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

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	)	

CONSOLIDATED REPLY OF SPACE EXPLORATION HOLDINGS, LLC

William M. Wiltshire
Paul Caritj

HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W.
Suite 800
Washington, D.C. 20036
202-730-1300 tel
202-730-1301 fax

Counsel to SpaceX

Tim Hughes
Senior Vice President, Global Business and Government Affairs

Patricia Cooper
Vice President of Satellite Government Affairs

SPACE EXPLORATION TECHNOLOGIES CORP.
1030 15th Street, N.W.
Suite 220E
Washington, D.C. 20005
202-649-2700 tel
202-649-2701 fax

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SUMMARY

Space Exploration Holdings, LLC ("SpaceX") hereby replies to the Oppositions filed by The Boeing Company ("Boeing") and SOM1101, LLC ("SOM1101") to petitions to deny their proposal 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 in the Ka- and V-bands.

As SpaceX and every other petitioner have demonstrated, the Applicants' proposal would violate the Commission's prohibition on one party holding an attributable interest in multiple NGSO systems in a single frequency band, codified Section 25.159(b). Although the Applicants go to great lengths to suggest that this rule and the Commission's related control rules either do not cover this situation or are unclear, the opposite is true: the Commission's rules unambiguously address these applications, and prohibit the proposed amendments. The Commission has explicitly adopted rules that make individual directors attributable interest holders for the purposes of the multiple-ownership rule. Therefore, Gregory T. Wyler, who no party disputes is a OneWeb director, plainly holds an attributable interest in OneWeb and its Ka- and V-band NGSO systems, in addition to being the sole owner of SOM1101.

The Commission's rule was designed specifically to serve the public interest by avoiding excessive concentration of system ownership that would reduce overall efficiency by diluting one system owner's incentives to coordinate with other NGSO operators in a reasonable and productive way. The Commission should apply this clear rule to deny the proposed amendments, averting both aggregation of independent spectrum applicants and harm to competing NGSO applicants by distorting the playing field for an already challenging coordination task.

If the Commission were to overlook these harms and grant a waiver of the multiple-ownership rule to permit the amendments, such a change of ownership would constitute a major modification, requiring the underlying applications to be considered in a subsequent processing round. Again, Applicants' responses to SpaceX's and other petitioners' arguments on this point relies more on misdirection than it does on substantive argument. In fact, in the primary case cited by the Applicants on this issue, the Commission definitively confirmed that applicant substitution constitutes a major amendment. Finally, Applicants' requested waiver of this rule would undermine the integrity of the processing round regime that the Commission has set out and compound the competitive and other public interest harms that would be caused by permitting the amendments in the first place.

Accordingly, the Commission should deny the amendments, or, at a minimum, remove the underlying applications as amended from the current NGSO processing rounds.

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CONSOLIDATED REPLY OF SPACE EXPLORATION HOLDINGS, LLC

Space Exploration Holdings, LLC ("SpaceX") hereby replies to the Oppositions filed by The Boeing Company ("Boeing") and SOM1101, LLC ("SOM1101")[1] in response to four petitions to deny[2] their request to amend two of Boeing's pending applications for authority to launch and operate non-geostationary orbit ("NGSO") satellite systems in the Ka- and V-bands.[3] 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, Executive Chairman, and significant shareholder of WorldVu Satellites Limited ("OneWeb"), an entity that also proposes to launch and operate two NGSO systems in the Ka- and V-bands.

The petitions to deny demonstrated that the proposed conveyance by Boeing would clearly violate the prohibition in Section 25.159(b) of the Commission's rules on one party holding a

[1] *See* Opposition of The Boeing Company ("Boeing Opposition"); Opposition of SOM1101, LLC to Petitions to Deny ("SOM1101 Opposition"). Both of these oppositions were filed in IBFS File Nos. SAT-AMD-20171206-00167 and -00168 on Feb. 27, 2018.

[2] *See* Petition to Deny of Space Exploration Holdings, LLC ("SpaceX Petition"); Petition to Deny of Iridium Satellite LLC ("Iridium Petition"); Petition to Deny of O3b Limited ("O3b Petition"); and Petition to Deny and Opposition of Telesat Canada ("Telesat Petition"). All four of these petitions were filed in IBFS File Nos. SAT-AMD-20171206-00167 and -00168 on Feb. 12, 2018.

