satellite Systems under the leadership of Mr. Wyler and SOM1101. First, the ownership restrictions imposed by Section 25.159(b) are no longer necessary because the underlying goals – deterring speculation and warehousing – are adequately addressed by other less burdensome regulations. Second, Mr. Wyler's involvement in multiple NGSO FSS systems will further the critical goals of the Commission to help bridge the persistent digital divide in access to broadband services. Third, allowing Mr. Wyler's involvement in multiple NGSO FSS systems will not harm other satellite operators or applicants.

A. The Standard of Review for the Commission's Consideration of this Waiver

Waiver is appropriate where good cause is shown.[12] Good cause justifies – and sometimes compels – waiver where time and changed circumstances have rendered a rule obsolete.[13] Waiver also is appropriate where the particular facts make strict compliance inconsistent with the public interest.[14] Waiver of the Commission's rules is appropriate if

[12] 47 C.F.R. § 1.3.

[13] *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 225 (1943).

[14] *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

deviation will serve the public interest.[15] In addressing the waiver question, the Commission evaluates the effective implementation of the Communications Act as a whole.[16]

B. Section 25.159(b) is Outmoded, and like Section 25.159(a) in the GSO Context, It No Longer Serves the Purposes It was Promulgated to Advance

The Commission adopted Rule 25.159(b)'s prohibition on a single party maintaining multiple satellite applications to prevent speculation and trafficking in spectrum.[17] This rationale is no longer justified and, if applied here, would be contrary to the public interest and undermine the Commission's goal of developing vibrant competition in the NGSO FSS services.

The Commission has already eliminated Section 25.159(a), an almost identical restriction on multiple ownership of GSO-like applications and licensed-but-unbuilt GSO-like space stations.[18] Like Section 25.159(b), Section 25.159(a) was promulgated to "prevent speculation and warehousing."[19] In eliminating Section 25.159(a), however, the Commission explicitly acknowledged that, "in light of the bond and milestone requirements and other safeguards," a prohibition on multiple pending applications is unnecessary "to deter warehousing of spectrum and orbital resources."[20]

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[15] *Northeast Cellular*, 897 F.2d at 1166.

[16] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[17] Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order*, 18 FCC Rcd 10760, ¶ 230 (2003) ("*2003 License Reform Order*").

[18] Comprehensive Review of Licensing and Operating Rules for Satellite Services, 81 FR 55316-01, ¶ 35 (2016) (removing and reserving the GSO application limits in 25.159(a)).

[19] *2003 License Reform Order*, ¶ 76.

[20] Comprehensive Review of Licensing and Operating Rules for Satellite Services, 30 FCC Rcd. 14713, IB Docket No. 12-267, *Second Report and Order*, FCC 15-167, ¶ 337 (Dec. 17, 2015).

As the Commission has explained, a bond "requir[es] satellite licensees to make a financial commitment to construct and launch their satellites, . . . help[s] deter speculative satellite applications, and help[s] expedite provision of service to the public."[21] Similarly, milestone requirements "ensure that licensees provide service to the public in a timely manner" and "prevent warehousing of scarce orbital resources."[22] NGSO applications are subject to the same kinds of "bond and milestone requirements and other safeguards" that exist for GSO applications to prevent speculation and spectrum warehousing.[23] Therefore, the Commission's justifications for eliminating the restriction for GSO applications fully supports a waiver of the same restriction for NGSO applications.

The bond and milestone requirements are augmented by the "Three-Strikes" rule in Section 25.159(d). The rule provides that a licensee that misses three or more milestone requirements within any three-year period may not apply for another space station license if it has more than one space station application already pending or more than one outstanding license for an unbuilt satellite system.[24] A licensee can overcome this limitation if it rebuts the presumption that it filed applications for speculative purposes or demonstrates that it would be "very likely to construct its licensed facilities if it were allowed to file more applications."[25]

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[21] *2003 License Reform Order*, ¶ 167.

[22] *Id.* ¶ 173.

[23] *See id.* ¶¶ 166–178.

[24] 47 C.F.R. 25.159(d).

