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

In the Matter of	)	
	)	
FINAL ANALYSIS	)	File Nos. 25-SAT-P/LA-95
COMMUNICATION SERVICES, INC.	)	76-SAT-AMEND-95
	)	79-SAT-AMEND-96
For Authorization to Construct, Launch	)	151-SAT-AMEND-96
and Operate a Non-Voice, Non-	)	7-SAT-AMEND-98
Geostationary Mobile Satellite System	)	
in the 148-150.05 MHz, 400.15-401 MHz,	)	
and 137-138 MHz bands	)	

To: The Chief, International Bureau

PETITION FOR RECONSIDERATION

FINAL ANALYSIS COMMUNICATION SERVICES, INC.

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Dated: May 14, 1998

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To: The Chief, International Bureau

PETITION FOR RECONSIDERATION

Final Analysis Communication Services, Inc. ("Final Analysis"), by its attorneys hereby submits this Petition for Reconsideration of the International Bureau's Order of May 8, 1998[1] denying Final Analysis's Request for Clarification or Stay ("Request") [2] of the Certification Condition imposed in the Bureau's April 1, 1998 *Licensing Order*.[3] The *Denial Order* erroneously concludes that the Certification Condition "in no way affects Final Analysis's ability to exercise its right to administrative or judicial review of its license."[4] In fact, enforcement of the Certification Condition irremediably prejudices Final Analysis's interests in Commission

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[1] *See Final Analysis Communication Services, Inc.*, Order, DA 98-881 (rel. May 8, 1998) ("*Denial Order*").

[2] Final Analysis, Request for Clarification or Stay, April 20, 1998.

[3] *See Final Analysis Communication Services, Inc.*, Order, DA 98-616 (rel. April 1, 1998) ("*Licensing Order*"). The deadline was initially extended to May 8, 1998. *Final Analysis Communication Services, Inc.* Order, DA 98-838 (rel. May 1, 1998), and in the *Denial Order* has been extended further to May 15, 1998.

[4] *Denial Order* at ¶1.

consideration of its Application for Review,[5] and unreasonably places the company in untenable position. The *Denial Order* also incorrectly concludes that Final Analysis has not made the necessary showing justifying a stay. Final Analysis actually has made a clear case on each of the four factors required to justify a stay, namely that it will succeed on the merits, that it will suffer irreparable harm in the absence of a stay, that a stay will not injure other parties, and that a stay is in the public interest.

I. FINAL ANALYSIS'S DUE PROCESS RIGHTS ARE NOT PRESERVED

In its Request, Final Analysis sought clarification that the Certification Condition would be tolled pending administrative or judicial review of the *Licensing Order*. Instead, in the *Denial Order*, the Bureau "clarified" that by filing a Certification "Final Analysis does not waive its right to Commission or judicial review." These are not the same thing. The imposition of the Certification Condition does deny Final Analysis its due process rights in both fact and law.

A. The Certification Condition Irremediably Prejudices Final Analysis in Commission Review Proceedings

In the *Denial Order*, the Bureau states that Final Analysis's rights are preserved because, "[i]n the event that the Commission overturns the Bureau's ruling denying the proposed amendments, Final Analysis could be granted a modified license."[6] On the other hand, the Bureau finds that tolling or stay of the Certification Condition could harm other licensees because it may delay coordination activities among the licensees.[7] This assessment is backwards. In reality, enforcement of the Certification Condition will lead to such a prejudice to Final Analysis's interests that the Commission will be left without an incentive to overturn the

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[5] Final Analysis, Application for Clarification and Review ("Application for Review"), filed May 1, 1998. All of the arguments made by Final Analysis in its Application for Review are hereby incorporated by reference and made fully a part of this Petition for Reconsideration.

[6] *Denial Order* at ¶ 6.

[7] *Id.* at ¶ 7.

Bureau. While enforcement will certainly prejudice Final Analysis's interests and administrative rights, tolling the Condition will actually prevent harm to other licensees by protecting them from the incurrence of unnecessary costs.

First, the *Denial Order* recognizes that, in the event Final Analysis files a certificate, it will be constrained to coordinate and build based upon the parameters in the *Licensing Order*. Thus, the matters to which Final Analysis are being required to certify go to the very heart of the company's request for Commission review. Upon threat of the loss of its license, Final Analysis is being required to agree to do something it is endeavoring to demonstrate that it cannot do. There can be no greater prejudice to a party's position in an administrative proceeding.