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

controlling interest in multiple unbuilt NGSO systems operating in the same frequency band. Moreover, they showed that even if the proposed amendments were granted, Section 25.116 of the Commission's rules provides that the applications as amended should be considered to be newly filed, and therefore removed from their current NGSO processing rounds. They also demonstrated that there is no basis for waiving either of these rules, especially without conducting a much more thorough investigation into the terms of the Applicants' arrangements for this conveyance of applications.

In response, the Applicants have tried their best to inject confusion into both (1) the question of whether Wyler has a "controlling interest" that is attributable for purposes of Section 25.159(b), and (2) the question of whether substitution of Wyler for Boeing is a "major amendment" that triggers Section 25.116. As discussed in detail below, Commission precedent on these matters is clear and dispositive, and the Applicants' arguments should be rejected. On the question of what constitutes "controlling interest," the Commission explicitly adopted a control standard that automatically makes directors and officers attributable-interest holders for the purpose of its NGSO ownership limitations.[4] No party disputes that Wyler is a director of OneWeb and the sole equity owner of SOM1101.[5] Therefore, he plainly holds an attributable interest in both companies. The proposed amendments would create attributable interests in multiple NGSO

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[4] *See Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd. 10760, ¶ 237 n.564 (2003) ("*2003 Licensing Reform Order*") (citing *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, 15 FCC Rcd. 15293, ¶¶ 59-67 (2000) ("*2000 Attribution Rules Order*")).

[5] *See, e.g.*, SOM1101 Opposition at 8 and n.31. Indeed, Wyler recently confirmed his position in a press announcement on OneWeb deal-making. *See* Press Release, "Airbus, Delta, OneWeb, Sprint, Airtel Announce the Formation of Seamless Air Alliance Enabling Airlines to Empower Passengers with Seamless In-Cabin Connectivity Experience" (Feb. 25, 2018), *available at* http://www.oneweb.world/press-releases/2018/airbus-delta-oneweb-sprint-airtel-announce-the-formation-of-seamless-air-alliance-enabling-airlines-to-empower-passengers-with-seamless-in-cabin-connectivity-experience.

systems in the same frequency band – the very outcome that Section 25.159(b) straightforwardly forbids.

Similarly, while the Applicants focus on irrelevant portions of Section 25.116, the primary case cited in defense of their position actually confirms that applicant substitution is a "major" amendment under the relevant Commission's rules.[6] In addition, their arguments for waiving these two rules fall well short of satisfying the "high hurdle" that such requests face in general,[7] and do not present the sort of "extreme cases involving extraordinary circumstances"[8] required to waive processing round deadlines in particular. Accordingly, the Commission should deny the amendments, or, at a minimum, find that any grant results in the underlying NGSO applications being treated as newly filed.

I. THE APPLICANTS' PROPOSAL CLEARLY CONTRAVENES THE PROHIBITION IN SECTION 25.159(B) AND THEREFORE MUST BE DENIED

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.[9] When the Commission adopted this rule, it also adopted rules that would extend the prohibition to cover those parties that hold an attributable interest in another entity.[10] Specifically, the Commission decided to define such an attributable interest to include those who hold a controlling interest in another entity.[11] Wyler

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6 *See Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other Than Maritime Mobile*), 60 F.C.C.2d 549, ¶ 15 (1976) ("*1976 Update Order*").

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

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

9 *See* 47 C.F.R. § 25.159(b).

10 *2003 Licensing Reform Order*, ¶ 236.

11 47 C.F.R. § 25.159(c)(1) and (2).

owns 100% of SOM1101, and is the Founder and Executive Chairman of OneWeb. The Commission's attribution rules provide that officers and directors of a company have a controlling interest in that company.[12] Accordingly, all four petitioners argued that Wyler has a controlling interest in both entities under the Commission's rules, such that grant of the proposed amendment would violate Section 25.159(b).

A. Despite the Applicants' Best Efforts to Create Confusion, Commission Precedent Makes Clear that Wyler Has an Attributable Interest in OneWeb

In an attempt to salvage their transaction, the Applicants go to great lengths to confuse the issue of whether Wyler's positions with OneWeb create an attributable interest. They specifically challenge whether Wyler should be deemed to have a controlling interest due to his position on the OneWeb board and other interests. In support, they cite general – and largely irrelevant – principles of corporate governance, as well as prior cases in which the Commission has analyzed *de facto* control in other contexts.[13] They conclude that, notwithstanding Wyler's position as the Executive Chairman of OneWeb's board and his claimed status as the architect of OneWeb's NGSO system, it would be inappropriate to conclude that he has a controlling interest in OneWeb.