[25] *Id.*

There is no legitimate reason to impose disparate regulatory burdens on GSO and NGSO applicants when the concerns animating those burdens have been addressed and eliminated by more efficient regulations, and Petitioners do not offer one.

SpaceX argues that the Commission's change to the rule for GSO applications and not NGSO applications provides "a clear sign that the Commission intended a different approach in the NGSO context."[26] And O3b asserts that the Commission did not consider Section 25.159(b) when it repealed Section 25.159(a).[27] In addition to being contradictory, both claims miss the mark. Regulatory silence does not bespeak intent,[28] and in any event, the point is that the reasoning behind the repeal of Section 25.159(a) applies with equal force to Section 25.159(b).

Similarly unavailing is O3b's claim that substantive differences in the Commission's treatment of GSO and NGSO applications warrant a stricter approach in the NGSO context.[29] Specifically, O3b observes that the Commission maintains a prohibition on GSO applicants transferring their place in the queue to other applicants, a restriction that does not exist for NGSO system applicants.[30] This distinction makes no difference, for two reasons.

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[26] *SpaceX Petition* at 8.

[27] *O3b Petition* at 12.

[28] *See, e.g.*, *Cummings v. Dep't of the Navy*, 279 F.3d 1051, 1055 (D.C. Cir. 2002) ("Congressional enactments are better evidence of legislative intent than is congressional silence.").

[29] *O3b Petition* at 13.

[30] *See id.* (*citing* 47 C.F.R § 25.158(c)).

First, the Commission did not make reference to its prohibition on transferring a place in the queue as a justification for eliminating its restrictions on multiple GSO applications, referencing its bond and milestone rules instead.

Second, there are obvious and important substantive differences between a first-in-time application queue, as in the GSO context, and a processing round approach, as is employed in the NGSO context.[31] When a satellite system application is subject to a first-come, first-served processing queue, the filing of the application by first party immediately creates speculative value in that application. The first party is the presumptive licensee and its qualifications will be evaluated before any other applicant in line has a chance to be considered. All the subsequent GSO-like applications that are mutually-exclusive with the first application are effectively blocked by that application.

In contrast, the filing of an NGSO-like application does not create immediate speculative value in that application. Instead, the first application results in a public notice and the initiation of a processing round in which any and all other applicants are allowed to participate. Even after the cut-off deadline, the speculative value of each NGSO-like application is strictly limited by the existence of numerous other NGSO-like applications in the same processing round. Therefore, the speculative risks that exist in a first-come, first-served processing queue are not present in a processing round approach. Thus, if the Commission found that protections other than a limitation on applications were sufficient to prevent speculation in the GSO licensing system, *a fortiori*, such limitations are not necessary in a licensing proceeding far less subject to speculation.

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[31] *See 2003 License Reform Order*, ¶ 242 (explaining that "without this prohibition, it is possible that some parties would file satellite applications simply to obtain a place in a queue to sell to another party willing and able to implement its proposed satellite system").

Because the multiple applications limitation is obsolete in the NGSO context for the same reasons the Commission explained in the GSO context, waiver is appropriate here. Moreover, waiver is also consistent with this Commission's deregulatory, pro-market approach in other areas[32] and consonant with the Executive Branch mandate to eschew unnecessary regulations.[33]

C. Rejecting the Proposed Substitution under Section 25.159(b) would Not Serve the Public Interest Because it Would Impede the Development of Additional NGSO Satellite Systems

Rejecting the proposed substitution of SOM1101 under Section 25.159(b) would disserve the public interest, given the special circumstances present here. Specifically, this transfer was arranged with an applicant such as SOM1101 to advance a business plan for U.S. rural broadband service through low earth orbit satellites.

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[32] *See. e.g.*, Restoring Internet Freedom, 83 FR 7852-01 (Feb. 22, 2018) ("noting that the order repeals the net neutrality rules and "returns to the light-touch regulatory scheme that enabled the internet to develop and thrive for nearly two decades"); 2014 Quadrennial Regulatory Review, 83 FR 733-01 (Jan. 8, 2018) (repealing the Newspaper/Broadcast Cross-Ownership Rule, the Radio/Television Cross-Ownership Rule, and the attribution rule for television joint sales agreements.).

