

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of Application of)	DA 03-328	FEDERAL COMMUNICATIONS COMMISSION
)		OFFICE OF THE SECRETARY
Globalstar, L.P.)	File Nos.:	
)	183/184/185/186-SAT-P/LA-97	
For Modification of License for a Mobile-Satellite Service System in the 2 GHz Band)	182-SAT-P/LA-97(64)	
)		
)	IBFS Nos.:	
For Waiver and Modification of Implementation)	SAT-LOA-19970926-00151/52/53/54	
Milestones for 2 GHz MSS System)	SAT-LOA-19970926-00156	
)	SAT-AMD-20001103-00154	
)	SAT-MOD-20020717-00116/17/18/19	
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)	S2320, S2321, S2322, S2323, S2324	

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OPPOSITION TO EMERGENCY APPLICATION FOR REVIEW

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TABLE OF CONTENTS

SUMMARY	ii
I. INTRODUCTION	2
II. THE COMMISSION SHOULD NOT REINSTATE THE ONE GEO SATELLITE LICENSE	3
III. THE <i>BUREAU ORDER</i> CORRECTLY FOUND THE INITIAL NON- CONTINGENT CONTRACT MILESTONE WAS NOT MET	5
IV. THE BUREAU CORRECTLY DENIED GLOBALSTAR'S EXTENSION REQUEST.....	7
V. GLOBALSTAR'S NEW BANKRUPTCY ARGUMENTS ARE ALSO WITHOUT MERIT	13
CONCLUSION.....	17

SUMMARY

The Carriers oppose the Application for Review filed by Globalstar seeking a reinstatement of its 2 GHz MSS authorization. The *Bureau Order* correctly denied Globalstar's request for an extension of the construction and launch milestones for its 2 GHz MSS system and found the contract, which assumed the extensions would be granted, inadequate for meeting the initial non-contingent contract milestone. The *Bureau Order* thus declared the authorization null and void pursuant to the explicit condition in the authorization. Globalstar has not shown that the Bureau committed any errors in reaching its decision. The *Bureau Order* was well reasoned, consistent with precedent and fully considered the waiver request of Globalstar. In contrast, Globalstar's Application for Review is procedurally defective and substantively without merit.

Globalstar first argues that, at the very least, the Commission must reinstate the license for the one GEO satellite that would have been timely constructed under the contract. There is no ground for now treating Globalstar's modification and waiver request as an application to reduce the 2 GHz MSS authorization to a single GEO satellite, and the single satellite would not meet the coverage requirements for hybrid systems like Globalstar's. Such a system would also inefficiently use the spectrum in CONUS, and warehouse the spectrum throughout the rest of the world.

The Commission has also long established that in order to support an initial milestone, the non-contingent contract must provide for construction and launch of the satellites within the milestones. Globalstar cannot claim ignorance of this policy, and it (along with the other 2 GHz MSS licensees) was explicitly told that the Commission would strictly enforce the milestones. To the extent there was any ambiguity (and the Carriers maintain there was none), Globalstar should have sought guidance from the Commission instead of simply waiting until the milestone deadline to submit its request for extension of the waivers and a milestone showing that assumed the extensions would be granted.

The *Bureau Order* considered and rejected Globalstar's justifications for the extension request. Indeed, Globalstar was simply seeking what the Commission explicitly rejected in the *Globalstar Authorization Order* – authority for Globalstar to defer implementation of its 2 GHz MSS system in order to align it with the second generation Big LEO system. The *Bureau Order* properly found that the purported reasons for delay were business decisions within Globalstar's control, and that grant of the waiver would undercut the purpose of the strict enforcement of the milestones. Finally, there is no merit to Globalstar's arguments, raised for the first time in the application for review, that the *Bureau Order* is inconsistent with the bankruptcy code.

For all of these reasons, the Carriers urge the Commission to deny summarily Globalstar's Application for Review.

