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March 12, 2003

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Washington, DC 20554

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Policy Branch
International Bureau

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Applications of Globalstar, L.P.*
File No. 183/184/185/186-SAT-P/LA-97 *et al.*; DA 03-328

Dear Ms. Dortch:

Attached please find corrected copies of the "Opposition to Request for Stay" filed on March 10, 2003, on behalf of AT&T Wireless Services, Inc., Cingular Wireless LLC, and Verizon Wireless, in the above-referenced proceeding. The attached version corrects non-substantive typographical and other errors that have recently come to our attention.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Stephen L. Goodman
Craig E. Gilmore

Attachment

Before the
Federal Communications Commission
Washington, DC 20554

MAR 12 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Application of)	File Nos.:
)	183/184/185/186-SAT-P/LA-97
Globalstar, L.P.)	182-SAT-P/LA-97(64)
)	
For Modification of License for a Mobile-Satellite Service System in the 2 GHz Band)	IBFS Nos.:
)	SAT-LOA-19970926-00151/52/53/54
)	SAT-LOA-19970926-00156
For Waiver and Modification of Implementation)	SAT-AMD-20001103-00154
Milestones for 2 GHz MSS System)	SAT-MOD-20020717-00116/17/18/19
)	SAT-MOD-20020722-00107/08/09/10/12
)	
)	Call Signs:
)	S2320, S2321, S2322, S2323, S2324

OPPOSITION TO REQUEST FOR STAY

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March 10, 2003

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SUMMARY

The Carriers oppose the request filed by Globalstar seeking a stay of the *Bureau Order* that 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 milestone. The *Bureau Order* thus declared the authorization null and void pursuant to the condition in the license. The Carriers contend that Globalstar has failed to meet any of the four elements to support its stay request.

Globalstar is unlikely to prevail on the merits. The *Bureau Order* was well reasoned, consistent with precedent and fully considered the waiver request of Globalstar. 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 Geostationary satellite. In addition, the Commission has 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* – allowing 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 these 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 stay request and application for review, that the *Bureau Order* is inconsistent with the bankruptcy code.

Globalstar fails to meet any of the other three standards for issuance of a stay. It will suffer no irreparable injury, particularly insofar as it was seeking to delay implementation of its 2 GHz MSS system because of the glut of capacity on its Big LEO system. Grant of the stay would harm the Carriers, because the spectrum freed up by cancellation of the Globalstar license makes up part of the spectrum reallocated to AWS. And the public interest would be adversely affected by grant of the stay, because it would undercut the anti-warehousing policies reflected in the milestone requirements. The Carriers thus urge the Commission to deny summarily Globalstar's stay request.

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Implementation Milestones for 2 GHz MSS)	SAT-MOD-20020717-00116/17/18/19
System)	SAT-MOD-20020722-00107/08/09/10/12
)	
)	Call Signs:
)	S2320, S2321, S2322, S2323, S2324

To: The Commission

OPPOSITION TO REQUEST FOR STAY

Pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (jointly, the "Carriers") hereby oppose the above-referenced request filed by Globalstar, L.P. ("Globalstar") seeking a stay from the Commission of the International Bureau's decision denying Globalstar's request for an extension of its milestones, finding its contract with Space System/Loral inadequate to meet the first milestone, and declaring its 2 GHz MSS authorization null and void.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 stay request.² To support a stay, a petitioner must demonstrate that: (1) it is likely

¹ *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, 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

to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.³ As demonstrated below, because Globalstar fails to satisfy any of these four parts, its request should be summarily denied.

I. GLOBALSTAR FAILS TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

In light of the shortened period for responding to a request for stay, the Carriers here will demonstrate that the *Bureau Order* was well reasoned, consistent with precedent and fully addressed all of the issues raised by Globalstar in its request for extension of the milestones. A more detailed critique of Globalstar's more extensive (but no better supported) arguments set forth in its Emergency Application for Review will be filed subsequently in response to that

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)).