Additionally, enforcement of the Certification Condition will prejudice the Commission's own decision-making. It would be bad enough if the Certification Condition affected only Final Analysis. But it affects all Little LEO licensees. The whole purpose of it is to create a condition upon which other licensees can rely in coordination efforts. Thus, the direct impact of a Final Analysis certificate, all during this the time the Commission is considering the Application for Review, will be to cause other parties to expend money and other resources, – not "at their own risk," but in detrimental reliance on a certification the Commission has required Final Analysis to make.

It has long been recognized, particularly in the satellite industry, that the expenditure of money and other resources toward the implementation of stations and systems creates a "psychological impact on the decision-maker" that, despite the Commission's efforts to be unbiased, can result in a prejudiced outcome.[8] Thus, after the Commission-mandated certificate has created the basis of reliance by all other Little LEO licensees, and they have in fact invested

[8] *See, e.g., Satellite Business Systems*. 61 F.C.C.2d 315, 317 (1976) (noting that one of the purposes of Section 319 of the Communications Act was to "shield the Commission from the pressure to grant an application based on expenditures made before Commission action.")

significant resources, it must be assumed that these other parties could and would credibly argue that they would be directly harmed by a grant of Final Analysis's Application for Review. In such case, even aside from the merits of Final Analysis's position, the Commission, as a matter of reality, will face great disincentives to grant the requested relief and require the parties to restart the entire coordination process. Given the fact that expeditious Commission action could resolve the issue in a few months, there is no public interest reason to require that Final Analysis be so disadvantaged.

B. The Certification Condition is An Intolerable Condition

As pointed out in the April 20, 1998 Request, described in detail in Final Analysis's May 1, 1998 Application for Review, and further underscored in Final Analysis's May 7, 1998 Reply,[9] the Certification Condition is an intolerable condition because it places Final Analysis in a completely untenable position:

1. The Condition Requires Certification Prematurely Before Vague and Uncertain Terms of The License Are Clarified on Review.

Final Analysis has demonstrated that in several respects the *Licensing Order* is unclear and self-contradictory so that it is not possible to determine exactly what has been licensed. For example, the *Licensing Order*, at paras.52-54, purports to deny Final Analysis the ability to utilize "high" data rates. However, Final Analysis's Conforming Amendment[10] included both data rate increases and decreases on various operating links as well as proposed data rate capabilities for activation in the event future frequency allocations become available. The Bureau's "catch-all" denial of proposed data rate changes leaves Final Analysis with no

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[9] Final Analysis Reply Comments, dated May 7, 1998, to Comments of Leo One USA Corporation ("Leo One"), dated April 28, 1998.

[10] Final Analysis, Amendment to Application, filed October 30, 1997 (File No. 25-SAT-P/LA-95).

certainty whatsoever as to which data rates actually are approved.

In another example, the *Licensing Order*, at paras. 55-57, denies what the Bureau characterizes as proposed increases in downlink subscriber links, downlink feeder links and uplink feeder links. However, Final Analysis has not actually proposed any such increases and, in fact, has proposed to decrease feeder downlinks.[11] The *Licensing Order* simply is unclear in what it has approved.

Thus, imposition of the Certification Condition requires Final Analysis to certify that it will build a system in conformance with technical parameters that are vague and uncertain. This is an impossibility. No licensee can reasonably be required to certify that it will comply with requirements that are uncertain. Requiring Final Analysis to file any certification before the completion of review proceedings is completely premature.

2. The Condition Essentially Requires Final Analysis to Commit Disingenuously To Coordinate and Build An Unworkable System

Most unreasonably, as referenced in its Request, at p. 2 and argued in the Application for Review at pp 5-7, the *Licensing Order* requires Final Analysis to commit to coordinate and build a system that does not work. Final Analysis's Application for Review details the problems.

First, Final Analysis proposed an increase of downlink power from 12.8 dBW to 17.8 dBW. This increase, which results in a power flux density well within FCC and ITU limits, is necessitated by the need to communicate effectively with ground terminals in frequencies different than had originally been proposed.[12] Similarly, Final Analysis has demonstrated that an increase of uplink power from 10W to 20W is absolutely essential for satellite access from

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[11] *See* Application for Review at p. 21.