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) Call Signs:
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To: The Commission

OPPOSITION TO EMERGENCY APPLICATION FOR REVIEW

Pursuant to Section 1.115(d) of the Commission's Rules, 47 C.F.R. § 1.115(d), AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (jointly, the "Carriers") hereby oppose the above-referenced Emergency Application for Review filed by Globalstar, L.P. ("Globalstar") seeking reinstatement of its 2 GHz MSS authorization.¹ As competitors in the mobile telephony marketplace and as parties who have successfully convinced the Commission to re-allocate some of the 2 GHz MSS spectrum, the Carriers have a strong interest in the application for review.² As demonstrated below, Globalstar's application for review is

¹ The International Bureau ("Bureau") determined that Globalstar failed to meet its initial non-contingent contract milestone, and declared the authorization null and void pursuant to its license condition. *Globalstar, L.P., Memorandum Opinion and Order*, 18 F.C.C.R. 1249 (Jan. 30, 2003) ("*Bureau Order*").

² The Carriers are licensed to compete with Globalstar in the nationwide mobile telephony market. *See Seventh Annual CMRS Competition Report*, 17 F.C.C.R. 12985, 12997,

procedurally and substantively defective. Thus, the Commission should summarily deny the Globalstar Emergency Application for Review.

I. INTRODUCTION

Globalstar has presented no valid basis for overturning the *Bureau Order*. That decision was well reasoned, consistent with precedent and fully addressed all of the issues raised by Globalstar in its request for extension of the milestones. The Bureau correctly held that the contract on which Globalstar relied for satisfying the initial non-contingent contract milestone did not satisfy the Commission's requirements for such agreements, particularly in light of the fact that the Commission had made clear that it would strictly enforce the milestones with regard to the 2 GHz MSS authorizations. Moreover, the Bureau properly considered and rejected Globalstar's request for waiver of the milestones, because it was not justified under the Commission's well-established standards for milestone extensions.

Finally, Globalstar's application for review is procedurally defective. Several of the arguments raised by Globalstar in the Emergency Application for Review were never presented

13025-13026 (2002); *Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, *Report and Order*, 15 F.C.C.R. 16127, 16128-29 (2000) ("2 GHz MSS Order"). Moreover, the Carriers were active participants in the proceedings to redistribute and/or reallocate non-viable MSS spectrum to advanced wireless services that relied upon the voidance of Globalstar's authorization to make 30 MHz of spectrum available for new terrestrial services. See *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, IB Docket Nos. 01-185, 02-364, *Report and Order and Notice of Proposed Rulemaking*, FCC 03-15 (rel. Feb. 10, 2003) (hereafter cited as "ATC Order"); see also *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258, IB Docket No. 99-81, *Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order*, FCC 03-16 (rel. Feb. 10, 2003). Accordingly, the Carriers would be adversely affected by a grant of this stay request, which would impede their access to a portion of this needed spectrum. See *AmericaTel Corporation, Memorandum Opinion, Order, Authorization and Certificate*, 9 F.C.C.R. 3993, 3995 (1994) (citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)).

to the Bureau, and thus cannot be considered by the Commission. Even if it considers those arguments, however, the Commission should still uphold the *Bureau Order*. In addition, Globalstar's modification application and request for extension of the milestones was a belated challenge to the *Globalstar Authorization Order*, and thus could have been rejected by the Bureau on that basis as well.

II. THE COMMISSION SHOULD NOT REINSTATE THE ONE GEO SATELLITE LICENSE

In its first argument, Globalstar alleges that the Bureau erred in declaring null and void the license for the one geostationary satellite that purportedly was set for timely launch under the submitted contract, even though the other 51 satellites in its system (under its modified design) would not be timely constructed or launched.³ As an initial matter, this is a new argument upon which the Bureau has had no opportunity to pass, and thus cannot form the basis for overturning the Bureau on review.⁴ Globalstar's modification request did not explicitly indicate that the authorization should be reduced to a single satellite if the Commission rejected the extension request. Nor was such a request implicit in that modification application, insofar as Globalstar was still relying on the benefits of a global system to support grant of its waiver request. The Emergency Application for Review was the first indication from Globalstar that it viewed its modification application as a request for a 2 GHz MSS authorization for just one satellite, CONUS-only service.

³ Application for Review at 3-4. Under the original application submitted by Globalstar and granted by the Commission, Globalstar was authorized to launch a hybrid system, consisting of four Geostationary (GEO) satellites and a constellation of 64 Non-Geostationary (NGSO) satellites. In its modification application, Globalstar sought to reduce its NGSO constellation to 48 satellites (along with its request to extend the construction and launch milestones for three of its GEO satellites and all of its NGSO satellites).