³ See *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*per curiam*) (setting forth the requirements for stay), as modified by, *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); see also *Implementation of Video Description of Video Programming*, 17 F.C.C.R. 6175, 6176-6177 (2002) noting that, when considering a motion for stay, the Commission applies the four-part test set forth in *Virginia Jobbers Ass'n*, subsequently modified by *Washington Metropolitan Area Transit Comm'n*.

pleading. Nevertheless, the Commission must conclude that there is little likelihood that Globalstar will prevail on the merits of any of its claims.

A. The Commission Should Not Reinstate the One GEO Satellite License

As an initial matter, 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. 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.⁴

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

⁴ See *Globalstar, L.P., Order and Authorization*, 16 F.C.C.R. 13739, 13757 (2001) (2001) ("*Globalstar Authorization Order*");

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* (at ¶ 60) also provides that the "authorization" shall become null and void if the milestones are not met.

“downsize” its system to such a degree.⁵ Whether such a modification request would have been granted by the Commission had such a request been made is wholly speculative.⁶ 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.⁷

B. The Bureau Order Is Consistent with Precedent

Globalstar also now claims that the Bureau’s decision finding its submitted contract inadequate was inconsistent with precedent. 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.⁸ Indeed, in a decision released some three weeks before Globalstar filed its modification and deferral

⁵ Globalstar is thus distinguishable from Celsat’s situation, 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. Finally, all 2 GHz MSS licensees are subject to the same “strict enforcement” standard for milestone compliance.

⁶ 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.

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

⁸ *See Bureau Order*, 18 F.C.C.R. 1249 at ¶ 6 & n.13.

request, the Commission explained 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.”⁹ Globalstar clearly knew or should have known that the contract it had executed in satisfaction of the initial milestone was inadequate.

Globalstar’s attempted reliance on the *Teledesic* decision¹⁰ 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.

C. Globalstar Was Not Denied Due Process

The Commission can likewise reject Globalstar’s claim that the *Bureau Order* somehow denied it of due process. 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.

⁹ *Mobile Communications Holdings, Inc., Memorandum Opinion and Order*, 17 F.C.C.R. 11898, 11901-11902 (2002).

¹⁰ *Teledesic LLC, Memorandum Opinion and Order*, 17 F.C.C.R. 11263 (2002).

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.¹¹ The FCC emphasized that strict milestone enforcement would be “especially important” in lieu of “financial qualifications as an entry criterion,”¹² and specifically anticipated that spectrum would be “returned to the Commission as a result of missed milestones.”¹³ Moreover, as noted above, the Commission 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. Moreover, to the extent there was any ambiguity (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.¹⁴ Instead, on the day milestone compliance was due, Globalstar submitted

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

¹² *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).

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

¹⁴ *See 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 contract. . . . [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.”); *see also Motorola, Inc. and Teledesic,*

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.¹⁵ Such a procedure would be particularly incompatible with the “strict enforcement” standard applied to the 2 GHz MSS licensees.

D. The Bureau Properly Considered and Rejected the Waiver Request

Globalstar also claims that the Bureau failed to give meaningful consideration to its request for waiver of the milestones, citing *WAIT Radio*.¹⁶ 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. Moreover, 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.”¹⁷ An exemption from the rule must be based on “special circumstances,” and the “very essence of

Inc., Memorandum Opinion and Order, 17 F.C.C.R. at 16550-16551 (“Not even having 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.”).

¹⁵ *Bureau Order*, 18 F.C.C.R. 1249 at ¶ 12.

¹⁶ Globalstar Request for Stay at 6 (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1156-59 (D.C. Cir. 1969)).

¹⁷ *Id.* at 1157.

waiver is the assumed validity of the general rule.”¹⁸ *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.”¹⁹

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.” 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 be unacceptable.²⁰ 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.²¹

¹⁸ *Id.* at 1157-1158.

¹⁹ *Id.* at 1159.

²⁰ *Globalstar Authorization Order*, 16 F.C.C.R. at 13743, 13758.

²¹ 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; *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 224, 225-27 (1995); *see also* Morning Star Satellite Company, L.L.C., 16 F.C.C.R. 11550, ¶ 8 (2001) (“Failure to challenge the conditions imposed is tantamount to accepting its license as conditioned.”).