[33] *See* Executive Order 13711, *Reducing Regulation and Controlling Regulatory Costs*, 2017 WL 394070, at *1 ("It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.").

Mr. Wyler's advancement of high speed broadband access to remote corners of the world is well-recognized.[34] The addition of Boeing's applications for authority to launch and operate the NGSO Satellite Systems to an entity owned by Mr. Wyler would clearly serve the public interest. Approving the substitution is also consistent with the Commission's goal of closing the digital divide and "encourag[ing] the development of new broadband services to the American public" through satellite broadband internet access.[35] Indeed, each member of the Commission has stated the important role NGSO FSS systems play in furthering this goal.[36] By allowing the substitution of SOM1101 as the applicant for the NGSO Satellite Systems, the Commission will ensure that multiple potential competitors will strive to achieve this important goal.

D. The Grant of a Waiver of Section 25.159(b) Would Not Harm Other NGSO Operators or Applications

Petitioners' arguments that a waiver of Section 25.159(b) would harm them are not persuasive. Telesat contends that allowing one party to control multiple NGSO systems would

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[34] *See OneWeb Founder Greg Wyler Shares his Journey to Close the Digital Divide*, Orlando Business Journal (Florida) (Nov. 1, 2017).

[35] Update to Parts 2 & 25 Concerning Non-Geostationary, Fixed-Satellite Serv. Sys. & Related Matters, IB Docket No. 12-267, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 17-122, 2017 WL 4316351, ¶ 1 (Sept. 27, 2017).

[36] *See id.*, Statement of Chairman Ajit Pai (noting that satellite broadband service from NGSO satellite systems "has the potential to connect consumers across the nation, especially in rural, remote, and tribal areas . . . where it's needed most."); Statement of Commissioner Mignon Clyburn (noting that the Commission's rules for NGSO FSS systems "will promote more affordable and faster broadband service for areas that remain unserved"); Statement of Commissioner Michael O'Rielly ("These NGSO systems bring the promise of high speeds and low latency, which may ultimately bring gigabit broadband to all, including remote areas."); Statement of Commissioner Brendan Carr (noting that NGSO FSS systems "have the potential to introduce additional competition into the market, bring affordable broad band to more consumers, and become part of 5G future").

give that party access to a greater share of spectrum during in-line events, thus harming other NGSO system operators.[37] Telesat appears to be alluding to a situation in which satellites from three NGSO systems have a simultaneous in-line event, presumably requiring them to split the available spectrum three ways. According to Telesat, Mr. Wyler's interest in SOM1101 plus his position at OneWeb creates an affiliation that would have access to two-thirds of the total available. But *assuming arguendo* that OneWeb and SOM1101 can be said to have such affiliation through Mr. Wyler, Telesat cannot and does not explain how the latter situation harms the unaffiliated operator: either way, that operator has access to one-third of the available spectrum. Telesat's argument also ignores that this situation already exists as a practical matter without harming NGSO system operators. Any independent operator of an NGSO system could lease all or a portion of its capacity of another NGSO system, thereby producing the same result – the operator that controls one system and leases capacity on a second would have access to two-thirds of the spectrum during an three-way in-line event. Therefore, the proposed substitution of SOM1101 as the applicant will not reduce the overall spectrum access of other NGSO system licensees.

In turn, O3b argues that allowing the substitution of SOM1101 as the applicant would harm other NGSO system applicants because the existence of speculative applications requires other applicants to design their satellite systems to accommodate the speculative applications.[38] But that concern is not present here, as Boeing and SOM1101 are not proposing to change the nature of the Applications, just substitute the applicant.

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[37] *Telesat Petition* at 12.

[38] *O3b Petition* at 13-14.

SpaceX argues that allowing the substitution would permit the Applications to be used "in a coordinated manner with OneWeb to undermine legitimate competition."[39] In making this argument, SpaceX overlooks that Boeing – as the licensee – also could have coordinated with OneWeb or any other service provider in the operation of its network. Such an arrangement would not necessarily harm other NGSO system operators. Instead, a number of satellite operators have arrangements with other operators to use their capacity in a coordinated manner, including OneWeb with Intelsat and O3b with SES. Such arrangements do not impede competition between existing and proposed NGSO systems or between NGSO systems and other broadband communications services.