⁴ See 47 C.F.R. § 1.115(c).

Even apart from the procedural defect in this new argument, Globalstar's claim is based on the erroneous assumption that the initial noncontingent contract milestone is discrete as to each element of the Globalstar constellation. Although for administrative purposes the FCC issued separate call signs for different parts of the Globalstar system, the authorization (and the nullification if the noncontingent contract milestone is not met) applies to the satellite system as applied for by Globalstar.⁵

Globalstar did not apply for or receive an authorization for a single Geostationary satellite, or for a Geostationary-only satellite system, and its modification request did not seek to "downsize" its system to such a degree.⁶ Whether such a modification request would have been

⁵ See *Globalstar, L.P., Order and Authorization*, 16 F.C.C.R. 13739, 13757 (2001) (2001) ("*Globalstar Authorization Order*"), *aff'd*, 18 F.C.C.R. 1405 (2003), *appeal pending sub nom. AT&T Wireless Services, Inc., et al. v. FCC*, No. 03-1042 (D.C. Cir. filed Feb. 26, 2002):

Accordingly, IT IS ORDERED that Application File Nos. 183/184/185/186-SAT-P/LA-97 and 182-SAT-P/LA-97(64); IBFS File Nos. SAT-LOA-19970926-00151/52/53/54, SAT-LOA-19970926-00156 and SAT-AMD-20001103-00154 IS GRANTED, and Globalstar, L.P. IS AUTHORIZED to construct, launch and operate a satellite system comprised of sixty-four non-geostationary-satellite orbit satellites and four geostationary-satellite orbit satellites capable of operating in the 1990-2025/2165-2200 MHz bands in the United States, in accordance with the technical specifications set forth in its application and consistent with our rules unless specifically waived herein, and subject to the following conditions[.] (emphasis added)

The *Globalstar Authorization Order*, 16 F.C.C.R. at 13759, also provides that the "authorization" shall become null and void if the milestones are not met.

⁶ Globalstar asserts that it was treated differently than Celsat and Boeing. Globalstar is readily distinguishable from Celsat (where the FCC did find milestone compliance), because Celsat's milestone submission demonstrated that it would timely construct and launch everything for which it had been authorized. In contrast to Globalstar, under its contract Celsat will be able to deliver in a timely fashion what it promised. The FCC has applied the same "strict enforcement" milestone compliance standard to all 2 GHz MSS licensees. Boeing does not provide Globalstar with any precedential support, because the Commission has not yet acted on Boeing's request.

granted by the Commission had such a request been made is wholly speculative.⁷ In Globalstar's case, however, such a single satellite would not appear to be acceptable because it clearly would not meet the 2 GHz MSS coverage requirements for the hybrid system authorized by the Commission.⁸

III. THE BUREAU ORDER CORRECTLY FOUND THE INITIAL NON-CONTINGENT CONTRACT MILESTONE WAS NOT MET

Globalstar also now claims that the Bureau's decision finding its submitted contract inadequate was inconsistent with precedent.⁹ Globalstar's argument lacks merit. The Commission has long made clear that in order to fulfill an initial milestone, the licensee must have executed a non-contingent contract that incorporates a payment and construction schedule that allows construction and launch to be completed within the licensee's milestones.¹⁰ Globalstar clearly was on notice that the contract it had executed in satisfaction of the initial milestone was inadequate.

⁷ The Commission seeks concrete satellite system applications when considering a new satellite service so that potential allocations and service rule development do not occur in a vacuum. *E.g.*, *LEOSAT Corporation, Memorandum Opinion and Order*, 8 F.C.C.R. 668, 670 (1993). It is far from clear whether the FCC would have allocated the same amount of spectrum or the particular frequencies selected for the 2 GHz MSS if the majority of applicants sought merely to provide a CONUS-only service, as opposed to the global services proposed by Globalstar and others. The Commission could well conclude that a "bait and switch" down to a single GEO satellite from a promised 68 satellite system would be viewed as contrary to the public interest because it would result in the waste of spectrum for most of the world. In any event, Globalstar did not make such an application, although by seeking reinstatement of the license for one of its satellites, it appears to be attempting to do so in this pleading.