The Commission should simply ignore the Applicants' attempt at misdirection, as both the prevailing applicability and effect of the controlling interest test are clear. In adopting its NGSO ownership limits, the Commission addressed the question of what types of interests were attributable for the purposes of applying those new limits. The Commission stated that, in addition to considering equity and debt interests, it would "adopt . . . the 'controlling interest' standard the Commission adopted in Amendment of Part 1 of the Commission's Rules – Competitive Bidding

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[12] *Id.* § 1.2110(c)(2)(ii)(F).

[13] *See* Boeing Opposition at 3-5; SOM1101 Opposition at 14-15.

Procedures."[14] The Commission cited nine paragraphs from the underlying order it adopted by reference, one of which definitively states that, "under the controlling interest standard, the officers and directors of any applicant will be considered to have a controlling interest in the applicant," and specifically cites Section 1.2110(c)(2)(ii)(F).[15]

This is a bright-line rule under which the Commission has decided that it should deem officers and directors to have a controlling interest without undertaking a *de facto* control analysis in each individual case. "Since the earliest competitive bidding rules on DE eligibility, the Commission has considered officers and directors to be controlling interests because of their ability to exert influence over companies in which they have significant managerial responsibility."[16] The presence or absence of other officers, directors, shareholders, or others who might also exert influence is irrelevant. As the Commission has explained,

> the current attribution rule, which is applicable to all services and is based on the "controlling interest" standard, includes the specific provision that ***an applicant's officers and directors should be automatically deemed to have a controlling interest*** in the applicant and that any entities in which they have a controlling interest should be attributed to the applicant for purposes of eligibility calculation. According to the Commission, such attribution "reflects the corporate reality that business decisions and corporate policy are established by a corporation's board of directors and officers" . . . .[17]

The Commission recently rejected arguments that it should narrow the scope of this rule so that it would not apply where "a particular officer or director is unlikely to exercise control over the applicant," concluding that defining officers and directors as controlling interests helps ensure that

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[14] *See 2003 Licensing Reform Order*, ¶ 237 n.564 (citing *2000 Attribution Rules Order*, ¶¶ 59-67).

[15] *2000 Attribution Rules Order*, ¶ 63 and n.203. Given the Commission's citation of the rule, it is thus nonsensical for SOM1101 to assert that the controlling interest standard adopted for use with Section 25.159 "bears no relationship whatsoever to that found in Section 1.2110(c)(2)." SOM1101 Opposition at 13.

[16] *Updating Part 1 Competitive Bidding Rules*, 30 FCC Rcd. 7493, ¶ 60 n.188 (2015) ("*2015 Attribution Update Order*").

[17] *Leap Wireless Int'l, Inc.*, 19 FCC Rcd. 14909, ¶ 22 (WTB 2004) (emphasis added) ("*Leap Wireless*").

the attribution rules effectively implement the Commission's policy goals.[18] Because the Commission deems a director such as Wyler to hold a controlling interest simply due to the fact of that position with the company, Applicants' arguments about a more amorphous case-by-case analysis are inapposite and should be ignored.[19]

In a further effort to muddy the waters, Boeing argues that the controlling interest attribution rule applies to officers and directors as a group, and not to an individual officer or director.[20] Boeing cites no precedent in support of its curious interpretation of the rule, and for good reason: the precedent is directly to the contrary. For example, when an applicant argued that the attribution rule does not apply (or should be waived) where attribution is based on a single director, the Commission explained that it had "determined that each director and all entities in which they have a controlling interest should be automatically attributed to the applicant. The Commission did not qualify that the entity had to be affiliated through more than one director."[21] The Commission should therefore reject Boeing's argument, as it should reject all of the Applicants' efforts to defeat a straightforward application of the controlling interest attribution rules by citing irrelevant standards and otherwise creating undue confusion.

B. There Is No Basis for Granting a Waiver of the Multiple Ownership Prohibition

The Applicants' arguments for waiver of the multiple ownership prohibition in Section 25.159(b) fare no better. For example, in support of their waiver request, Boeing and SOM1101 contend that, unlike a GSO application with an established position in the Commission's first-

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[18] *See 2015 Attribution Update Order*, ¶¶ 56, 60.

