

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

In the matter of	)	Call Sign S2150
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<b>FINAL ANALYSIS COMMUNICATION SERVICES, INC.</b>	)	File Nos. 25-SAT-P/LA-95
	)	76-SAT-AMEND-95
	)	79-SAT-AMEND-96
Authorization to Construct, Launch and Operate	)	151-SAT-AMEND-96
a Non-Voice, Non-Geostationary Mobile Satellite	)	7-SAT-AMEND-97
System in the 148-150.5 MHz, 400.15-401 MHz,	)	SAT-MOD-20020329-00245
and 137-138 MHz Bands	)	SAT-AMD-20030606-00112

**MEMORANDUM OPINION AND ORDER**

**Adopted:** March 17, 2004

**Released:** March 17, 2004

By the Chief, International Bureau:

**I. INTRODUCTION**

1. With this Order, we deny the request of Final Analysis Communication Services, Inc. ("Final Analysis") for waiver of the automatic termination provision of its authorization because it failed to meet the prescribed system implementation milestones set forth in its non-voice, non-geostationary satellite system license.<sup>1</sup> Those milestones required Final Analysis to complete construction of its first two satellites by March 2002 -- four years after its license was granted -- and to launch those two satellites by September 2002. Final Analysis did not meet those milestones, and has not demonstrated sufficient reason to warrant a waiver of its milestone deadlines. Consequently, Final Analysis's license is rendered null and void by its own terms.

**II. BACKGROUND**

2. On March 31, 1998, the International Bureau granted Final Analysis a license to launch and operate a non-voice, non-geostationary satellite service system in low Earth orbit (a "Little LEO" system) in the second processing round for the Little LEO service.<sup>2</sup> The grant of its license, as well as the other second-round system licenses, was based upon a joint sharing agreement among the second-round applicants, including Final Analysis.<sup>3</sup> The Commission adopted this sharing agreement as the foundation

<sup>1</sup> Final Analysis Communication Services, Inc. Petition for Waiver, SAT-MOD-20020329-00245 (filed March 29, 2002) (the "Milestone Extension Request"). See 47 C.F.R. § 25.161 (2002) (rule section on automatic termination of station authorization).

<sup>2</sup> *Final Analysis Communication Services, Inc. Application for Authorization to Construct, Launch and Operate a Non-Voice, Non-Geostationary Mobile Satellite System in the 148-150.05, 400.15-401 MHz, and 137-138 MHz Bands*, Order and Authorization, 13 FCC Rcd 6618 (Int'l Bur. 1998) ("*Final Analysis Authorization*").

<sup>3</sup> Joint Proposal of E-SAT, Inc., Final Analysis Communication Services, Inc., Leo One USA Corporation, Orbital Communications Corporation, and Volunteers in Technical Assistance (filed Sept. 22, 1997) ("*Joint Proposal*").

for the service rules and procedures governing the licensing of second-round applicants.<sup>4</sup> Under that sharing agreement, and the *Second Round Processing Order*, Final Analysis was designated as "System 2," and authorized to operate a 26-satellite Little LEO system in the 148-150.05 MHz uplink and the 137-138 MHz and 400.15-401 MHz downlink frequency bands.

3. At the time the Commission granted Final Analysis its license in 1998, the licensee was the fully-owned subsidiary of Final Analysis, Inc. ("FAI"), a privately held, for-profit, Maryland corporation.<sup>5</sup> FAI's stock, in turn, was owned 50% by Nader Modanlo ("Modanlo") and 50% by Michael H. Ahan ("Ahan").<sup>6</sup> In September 2000, the Commission granted a *pro forma* transfer of control application to transfer less than ten percent of the stock of FAI from its equal shareholders, Modanlo and Ahan, to Polyot, a corporation located in Omsk, Russia.<sup>7</sup> Modanlo and Ahan retained an equal portion of the remaining stock of FAI.

4. In September 2001, a petition for involuntary Chapter 7 bankruptcy was filed by three creditors of FAI (the parent corporation) against FAI in the United States Bankruptcy Court for the District of Maryland to liquidate the assets of FAI.<sup>8</sup> According to comments by Final Analysis on its post-bankruptcy transfer, equal ownership of FAI by Modanlo and Ahan created a decision-making deadlock, which led to extensive corporate litigation and eventually to FAI's bankruptcy.<sup>9</sup> When the bankruptcy court granted the petition on October 16, 2001, allowing a bankruptcy case to proceed, the court appointed Cheryl Rose as Trustee for the company. Shortly thereafter, on February 7, 2002, the Commission approved transfer of control of the Final Analysis license from FAI to the Trustee.<sup>10</sup>

5. The Trustee sold the assets and properties of FAI on January 14, 2002 -- including all the stock of licensee Final Analysis -- to New York Satellite Industries LLC ("NYSI"), a Delaware limited liability corporation that is 100% owned by Modanlo.<sup>11</sup> Pursuant to the terms of the sale, the Trustee

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<sup>4</sup> *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, Report and Order, 13 FCC Rcd 9111, 9124 (1997) ("*Second Processing Round Order*").

<sup>5</sup> *See Final Analysis Communications Services, Inc's Application to Construct, Launch and Operate the FACS Low-Earth Orbit Satellite System*, File No. 25-SAT-P/LA-95 (filed November 16, 1994), Exhibits VI - VIII (the application also encompassed amendments filed February 24, 1995, February 23, 1996, August 19, 1996, and October 30, 1997) ("*Application*"). Final Analysis had only one class of common (voting) stock. *Id.* *See also*, *Final Analysis Communication Services, Inc.*, Order and Authorization, 13 FCC Rcd 6618 (1998).

<sup>6</sup> *See Application* at Exhibits VI - VII.

<sup>7</sup> *Final Analysis Communication Services, Inc. Application for Consent to Non-substantial (pro forma) Transfer of Control*, File No. SAT-T/C-20000815-00120 (filed August 15, 2000; granted September 5, 2000) ("*pro forma transfer*").

<sup>8</sup> United States Bankruptcy Court for the District of Maryland, Case Number 01-21039, filed September 14, 2001. *See* Milestone Extension Request at p. 9.

<sup>9</sup> *See Final Analysis Communication Services, Inc. Reply to Comments* (filed April 22, 2002). *See also* Michael Ahan Comments (filed April 12, 2002) (the "Ahan Comments").

<sup>10</sup> *Final Analysis Communication Services, Inc. Application for Consent to Involuntary Transfer of Control*, File No. SAT-T/C-20011105-00094 (filed November 5, 2001; granted February 7, 2002).

<sup>11</sup> *See Application* at 2. *See also* letter to William F. Caton, Acting Secretary, Federal Communications Commission from Aileen A. Pisciotta, Counsel to Final Analysis Communication Services, Inc., dated February 20, 2002, submitting Supplemental Statement to Exhibit A. Nader Modanlo holds 100% of the equity and voting stock of NYSI. Other litigation against Modanlo stems from NYSI's purchase of FACS's assets. Various minority shareholders of FACS initiated a shareholders' derivative action on behalf of FACS against Modanlo and NYSI in

retained control over the license until the Commission granted an order approving the transfer to NYSI.<sup>12</sup> Final Analysis filed an application seeking transfer of its license to NYSI on January 25, 2002.<sup>13</sup> The Satellite Division granted the transfer on August 15, 2002.<sup>14</sup>

6. In addition to his ownership interests in the parent companies FAI and NYSI, Modanlo has been Chairman and President of Final Analysis, the wholly-owned subsidiary FCC licensee, from that company's inception through the present date. In this role, Modanlo managed Final Analysis's business operations, including whatever efforts it has made toward construction and launch of its satellite system.<sup>15</sup>

7. The *Final Analysis Authorization* specified a system implementation milestone schedule, including the milestone for completing construction of its first two satellites by March 2002, and the milestone for launching those two satellites by September 2002.<sup>16</sup> The authorization explicitly states that unless the licensed space stations are constructed and launched in accordance with the dates specified, failure to meet the milestones will render the authorization null and void.<sup>17</sup> In March 2002, four years into its license period and on the eve of the construction completion milestone, Final Analysis filed a petition seeking a waiver of the automatic termination of its license despite its anticipated failure to meet its third milestone.<sup>18</sup> Final Analysis amended the Milestone Extension Request in June 2003, clarifying its reasons for requesting an extension of time to complete construction and launch of its system.<sup>19</sup> The

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the Circuit Court for Montgomery County, Maryland. See February 6, 2004 *Ex Parte* letter from Patricia J. Paoletta, Counsel to New York Satellite Industries, to Marlene H. Dortch, Secretary, FCC, and Attached Settlement Report by Independent Investigator in that action. Although the investigator's report may be an encouraging development for Modanlo personally, that civil suit is not yet concluded, and, in any event, this state court litigation has no relevance to the instant Milestone Extension Request.