⁸ *2 GHz MSS Order*, 15 F.C.C.R. 16154-16155.

⁹ Application for Review at pp. 5-6.

¹⁰ *See Bureau Order*, 18 F.C.C.R. 1249, ¶ 6 & n.13 (citing precedent); *see also Mobile Communications Holdings, Inc., Memorandum Opinion and Order*, 17 F.C.C.R. 11898, 11901-11902 (2002) (explaining that "the execution of a contract that does not provide for complete construction of the satellites in question by a specified date consistent with the licensee's milestone deadline for making its system fully operational cannot satisfy a construction-commencement milestone requirement").

Globalstar's attempted reliance on the *Teledesic* decision¹¹ to undermine the *Bureau Order* lacks merit. In that case, the Bureau did find that the contract, which comported with the modification request (but not the licensed system), was sufficient for meeting the initial contract milestone. What is significant, however, is that the deviation had to do with the technical design of the satellite system (substituting a 30 satellite MEO system for a 280 satellite NGSO system), not with the timing of deployment many years after the milestone schedule. In Globalstar's case, the Bureau did not reject the contract as non-conforming because of the reduction in the number of NGSO satellites – it rejected the contract because it did not allow for construction and launch of the satellites within the milestones. Had Globalstar simply filed the modification to change the technical parameters without seeking milestone extensions (and submitted a contract consistent with that modification), then it could rely on the *Teledesic* precedent – but that is not what Globalstar did, so the *Teledesic* case is readily distinguishable.¹²

Likewise, the *NetSat 28* decision provides no support for Globalstar. In the *NetSat 28* case, the Commission granted a waiver of the initial milestone because the non-compliance was due to a cloud the Commission had cast over NetSat 28's authorization that the Commission subsequently determined was erroneous.¹³ Globalstar has not argued that its non-compliance was due to any wrongful action by the Commission. Nor can Globalstar rely on the *Echostar*

¹¹ *Teledesic LLC, Memorandum Opinion and Order*, 17 F.C.C.R. 11263 (2002).

¹² *Cf.* Application for Review at 6 n.18 (the need for delay was unrelated to any technical changes proposed in the modification request).

¹³ *NetSat 28 Co., Memorandum Opinion and Order*, 16 F.C.C.R. 11025 (IB 2001). In that case, the Commission called into question the qualifications of NetSat 28, because its principal had also been an officer at MobileMedia (which had falsified numerous FCC filings), but subsequently found that the NetSat 28 principal had not been involved in the wrongdoing at MobileMedia.

case¹⁴ to bolster its entitlement to relief, because that case was based on the more lax “due diligence” standard applicable at that time to DBS licensees, in contrast to the “strict enforcement” standard the Commission made clear applies to 2 GHz MSS licensees. Particularly in light of the “strict enforcement” policy, Globalstar should have sought a determination in advance from the Commission if it believed there was any ambiguity as to the Commission’s standards for evaluating an initial contract.¹⁵

IV. THE BUREAU CORRECTLY DENIED GLOBALSTAR’S EXTENSION REQUEST

The Commission can likewise reject Globalstar’s claim that the Bureau acted in an arbitrary or capricious manner in rejecting its milestone extension request. Globalstar (and the other 2 GHz MSS licensees) were all on notice that the Commission would be applying a “strict enforcement” standard to milestone compliance. The Commission has long placed critical importance on milestone compliance in the 2 GHz MSS proceeding. In adopting the service rules, the Commission concluded that it would “*impose and strictly enforce milestone requirements*” instead of financial qualifications.¹⁶ The FCC emphasized that strict milestone enforcement would be “especially important” in lieu of “financial qualifications as an entry criterion,”¹⁷ and specifically anticipated that spectrum would be “returned to the Commission as

¹⁴ *Echostar Satellite Corp., Memorandum Opinion and Order*, 7 F.C.C.R. 1765 (1992).