[12] *Id.* at pp. 14-15.

subscriber terminals.[13] Additionally, proposed design changes are necessary to ensure that Final Analysis can utilize future downlink spectrum for which it has received a priority, well as to relocate its feeder link uplinks,[14] both of which are cornerstone features of the industry settlement.[15] Final Analysis has demonstrated in its Application for Review that these changes do not create additional potential interference, but are essential to implement an operable system.

Also, as described in the Application for Review at pp. 5-6, the *Licensing Order* limits Final Analysis to a system with no more than 55% availability. Such a system has the functionality only of a small constellation offering only intermittent messaging, similar to E-SAT's six-satellite system, and does not justify the expense of constructing and launching 26 satellites. It was neither the objective of the industry settlement, nor the intent of Final Analysis in entering into the settlement, to constrain Final Analysis, to a small intermittent operation forever. Compliance with the Certification Condition would commit Final Analysis to coordinate and build an inoperable, inefficient and non-cost effective system.

Because the *Licensing Order* requires Final Analysis to design an unworkable system, it places Final Analysis in the impossible position of having to design a failure and knowingly coordinating a system that cannot practically be implemented. This is tantamount to a requirement that Final Analysis coordinate in bad faith.

3. The Condition Requires Final Analysis To Make A Hobson's Choice

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[13] *Id.* at p. 19.

[14] The relocation of Final Analysis's feeder link uplinks would make additional spectrum available for first round licensee, Orbital Communications Corporation ("ORBCOMM"), and was a significant inducement for ORBCOMM's agreement to the band plan resolving the second processing round.

[15] *See* Joint Proposal, filed by E-SAT, Inc.("E-SAT"), Final Analysis, Leo One, ORBCOMM, and Volunteers in Technical Assistance ("VITA") in IB Docket No. 96-220, on Sept. 22, 1997 ("Joint Proposal").

A requirement that Final Analysis commit to "take or leave" its license now requires a choice between two equally untenable options. This is essentially no choice at all. The first option is to file a certificate that (i) commits Final Analysis to coordinate and build a system of uncertain parameters and a doomed design, that will not function, and is not what has been agreed to or applied for; and (ii) that by its very existence prejudices the Commission's consideration of Final Analysis's Application for Review. The only other option is for Final Analysis to decline to file such a certificate. However, under this second option, after four years and $40 million worth of investment in development of its Little LEO system, Final Analysis would risk (i) having its license deemed null and void and capable of being reinstated only if the Commission overturns the Bureau and (ii) being entirely excluded from coordination discussions, prejudicing its ability to participate in the market – as well as the Commission's review -- and irremediably damaging its development and long term financing activities.

This is certainly an unreasonable and intolerable condition. It is also unnecessary. The fact that Final Analysis has filed an Application for Review is a clear signal to the other licensees that Final Analysis intends to move forward. If the Certification Condition is tolled, and the Commission acts expeditiously to remedy the ambiguities and errors in the *Licensing Order*, all licensees will be able to move forward together as quickly and efficiently as possible to perform coordination correctly the first time.

C. Enforcement of The Certification Condition is Unreasonable and Extraordinary

Final Analysis is the only licensee in the Little LEO second processing round subject to such a Certification Condition. All of the other licensees were subject only to the standard provision that the license is deemed final unless rejected by the licensee within 30 days. This standard condition is rooted in Sections 25.156(b), 25.160, and 25.161 of the Commission's

rules,[16] According to standard practice, a license is deemed final and valid unless voluntarily declined by a licensee, forfeited due to failure to operate in conformance with the terms of the license, and/or automatically terminated for failure to meet construction milestones.[17]

The Certification Condition is extraordinary and unusual. It places an unnecessary and inequitable burden on Final Analysis, particularly in light of the fact that the certification required to be made is itself unreasonable. Neither the *Licensing Order* nor the *Denial Order* provide a compelling rationale for treating Final Analysis so differently from all other licensees.

II. FINAL ANALYSIS HAS MET THE TEST FOR A STAY

The *Denial Order* erroneously concludes that Final Analysis has not met the requisite test for a stay set forth in *Virginia Petroleum Jobbers.*[18] As explained below, Final Analysis has, in fact, made the required showing.