[19] *See* Boeing Opposition at 3-5; SOM1101 Opposition at 14-15. *See also Grain Management, LLC*, 29 FCC Rcd. 9080 ¶ 2 n.4 (2014) (discussing factors used in *de facto* control analysis, then stating that "[u]nder the controlling interest standard, the officers and directors of any applicant are ***also*** considered to have a controlling interest in the applicant" (emphasis added)).

[20] *See* Boeing Opposition at 4-5.

[21] *Leap Wireless*, ¶ 23.

come, first-served processing queue, an application's status in an NGSO processing round does not confer any value. Thus, they argue, there is no attendant risk of speculation and therefore no reason for concern in the NGSO context that justifies application of the prohibition.[22]

Applicants are fundamentally mistaken, as the Commission explained when it adopted Section 25.159(b) to protect the integrity of the processing round regime.

> By announcing a cut-off date in a processing round, the Commission gives both speculative and legitimate applicants an opportunity to file, and to have their applications considered concurrently with the lead application. Furthermore, announcing a cut-off date can cause a sense of scarcity to develop, when applicants recognize that this may be their only opportunity to secure access to that orbit/spectrum resource. Consequently, we will adopt the same safeguards against speculation in modified processing rounds that we adopt for the first-come, first-served procedure.[23]

Indeed, the fact that the Applicants are fighting so hard to avoid removal of the Boeing applications from the current NGSO processing rounds as a result of these amendments demonstrates the value of those applications' current status and highlights the risk of speculation.

The Applicants also contend that Section 25.159(b) is no longer necessary, and thus should be ignored for the reasons that led the Commission to rescind a similar ownership limitation on GSO applications in former Section 25.159(a).[24] They do not contest that the Commission did not rescind the multiple ownership limitation on NGSO systems or the outright prohibition in Section 25.158(c) on any transaction that would allow one party to take the place of another applicant in a GSO processing queue. This latter provision made Section 25.159(a) superfluous,[25] while the

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[22] *See* Boeing Opposition at 10; SOM1101 Opposition at 2, 24-26.

[23] *2003 Licensing Reform Order*, ¶ 227.

[24] *See* Boeing Opposition at 7-9; SOM1101 Opposition at 22.

[25] The Applicants contend that the Commission rescinded Section 25.159(a) in reliance solely upon its bond and milestone requirements, without mentioning Section 25.158(c). *See* Boeing Opposition at 7-9; SOM1101 Opposition at 21-22. Yet in rescinding that rule, the Commission actually cited "the bond and milestone requirements ***and other safeguards***." *See Comprehensive Review of Licensing and Operating Rules for Satellite Services*, 30 FCC Rcd. 14713, ¶ 337 (2015) (emphasis added). Had the Commission felt that the safeguard in Section 25.158(c) also was no longer necessary, presumably it would have rescinded that provision as well in

former provision was retained in order to continue to protect the NGSO processing round regime against speculative filings. Moreover, the Commission's conclusion that the licensing procedures for both GSO and NGSO systems require "the same safeguards against speculation"[26] refutes the Applicants' assertion that applicant substitution should be allowed in the NGSO context while specifically disallowed in the GSO context.[27]

Although the Applicants repeatedly assert that grant of the proposed amendments will serve the public interest,[28] they provide scant evidence to support that position. They assert, for example, that their proposal will help to close the digital divide.[29] While this is certainly an important national goal, it is precisely the same one that OneWeb claimed to have designed its NGSO system to achieve by executing Wyler's "vision."[30] The Applicants have yet to explain why Wyler now wishes to pursue another party's vision.[31] If Wyler has lost faith in his OneWeb vision, he could simply file for modification of OneWeb's existing authorization or for amendment

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order to lift the prohibition on applicant substitution. The fact that it did not do so demonstrates the Commission's ongoing concern with this type of transaction.

26 *See 2003 Licensing Reform Order*, ¶ 227 (quoted above).

27 *See* Boeing Opposition at 10; SOM1101 Opposition at 22-24.

28 *See, e.g.*, Boeing Opposition at 11-12; SOM1101 Opposition at 3-6.