<sup>12</sup> Application at Exhibit A, p.2, attached Exhibit (Bill of Sale) and attached Exhibit (Federal Communications Commission Addendum to Trustee's Bill of Sale).

<sup>13</sup> Final Analysis Communication Services, Inc. application for transfer of control, File No. SAT-T/C 20020125-00010 at Exhibit A, p.1 (filed January 25, 2002) ("post-bankruptcy transfer").

<sup>14</sup> *Final Analysis Communication Services, Inc.*, Order and Authorization, (Satellite Division, Int'l Bur., released August 17, 2002).

<sup>15</sup> See August 30, 2000 Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, International Bureau, FCC, to Randall W. Sifers, counsel to Final Analysis Communications Services, Inc., granting *pro forma* transfer.

<sup>16</sup> *Final Analysis Authorization*, 13 FCC Rcd at 6646, 6649. These March 2002 and September 2002 deadlines are the third and fourth system implementation milestones, respectively. Final Analysis asserts that its non-contingent construction agreement with Final Analysis, Inc., its parent company, satisfied its first two milestones, which required the commencement of construction of the first two satellites by March 1999, and the commencement of construction of the remaining satellites by March 2001. April 1, 1999 Letter from Aileen A. Pisciotta, counsel to Final Analysis, Inc. and Final Analysis Communication Services, Inc., to Roderick K. Porter, Acting Chief, International Bureau, FCC (certifying Final Analysis's compliance with the initial construction commencement milestone in its license). See also, *Applications Of The Boeing Company*, 18 FCC Rcd 12317, 12327 (Int'l Bur. and OET 2003) (showings relevant to in-house manufacturing contracts).

<sup>17</sup> *Final Analysis Authorization*, 13 FCC Rcd at 6649.

<sup>18</sup> Milestone Extension Request at p. 16.

<sup>19</sup> Final Analysis Communication Services, Inc. Amendment to Petition for Waiver and Modification to Extend Milestones, SAT-AMD-20030606-00112 (filed June 6, 2003) (the "Amendment").

Milestone Extension Request, as amended, was placed on public notice as accepted for filing on June 30, 2003.<sup>20</sup> No comments were filed in response.

### III. DISCUSSION

8. It is longstanding Commission policy to impose milestones for satellite system implementation. These milestones are deadlines by which licensees must commence construction, complete construction, and launch their satellites.<sup>21</sup> Moreover, Section 319(b) of the Communications Act of 1934, as amended, requires any authorization to construct a radio station to specify dates by which the actual operation of such station is expected to begin, and requires automatic forfeiture of the authorization if the station is not ready for operation within the time specified.<sup>22</sup> Requiring licensees to make and fulfill realistic construction and launch commitments prevents increasingly scarce orbital and spectrum resources from being warehoused by licensees. The Commission has strictly enforced system implementation milestones because it is in the public interest to ensure that licensees proceed expeditiously to complete construction of their full systems and to commence service.<sup>23</sup> Indeed, strict milestones enforcement is especially important in the Little LEO service, because the Commission chose to rely on strict milestones enforcement rather than to apply financial qualification requirements on the service applicants.<sup>24</sup>

9. Section 25.117(e) of the Commission's rules permits modification of licenses to extend system implementation milestones only (1) when delay in implementation is due to unforeseeable circumstances beyond the control of the licensee or (2) where there are unique and overriding public interest concerns to justify an extension.<sup>25</sup> Final Analysis advances two principal reasons to justify its request for extension under Section 25.117(e)(1). First, it argues that the bankruptcy proceeding of its former corporate parent impeded progress on its system implementation for one year. Second, it argues that the parent company's bankruptcy caused an unforeseen and uncontrollable delay in obtaining United States State Department approval of a technical assistance agreement for the launch of Final Analysis's satellites by a Russian company. We find that neither reason was unforeseeable, nor beyond the control of Final Analysis. We first discuss, however, the effect of Final Analysis's failure to implement its system in the three and one-half years that transpired *before* the commencement of a bankruptcy proceeding against its parent company.

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<sup>20</sup> Public Notice Report No. SAT-00154, Policy Branch Information, Satellite Space Applications Accepted for Filing (June 30, 2003).

<sup>21</sup> See, e.g., *MCI Communications Corporation*, 2 FCC Rcd 233, 234 (Comm Carr. Bur. 1987) ("*MCI Order*") (milestone schedule included in each domestic space station authorization issued by the Commission).

<sup>22</sup> 47 U.S.C. § 319(b).

<sup>23</sup> *Amendment of the Commission's Space Station Licensing Rules and Policies and Mitigation of Orbital Debris*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760, 10828 (2003) ("*First Space Station Reform Order*"). See also, *Advanced Communications Corporation*, Memorandum Opinion and Order, 10 FCC Rcd 13337, 13338 (Int'l Bur. 1995); *Policies and Procedures for the Licensing of Space and Earth Stations in the Radiodetermination Satellite Service*, Second Report and Order, 104 F.C.C.2d 650, 665 (1986).

<sup>24</sup> *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, Report and Order, 13 FCC Rcd 9111, 9119 (1997) ("*Second Processing Round Order*").

<sup>25</sup> 47 C.F.R. § 25.117(e). In the *Third Space Station Reform Order*, the Commission moved subsection 25.117(e) to 25.117(c). *Amendment of the Commission's Space Station Licensing Rules and Policies and Mitigation of Orbital Debris*, Third Report and Order and Further Notice of Proposed Rulemaking, IB Dockets No. 02-34 and 02-54, 18 FCC Rcd 13486 (2003) ("*Third Space Station Reform Order*"). For purposes of this Order, we will continue to refer to the subsection as 25.117(e) to avoid confusion with the citations in the pleadings before us.

**A. 1998 to 2001: Failure to Implement System**

10. Long before the institution of an involuntary bankruptcy proceeding against FAI in September 2001, Final Analysis made little progress on system implementation. In its Milestone Extension Request, Final Analysis describes how, as early as 1999, the company was hindered by a decision-making deadlock between Modanlo and Ahan.<sup>26</sup> The deadlock resulted in litigation and created significant uncertainties and delays in Final Analysis's satellite construction program.<sup>27</sup> According to Final Analysis, these circumstances so adversely affected Final Analysis's ability to conduct business that progress on its construction program virtually came to a halt.<sup>28</sup>

11. The record in this matter confirms the effect of the corporate deadlock on Final Analysis's design efforts during the four years' time granted it to build the first two satellites. Final Analysis asserts that it made substantial progress toward compliance with its milestones.<sup>29</sup> We disagree. In an *ex parte* communication, Final Analysis filed 42 technical documents that it asserts demonstrate substantial progress on the development of its satellite system.<sup>30</sup> We have reviewed these documents. Although most of the documents are undated and unsigned, they disclose that Final Analysis made no substantial progress on construction before the filing of the bankruptcy petition in 2001.

12. These documents indicate that FAI, as the general contractor for construction of the Final Analysis system, coordinated the work of two subcontractors, as well as its own responsibility for construction of the communication payload on the satellites. General Dynamics and Polyot had subcontracts to build the satellite buses and portions of their frames. The documents indicated that preliminary design work was done by both General Dynamics and by Polyot, but both companies' work was stymied in the preliminary design phase, awaiting further input by FAI. For example, it appears that Polyot performed an initial structural analysis of the frame of the spacecraft. However, Polyot notes that the results of this analysis are preliminary, and would be corrected and modified when the actual configuration of the spacecraft was provided by FAI.<sup>31</sup> The records do not show that FAI ever provided this information to Polyot. In addition, Polyot provided a DRAFT interface control document, describing the installation of the spacecraft bus into the Polyot rocket booster. These documents indicate that Polyot was awaiting input from Final Analysis, listed as "to be determined." General Dynamics provided a series of conceptual and interface documents, but in the Systems Requirement Review, General Dynamics noted that its presentation was not complete, because the interface control drawings to be drafted by FAI were not yet available.<sup>32</sup>

13. Most critically, FAI failed to advance its own in-house construction of the spacecraft communications payload, a responsibility entirely within the control of FAI. The "Air Interface Specification" document for the communications payload to be built by FAI is an unsigned (and undated) DRAFT specification. It appears, then, that FAI's own in-house construction efforts never advanced to the preliminary design review ("PDR") stage, much less to critical design review ("CDR") or to actual construction work.

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<sup>26</sup> Milestone Extension Request at p. 8.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at p. 9.