A. Final Analysis Is Likely to Succeed on the Merits

In the *Denial Order*, the Bureau states that Final Analysis has not demonstrated that it will be likely to succeed on the merits in the Commission review proceeding. In fact, however, Final Analysis has clearly demonstrated that Commission revision of the *Licensing Order* is necessary. Although the Application for Review was filed after the Request was initially submitted, Final Analysis's Reply Comments are replete with references to the case made therein that the *Licensing Order* is ambiguous and erroneous in several critical respects.

In particular, in its Reply Comments, at p. 3, Final Analysis clearly summarized the case

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[16] 47 C.F.R. §§ 25.156(b), 25.160 and 25.161.

[17] In fact, it is additional evidence of the internal ambiguity of the *Licensing Order* that Final Analysis is inconsistently subject to the Certification Condition, at ¶ 80, and at the same time to the opposite standard condition, at ¶ 97.

[18] *Virginia Petroleum Jobbers Assn't v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Virginia Petroleum Jobbers*").

made in the Application for Review that the license it has been granted inaccurately and unfairly denies certain critical amendments required to conform to the *Second Round Report and Order*[19] that should have been accepted by the International Bureau under any one of three legal principles – (1) the amendments are necessary to conform to the frequency plan assigned to Final Analysis in the *Second Round Report and Order*; (2) the amendments do not create any increased potential for interference; and (3) the amendments are necessitated by significant changes in operating parameters and frequency assignments imposed by the *Second Round Report and Order* completely unforeseen when Final Analysis's original application was filed in 1994."[20]

Additionally, as referenced in its Request, at p. 2, spelled out in its Application for Review, at pp. 5-7, and summarized in its Reply Comments, at p. 4, Final Analysis has repeated that the license granted is for a system: (i) with insufficient power to actually function, (ii) with such limited function as to be uneconomical to build, and (iii) uncertain with respect to critical design factors such that no meaningful commitment to build can be made. Thus, Final Analysis has made a clear case that the *Licensing Order* must be modified as requested.

In any event, it must be acknowledged that likelihood of success on the merits is not a dispositive factor when, as here, the petitioner has raised "serious and substantial" issues on the merits and the "balance of hardships tips sharply in his favor."[21] In such a case, the stay should be granted, based on a balance of equities, in consideration of the other three factors – i.e. there

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[19] *See 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, IB Docket No. 96-220, FCC 97-370 (rel. Oct. 15, 1997) ("*Second Processing Round Order*").

[20] *See Second Round Report and Order* at ¶ 131; 47 C.F.R. §§ 25.116(b)(1), (c)(4).

[21] *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843-844 (D.C. Cir. 1977) (explaining *Virginia Petroleum Jobbers*).

is a strong likelihood of irreparable harm to petitioner in the absence of a stay, there is little indication that a stay pending administrative or judicial review proceedings will result in substantial harm to the other parties, and grant of the stay is in the public interest.

B. Final Analysis Will Be Irreparably Harmed

The *Denial Order* asserts that Final Analysis has not made an adequate showing that it will be irreparably harmed, stating that "Final Analysis is free to design and construct its satellite system, at its own risk, regardless of whether we stay the effectiveness of the Certification Condition" (emphasis added) [22]. However, the relevant issue is not whether Final Analysis is free to take a risk. Freedom to take a risk does not insulate a licensee from harm. It is exactly because the design and construction of a system includes great risk that Final Analysis in fact is harmed. Moreover, the *Denial Order* requires Final Analysis to take all of the risk resulting from the regulatory uncertainty created by the *Licensing Order*. This is an allocation of risk which courts have previously found unreasonable.[23]

Also, Final Analysis has stated unequivocally that it cannot, in good faith, comply with the Certification Condition. However, if it does not, and its license is deemed null and void pending review, it will not be able to move forward, even on long lead-time items, and will lose critical time in the design and construction of its full constellation. This will seriously delay Final Analysis's entry into the market which will in turn impair its ability to compete with other Little LEO licensees. At worst, this may create such a cloud of uncertainty and impose on Final Analysis such regulatory barriers and delays, that its participation in the Little LEO market is actually foreclosed.

The next few months are critical for constellation design, construction and coordination.