¹⁵ *See e.g., Morning Star Satellite Company, L.L.C., Memorandum Opinion and Order*, 16 F.C.C.R. 11550, 11554 (2001) (“At no point did Morning Star request a clarification, extension or waiver of its construction commencement milestone. . . . [W]hen satellite licensees do not pursue procedural avenues available to them to address concerns surrounding their authorizations, but rather wait until their authorizations are null and void due to their failure to act, their inaction ensures the result that the milestone concept is designed to prevent.”).

¹⁶ *2 GHz MSS Order*, 15 F.C.C.R. 16127, 16150 (2000) (emphasis added).

¹⁷ *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, *Notice of Proposed Rulemaking*, 14 F.C.C.R. 4843, 4881 (1999).

a result of missed milestones.”¹⁸ As noted above, the Commission also had previously made clear that an initial milestone compliance contract must incorporate payment and construction schedules that will allow for completion of the satellite system in conformity to the milestones.

Thus, Globalstar can claim no surprise that the contract it submitted would be insufficient for demonstrating compliance with the first milestone, as grant of the waiver would have undercut these policies. First, the “justification” proffered by Globalstar for grant of the deferral – a greater ability to finance the construction of the satellite system if given more time – directly contradicts the purpose of strict milestone enforcement as a substitute for a financial qualifications standard.¹⁹ Second, the significant delay in deployment of the other three GEO satellites and the NGSO constellation would result in “warehousing of spectrum,” contrary to the purpose of milestones. Although limited capacity would be available in CONUS with the launch of the one GEO satellite within the milestones, the Globalstar spectrum would lie fallow throughout the rest of the world (and would be significantly underutilized in CONUS).

To the extent there was any ambiguity concerning milestone compliance (and the Carriers submit there was none), it was incumbent on Globalstar to try to resolve any questions it may have had prior to the milestone deadline. Globalstar chose not to pursue a declaratory ruling or other determination in advance of the July 17 deadline even though the authorization was at stake, ignoring advice the Commission had provided in prior milestone case law.²⁰ Instead, on

¹⁸ *2 GHz MSS Order*, 15 F.C.C.R. at 16150.

¹⁹ Under a traditional financial qualifications test, the Commission only issues a license to an applicant that can demonstrate a present ability to finance the construction, launch and first year’s operations of the proposed satellite system. In this case, Globalstar admits that it cannot presently finance its 2 GHz MSS system, and hence would not have been qualified to receive a license if the traditional test had been used.

²⁰ *See Morning Star Satellite Company, L.L.C., Memorandum Opinion and Order*, 16 F.C.C.R. at 11554 (2001); *see also Motorola, Inc. and Teledesic, Inc., Memorandum Opinion*

the day milestone compliance was due, Globalstar submitted an application for modification of its authorization requesting, *inter alia*, an extension of the construction and launch milestones. The contract relied upon by Globalstar to demonstrate compliance with the first milestone simply treated the extension request as having been granted.

Nor was it reasonable, in light of the strict enforcement standard, for Globalstar to assume that it would be provided an additional 90 days after any rejection of the extension request to re-negotiate its satellite manufacturing contract. As the *Bureau Order* makes clear, it would be contrary to the public interest to allow such an extension of the initial milestone, because then anyone could get an “automatic” extension of the initial milestone of 90 days or more simply by filing an extension request.²¹ Such a procedure would be particularly incompatible with the “strict enforcement” standard applied to the 2 GHz MSS licensees.

Globalstar also claims that the Bureau failed to give meaningful consideration to its request for waiver of the milestones, citing *WAIT Radio*.²² Although *WAIT Radio* does stand for the proposition that an agency cannot simply reject a waiver request summarily because it is inconsistent with the rule, the Bureau did not do that here. Globalstar’s argument ignores other important aspects of the *WAIT Radio* decision. As the Court in *WAIT Radio* observed, “An applicant for waiver faces a high hurdle even at the starting gate.”²³ An exemption from the rule must be based on “special circumstances,” and the “very essence of waiver is the assumed

and Order, 17 F.C.C.R. 16543, 16550-51 (IB 2002) (“Not having even taken the basic step of apprising us of the alleged difficulty prior to expiration of the time allowed for compliance, the Applicants must accept the consequences of their failure to satisfy the milestone requirement within that time-period.”).

²¹ *Bureau Order*, 18 F.C.C.R. 1249 at ¶ 12.