<sup>29</sup> *Id.*

<sup>30</sup> May 12, 2003 Letter from Randall W. Sifers, Counsel to Final Analysis Communication Services, Inc., to Donald Abelson, Chief, International Bureau, Federal Communications Commission, at Attachment A.

<sup>31</sup> *Id.* at Attachment A, Document #5.

<sup>32</sup> *Id.* at Attachment A, Document # 36.

14. In a document entitled "FAISAT System Design Status CDR," Final Analysis acknowledges that 'the design of FAISAT subsystems varies between pre-PDR and CDR. A lot of things have not been designed. A full time staff is needed for a few months to complete the *design*.'<sup>33</sup> The document also states:

"The antenna system is in a pre-PDR state. Only conceptual work was done....

Launch vehicle interface design has recently been changed, and no detailed design nor analyses exist....

No work has been done on payload software. The contract for developing the payload software was just awarded when the effort was suspended....

The mechanical linkages of the solar array connecting them to the SADA are not designed. Only a conceptual design exists....

The charge regulators and power distribution unit have not been designed yet. Only a preliminary design exists. The battery has been selected. It turns out that despite catalog listing of Eagle Pitcher batteries of the same AH rating that we need do not really exist."<sup>34</sup>

It is obvious from this documentation that FAI itself never got to the stage at which it was bending metal on the construction of the communications payload.

15. Final Analysis asserts it spent more than \$70 million on system implementation.<sup>35</sup> An examination of the record submitted does not indicate any construction efforts. In the absence of evidence that these expenditures of time and money were specifically related to construction of the licensed system, there is no basis to conclude that the expenditures represent progress toward system implementation.<sup>36</sup>

16. In addition, Final Analysis argues that its funding of efforts to win and implement a global allocation are properly viewed as steps taken to implement its system.<sup>37</sup> According to Final Analysis, its license noted that it had insufficient spectrum and would receive first priority to apply for additional spectrum if attempts to obtain an international allocation of Little LEO spectrum were successful. Final Analysis argues that its system implementation was predicated on obtaining additional spectrum at the World Radiocommunication Conference ("WRC").<sup>38</sup> In its view, gaining additional spectrum within the WRC process has been an integral and consistent part of Final Analysis strategic efforts and resource expenditures to implement its system.

17. We find that this argument misinterprets the grant of supplemental spectrum in the Commission's *Second Processing Round Order*. In that *Order*, the Commission noted Final Analysis's argument that without additional spectrum it lacked sufficient service downlink spectrum to implement a

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<sup>33</sup> *Id.* at Attachment A, Document # 34, FAISAT System Design Status CDR (emphasis added).

<sup>34</sup> *Id.*

<sup>35</sup> Milestone Extension Request at Summary p. i.

<sup>36</sup> *See, e.g., Panamsat Licensee Corp*, Memorandum Opinion and Order, 16 FCC Rcd 11534, 11548 (2001).

<sup>37</sup> January 28, 2004 *ex parte* Letter from Patricia J. Paoletta, counsel to New York Satellite Industries LLC, to Marlene H. Dortch, Secretary, FCC, at p.4.

<sup>38</sup> *Id.*

large Little LEO system.<sup>39</sup> The Commission found, however, that the System 2 Little LEO applicant *could* operate a system in the bands that were licensed to Final Analysis.<sup>40</sup> But because the other second-round Little LEO applicants agreed, in their joint spectrum proposal, to allow Final Analysis to have first priority on this future spectrum, the *Second Processing Round Order* granted that first priority. In doing so, however, the Commission explicitly conditioned that grant of priority on System 2 complying with the terms and conditions of its license, including its system construction, launch, and operation milestones.<sup>41</sup> Far from being an integral part of its efforts to implement its system, expenditures on an international allocation, at the expense of work on its licensed system, were a misallocation of resources.

18. In every instance where the Commission has denied a milestone extension request, construction of the satellite either had not begun or was not continuing, thus raising questions regarding the licensee's intent to proceed.<sup>42</sup> This case presents a far worse situation. In this case, system construction was completely halted due to Final Analysis's owners' inability to cooperate with each other. While Final Analysis continues to assert its intention to proceed, the only reliable measure of that intent is the physical result of its efforts. Because Final Analysis failed to build two satellites during four years of its license period, we have no basis to support its assertions of intent to proceed with system implementation. The record reveals that for the most part, progress on system implementation did not go beyond the preliminary design phase.

#### **B. Bankruptcy (September 2001 to January 2002)<sup>43</sup>**

19. Final Analysis failed to achieve substantial progress in the construction of its first two satellites during the first three and one-half years of its authorization. Shortly before the March 2002 milestone deadline, a petition for involuntary bankruptcy was filed against FAI, Final Analysis's parent company. Final Analysis argues that this eleventh-hour occurrence prevented it from meeting its milestone deadlines.<sup>44</sup> We find that a bankruptcy proceeding, particularly one commenced so very late in the system implementation construction period, had little, if any, relevance to Final Analysis's failure to meet its milestones. At best, it might be argued that the bankruptcy proceeding impeded the final six months of construction on Final Analysis's first two satellites.

20. In recent years, the Commission has considered issues relating to federal bankruptcy law and the Commission's enforcement of the regulatory obligations of licensees engaged in the bankruptcy process.<sup>45</sup> In none of the decisions has the Commission looked favorably upon a claim that federal bankruptcy proceedings prevent a licensee from meeting its regulatory obligations to the Commission. The International Bureau, under delegated authority, has similarly grappled with various issues arising from the bankruptcy filings of a number of satellite licensees and the relevance of bankruptcy on a

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<sup>39</sup> *Second Processing Round Order*, 13 FCC Rcd at 9125.

<sup>40</sup> *Id.* at p. 9124.

<sup>41</sup> *Id.* at 9127.

<sup>42</sup> See *GE American Communications, Inc.*, Order and Authorization, 16 FCC Rcd 11038, 11041 (Int'l Bur. 2001); see also, *Advanced Communications Corporation*, 10 FCC Rcd 13337, 13342 (Int'l Bur. 1995), *aff'd* 11 FCC Rcd 3399 (1995), *aff'd* *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996), *cert. denied*, *Advanced Communications Corp. v. FCC*, 519 U.S. 1071 (1997).

<sup>43</sup> September 2001 was the month in which a bankruptcy petition was filed against FAI. January 2002 was the month in which the bankruptcy trustee sold FAI's assets to NYSI.

<sup>44</sup> Amendment to Petition for Waiver at p. 10.

<sup>45</sup> See, e.g., *Globalstar, L.P.*, 18 FCC Rcd 1249 (Int'l Bur. 2003); *Space Station System Licensee, Inc. and Iridium Constellation, LLC*, 17 FCC Rcd 2271 (Int'l Bur. 2002); *ICO-Teledesic Global Limited*, 16 FCC Rcd 6403 (Int'l Bur. 2001). See also, Luisia Beltran, "WorldCom Files Largest Bankruptcy Ever," CNN/Money, [http://money.cnn.com/2002/07/19/news/worldcom\\_bankruptcy](http://money.cnn.com/2002/07/19/news/worldcom_bankruptcy) (July 22, 2002).

licensee's obligations to meet milestones deadlines. In each case, the Bureau has not been persuaded to extend a milestone deadline because of a bankruptcy proceeding. In fact, precedent has shown that satellite licensees have successfully undergone business reorganization under bankruptcy protection and maintained milestone schedules.

21. In July 2001, the International Bureau and the Office of Engineering and Technology authorized WT Docket No. 03-202, L.P. ("Globalstar") to construct, launch and operate a satellite system comprised of 64 non-geostationary-satellite orbit satellites and four geostationary-satellite orbit satellites operating in the 2 GHz mobile satellite service.<sup>46</sup> Globalstar's license contained milestones for system implementation, including a requirement to enter into a non-contingent satellite manufacturing contract for all system components by July 17, 2002. On February 15, 2002, Globalstar sought Chapter 11 bankruptcy protection.<sup>47</sup> On its July 17, 2002 milestone deadline, Globalstar filed a request for waiver and modification of its implementation milestones. Despite the fact that Globalstar's first milestone passed during its bankruptcy proceeding, the International Bureau found that the extension request did not present special circumstances justifying a waiver, and thus Globalstar did not meet its burden of demonstrating that it qualified for a milestone extension.<sup>48</sup> On application for Commission review of the Bureau decision, Globalstar now claims that its status as debtor-in-possession under Chapter 11 of the U.S. Bankruptcy Code required the Bureau to give special consideration to its requests, and protects Globalstar's license from cancellation.<sup>49</sup> The application for review is pending.