The substitution of SOM1101 as the applicant for the NGSO Satellite Systems also does not create delay and uncertainty in the Commission's ongoing progress in completing the current processing rounds for NGSO FSS systems operating in the Ku-, Ka- and V-bands, as SpaceX suggests in its *ex parte* filing.[40] The Applications at issue have long been on the public docket. Boeing's V-band application was the first system to be filed and placed on public notice, and its Ka-band application was placed on public notice for comment nearly one year ago on May 26, 2017.[41] The Commission is processing each application in its own timeframe, placing them on public notice for comment when they are found to be complete and granting them when they are

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[39] *Id.* at 11.

[40] *See Letter from William M. Wiltshire, Counsel to SpaceX to Marlene H. Dortch, Secretary, Federal Communications Commission,* IBFS File No. SAT-AMD-20171206-00166, *et. al*, at 1 (Feb 2, 2018).

[41] *See* Public Notice, *Applications Accepted For Filing, Cut-Off Established for Additional NGSO-Like Satellite Applications or Petitions For Operations in the 12.75-13.25 GHz, 13.85-14.0 GHz, 18.6-18.8 GHz, 19.3-20.2 GHz, and 29.1-29.5 GHz Bands*, DA 17-524, File No. SAT-LOI-20161115-00121 (May 26, 2017).

deemed qualified. Indeed, the Commission has already granted three applications in the Ku-/Ka-band processing round,[42] and has been placing applications in both processing rounds on public notice for comment. Therefore, it is simply incorrect that the substitution of SOM1101 as the applicant for the two NGSO Satellite Systems could delay or disrupt the current processing round for any other applicants.

In sum, the substitution of SOM1101 as the applicant for the NGSO Satellite Systems will not have any impact on the Commission's consideration of other NGSO system applications in the current processing rounds and will not disadvantage the other applicants in their plans for the launch and operation of their proposed satellite systems. If the Commission determines a waiver of Section 25.159(b) is required, it should disregard the anti-competitive objections of Petitioners and permit the development of additional resources to close the global digital divide.

III. BOEING FILED AND PURSUED ITS NGSO APPLICATIONS IN GOOD FAITH AND WITHOUT SPECULATIVE INTENT

Several Petitioners allege that Boeing seeks to profit by substituting SOM1101 as the applicant.[43] Such allegations are particularly specious with respect to Boeing's V-band NGSO application, which was the first application that initiated the processing round. When Boeing filed that application, it could not have had any expectation of selling the application for a profit

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[42] WorldVu Satellites Limited, Petition for a Declaratory Ruling Granting Access to the U.S. Market for the OneWeb NGSO FSS System, IBFS File No. SAT-LOI-20160428-00041, *Order and Declaratory Ruling*, FCC 17-17, ¶ 26 (June 23, 2017); Space Norway AS, Petition for a Declaratory Ruling Granting Access to the U.S. Market for the Arctic Satellite Broadband Mission, IBFS File No. SAT-PDR-20161115-00111, *Order and Declaratory Ruling*, FCC 17-146, ¶ 27 (Nov. 3, 2017); Telesat Canada, Petition for Declaratory Ruling to Grant Access to the U.S. Market for Telesat's NGSO Constellation, IBFS File No. SAT-PDR-20161115-00108, *Order and Declaratory Ruling*, FCC 17-147, ¶ 30 (Nov. 3, 2017).

[43] *O3b Petition* at 17-18; *Iridium Petition* at 5; *SpaceX Petition* at 3.

given the fact that all other parties were given an opportunity to file their own applications in the same processing round. Moreover, Boeing has incurred considerable expense to prosecute its Applications and has undertaken extensive efforts to advocate before the Commission and the ITU for the spectrum allocation and service rules.[44] The substitution of SOM1101 for Boeing as the applicant is a legitimate business transaction, not speculation.[45]

Notably, there can be no dispute that, if Boeing and SOM1101 had waited to effectuate this arrangement until after the licenses were granted, the transaction would be entirely consistent with Commission policies[46] and the Commission would reject Petitioners' "bald allegations and weakly supported claims of speculation."[47] There is no reason to afford Petitioners' allegations any additional credibility because they are made at the application stage rather than post-licensing.