²² Globalstar Request for Stay at 6 (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1156-59 (D.C. Cir. 1969)).

²³ 418 F.2d at 1157.

validity of the general rule.”²⁴ *WAIT Radio* also constrains the Commission’s ability to grant waivers: “The court’s insistence on the agency’s observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers. . . . The process viewed as a whole leads to a general rule, and limited waivers or exceptions granted pursuant to an appropriate general standard.”²⁵ This instruction is particularly relevant here, given the number of 2 GHz MSS licensees that have sought to waive or extend the milestone deadlines.²⁶

The Bureau properly considered Globalstar’s request for milestone extensions under its well-established standard that business decisions within the licensee’s control are insufficient to justify extensions. The Bureau considered (and rejected) the excuses proffered by Globalstar in its modification filing, because the proposal to delay construction and launch so as to wait out the downturn in the MSS industry and the resulting excess capacity in Globalstar’s Big LEO system are “business decisions.” The volatile nature of the satellite industry in general, and the MSS sector in particular, can hardly be considered “unanticipated events” as Globalstar asserts.²⁷

Indeed, Globalstar’s desire to align its second generation Big LEO system and its 2 GHz MSS system had been explicitly rejected by the Commission when authorizing Globalstar’s 2 GHz MSS system because the resulting delays in deployment of the 2 GHz MSS system would

²⁴ *Id.* at 1157-58.

²⁵ *Id.* at 1159.

²⁶ *See, e.g.*, Letter from Kathryn A. Zachem, Esq. and L. Andrew Tollin, Esq. on behalf AT&T Wireless Services, Inc., Cingular Wireless and Verizon Wireless to Marlene H. Dortch, Secretary, FCC in IB Docket No. 01-185 *et al.*, at 5 (Aug. 15, 2002); *see also Nextel Communications, Inc.*, 14 F.C.C.R. 11678, 11691-92 (WTB 1999) (“The Commission has been especially reluctant to grant a waiver when to do so would ‘invite numerous other waiver requests which, if granted, would effectively circumvent the Commission’s rulemaking function.’”) (quoting *Verilink Corporation*, 10 F.C.C.R. 8914, 8916 (1995)).

²⁷ Application for Review at 7.

be unacceptable.²⁸ The same problems in the MSS industry that Globalstar complained about in its extension request existed a year earlier when its authorization was issued. However, rather than challenge that determination in a timely petition for reconsideration of its licensing order, Globalstar waited until the first milestone deadline to request the relief that had been denied in the 2 GHz MSS licensing decision.²⁹ As the Court of Appeals indicated in the *Capital Telephone* decision,³⁰ the Commission's Rules logically require the licensee to accept the privileges along with the obligations, or to follow the procedures to seek reconsideration of the conditions. Here, Globalstar accepted the 2 GHz MSS authorization, despite the fact that the Commission imposed milestone deadlines that rejected Globalstar's request to align its 2 GHz MSS system with its second generation Big LEO system. Its belated attempt to challenge that determination is therefore an impermissible collateral attack on a final decision that must be rejected.³¹

Even apart from this fatal procedural flaw, there is no merit to Globalstar's claim that the Bureau did not adequately consider its "intent to proceed." Globalstar has not exhibited any such intent.³² Indeed, Globalstar's expressed intent in seeking extension of the milestones was to

²⁸ *Globalstar Authorization Order*, 16 F.C.C.R. at 13743, 13758.

²⁹ A conditioned license becomes final if the licensee fails to timely challenge the conditions on its license. *See* 47 U.S.C. §§ 402(b), 405(a); 47 C.F.R. §§ 1.110 and 25.156(b); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 224, 225-27 (1995); *see also Morning Star Satellite Company, L.L.C., Memorandum Opinion and Order*, 16 F.C.C.R. 11550, 11553 (2001) ("Failure to challenge the conditions imposed is tantamount to accepting its license as conditioned.").

³⁰ *Capital Telephone Company, Inc. v. FCC*, 498 F.2d 734 (D.C. Cir. 1974).