22. Similarly, in two other cases, the Bureau held licensees to their implementation milestone deadlines despite ongoing bankruptcy proceedings. First, in the case of Iridium, the principal corporate owner of the Iridium System's assets defaulted on loans in excess of \$1.5 billion in August 1999, and thereafter filed for protection from its creditors under Chapter 11 of the Bankruptcy Code.<sup>50</sup> During the course of the parent company's bankruptcy proceedings, the International Bureau granted a 2 GHz mobile satellite system license to Iridium LLC, the Debtor-in-Possession in the Iridium bankruptcy proceeding.<sup>51</sup> As with all satellite licenses, Iridium's authorization included system implementation milestones, including a condition that failure to meet the specified milestones would render the license null and void.<sup>52</sup> Seven months later, the Commission authorized assignment of Iridium's 2 GHz license to the entity that purchased the Iridium system assets from the bankruptcy proceeding.<sup>53</sup> Iridium was not granted additional time to meet its milestones because its parent was in bankruptcy. Indeed, despite its parent's bankruptcy, Iridium met its first milestone in July 2002.<sup>54</sup>

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<sup>46</sup> *Globalstar, L.P.*, Order and Authorization, 16 FCC Rcd 13739 (Int'l Bur./Off. Eng'g and Tech. 2001) ("*Globalstar License*").

<sup>47</sup> "Globalstar, Creditors Finalize Agreement On Debt Restructuring and New Business Model," News Release, Globalstar L.P., Feb. 15, 2002.

<sup>48</sup> *Globalstar, L.P.*, 18 FCC Rcd 1249 (Int'l Bur. 2003).

<sup>49</sup> Emergency Application for Review of Globalstar, L.P., File Nos. SAT-LOA-19970926-00151/52/53/54/56, SAT-AMD-20001103-00154, SAT-MOD-20020717-00116/17/18/19, SAT-MOD-20020722-00107/08/09/10/12 (March 3, 2003) ("*Globalstar Emergency Application for Review*") at pp. 7-8, 11-12, 19-22.

<sup>50</sup> *Space Station System Licensee, Inc. and Iridium Constellation, LLC*, 17 FCC Rcd 2271, 2274 (Int'l Bur. 2002) ("*Iridium Assignment*").

<sup>51</sup> *Iridium LLC*, Order and Authorization, 16 FCC Rcd 13778 (Int'l Bur. 2001).

<sup>52</sup> *Id.* at 13791.

<sup>53</sup> *Iridium Assignment*, 17 FCC Rcd at 2291.

<sup>54</sup> Public Notice, *Satellite Division Information: 2 GHz MSS Systems in Compliance with First Milestone Requirement*, Report No. SAT-00135, DA 03-386 (released February 10, 2003).



23. Another 2 GHz MSS licensee, ICO Services Limited (“ICO”), a corporation organized under the laws of the United Kingdom, filed a letter of intent in 1997 to access the U.S. market to provide mobile satellite service in the 2 GHz frequency bands.<sup>55</sup> In June 2000, ICO filed an amendment to its letter of intent, disclosing the reorganization of the company pursuant to bankruptcy proceedings.<sup>56</sup> In July 2001, ICO’s letter of intent was granted.<sup>57</sup> Like the Globalstar 2 GHz license, ICO’s license specified system implementation milestones, including a requirement to enter into a non-contingent satellite manufacturing contract for all system components by July 17, 2002.<sup>58</sup> ICO was not granted additional time to meet its milestones because it was in bankruptcy. Indeed, ICO met its first milestone in July 2002.<sup>59</sup>

24. These recent International Bureau decisions are consistent with earlier Commission decisions involving Commission licensees in federal bankruptcy proceedings. In 1990, Geostar Positioning Corporation (“Geostar”) applied to make various modifications to its radiodetermination satellite service system license, including a request for a two-and-a-half year extension to launch its Geostar 3 satellite.<sup>60</sup> Although the Common Carrier Bureau’s decision noted that Geostar had filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code, the Bureau held that Geostar’s bankruptcy petition was not in itself dispositive of Geostar’s financial ability to proceed with system implementation.<sup>61</sup> The Bureau nevertheless required Geostar to submit a revised business plan and any other documentation necessary to demonstrate its ability to meet the system implementation milestones schedule in its authorization.<sup>62</sup> Geostar requested an extension of time to launch its Geostar 3 satellite because the extended schedule comported with its market forecasts. The Bureau denied the extension because independent business judgments based upon economic considerations are not considered circumstances beyond a licensee’s control. Thus, while Geostar’s bankruptcy was not dispositive of its financial ability, it was required to meet its milestones. Moreover, Geostar’s bankruptcy was not considered a justification for its failure to meet its milestones.

25. In *JET-TEL Group Limited Partnership*, the Wireless Telecommunications Bureau rejected a request to waive the automatic termination of a license for failure to meet a construction requirement.<sup>63</sup> JET-TEL alleged that it was unable to construct the required 25 ground stations for three years because of the bankruptcy of its principal financing source, the Haas Group.<sup>64</sup> According to JET-TEL, the assets of the Haas Group were frozen in the bankruptcy proceeding and unavailable to JET-TEL. JET-TEL asserted, however, that it would meet the next construction milestone.<sup>65</sup> The Wireless Bureau rejected the

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<sup>55</sup> Letter of Intent of ICO Services Limited, File No. 188-SAT-LOI-97; IBFS File Nos. SAT-LOI-19970926-00163.

<sup>56</sup> Amendment of Letter of Intent of ICO Services Limited to Access the 2 Ghz MSS Frequency Bands, File no. SAT-AMD-20000612-00107 (June 12, 2000).

<sup>57</sup> *ICO Services Limited*, Order, 16 FCC Rcd 13762 (Int’l Bur. 2001).

<sup>58</sup> *Id.* at 13775.

<sup>59</sup> Public Notice, *Satellite Division Information: 2 GHz MSS Systems in Compliance with First Milestone Requirement*, Report No. SAT-00135, DA 03-386 (released February 10, 2003).

<sup>60</sup> *Application of Geostar Positioning Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2276 (Comm. Carr. Bur. 1991).

<sup>61</sup> *Id.* at 2278.

<sup>62</sup> *Id.*

<sup>63</sup> *JET-TEL Group Limited Partnership Air-Ground Station KNKG802*, Order, 11 FCC Rcd 21215 (Wireless Bur. 1996).

<sup>64</sup> *Id.* at 21217.

<sup>65</sup> *Id.*

bankruptcy of JET-TEL's financing source as a justification for its waiver request. The Wireless Bureau noted that lack of financing cannot be used as a basis for granting an extension of time to construct.<sup>66</sup>

26. In none of these decisions did the Commission look favorably upon the claim that a bankruptcy proceeding prevented a licensee from meeting its regulatory obligations. Nor does Final Analysis cite any decision in which the Commission's regulatory requirements were excused due to the initiation of federal bankruptcy proceedings.

27. The Supreme Court's decision in *FCC v. NextWave Personal Communications* is consistent with the view that licensees cannot use an ongoing federal bankruptcy proceeding to excuse their regulatory obligations.<sup>67</sup> *NextWave* involved Section 525(a) of the Bankruptcy Code,<sup>68</sup> in which Congress limited government agencies' regulatory licensing powers under specific narrow conditions (such as where the license is revoked for non-payment of a debt that is dischargeable in the bankruptcy case). *NextWave* does not, however, support a wholesale bankruptcy exception to otherwise enforceable regulatory requirements. Indeed, the *NextWave* decision took pains to point out that "[t]he government may take action that is otherwise forbidden [under 11 U.S.C. § 525] when the debt in question is one of the disfavored class that is non-dischargeable."<sup>69</sup> Here, there is no debt at issue, only the even-handed enforcement of system implementation milestones to all similarly situated licensees. The Commission has not taken any action that discriminates against a licensee simply because it is in bankruptcy or associated with a firm in bankruptcy. Nothing in the Bankruptcy Code prevented this licensee, or its parent, from complying with the regulatory construction milestones other than issues related to the licensee or its parent's business discretion. The Commission's consistent application of its milestone policy is thus not inconsistent with the Bankruptcy Code or the Supreme Court's *NextWave* holding.