Nor is there any merit to Globalstar's claim that the Bureau did not adequately consider its "intent to proceed." Globalstar has not exhibited any such intent. Indeed, Globalstar's expressed intent in seeking extension of the milestones was to delay construction of the satellites, not to proceed expeditiously with the introduction of new services.

Moreover, grant of the waiver would undercut the policies reflected in the strict enforcement of milestone deadlines rule applicable to Globalstar and the other 2 GHz MSS licensees. 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. 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.

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). In sum, the Bureau gave the Globalstar waiver request the "hard look" it deserved, and properly concluded that its waiver request was unjustified under the Commission's well-established standards.

E. Globalstar's New Bankruptcy Arguments Are without Merit

Finally, Globalstar makes what is probably its most brazen argument 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. 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.

With regard to Globalstar's newly-minted claim to milestone relief because of its status as 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 plead with particularity the facts and circumstances which warrant such action."²² In seeking to justify the extension request, Globalstar did generally refer to its bankruptcy status as background information.²³ 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."²⁴ 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. Likewise, the fact that the Commission in other cases in response to specific requests for relief from the payment of application filing fees or annual regulatory fees has provided relief 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.

Moreover, even if the Bureau had addressed Globalstar's new claim that bankruptcy justified an extension of the milestones, it would have to reject such a claim. As noted above, one of the purposes underlying the strict enforcement of the milestones is its substitution as a

²² *WAIT Radio*, 418 F.2d at 1157 (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)).

²³ *Globalstar, L.P., Request for Waiver and Modification of Implementation Milestones for 2 GHz MSS System*, SAT-MOD-20020717-00116, *et al.*, at pp. 3, 5, 10 (July, 17, 2002).

²⁴ *Id.* at p. 5.

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 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.²⁵

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.²⁶ Although some ambiguity may have existed previously, Congress has now made clear that the regulatory exception applies in cases such as this. Before 1998, 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.²⁷ Accordingly, as a result of the 1998 amendment, there is no longer any question as to whether a regulatory action

²⁵ *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).

²⁶ *See generally FAA v. Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989).

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

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 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.²⁸

In sum, Globalstar has failed to raise any credible claim that it is likely to prevail on the merits.

II. GLOBALSTAR IS SUFFERING NO IRREPARABLE INJURY

Globalstar also failed to demonstrate it is entitled to a stay under the "irreparable injury" prong. The declaration that the license is null and void presents no immediate or cognizable injury to Globalstar or otherwise adversely affects its current operations, much less harm them irreparably. Globalstar has more than adequate capacity on its current Big LEO satellite system to meet its needs for years to come. As the "sole surviving" CDMA Big LEO system, Globalstar has exclusive access to capacity that was originally to have been shared among four CDMA

²⁸ 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).

systems. Indeed, Globalstar sought to justify deferral of its 2 GHz MSS satellite system because it has too much capacity presently for the little demand that exists.

Moreover, the glut of capacity claimed by Globalstar in its extension request did not even take into account the fact that the FCC subsequently provided Globalstar the opportunity to provide an Ancillary Terrestrial Component to its MSS system, which will potentially provide Globalstar with 11 MHz of nationwide spectrum for terrestrial services.²⁹ According to the MSS proponents of ATC, such authority will allow them to serve new customers and free up satellite capacity for other potential users.³⁰ In addition, claims that Globalstar will suffer injury while the Commission and/or the Court takes the time to review its claim is contradicted by the fact that the relief sought by Globalstar (which was denied by the *Bureau Order*) was to *delay* implementation of its 2 GHz MSS satellite system.

The Carriers also observe that the injury is not irreparable, because even assuming *arguendo* the Commission and/or the Court determines that the authorization should be reinstated, Globalstar will have a full opportunity to construct its proposed 2 GHz MSS satellite system. As the Commission indicated in the case of NextWave, the construction deadlines would be tolled during the period the licenses are deemed null and void.³¹

Finally, the Carriers also dispute Globalstar's attempts to conjure up a "present" injury by asserting that the *Bureau Order* will hamper its current fundraising activities. What Globalstar is really saying is that the *Bureau Order* interferes with its ability at present to monetize the

²⁹ *ATC Order*, FCC 03-15 at ¶ 93.