³¹ *See e.g., MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co., Memorandum Opinion and Order*, 5 F.C.C.R. 216, 221 n.38 (1990), *recon. denied*, 5 F.C.C.R. 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

³² Globalstar makes some apparent references to financial information redacted from its milestone application referencing payments to its satellite contractor. Application for Review at 16. Because that information is not publicly available, the Carriers cannot address the nature of

delay construction of the satellites, not to proceed expeditiously with the introduction of new services.

Finally, Globalstar contends that the *Bureau Order* failed to address the benefits of its extension request,³³ but its application for review presented no real countervailing public interest benefits. Globalstar refers to its increased chances of emerging from bankruptcy, but to the extent it seeks to accomplish this by capturing now the speculative value of the ATC authority, that would hardly constitute a “public” benefit. Globalstar also seeks to rely on the fact that it would be able to continue to serve unserved and underserved populations. However, Globalstar has more than sufficient capacity in its Big LEO system to continue serving those customers – indeed, it is the glut of capacity on its Big LEO system that Globalstar relies on to justify deferring the deployment of the 2 GHz MSS capacity. Moreover, as far as the Carriers are aware, Globalstar is not threatening to shut down its system and de-orbit its satellites – and even where Iridium had threatened to do so when it was in bankruptcy, that threat never materialized.³⁴

In fact, grant of the extension is contrary to the public interest. Because the spectrum freed up by the declaration that Globalstar’s authorization was null and void was a component of the 30 MHz of spectrum reallocated to Advanced Wireless Services, grant of the extension via the application for review would effectively nullify a portion of that reallocation, and thereby

any payments (and whether they reflect work performed on the Big LEO system), or how those payments are impacted by the affiliation between Globalstar and the satellite contractor.

³³ See Application for Review at 14.

³⁴ Indeed, according to the public accounts of its situation, Globalstar rejected one financing offer that was presented before the FCC released its ATC decision because that offer had not factored in the expected value of the FCC’s grant of ATC authority, and more recently Globalstar accepted temporary financing from investors that include its competitors.

foreclose the many beneficial services the Commission envisioned when creating that new terrestrial allocation.

In sum, the Bureau gave the Globalstar waiver request the “hard look” it deserved, and properly concluded that its extension of milestone request was unjustified under the Commission’s well-established standards.

V. GLOBALSTAR’S NEW BANKRUPTCY ARGUMENTS ARE ALSO WITHOUT MERIT

Finally, Globalstar makes new arguments in faulting the Bureau for not addressing Globalstar’s status as a bankrupt company as a basis for granting the milestone extensions or explaining why the *Bureau Order* is consistent with the automatic stay provisions of the bankruptcy code. Globalstar asserts in the Application for Review: “Inexplicably, nowhere in the MO&O does the Bureau even mention GLP’s status as a Chapter 11 debtor, nor the relation of its status to the rationale for the Extension Request.”³⁵ Of course, the fact that Globalstar never raised these arguments to the Bureau probably goes far in explaining why the Bureau failed to address them. Moreover, the Commission’s rules make clear that an application for review cannot rely on questions of law the Bureau has been afforded no opportunity to address.³⁶

With regard to Globalstar’s newly-minted claim to milestone relief because of its status as a Chapter 11 debtor, the obligation was clearly on Globalstar to assert such a claim explicitly. As the Court in *WAIT Radio* made clear, “When an applicant seeks a waiver of a rule, it must

³⁵ Application for Review at 19 (emphasis in original).

³⁶ 47 C.F.R. § 1.115(c); see also *Richard Duncan d/b/a Anderson Communications, Memorandum Opinion and Order and Order on Remand*, FCC 03-52, at ¶ 7 (rel. Mar. 12, 2003).

plead with particularity the facts and circumstances which warrant such action.”³⁷ In seeking to justify the extension request, Globalstar did generally refer to its bankruptcy status as background information.³⁸ On the other hand, in that same application Globalstar asserted that “Undaunted by its financial setbacks and determined to succeed in the global MSS business, GLP has begun to implement its Plan of Reorganization.”³⁹ These few fleeting (and in some cases positive) descriptions of Globalstar’s bankruptcy status are hardly sufficient to have put the Bureau on notice that it was expected to address bankruptcy as a basis for waiver of milestones. Moreover, the fact that the Commission in other cases has provided relief in response to specific requests for exemptions from the payment of application filing fees or annual regulatory fees based on bankruptcy status does not establish a general requirement that the Bureau grant or even address such bankruptcy issues *sua sponte* in every case involving a company in bankruptcy. Thus, Globalstar’s bankruptcy arguments are procedurally defective.