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[22] *Denial Order* at ¶ 10.

[23] *See, e.g., Rainbow Broadcasting Co.*, 75 Rad. Reg. 2d (P&F) 316, 324 (1994) ("It would have been unreasonable to have required or expected Rainbow to proceed with construction while faced with the uncertainties resulting from the appellate challenges to its construction permit"). *See also Beta Television Corp.*, 27 F.C.C.2d 761 (1970) (requiring TV permittee to proceed with construction schedule is unfair where the FCC's pending "quiet zone" (continued...)

Required compliance with the Certification Condition now will mean that Final Analysis must expend valuable resources on a design that it has not proposed and does not believe is marketable. Again, the prospect that the Commission might ultimately rule in Final Analysis's favor does not undo the damage. By being forced to comply with the Certification Condition now, Final Analysis is placed at a significant disadvantage that cannot be remedied. This is true not only with the expenditure of funds and the difficulties created by the prospect of having to make other licensees redo coordination, but most significantly with respect to the perception of Final Analysis in the financial community.

Finally, Final Analysis will be irreparably harmed by the inevitable prejudice to the eventual outcome discussed above. Enforcement of the Certification Condition essentially will deprive the Commission of the opportunity to fairly and objectively review the *Licensing Order.*

C. Other Parties Will Not Be Injured

The *Denial Order* claims that grand of a stay may injure other parties because unless other affected licensees know whether Final Analysis will proceed with implementation, "coordination will be significantly hampered," and may reach a "standstill." However, this position is totally inconsistent with the very nature of this proceeding. This proceeding is fundamentally characterized by a painstakingly achieved balance of interests and the adoption of a technical plan that requires all participating operators to be carefully coordinated. Thus, as the Bureau has acknowledged, the interests of all licensees in this proceeding are inextricably entwined.[24] The coordination that must be performed depends upon accurate engineering input from all parties. It makes absolutely no sense, to move forward on the basis of inaccurate

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(...continued)
proceeding could adversely affect the permittee's engineering proposal, and ultimate outcome of the proceeding is "beyond the control of the permittee").

technical assumptions. The best, and only reasonable, solution is for the Commission to act expeditiously on Final Analysis's Application for Review.[25]

The *Denial Order* admits that if Final Analysis prevails in its review, all licensees will have to recoordinate. Thus, enforcement of the Certification Condition will require licensees to coordinate for a system that may or may not be granted and exposes all licensees in this proceeding to the incurrence of additional costs and delays. This is not in the interest of any of the licensees.

D. The Public Interest Will Be Served

As argued in the Request, Application for Review and Reply Comments, the public's interest is in the prompt implementation of the parties' Joint Proposal. The importance of faithful implementation of the Joint Proposal to this proceeding and to the vitality of the Little LEO industry cannot be overstated given that it was formally relied upon by the Bureau as the very basis for the band-sharing plan and rules adopted in the *Second Round Processing Order* to facilitate the licensing of all the second round Little LEO operators. If the Certification Condition is not stayed and Final Analysis's license is vacated on May 15, 1998, while issues concerning the way in which the Bureau implemented the settlement are under review, the entire industry settlement will be voided and the applications will once again be mutually exclusive. The cloud placed over the industry settlement in the absence of a stay thus will create uncertainty for the entire Little LEO industry. Accordingly, grant of a stay of the Certification Condition is

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(...continued)

[24] Denial Order at ¶ 7.

[25] Other applications for review have been filed by ORBCOMM on Leo One's License DA-98-238 (rel. February 13, 1998), and by Leo One on ORBCOMM's License, DA-98-617 (rel. March 31, 1998). Both of these proceedings are currently pending. The pleading cycle on the Leo One license has just closed, and the pleading cycle on the ORBCOMM license is the same as on Final Analysis's license.

in the public interest.

WHEREFORE, Final Analysis urges the Bureau to reconsider its *Denial Order* and grant the relief requested in Final Analysis's Request for Clarification or Stay, in the public interest, and move forward expeditiously with consideration of Final Analysis's Application for Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Beatriz Viera, hereby certify that a true and correct copy of the foregoing "**Petition for Reconsideration**" on behalf of Final Analysis Communication Services, Inc. was delivered via hand delivery or regular mail this 14th day of May 1998, to each of the following:

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