28. Final Analysis repeatedly emphasizes the fact that its parent company's bankruptcy began as an involuntary Chapter 7 proceeding.<sup>70</sup> According to Final Analysis, an involuntary bankruptcy proceeding is beyond its legal or practical control.<sup>71</sup> We disagree. Under bankruptcy law, ample opportunities are afforded for a debtor to control the course of its bankruptcy proceeding. For instance, when an involuntary petition for liquidation under Chapter 7 of the Bankruptcy Code is filed against a debtor company, the debtor has a right to "controvert," or oppose, the petition.<sup>72</sup> If the petition is not controverted, the Bankruptcy Code provides that the court will order relief against the debtor, by commencing a liquidation proceeding.<sup>73</sup> If, however, the debtor controverts the petition, the bankruptcy court must order a trial on whether to grant bankruptcy relief against the debtor.<sup>74</sup> Aside from the debtor's own right to controvert the petition, the Bankruptcy Code also permits other interested parties to move for dismissal of the bankruptcy proceeding.<sup>75</sup>

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<sup>66</sup> *Id.* at 21220.

<sup>67</sup> *FCC v. NextWave Personal Communications, Inc.*, 123 S. Ct. 832 (2003) ("*NextWave*").

<sup>68</sup> 11 U.S.C. § 525(a).

<sup>69</sup> *NextWave* 123 S. Ct. at 841 (emphasis in original).

<sup>70</sup> Amendment at 4, 10.

<sup>71</sup> Amendment at 10.

<sup>72</sup> 11 U.S.C. § 303(a) provides for the filing of an involuntary petition and § 303(d) provides for an answer to the petition.

<sup>73</sup> 11 U.S.C. § 303(h).

<sup>74</sup> *See, generally, In re Jr. Food Mart of Arkansas, Inc.*, 234 B.R. 420, 421 (Bankr. E.D. Ark. 1999).

<sup>75</sup> *Id.*, citing 11 U.S.C. § 707(a).

29. Even if an involuntary petition is not challenged at its commencement, a debtor in Chapter 7 does not lose control of its proceeding. The Bankruptcy Code also grants the debtor a one-time, absolute right to convert a Chapter 7 liquidation case into a Chapter 11 reorganization proceeding at any time.<sup>76</sup> Thus, the term “involuntary bankruptcy” describes little more than the fact that the debtor itself did not choose to initiate the bankruptcy proceeding. Debtors, creditors, and the principals of these companies employ bankruptcy proceedings for any number of strategic business purposes, including – as in this case – the opportunity to buy a company’s assets in a liquidation sale. We find that the decision to resort to bankruptcy, or to fail to contest a bankruptcy initiated by creditors, is a business decision. As we noted in denying a milestone extension to Globalstar, “[w]e have held that ‘business decisions’ based on economic considerations are not circumstances outside the control of the licensee, and therefore, do not warrant an extension of milestones.”<sup>77</sup>

30. Moreover, the bankruptcy in question here is not even the bankruptcy of Final Analysis, our licensee, but instead the bankruptcy of its parent corporation. Final Analysis emphasizes that it was financially solvent at the time that its parent company was forced into bankruptcy, but at the same time claims that the bankruptcy trustee – through her control of Final Analysis’s stock – prevented the licensee from doing anything to meet its regulatory obligations. Final Analysis asserts that the automatic stay in a bankruptcy proceeding reaches not just to any action against the debtor, but also to any business operations by its wholly-owned subsidiary.<sup>78</sup> This argument, however, is questionable as a matter of corporate law and bankruptcy law. Under corporate law, having chosen its parent and subsidiary incorporations, Final Analysis, Inc. must respect all corporate formalities, including controlling its subsidiary by voting its stock. The two corporate entities cannot be collapsed into a single controlling voice without piercing the corporate veil.<sup>79</sup> Under bankruptcy law, the bankruptcy petition of Final Analysis, Inc. placed its shares in Final Analysis Communication Services, Inc. under the bankruptcy court’s control, but not the assets or property of the subsidiary itself. Consequently, the automatic stay in the parent’s bankruptcy does not apply to actions by or against the subsidiary.<sup>80</sup>

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<sup>76</sup> 11 U.S.C. § 706(a); *In re Anna Wade Bowman*, 181 B.R. 836, 842 (Bankr. D. Md. 1995); *Finney v. Smith*, 992 F.2d 43, 44 (4<sup>th</sup> Cir. 1993).

<sup>77</sup> *Globalstar, L.P.*, Memorandum Opinion and Order, 18 FCC Rcd. 1249, 1252 (Int’l Bur. 2003). See also, *Panamsat License Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 18720, 18723 (Int’l Bur. 2000). We have determined on several occasions that business transactions are within the control of the licensee, and so cannot justify a milestone extension. For example, we have observed that mergers cannot justify a milestone extension request. *MCI Order*, 2 FCC Rcd at 234; *Columbia Communications Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 15566, 15571 n.35 (Int’l Bur. 2000) (“*First Columbia Order*”). We have determined that construction contract negotiations cannot justify a milestone extension request. *Advanced Communications Corporation*, Memorandum Opinion and Order, 11 FCC Rcd 3399, 3417 (1995); *First Columbia Order*, 15 FCC Rcd at 15571 n.35. We have also determined that the filing of a modification application does not warrant extension of milestone deadlines, as the decision to seek modification of a license is a business decision wholly within the control of the licensee. *First Columbia Order*, 15 FCC Rcd at 15571; *Advanced Communications Corp.*, 10 FCC Rcd at 13341.

<sup>78</sup> Amendment at p. 11. Subject to exceptions, the commencement of a bankruptcy proceeding by filing a petition for bankruptcy, generally operates as a stay against any legal actions to obtain possession of property of the bankrupt entity’s estate. 11 U.S.C. § 362 (2003).

<sup>79</sup> See *In re Tonkawa Refining Company*, 502 F.2d 1341, 1343 (10<sup>th</sup> Cir. 1974) (“Except in circumstances in which the parent and subsidiary are so completely ‘one’ that the corporate veil may be pierced with impunity and technicalities laid aside (not the situation here), the tendency of the courts, in general, is to interpret their jurisdiction over the debtor parent as limited to the parent’s property ownership, i.e., to the stock held by the parent corporation.”).

<sup>80</sup> See *In re Winer*, 158 B.R. 736, 743 (Bankr. N.D. Ill. 1993) (the automatic stay “does not proscribe actions brought against nondebtor entities,” a doctrine that “applies with equal force even where the nondebtor is a

31. We are unable to conclude, as Final Analysis would have us do, that a bankruptcy trustee, who has a statutory and fiduciary duty to preserve the assets of the debtor, would effectively de-value the debtor's principle asset, Final Analysis's FCC license, by instructing it not to meet its milestones.<sup>81</sup> Final Analysis argues that the Trustee directed Final Analysis not to take any action outside the normal course of business and threatened to institute legal proceedings in the event that Final Analysis took such actions.<sup>82</sup> In Final Analysis's view, it "was prohibited by the Trustee from entering into new contracts, hiring additional employees, selling assets, incurring debt, or taking any action which would affect FACS' balance sheet, or which might make the controlling stock interest less attractive to a potential investor."<sup>83</sup> There is no support for this view in the record.

32. On January 9, 2002, James M. Hoffman, counsel for Cheryl E. Rose, who was the bankruptcy Trustee, wrote to George N. Grammas and Ann E. Schmitt, counsel for Final Analysis:

"This letter will confirm our previous agreement that FACS [Final Analysis Communication Services, Inc., "Final Analysis" herein] will not make any disbursements or enter into any transactions not in the ordinary course of business without first seeking the approval of the Trustee. If you have any questions or concerns, please contact me."<sup>84</sup>

Grammas responded:

"I received your letter earlier today. I do not understand what you have in mind or to which agreement you refer. Perhaps you had an understanding with Ann. I believe that [Final Analysis's] position has always been that the Trustee represents the interest of the majority voting shareholders of [Final Analysis] and has the rights and obligations associated with such interest."<sup>85</sup>

Hoffman then wrote:

"This letter responds to George's letter dated January 9, 2002, regarding [Final Analysis's] use of money. It is the Trustee's recollection that [Final Analysis] represented at the meeting of creditors that [Final Analysis] would use its funds for its ordinary operations and no other purposes. [Final Analysis] represented that its funds would not be used outside the ordinary course of business without the Trustee's prior consent. The above-described use of [Final Analysis] funds is not subject to debate, interpretation, or even [Final Analysis's] apparent misinterpretation of the role of a Chapter 7 Trustee in a bankruptcy proceeding.

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corporation wholly owned by the debtor... the debtor cannot invoke the automatic stay just because the action against the nondebtor subsidiary will impact on the value of the debtor's stock").

<sup>81</sup> We note that the trustee filed comments in support of the application to transfer the Final Analysis licensee from Final Analysis, Inc. to New York Satellite. See Letter from Cheryl E. Rose, Chapter 7 Trustee for the Estate of Final Analysis, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (April 22, 2002) (filed with Application of Final Analysis Communication Services, Inc. For Authority to Transfer Control of NVNG MSS License to New York Satellite Industries, L.L.C., File No. SAT-T/C-20020125-00010).