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[44] Iridium asserts that Boeing's substantive investments in prosecuting its applications were "precisely the steps *any* speculative applicant would take to maximize the value of its investment." *Iridium Petition* at 5. Based on Iridium's flawed reasoning, any effort by any serious satellite applicant to secure the grant of its license on favorable terms provides evidence of speculation because it concurrently increases the value of the underlying application. The Commission cannot base its decision on such capricious logic.

[45] *See* Ka-Band Amendment at 3; V-Band Amendment at 3. SpaceX speculates that the decision to substitute SOM1101 as the applicant suggests a quid-pro-quo, from which Boeing will profit at some later date, by supplying support services to SOM1101. *SpaceX Petition* at 8-10. There is, however, no written or oral agreement between Boeing or its affiliates and SOM1101, Mr. Wyler, or their affiliates regarding any subsequent deals with Boeing.

[46] Amendment of the Commission's Space Station Licensing Rules and Policies, IB Docket No. 02-34, *Second Order on Reconsideration*, FCC 16-108, ¶ 15 (Aug. 16, 2016) ("*2016 Licensing Reform Reconsideration Order*") (*citing 2003 License Reform Order* at 10844-45, ¶¶ 221-22). The Commission explained that it will consider as a part of its public interest determination "whether the seller obtained the license in good faith or for the primary purpose of selling it for profit, whether the licensee made serious efforts to develop a satellite or constellation, and/or whether the licensee faces changed circumstances." In considering this issue, the Commission explained that "it would consider only substantial evidence that a satellite license was obtained exclusively for purposes of selling for profit." *Id.*, ¶ 222 and n.528.

[47] *2003 License Reform Order* at 10845, ¶ 222 and n.528.

To do so would undermine the Commission's goals of creating more competition in the NGSO FSS services and serve Petitioners' interests in impeding viable competitors in this emerging sector of the communications market.[48]

IV. THE SUBSTITUTION OF SOM1101 AS THE APPLICANT IS NOT A MAJOR AMENDMENT AND THE APPLICATION'S STATUS IN THE PROCESSING ROUND SHOULD BE PRESERVED

Petitioners also argue that the amendment sought by Boeing and SOM1101 is a "major amendment" within the meaning of the Commission's rules.[49] Yet this argument depends on a rule that has been rescinded. Some Petitioners even go so far as to cite Commission decisions applying the now-defunct rule. Others argue that the Commission's failure to remove an exception to the prohibition from the CFR – a scrivener's error at best – means that the prohibition must somehow remain in place. None of these arguments changes the reality that the Commission eliminated the regulatory prohibition Petitioners rely upon in 2003.

That prohibition was eliminated specifically to allow application transfers in situations where business realities require a change in ownership of the application.[50] That is the situation here. Boeing filed its application in the good faith belief that it would be constructing and

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[48] As noted above, four of the five Petitioners argue that because the Amendment itself is evidence of speculation, Boeing should be summarily divested of its third pending application in the processing round. *Iridium Petition* at 6-7; *O3b Petition* at 17-18; *SpaceX Petition* at 16-18; *Telesat Petition* at 3-6. There is nothing in the FCC's satellite licensing rules that would support such a result and Petitioners do not cite any authority supporting this extreme position.

[49] 47 C.F.R. § 25.116(b).

[50] *2003 License Reform Order*, ¶ 212 (2003) ("Eliminating the restriction on sales expedites provision of satellite service to the public by facilitating the transfer of licenses in the secondary market to those parties that have the greatest incentive and ability to construct a satellite system within the required time frame.").

operating the proposed system to provide broadband services in the United States (and beyond), including service to rural areas. A change in business plans caused Boeing to substitute SOM1101 as the applicant for the NGSO broadband project. The substitution is thus driven by changes in business realities analogous to a change in equity ownership, debt holdings or effective control. That is exactly the kind of party substitution the Commission made clear is not a major amendment when it rescinded Section 25.116(b) in 2003.[51]