29 SOM1101 argues that, because the Commission concluded that broadband is not being deployed to all Americans in a reasonable and timely fashion, it has a mandate under Section 706 of the Telecommunications Act to take action to accelerate deployment of advanced telecommunications. *See* SOM1101 Opposition at 5-6. Unfortunately, SOM1101's argument relies upon a broadband progress report issued in 2016. The report issued earlier this year reached precisely the opposite conclusion. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2018 Broadband Deployment Report, FCC 18-10, ¶ 94 (rel. Feb. 2, 2108) ("We conclude that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.").

30 *See, e.g.*, Petition for Declaratory Ruling, IBFS File No. SAT-LOI-20160428-00041, at 1-6 (Apr. 28, 2016) (discussing digital divide and stating that "OneWeb was founded on this mission"); Opposition and Response of WorldVu Satellites Limited, IBFS File No. SAT-LOI-20160428-00041, at 3 (Aug. 25, 2016) (asserting that Wyler has attracted OneWeb investors who "support [his] vision"); 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/.

31 As SOM1101 recognizes, it will take the Boeing applications "as is." *See* SOM1101 Opposition at 30.

of its pending application, or he could renounce his position as Executive Chairman and file entirely new applications through SOM1101. Of course, such applications would not be eligible for consideration in the current Ka- and V-band NGSO processing rounds. The fact that Wyler has not pursued either of these options reveals that the real motivation for his desire to replace Boeing as the applicant is the value of the Boeing applications' status in the ongoing processing rounds and the interest in aggregating the spectrum from multiple applicants within those rounds – precisely the concern underlying the Commission's multiple-ownership prohibition.

The Applicants also contend that grant of the amendments will serve the interests of competition.[32] In fact, just the opposite is true. The amendments would eliminate one independent potential competitor (Boeing) in favor of giving Wyler a controlling interest over two NGSO systems in both the Ka- and V-bands that are unlikely to compete robustly with each other. Boeing, a company that is number 24 on the Fortune 500 list,[33] with $94.6 billion in annual revenue from activities that make it a world leader in the manufacturing and launch of satellites – a combination that led Boeing previously to conclude that it "has unmatched qualifications to launch and operate" an NGSO system[34] – would no longer be involved in the applications. In its place would be Wyler, an individual who owes fiduciary duties to a company with its own NGSO system.[35] In support of this substitution, the Applicants offer vague assertions that Wyler "has been instrumental in refocusing the broader fixed-satellite industry on the potential for NGSO

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[32] *See, e.g.*, Boeing Opposition at 12; SOM1101 Opposition at 29.

[33] *See* Fortune 500 List, *available at* fortune.com/fortune500/boeing. Thus, this is not a case in which the applicant is bringing on a partner in order to "secur[e] financial backing sufficient to facilitate prompt implementation of a competitive [NGSO] system," as SOM1101 implies. SOM1101 Opposition at 41.

[34] Application, IBFS File No. SAT-LOA-20160622-00058, at 2 (June 22, 2016).

[35] *See* SpaceX Petition at 11 and n.44. SOM1101 has not addressed Wyler's ability to compete in light of these fiduciary duties to OneWeb.

networks"[36] and that he would be in a position to "advance[] high-speed broadband access to remote corners of the world."[37] The Commission has not traditionally found such hyperbolic arguments compelling, because all applicants that are licensed through a processing round must be found to have the necessary qualifications and will be required to deploy their systems within the period established under the milestone rules.[38] Thus, denial of the proposed amendments would actually ensure more competitors and less concentration in the NGSO industry.

Moreover, the proposed transaction would adversely affect other NGSO applicants participating in the processing rounds – a fact confirmed by the four parties that filed petitions to deny.[39] Nonetheless, the Applicants assure the Commission that no such harm will arise. For example, given that SpaceX would have to coordinate with the constellations proposed by Boeing no matter who holds the authorizations, SOM1101 argues that "[r]ejection of the Amendments changes nothing for SpaceX."[40] This is demonstrably false. The applications may transfer "as is," but the applicant will change dramatically, as demonstrated by the unreasonable coordination positions taken by OneWeb (under Wyler) compared to the accommodating attitude demonstrated by Boeing (after noting OneWeb's unreasonableness).[41] Clearly, allowing the conveyance of two NGSO systems 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. Moreover, Wyler's control of two systems in a band would likely distort the

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36 SOM1101 Opposition at 41-42.

37 Boeing Opposition at 12.

38 *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").