<sup>82</sup> Amendment at p. 12.

<sup>83</sup> *Id.*

<sup>84</sup> January 9, 2002 letter from James M. Hoffman, counsel to bankruptcy trustee Cheryl E. Rose, to George N. Grammas and Ann E. Schmitt, counsel to Final Analysis Communication Services, Inc.

<sup>85</sup> January 9, 2002 letter from George N. Grammas, counsel to Final Analysis Communication Services, Inc. James M. Hoffman, counsel to bankruptcy trustee Cheryl E. Rose.

“If [Final Analysis] has misunderstood the Trustee’s position, then the Trustee demands that you inform me immediately of any [Final Analysis] transactions that have occurred outside or the ordinary course of business since the meeting of creditors. Also, in the event [Final Analysis] has made any transfers outside the ordinary course of business since the meeting of creditors, then I strongly suggest that the transfers be immediately returned to [Final Analysis] prior to the institution of legal proceedings related to such transfers.”<sup>86</sup>

We find that Final Analysis’s argument is not a reasonable interpretation of the Trustee’s instructions. The Trustee’s correspondence simply stated the standard obligations and limitations of a debtor-in-possession in a bankruptcy proceeding.<sup>87</sup> The Trustee said nothing whatsoever about new contracts, additional employees, selling assets, incurring debt, or taking actions which would affect Final Analysis’s balance sheet. Instead, the Trustee reminded Final Analysis that it was limited to operations in the ordinary course of its business, which was constructing and launching communications satellites. Even if Final Analysis somehow did not view building and launching satellites as the ordinary course of its business, the Trustee also suggested that Final Analysis could seek actions outside the ordinary course of business so long as it obtained the Trustee’s prior consent. There is nothing in the record to suggest that it attempted to obtain that consent.

33. Regardless of Final Analysis’s apparent misinterpretation of the role of a Chapter 7 Trustee in a bankruptcy proceeding, it is important to note that any Trustee appointed by the bankruptcy court is always subject to the supervision of the bankruptcy court. Consequently, Final Analysis always retained the right to ask the court to overrule the Trustee’s judgments on whether the licensee could proceed with system implementation milestones in order to preserve the debtor estate’s valuable asset – the FCC license.<sup>88</sup> Final Analysis never did so.

34. Instead, Final Analysis’s view of its parent company’s bankruptcy proceeding was that it was legally paralyzed, and that the only thing its principals could do was to urge that the bankruptcy proceeding be expedited so that Modanlo alone could take charge of the entity that emerged from bankruptcy. Under these circumstances, Final Analysis argues, the only thing that it could do to minimize the time in which Final Analysis’s business discretion would be constrained by the bankruptcy was to make the Trustee aware of the urgent need to accelerate the sale of FAI. Final Analysis submitted an *ex parte* filing including a transcript of testimony from a December 21, 2001 hearing before the U.S. Bankruptcy Court for the District of Maryland. Final Analysis asserts that this testimony shows that it was successful in convincing the Trustee to expedite the sale of the FAI. In the transcript of direct testimony before the bankruptcy court, Ann Schmitt, bankruptcy counsel to FAI, examines Aileen Pisciotta, telecommunications counsel for Final Analysis:

Schmitt: What happens if [Final Analysis] doesn’t meet its March deadline?

Pisciotta: By the terms of the license, the license becomes null and void. It is a conditional license. It is an automatic nullification of the license on that date.

Schmitt: And as counsel for [Final Analysis], what recommendation have you made in terms of avoiding that termination?

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<sup>86</sup> January 9, 2002 letter from James M. Hoffman, counsel to bankruptcy trustee Cheryl E. Rose, to George N. Grammas and Ann E. Schmitt, counsel to Final Analysis Communication Services, Inc.

<sup>87</sup> See 11 U.S.C. § 363.

<sup>88</sup> 11 U.S.C. § 363(e) (“Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.”).

Pisciotta: We have recommended, because the effort to obtain a waiver or an extension of time is very difficult, that the company should go to the Commission with a petition for modification of their license to extend the milestones or, in the alternative, request a waiver by the FCC of the rule requiring compliance with the milestones.

We have advised them that they need to do that as soon as possible because even delaying asking for such an extension has been held against companies in the past who have sought them, and we have advised them that the Commission's policies, which is set forth in a variety of decisions and Commission case law, is very clear that it is very difficult to get such an extension or waiver.

Schmitt: Is there any reason [Final Analysis] couldn't simply file that extension now with its current shareholder situation?

Pisciotta: The factors that the FCC will look at in acting on a request for extension or waiver include for an extension request, demonstration of unforeseen circumstances and – or a significant public interest reason why an extension should be granted.

In the case of a waiver, asking the Commission to waive the rule on its own motion has to be good cause shown. The case law is very clear that the Commission will take into consideration the capabilities of the company and a demonstration of its intent to proceed.

When the Commission granted [Final Analysis] its license and it was granting its license in the context of granting licenses to everyone in that processing round, the Commission declined to impose strict financial qualification standards. Their public policy objective was to approve a number of licenses so as to achieve a competitive industry in the little LEO industry.

They said at the time that they would require in lieu of the imposition up front of strict financial standards, strict compliance with these construction milestones.

In order to convince the Commission that they should grant an extension at this time, which is very late as it is in the process, we need to make a very clear demonstration that the company not only has accomplished an awful lot in the past up to this point and is in the process of constructing a system, but that it is capable of carrying forward even a very precise extension period. The Commission will require that they identify an exact period, that we have a demonstration of exactly how we are going to meet that extended period of time. So we need to go to the Commission with a very clear business plan with core credentials for moving forward and with a demonstration, probably, of contracts in place that will be required to implement the construction and launch over that time table.

The process for obtaining an extension requires, first, that we go and talk to the Commission and make them aware that we need the extension and then submitting formal papers with our best case put forward. We can't submit an intention to seek a waiver. We need to submit a fully justified request at the outset. The Commission has to deliberate. They might ask for information. They might ask to see contracts. We would have meetings with them. Then we have to write an order. And all of this has to take place before the end of March 2002.

So the time is getting extremely short for us to be in a position where we could go to the Commission with a resolution of the financial and corporate qualifications of the licensee and a business plan that clearly sets out a plan to meet an extended

construction schedule in a precise time frame. And I think the Commission would need to see that the company is basically hitting the ground running.

Schmitt: And just to make clear, if the licensee under any scenario continued to be [Final Analysis], does the identity and financial wherewithal of the controlling party of [Final Analysis] impact on that decision?

Pisciotta: Absolutely. Absolutely. I think the Commission is going to have to see that all of the resources of the company, and particularly because FAI is the prime contractor, they are the entity that the Commission is relying upon to actually implement this revised construction schedule. So both parties have to be before the Commission in one way or the other to make a convincing case that a revised construction milestone can be – can be granted.

There are considerations that weigh both in favor and against the company under the best of circumstances in their request for a waiver, but among the circumstances that we are concerned about is that the ultimate decision that the Commission will have to reach is, is a public interest better served by granting a waiver or not, and the fundamental issue in the Commission's mind is the warehousing of spectrum. They don't want to grant a waiver to a company that isn't going to do anything with the spectrum. They must have a rationale to overcome the significant case law that is there and that will not put them in a bad situation for future cases. They must have a very clear rationale for granting a waiver to a company at this – under these kinds of circumstances.

Schmitt: And is it your opinion that if you waited 45 or 60 days to file this application that the probability of success would be reduced?

Pisciotta: I think it would be virtually nil.

January 28, 2004 *ex parte* Letter from Patricia J. Paoletta, counsel for New York Satellite Industries, LLC to Marlene H. Dortch, Secretary, FCC at Exhibit 5, pp. 42-46.

Final Analysis argues that this bankruptcy court testimony by Pisciotta establishes that it was successful in convincing the Trustee to expedite the sale of FAI because of the potential effect on Final Analysis's FCC license. Final Analysis views this as proof of its urgent intent to proceed with its system implementation after its future owner was empowered to take over its business operations. Beyond its testimony as to the urgency of the impending milestone deadline, however, there is nothing in the record to suggest that Final Analysis requested permission from either the Trustee or the court to undertake concrete business activity in the ordinary course of its business, or outside the ordinary course, during the bankruptcy proceeding.