These new bankruptcy arguments are substantively inadequate as well. As noted above, one of the purposes underlying the strict enforcement of the milestones is its substitution as a replacement for a financial qualifications test – it would stand the policy on its head to then hold that being so egregiously unqualified financially so as to be adjudged bankrupt justifies waiving that replacement for a financial qualifications test.

The Commission can also dismiss Globalstar’s new claim that the automatic stay provision of Section 362 of the Bankruptcy Code precludes the Bureau from declaring the

³⁷ *WAIT Radio*, 418 F.2d at 1157 (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)).

³⁸ *Globalstar, L.P., Request for Waiver and Modification of Implementation Milestones for 2 GHz MSS System*, SAT-MOD-20020717-00116, *et al.*, at 3, 5, 10 (July, 17, 2002).

³⁹ *Id.* at 5.

license null and void per the terms of the condition in the license. Globalstar's argument is based on an inaccurate and overbroad reading of the NextWave decision (which was addressing Section 525 due to the non-payment of an auction debt), and a discredited bankruptcy court decision.⁴⁰ Unlike the NextWave case – which involved an auction debt and thus the Commission serving as both a regulator and creditor (and hence Section 525 issues) – this case involves the Commission solely in its regulatory capacity.

Under Globalstar's theory of the Bankruptcy Code, the Commission would virtually lose authority to regulate a licensee once it enters bankruptcy. Such a theory is undercut by the "regulatory exception" included in Section 362 itself.⁴¹ Although some ambiguity may have existed before 1998, Congress has since made clear that the regulatory exception applies in cases such as this. In previous versions of the bankruptcy code, subsection (b)(4) expressly excepted regulatory actions from the stay imposed by subsection (a)(1) but did not expressly except such actions from the stay imposed on acts to exercise control over property of the estate by subsection (a)(3). Congress resolved the confusion created by this omission when it amended Section 362(b)(4) in 1998 to make it an express exception to the automatic stay imposed by subsection (a)(3) as well.⁴² Accordingly, as a result of the 1998 amendment, there is no longer any question as to whether a regulatory action within the scope of subsection (b)(4) that terminates or destroys a debtor's rights or property interests is subject to the automatic stay. The

⁴⁰ *FCC v. Nextwave Personal Communications Inc.*, 71 U.S.L.W. 4085 (U.S. Jan. 27, 2003); *In re Fugazy Express, Inc.*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992).

⁴¹ *See generally FAA v. Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989).

⁴² 11 U.S.C. § 362(b)(4) (Act of October 21, 1998).

regulatory purpose of the Commission's actions in enforcing a condition in the license, therefore, renders it exempt from the automatic stay pursuant to Section 362(b)(4).


Globalstar suggests that Section 362(b)(4) is inapplicable because that exception applies only to government actions that "impact the health or safety of the public," citing *Fugazy Express*. The reliance on *Fugazy Express* for this proposition is erroneous because *Fugazy's* attempt to *limit* the scope of subsection (b)(4) to only those regulatory actions that protect the public's "health or safety" is foreclosed by the actual language of the provision and by the decision of every Court of Appeals that has addressed the issue.⁴³ In sum, the Commission must reject Globalstar's new bankruptcy arguments.

⁴³ See *In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297-98 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2367 (1998); *In re Yellow Cab Co-Op Ass'n*, 132 F.3d 591, 597 (10th Cir. 1997); *In re James*, 940 F.2d 46, 51 (3d Cir. 1991); *see generally In re Berry Estates, Inc.*, 812 F.2d 67, 71 (2d Cir.) (State court proceedings to enforce rent control regulations excepted from automatic stay under (b)(4) exception), *cert. denied*, 484 U.S. 819 (1987).

CONCLUSION

Globalstar has failed to demonstrate that the Bureau erred in finding the satellite manufacturing contract inadequate, denying the requested extension of the milestones or declaring the license null and void. The Carriers therefore urge the Commission expeditiously to deny Globalstar's Emergency Application for Review.

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