39 *See, e.g.*, SpaceX Petition at 12-14; Iridium Petition at 5-6; O3b Petition at 13-14; Telesat Petition at 12.

40 SOM1101 Opposition at 31.

41 *See* SpaceX Petition at 12-14.

incentives to invest in actual technologies for efficient use of spectrum and incentivize obstructionism by both systems, decreasing the chances for operator-to-operator coordination, the Commission's preferred outcome for NGSO spectrum sharing.

For example, as Telesat pointed out, during in-line events involving SOM1101, OneWeb, and a third NGSO system, Wyler-controlled systems would be entitled to two-thirds of the common spectrum in the absence of a coordination agreement, if these amendments were granted.[42] The Applicants argue that this is no hardship, since the third NGSO system would have access to one-third of the spectrum whether or not SOM1101 replaced Boeing.[43] However, this observation misses a critical point. If the amendments were granted, the NGSO operator would have to coordinate with a party (Wyler) for whom the default rule gives it access to twice as much spectrum as it would have absent the proposed transaction. This significantly decreases Wyler's incentives to explore and reach arrangements that would maximize intensive use of valuable spectrum resources for the benefit of all NGSO systems. Especially given the demonstrated tendency for OneWeb (under Wyler's control) to take unreasonable coordination positions, the harm that would result in this situation cannot be ignored.

Accordingly, the applicability of Section 25.159(b) is clear, and there is no basis for granting a waiver to allow the transaction to proceed. The Commission should deny the amendments.[44]

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[42] *See* Telesat Petition at 12.

[43] *See* Boeing Opposition at 12-13; SOM1101 Opposition at 31-32.

[44] If the Commission were to consider the proposed amendments on their merits, it would need to have more information for its analysis. At a minimum, the Applicants should be required to provide a copy of the agreement they have acknowledged. But it would be prudent to require an affidavit from each party confirming the full scope of any arrangements they may have, whether oral or written and both present and future. *See* SpaceX Petition at 9-10.

II. APPLICANT SUBSTITUTION IS A MAJOR AMENDMENT, AND THERE IS NO JUSTIFICATION FOR WAIVING SECTION 25.116(B) TO ALLOW THE BOEING APPLICATIONS TO RETAIN THEIR STATUS IN WYLER'S HANDS

Section 25.116 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.[45] Boeing and SOM1101, however, maintain that substitution of one applicant for another should not be considered "major." They argue that the petitioners are relying upon a portion of the rule that was rescinded in order to allow legitimate business transactions.[46] But, here again, the Applicants' arguments miss the point by focusing on a rescinded provision rather than one that is still in force and clearly applicable. Wyler's bid to acquire Boeing's status in the Ka- and V-band NGSO processing rounds is specifically the type of transaction that the Commission recognized can be used as an ongoing abusive strategy[47] – which is why such a change remains a major amendment under today's rules.

Specifically, Section 25.116(b)(4) provides that an amendment will be considered "major" if it is determined by the Commission to be substantial pursuant to Section 309 of the Communications Act.[48] In its Petition, SpaceX demonstrated that the transaction proposed by the Applicants would qualify as a major amendment under this standard.[49] SOM1101 never discussed

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45 *See* 47 C.F.R. § 25.116(c).

46 *See* Boeing Opposition at 17-19; SOM1101 Opposition at 36-38. It is worth noting that, in support of this assertion, Boeing erroneously cites a portion of the *2003 Licensing Reform Order* that relates to the Commission's decision to eliminate the restriction on the sale of a license after grant, as opposed to the relevant context of applicant substitution while an application is still pending. *See* Boeing Opposition at 17-18 nn.50-51.

47 *See Amendment of the Commission's Space Station Licensing Rules and Policies*, 31 FCC 9398, ¶ 19 (2016). The Applicants emphasize the fact that some of the precedent cited on this issue relates to the GSO context. However, the rescinded portion of the rule applied to both GSO and NGSO applications, such that to the Commission's statements in the former context should be informative in the latter. *See 2003 Licensing Reform Order*, ¶ 140.

48 *See* 47 C.F.R. § 25.116(b)(4).

49 *See* SpaceX Petition at 16-17.

that aspect of the rule. For its part, Boeing responded only briefly, arguing that this provision is inapposite. It cited a single case for this proposition, arguing that the Commission has long treated "major amendments" under its rules as synonymous with "substantial amendments" under Section 309.[50] Yet Boeing apparently overlooked the fact that, in that very same case, the Commission also confirmed that applicant substitution is a substantial amendment subject to notice and comment under *Section 309*.