35. Final Analysis asserts that its "commitment" to construction and launch of its satellite system has been unwavering.<sup>89</sup> However, the facts suggest otherwise. Expenses incurred by Final Analysis prior to bankruptcy were primarily attributable to the design phase of the satellite system. Any progress on actual construction of the satellites virtually came to a halt within one year of its license grant because its two owners could not agree on any decisions affecting the company.<sup>90</sup> This "deadlock" prompted the initiation of bankruptcy proceedings against the parent company, FAI. The milestones upon which its license is conditioned require demonstrations of actual system *implementation*. Intent to proceed, commitment, or developmental efforts are insufficient to meet milestones if they fail to result in actual,

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<sup>89</sup> Amendment at p. 19.

<sup>90</sup> Milestone Extension Request at pp. 8-9.

physical system implementation. In this case, intent would be established by completing construction of the first two commercial system satellites and launching those two satellites into orbit.

36. Our decision to reject FAI's bankruptcy as a justification for an extension of system implementation milestones is consistent with Commission precedent.<sup>91</sup> As there is no inherent conflict between the Communications Act and the Bankruptcy Code,<sup>92</sup> we choose not to create a conflict, by establishing bankruptcy proceedings as an excuse for failure to meet unrelated regulatory obligations where debt is not an issue. In the precedents discussed, licensees continued to meet their regulatory obligations regardless of the fact that the licensees or their corporate owners were engaged in bankruptcy proceedings. In fact, in the very industry in which Final Analysis is a prospective competitor, Orbital Communications Corporation, provided Little LEO service to the public before, during, and after its bankruptcy proceeding. While the Bankruptcy Code protects debtors from discrimination based on their debtor status, debtors cannot use bankruptcy to obtain a competitive advantage by exempting themselves from regulatory obligations that their competitors must bear.<sup>93</sup>

37. Although we have carefully reviewed Final Analysis's arguments as to why the four-month bankruptcy of FAI justified an extension of the milestone deadlines, our discussion of the details of the bankruptcy should not detract from the central point of our conclusion -- that the bankruptcy, coming only a few months before the milestone deadline, was essentially irrelevant to Final Analysis's failure to meet the milestone requirements. Our conclusion that Final Analysis did not make substantial progress in construction of its satellites during the four-year period allowed by our rules is based on its failure to make any progress over the *entire period*, the vast majority of which preceded the bankruptcy. For that reason, even if we accepted Final Analysis's bankruptcy argument, the bankruptcy itself is not sufficient to justify a further extension.

### C. Technical Assistance Agreement for Launch in Russia

38. Our decision regarding bankruptcy undermines another of Final Analysis's arguments for milestone extension. The registration and new technical assistance agreement at the State Department were only made necessary by the change in ownership when FAI was liquidated in bankruptcy. Absent the bankruptcy proceeding, the State Department's first technical assistance agreement would not have expired until late 2005. Nevertheless, we examine whether the need to gain State Department approval of a technical assistance agreement would, standing alone, justify extending system implementation milestones.

39. The International Traffic in Arms Regulations ("ITAR") require certain companies to obtain express approval, in the form of a Technical Assistance Agreement ("TAA"), from the United States Department of State's Directorate of Defense Trade Controls ("DDTC").<sup>94</sup> The act of Congress that mandates the required registration and TAA for Final Analysis incorporates a sense of Congress that the "United States should pursue policies that protect and enhance the United States space launch industry."<sup>95</sup> The export of any satellite for launch in, or by nationals of, a country that is not a member of the North

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<sup>91</sup> As the Court of Appeals recognized in *LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974): "[T]he Commission should assure that licensees do not use bankruptcy as a means of circumventing their obligation to operate in the public interest."

<sup>92</sup> See *NextWave*, 112 S. Ct. at 840.

<sup>93</sup> *White Crane Trading Company, Inc.*, 170 B.R. 694, 702 (Bankr. E.D. Ca. 1994); see also *Palmer v. Webster & Atlas National Bank of Boston*, 312 U.S. 156, 163 (1941) ("No good reason is perceived why a receiver should be permitted to operate under such an advantage as against his competitors not in receivership.").

<sup>94</sup> See ITAR Regulations, codified at 22 C.F.R. §§ 120-130.

<sup>95</sup> Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Public Law 105-261 (October 17, 1998), 112 Stat 1920, at Section 1511.



Atlantic Treaty Organization or a major non-NATO ally of the United States always requires special export controls.<sup>96</sup> The converse is that the ITAR requirements do not apply to trade with North Atlantic Treaty Organization allies or major non-NATO allies of the United States.

40. Final Analysis chose Polyot to manufacture the spacecraft bus for its satellite system. As reported in an August 1996 amendment to Final Analysis's Little LEO application, Polyot committed to launch Final Analysis's entire satellite constellation at no cost to Final Analysis as part of an agreement between Final Analysis and Polyot. Under the agreement, Polyot is to be the national service provider for Final Analysis's communications services in Russia.<sup>97</sup> It is reasonable to assume that these financial arrangements for construction and launch of the satellites underscored Final Analysis's business decision to undertake engaging the construction and launch services of a country that falls under the ITAR regulations. The inevitable result of its business decision required Final Analysis to obtain a TAA from the State Department.<sup>98</sup> Consequently, the events relating to obtaining the necessary TAA cannot be used to justify an extension of milestone deadlines.

#### D. Alternative Justification for Extension

41. Alternatively, Final Analysis advances two reasons to justify its request for extension under Section 25.117(e)(2) of the Commission's rules.<sup>99</sup> Under that rule subsection, an applicant for a milestone extension must demonstrate that there are unique and overriding public interest concerns to justify the extension.<sup>100</sup> Final Analysis argues that Final Analysis, Inc., the bankrupt entity, was both its parent company and its prime contractor, and that this constitutes a unique set of facts that warrant an extension. We disagree. The choice of these arrangements was a business judgment wholly within the control of Final Analysis's original owners. The rule subsection requires unique and overriding public interest concerns, not just unique facts. Final Analysis's business arrangements were not compelled by any unique and overriding public interest concern in the ownership structure of applicants and licensees.

42. Final Analysis also asserts that the public interest in competitive, affordable data services justifies its extension request.<sup>101</sup> A decade ago, this argument was rejected in the application of National Exchange Satellite, Inc. ("NEXSAT") for a milestone extension request.<sup>102</sup> Like NEXSAT, Final Analysis presents no evidence that strict enforcement of milestone schedules impairs new entrants'

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<sup>96</sup> 22 C.F.R. § 124.15 (2003)

<sup>97</sup> See Final Analysis Communication Services, Inc., Amendment to Application, File No. 7-SAT-AMEND-97 at p. 62 (filed October 30, 1997).

<sup>98</sup> We note that not only was this business decision by Final Analysis wholly within its control, the amount of time required for the recent State Department approval was foreseeable. Final Analysis emphasizes what it asserts were processing delays at the State Department in its effort to obtain the second TAA that was made necessary by the change in Final Analysis's ownership. In support of its Milestone Extension Request, Final Analysis submitted extensive correspondence it had with the State Department. We note that the same Final Analysis officers and counsel were involved with both the recent application to the State Department and Final Analysis's prior application. We observe that while the first application took approximately seven months to prosecute, the second application took just seven and one-half months to prosecute. The first application was submitted on April 15, 1999 and was granted on November 18, 1999; the second application was submitted on September 26, 2002 and granted on May 14, 2003. Both TAAs were authorized to expire on December 31, 2005. The difference in processing time is negligible.

<sup>99</sup> Amendment at p. 16.

<sup>100</sup> See ¶ 5, *supra*.

<sup>101</sup> Amendment at pp. 16-17.