Petitioners attempt to reconstitute the rescinded rule using general statutory and regulatory provisions.[52] But where the Commission has eliminated a regulation for a particular stated reason, that regulation cannot be resurrected by resort to one or more provisions addressing "major" or "significant" amendments more generally.[53]

Notably, when the Commission removed changes in ownership from the category of major amendments, it referenced the comments of Teledesic, which explained in part that allowing pre-licensing transactions "would waste fewer resources, both public and private, if the applicant had an incentive to step aside before licensing."[54] There was no reason to limit the type of legitimate

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[51] *Id.*

[52] *SpaceX Petition at 17*; *Telesat Petition* at 5. Notably, in support of this argument, Petitioners go so far as to quote a case involving the substitution of applicants in the GSO processing queue, even though the Commission's rules for processing GSO networks are inapplicable to NGSO systems. *See id.* (*quoting* Application of DIRECTV Enterprises, LLC to Amend its Pending Application for a 17/24 GHz BSS Authorization at the 107° W.L. Orbital Location¸ Memorandum Opinion and Order, 24 FCC Rcd 9408 (2009)); *SpaceX Petition* at 15 (quoting same case).

[53] *Cf. Verizon v. F.C.C.,* 740 F.3d 623, 628 (D.C. Cir. 2014) (*emphasis added*) (holding that "even though the Commission has general authority to regulate" broadband providers' treatment of internet traffic, it could not "impose requirements that contravene express statutory mandates").

[54] Comments of Teledesic Corporation, IB Docket Nos. 02-34 and 00-248, at 29-30 (June 3, 2002); *2003 License Reform Order*, ¶ 140 (referencing the comments of Teledesic and SES Americom).

business transaction to mergers and acquisitions, and the Commission did not do so. The Commission could have retained a restriction in Section 25.116(b)(3) for transactions other than mergers and acquisitions (such as assignments for example), but it did not. Section 25.116(b) clearly delineates what types of actions fall into the category of a "Major Amendment" and nothing in the rule suggests that a substitution of an applicant is a "Major Amendment." The substitution proposed by Boeing and SOM1101 is not a major amendment pursuant to the rules currently in effect, and the Commission should reject Petitioners' attempt to conjure up a violation of a rule that no longer exists.

The Commission should also reject Petitioners' argument that it should utilize its more general authority under Section 309 of the Communications Act (and Section 25.116(b)(4) of the rules)[55] and consider the proposed substitution "substantial." The Commission has long treated major amendments as synonymous with or "equivalent" to substantial amendments.[56] The Commission even considered eliminating the term "major amendment" in favor of the statutory

[55] Section 25.116(b)(4) requires the Commission to treat an application as major "[i]f the amendment, or the cumulative effect of the amendment, is determined by the Commission otherwise to be substantial pursuant to section 309 of the Communications Act." 47 C.F.R. § 25.116(b)(4).

[56] *See, e.g.,* Amendment of Parts 1 and 21 of the Commission's Rules and Regulations applicable to the Domestic Public Radio Services (other than Maritime Mobile), *Report and Order*¸ 609 F.C.C.2d 549, 553 (1976) (revising its rules "to equate more clearly the term 'major amendment' in the public radio serves as used in our Rules with the term 'substantial amendment' as used in Section 309(b) of the Act").

term "substantial amendment," opting against the change only because of the administrative burdens of making it.[57]

Citing precedent from 1989, Telesat argues that the Commission concluded that a transfer of control of an application is a substantial change under Section 309.[58] But in 1989, Section 25.116(b)(3) of the Commission's rules still defined a transfer of control as a major amendment. The Commission's decision in 2003 to modify its definition of a major amendment to exclude transfers of control of an application – and its justifications for doing so – applies to its interpretation of substantial amendments as well. Accordingly, the Commission should decline Petitioners' invitation to use Section 309 to encumber the very type of legitimate transaction it sought to allow when it removed Section 25.116(b)(3) from the rules.