> [W]e reaffirm our opinion that a substantial change in the ownership or control of an applicant (other than in the case of a *pro forma* change), or ***the substitution of one applicant for another, is an event which changes the identity of the applicant and requires a statutory public notice and a thirty-day opportunity for public comment***.[51]

Accordingly, Boeing's own case demonstrates that the proposed substitution of one applicant for another is substantial pursuant to Section 309, and therefore a major amendment under Section 25.116(b)(4). This definitive statement from the Commission authoritatively addresses the issue and should end all debate.[52]

Here again, the Applicants request a waiver if the Commission determines that Section 25.116 applies, recycling the same arguments previously discussed and demonstrated to be insufficient to justify the extraordinary relief they request. Here in particular, the Applicants have provided no explanation for why the waiver is necessary if they truly believe, as they have argued, that the underlying applications' status in the current processing rounds confers no advantage to

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50 *See* Boeing Opposition at 19-20 (citing *1976 Update Order*).

51 *1976 Update Order*, ¶ 15 (emphasis added).

52 Boeing asserts that, if the Applicants "had waited to effectuate this arrangement until after the licenses were granted, the transaction would be entirely consistent with Commission policies." Boeing Opposition at 16. Of course, that is erroneous given the patent violation of the multiple ownership rule in Section 25.159 discussed above. Moreover, while it is true that the Commission has rescinded the anti-trafficking rule that otherwise could have blocked a post-licensing sale by Boeing to SOM1101, it did so in part in reliance upon actions it was taking to deter speculation at the application stage, such as "limits on the number of pending applications and unbuilt satellites a licensee may have in each frequency band." *2003 Licensing Reform Order*, ¶ 216.

an NGSO applicant. Meanwhile, allowing the amendments *and* allowing the Boeing applications to remain in the ongoing processing rounds would exacerbate the harms to a competitive NGSO environment as described above. By allowing a subsequent SOM1101 operator to remain in these ongoing NGSO processing rounds, the Commission would empower gamesmanship over actual competition, and create an ever more skewed default position for the two Wyler systems, further diminishing Wyler's incentives to promote efficient use of spectrum through the Commission's preferred outcome, operator-to-operator coordination. The Commission should reject the waiver request and maintain the integrity of its processing round regime.

CONCLUSION

The Commission's rules and precedents are clear. Section 25.159(b) prohibits the proposed transaction, and the Applicants have not even begun to clear the high hurdle they face to justify a waiver. Moreover, even if the amendments were granted, the Boeing applications should be treated as newly filed and removed from their current NGSO processing rounds. Enforcement of these rules will safeguard the integrity of the Commission's NGSO processing round regime and thereby ensure fairness to all parties and encourage coordination as a means of sharing NGSO spectrum. Accordingly, the Commission should deny the amendments, or, at a minimum, remove the underlying applications as amended from the current NGSO processing rounds.

Respectfully submitted,

SPACE EXPLORATION HOLDINGS, LLC

By: */s/ Tim Hughes*
Tim Hughes
Senior Vice President, Global Business and Government Affairs

Patricia Cooper
Vice President, Satellite Government Affairs

SPACE EXPLORATION TECHNOLOGIES CORP.
1030 15th Street, N.W.
Suite 220E
Washington, DC 20005
202-649-2700 tel
202-649-2701 fax

William M. Wiltshire
Paul Caritj
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W.
Suite 800
Washington, DC 20036
202-730-1301 tel
202-730-1301 fax

Counsel to SpaceX

March 9, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of March, 2018, a copy of the foregoing Reply was served by First Class mail upon:

Bruce A. Olcott
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113

Ronald W. Del Sesto Jr.
Timothy L. Bransford
Catherine Kuersten
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004

Ryan Gardner
SOM1101, LLC
P.O. Box 86
Hanover, NH 03755

Karis Hastings
SatCom Law LLC
1317 F Street, N.W., Suite 400
Washington, DC 20004

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

Scott Blake Harris
Harris, Wiltshire & Grannis LLP
1919 M Street, N.W., Suite 800
Washington, DC 20036

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

/s/ *Abigail D. Hylton*
Abigail D. Hylton