<sup>102</sup> *National Exchange Satellite, Inc. Application for Extension of Time to Construct and Launch Space Stations in the Domestic Fixed-Satellite Service*, Memorandum Opinion and Order, 7 FCC Rcd 1990, 1991 (Comm. Car. Bur. 1992) ("NEXSAT Milestone Order").

opportunity to compete. As the Common Carrier Bureau noted in the *NEXSAT Milestone Order*, the enforcement of milestone schedules does not inhibit new entry, it merely ensures the timely availability of proposed services.<sup>103</sup> New entrants and the innovative services that they might provide are of little public value if the proposed satellite services are not predictably and promptly made available.<sup>104</sup>

43. We note that rule Section 25.117(e)(2) also requires an applicant to justify a precise extension period. Final Analysis's request does not satisfy this requirement. The entire period of delay caused by the circumstances outlined by Final Analysis amounts to 20 months, from September 2001 through May 2003. Yet Final Analysis requests a 30-month extension to complete construction its first two satellites. Final Analysis also seeks a 31-month extension of its final milestones, for completing construction and launch of its remaining satellites. In the rare instances in which they have been granted, milestone extensions have been precisely tied to the circumstances that justify them. For example, in the two milestone extension decisions Final Analysis cites, NetSat was granted just 12 more months to proceed, and EarthWatch was granted just six additional months for completion, because its request for an additional year to launch was deemed excessive.<sup>105</sup>

#### E. Waiver of Rules

44. We also find that grant of Final Analysis's waiver request would undermine Commission policies. It is in the public interest to ensure that licensees proceed expeditiously to complete construction of their full systems and to commence service.<sup>106</sup> The Commission has repeatedly denied extension or waiver of system completion milestones where construction of satellites had either not begun or was not continuing, thus raising questions regarding the licensee's intention to proceed.<sup>107</sup>

45. Final Analysis argues that we should waive Commission rules because its failure to meet its milestones is not precluding new entrants into the market.<sup>108</sup> This assertion is based on the fact that some, but not all, of the Little LEO spectrum is shared among the Little LEO licensees. We reject the proposition that licensees in shared frequency bands can extend their milestone deadlines indefinitely so long as they are not blocking other users of the frequency. Commission decisions have frequently explained our milestones policy as a means of preventing warehousing of scarce orbit and spectrum resources.<sup>109</sup> Our decisions have also described warehousing in terms of the ability to inhibit new entrants into a service, but no decision has suggested that inhibiting new entry is the only form of warehousing scarce orbit and spectrum resources.<sup>110</sup> Even where licensees operate in a service with shared frequencies, a licensee that fails to progress in construction of its licensed system is preventing another licensee from operating at those particular orbital parameters in that particular frequency band. Final Analysis has therefore been warehousing public frequency resources that might have been put to use by

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<sup>103</sup> *Id.*

<sup>104</sup> *NEXSAT Milestones Order*, 7 FCC Rcd at 1992.

<sup>105</sup> *See NetSat 28 Company, L.L.C.*, Memorandum Opinion and Order, 16 FCC Rcd 11025 (Int'l Bur. 2001); *EarthWatch Incorporated*, Order and Authorization, 15 FCC Rcd 13594, 13597-98 (Int'l Bur. 2000).

<sup>106</sup> *See* note 10, *supra*.

<sup>107</sup> *See, e.g., GE American Communications, Inc.*, Order and Authorization, 16 FCC Rcd 11038, 11041 (Int'l Bur. 2001); *AMSC Subsidiary Corporation*, Memorandum Opinion and Order, 8 FCC Rcd 4040, 4042 (1993).

<sup>108</sup> Amendment at p. 20.

<sup>109</sup> *See, e.g., Amendment of the Commission's Space Station Licensing Rules and Policies and Mitigation of Orbital Debris*, First Report and Order and Further Notice of Proposed Rulemaking, IB Dockets No. 02-34 and 02-54, 18 FCC Rcd 10760, 10826 (2003) ("*First Space Station Reform Order*").

<sup>110</sup> *PanAmSat Licensee Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 11534, 11538 (2001); *NEXSAT Milestones Order*, 7 FCC Rcd at 1991; *MCI Order*, 2 FCC Rcd at 233.

another licensee. The full use of the shared Little LEO frequency bands anticipated multiple operating licensees. Final Analysis's inability to construct its system for four years while its owners fought amongst themselves resulted in the warehousing of valuable public resources.

#### F. Other Matters

46. In support of its Milestone Extension Request, Final Analysis has made a number of ancillary arguments which have little to do with the Commission's standards for extending milestones. Although these matters are not directly relevant to the instant request, we nevertheless discuss the merits of these arguments.

47. We note that if Final Analysis -- under the new ownership of New York Satellite Industries, LLC, which purchased the licensee last year -- now has financial backing and the physical capacity to construct and launch a Little LEO satellite system, it may apply under the expedited new application procedures adopted in the *First Space Station Reform Order*.<sup>111</sup> Anticipating this reality, Final Analysis argues that if it loses its license, and thereafter decides to file a new application, then as a new licensee, it would be constrained to operate under power flux density ("PFD") limits applied by the ITU to new systems.<sup>112</sup> These new lower power limits, Final Analysis says, would put it at a severe competitive disadvantage with the one other existing, operational Little LEO system. We find that Final Analysis misunderstands that the international priority under which it claims frequency rights is not dependent upon its domestic license. The LEOTELCOM 5 filing with the ITU is an asset of the United States, not Final Analysis. It will not expire if Final Analysis ceases to be a Commission licensee. The frequency priorities claimed by the United States under LEOTELCOM 5 will continue to exist. Any future domestic applicants for the spectrum bands brought into use under the LEOTELCOM 5 international priority will receive the rights and priorities claimed under that filing, including grandfathered power limits.

48. Final Analysis also asserts that the modified processing round procedures under the Commission's *First Space Station Reform Order* will result in any new applicant getting just one-third of the spectrum that is now licensed to Final Analysis. In the *Second Processing Round Order*, the Commission determined that the best approach to licensing Little LEO operators was to adopt the unique sharing arrangements proposed by the applicants.<sup>113</sup> A simple division of the Little LEO spectrum among the qualified applicants in a modified processing round would be inconsistent with those sharing arrangements. Therefore, in order to preserve the carefully balanced policy decisions adopted by the Commission in the *Second Processing Round Order*, we conclude that a waiver of Sections 25.157 and 25.158 is warranted<sup>114</sup>, to the extent necessary to permit consideration of any future Little LEO applications for the System 2 license under the first-come, first-served procedure, rather than the modified processing round procedure.

49. In its discussion of the enforcement of milestone requirements, and as a means of preventing warehousing, the Commission adopted an additional milestone enforcement measure. As a logical outgrowth of the Commission's proposal to prohibit a licensee from filing future applications upon failure to meet milestones, the Commission decided to apply a stricter limit on the number of pending applications and unbuilt satellites for a licensee that has established a pattern of failure to meet milestones.<sup>115</sup> The Commission also presumed that missing three milestones in any three-year period

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<sup>111</sup> *Id.* at 10774-90.

<sup>112</sup> December 11, 2003 *ex parte* Letter from Patricia J. Paoletta, counsel to New York Satellite Industries LLC, to Marlene H. Dortch, Secretary, FCC, at p.2.

<sup>113</sup> *Second Processing Round Order*, 13 FCC Rcd at 9117.

<sup>114</sup> 47 C.F.R. §§ 25.157 and 25.158.

<sup>115</sup> *First Space Station Reform Order*, 18 FCC Rcd at 10836.

would constitute such a pattern. The circumstances underlying the decision herein do not constitute a pattern.<sup>116</sup>

50. Finally, Final Analysis argues that if it is not involved going forward in the coordination activities with Argentina, Brazil and Japan there is no one else in the industry that has demonstrated it is prepared to work with the FCC to maintain the priority and preserve the spectrum for U.S. interests. For example, it says, it is the only industry advocate for the 400 MHz band sought by Argentina. No other U.S. system has expressed interest in the supplemental spectrum or worked with ITU to obtain it. This is to be expected, since Final Analysis currently holds the only first priority to that spectrum granted by the Commission. No other U.S. system has any incentive to work for spectrum that will only benefit Final Analysis. We also note that the 400 MHz band sought by Argentina is on behalf of a system with operating satellites. Final Analysis is unable to contest Argentina's claimed international priority because Final Analysis does not have an operating satellite with which Argentina's system might interfere.

#### IV. CONCLUSION

51. Based on the foregoing, we conclude that Final Analysis failed to meet the milestone conditions of its authorization. Final Analysis has not shown that its failure was due to circumstances beyond its control that would warrant an extension of its construction milestones. We further conclude that Final Analysis has not shown any special circumstances that would justify a waiver of Commission rules on the milestone conditions of its license. As a consequence of its failure to meet these system implementation milestones, Final Analysis's system authorization has been rendered null and void by operation of its terms.<sup>117</sup>

#### V. ORDERING CLAUSES

52. Accordingly, IT IS ORDERED that the Final Analysis Communication Services, Inc. Milestone Extension Request, SAT-MOD-20020329-00245, as amended, SAT-AMD-20030606-00112, is DENIED.

53. IT IS FURTHER ORDERED that the authorization held by Final Analysis Communication Services, Inc., File Nos. 25-SAT-P/LA-95, 76-SAT-AMEND-95, 79-SAT-AMEND-96, 151-SAT-AMEND-96, 7-SAT-AMEND-97 is DECLARED NULL and VOID.

54. This Order is issued pursuant to delegated authority, 47 C.F.R. § 0.261, and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson  
Chief  
International Bureau

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<sup>116</sup> *Id.*, 18 FCC Rcd at 10835.

<sup>117</sup> *Final Analysis Authorization*, 13 FCC Rcd at 6649.