Even if the Commission were to consider the proposed amendments as major, it would serve the public interest to grant an exception to ensure that consumers in the U.S. have access to a greater number of competing service providers and to close the digital divide in rural and remote areas. The Commission is not required to treat a major amendment as a new application if it "reflects only a change in ownership or control found by the Commission to be in the public

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[57] *See id.* at 553 n.8 (acknowledging that "[t]o avoid semantic confusion, most of the comments favored discontinuance of the term 'major amendment' in favor of the statutory term 'substantial amendment'" and explaining that "[w]hile this suggestion has considerable merit, we have decided upon the continued use of the term 'major amendment' because it is used elsewhere in our Rules and will be more clearly equated by this rulemaking with its statutory equivalent").

[58] *Telesat Petition* at 3 (*citing* Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services; Applications of Hughes Communications Mobile Satellite, Inc. MCCA American Satellite Service Corporation McCaw Space Technologies, Inc. Mobile Satellite Corporation North American Mobile Satellite, Inc. Satellite Mobile Telephone Co. Skylink Corporation Transit Communications, Inc., *Memorandum Order and Authorization*, 4 FCC Rcd 6041, ¶ 34 (1989)).

interest and, for which a requested exemption from a 'cut-off' rule is granted."[59] Because it would serve the public interest, the Commission should grant the exception requested by Boeing and SOM1101 and retain the applications in the current NGSO processing rounds.

In sum, Petitioners' arguments that the proposed amendments constitute major amendments ring hollow, and appear motivated by the desire to eliminate a potential competitor. The substitution of SOM1101 as the applicant for the NGSO Satellite Systems will have no impact on other NGSO system applications and will not disadvantage Petitioners in any way. Because the Petitioners have alleged no cognizable injury, the Commission should disregard their objections and conclude that allowing this substitution would advance the public interest.

V. CONCLUSION

Boeing urges the Commission to reject the anticompetitive arguments on which the Petitions to Deny are based. The substitution of SOM1101 for Boeing as the applicant for NGSO FSS satellite systems does not violate Commission rules or policies, nor does it harm any other applicants. It is the result of a legitimate business transaction that was the result of a change in Boeing's business plans. It will also further the Commission's important public interest goals of fostering competition in the NGSO FSS services and will provide critical additional resources to efforts to expand reach of high-speed broadband services around the globe.

[59] 47 C.F.R. § 25.116(c)(2). SpaceX cites a case in which the Commission indicated that it grants waivers of its cut-off deadlines only in extreme circumstances. *See SpaceX Petition* at 7 (*quoting* Echostar Satellite Corp., 16 FCC Rcd. 143000, ¶ 5 (IB 2001), *recon. denied*, 17 FCC Rcd. 8305 (IB 2002)). The Commission's grant of an exception pursuant to § 25.116(c)(2) does not involve or require the grant of a waiver. Therefore, the case cited by SpaceX is irrelevant to this situation.

Accordingly, the Commission should promptly approve the proposed amendments substituting SOM1101 as the applicant for the NGSO FSS satellite systems.

Respectfully submitted,

THE BOEING COMPANY

By:

Andrew G. McBride
Dwayne D. Sam
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
(202) 654-6268

Bruce A. Olcott
Jones Day
51 Louisiana Ave. NW
Washington, D.C. 20001
(202) 879-3630

Its Attorneys

February 27, 2018

CERTIFICATE OF SERVICE

I, Bruce A. Olcott, hereby certify that on February 27, 2018, I caused a copy of the foregoing Opposition of The Boeing Company to be served by U.S. first-class mail, postage paid, upon each of the following:

Karis Hastings
SatCom Law LLC
1317 F Street, NW Suite 400
Washington, DC 20004

Suzanne Malloy
Vice President, Regulatory Affairs
900 17th Street, NW, Suite 300
Washington, DC 20006

William M. Wiltshire
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W. Suite 800
Washington, D.C. 20036

Tim Hughes
Senior Vice President
SPACE EXPLORATION TECHNOLOGIES CORP.
1030 15th Street, N.W., Suite 220E
Washington, D.C. 20005

Scott Blake Harris
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, NW, Suite 800
Washington, DC 20036

Henry Goldberg
Goldberg, Godles, Wiener & Wright LLP
1025 Connecticut Avenue, Suite 1000
Washington, DC 20036

Leslie Milton
Senior Counsel, Regulatory Affairs
1601 Telesat Court
Ottawa, Ontario, Canada, K1B 5P4

Counsel to The Boeing Company