³⁰ *Id.* at ¶ 19. While the Carriers are skeptical of these claimed benefits from ATC, in any event Globalstar has made clear that it has a huge amount of excess capacity on its current Big LEO system.

³¹ *Nextwave Personal Communications Inc. and Nextwave Power Partners Inc.*, File Nos. 0000855872, *et al.*, *Order*, DA 03-617, ¶¶ 6-7 (rel. Mar. 3, 2003).

speculative value of its 2 GHz MSS license, or more specifically, the speculative value of the ATC authority recently granted by the Commission (insofar as the MSS licensees have made clear that as a stand-alone service, MSS is worthless). Such efforts are not a cognizable injury, however, because these attempts to profit from the sale of a bare license are explicitly banned under the Commission's antitrafficking rules applicable to the 2 GHz MSS authorizations.

III. GRANT OF THE STAY WOULD RESULT IN HARM TO OTHER PARTIES

Under the standards for issuance of a stay, the Commission must also evaluate (and balance) the potential harm to other parties. Globalstar's simplistic analysis of this prong is its assertion that since no party filed comments on its extension request, no party could be harmed by a grant of the stay. Using that as the standard, the fact that the Carriers are now filing in opposition to the Stay Request *ipso facto* establishes harm to interested parties.³² Moreover, a substantive review of the situation also establishes the fact that interested parties would be injured by issuance of the requested stay.

As an immediate and direct impact, 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, issuance of a stay would effectively nullify that reallocation. That adverse impact would also be exacerbated by the precedential effect of such a decision and the inevitable stay requests that would quickly follow from the other 2 GHz MSS licensees who were similarly found not to have met the initial milestone. More indirectly, the

³² Although the carriers had not specifically filed against the modification and extension request, the Carriers had challenged the Commission decision authorizing Globalstar's 2 GHz MSS system. *See* Application for Review of AT&T Wireless Services, Inc., Verizon Wireless, and Cingular Wireless LLC (filed Aug. 16, 2001). Commission action on that petition, as well as Commission action in establishing ATC and re-allocating spectrum from MSS to AWS, occurred well after the filing deadline for comment on the modification and extension request.

Carriers will be harmed if Globalstar is allowed to impact the capital markets by raising money based on the speculative value of its 2 GHz ATC authority as it seeks to do, because the Carriers compete for funds in that same capital market.

IV. THE PUBLIC INTEREST WOULD BE ADVERSELY AFFECTED BY GRANT OF THE STAY

The Carriers also contend that the public interest would be adversely impacted by grant of the stay. As noted above, grant of the requested stay would impede the Commission's decision to re-allocate spectrum to AWS, and thereby foreclose the many beneficial services the Commission envisioned when creating that new terrestrial allocation. Moreover, grant of the stay would undercut the important public policies embedded in the milestone requirements, including the prohibition against warehousing. Indeed, Globalstar was on notice that its 2 GHz MSS license was subject to strict enforcement of the milestones. In addition, allowing Globalstar to market its bare 2 GHz MSS license as it suggests it should be allowed to do would contravene the Commission's antitrafficking policies, also to the detriment of the public interest.

Globalstar presented no real countervailing public interest benefits from grant of the stay. Globalstar refers to its increased chances of emerging from bankruptcy, although 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 current subscribers for its Big LEO system include public safety organizations. 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.³³ In sum, Globalstar has failed to make a credible demonstration that the *public* interest would be advanced by grant of the stay. To the contrary, the public interest would be harmed by grant of Globalstar's request.

³³ 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.

CONCLUSION

Globalstar has failed to demonstrate that its stay request satisfies any of the four tests: Globalstar is unlikely to prevail on the merits; Globalstar will not suffer any irreparable injury; other interested parties will be harmed by grant of the stay; and the public interest would be adversely affected by grant of the stay. The Carriers therefore urge the Commission expeditiously to deny Globalstar's request for a stay.

Respectfully submitted,



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