Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Application of	)	FCC 04-126
	)	
Emergency Application for Review and	)	File Nos.:
Request for Stay of Globalstar, L.P.	)	SAT-LOA-19970926-00151/52/53/54/56
	)	SAT-AMD-20001103-00154
	)	SAT-MOD-20020717-00116/17/18/19
	)	SAT-MOD-20020722-00107/08/09/10/12

OPPOSITION TO PETITION FOR RECONSIDERATION

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SUMMARY

The Carriers oppose the petition for reconsideration seeking reversal of the *FCC Order* and reinstatement of Globalstar's 2 GHz MSS authorization. The *FCC Order* correctly affirmed the denial of 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. As a result, the FCC properly recognized that the license cancelled automatically pursuant to the explicit milestone condition in the authorization.

Petitioners' primary argument on reconsideration is that automatic cancellation for failure to meet the milestone condition on the Globalstar license is inconsistent with Section 312 of the Act, which governs the revocation of licenses. But there is a material difference between automatic cancellation for failure to satisfy an express license condition -- where a licensee is made aware during a rulemaking and/or the licensing proceeding itself that failure to meet the license condition will render the license null and void -- and license revocation for bad acts -- where there has not been advance notice that the FCC is even considering revoking the license and further fact-finding is required.

Petitioners ignore the long-standing D.C. Circuit *Temmer* precedent, which held that where an entity fails to satisfy a requirement on which its authorization is conditioned, its rights under the license remain unperfected and it is not entitled to a hearing prior to cancellation for failure to meet that condition. Petitioners also ignore the court's more recent finding in *Peninsula Communications* that the rescission of a conditional grant for failure to satisfy the condition is not a revocation requiring a hearing under Section 312. Indeed, the FCC has consistently held, as far back as 1987 and as recently as this year, that a license that cancels for failure to satisfy a license condition is not revoked and does not trigger a hearing requirement. In any event, even assuming *arguendo* this were treated as a revocation case, no purpose would be served by a hearing because there is no factual issue to be heard -- there is only the legal question of whether the Globalstar contract satisfied the initial milestone.

Petitioners assert that Globalstar lacked fair notice of the principal that a contract which did not provide for completion of the licensed system within established milestones would not satisfy the initial milestone. In fact, this principle is well established in FCC precedent, starting with the 1986 *Tempo* case. Globalstar was also made well aware through the 2 GHz rulemaking, the FCC's rules, and the Globalstar authorization itself that its license would automatically terminate with no further action required by the Commission if it did not meet this milestone.

Petitioners' other arguments were properly rejected. The FCC correctly concluded that nullification was not contrary to the automatic stay provision in Section 362 of the Bankruptcy Code because it fell under the agency's regulatory power exception. The FCC also properly affirmed the Bureau's treatment of Globalstar's system as an integrated system. The rejection of a contract that provided for only a single satellite out of 68 to be timely constructed is not a "new" policy, but rather a recognition that Globalstar failed to provide for timely construction of the authorized "satellite system" as required.

For all these reasons, the petition should be denied and the *FCC Order* upheld.

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	)	SAT-MOD-20020722-00107/08/09/10/12

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

AT&T Wireless Services, Inc. and Cingular Wireless LLC (the "Carriers") hereby submit this opposition to the "Petition for Reconsideration" submitted by Globalstar, LLC and Globalstar Satellite LP ("Petitioners"), as the successors-in-interest to Globalstar, L.P. ("Globalstar").[1] Petitioners seek reconsideration of the Commission's decision affirming the nullification of Globalstar's 2 GHz Mobile Satellite Service ("MSS") authorization for failure to satisfy the initial milestone upon which its license was conditioned.[2] For the reasons set forth herein, the Petition should be denied and the *FCC Order* upheld.

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[1] Globalstar, LLC and Globalstar Satellite LP, Petition for Reconsideration, re: FCC 04-126 (July 26, 2004) ("Petition"); *see* 47 C.F.R. §§ 1.4(h), 1.106(g). The Carriers have previously demonstrated their interest in this proceeding, which demonstration is hereby incorporated by reference. *See* AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless, Opposition to Emergency Application for Review, in re: File No. 183/184/185/186-SAT-P/LA-97 *et al.*, at 1-2 & n.2 (Mar. 18, 2003).

[2] *See Emergency Application for Review and Request for Stay of Globalstar, L.P., Memorandum Opinion and Order*, FCC 04-126 (rel. June 24, 2004) ("*FCC Order*"), *affirming Globalstar, L.P., Memorandum Opinion and Order*, 18 F.C.C.R. 1249 (IB 2003) ("*Bureau Order*").

DISCUSSION

I. THE *FCC ORDER* IS LAWFUL AND SHOULD BE UPHELD

Globalstar, like all 2 GHz MSS licensees, accepted its license on the condition that it satisfy certain implementation milestones. That condition, set forth expressly in its authorization, provided that failure to meet any milestone would result in automatic cancellation of the license. The first milestone was the requirement to demonstrate the commencement of construction within one year of licensing by entering into a non-contingent contract for the timely manufacture of the Globalstar satellite system. Globalstar, however, sought up to a two-year extension to complete its system and entered into a contract to complete construction not within its milestones, but within the extended timeframe it proposed. As discussed below, the *FCC Order* finding that the Globalstar license became null and void for failure to meet the milestone deadline specified as a condition of its license is lawful and should be upheld.

A. The FCC Properly Upheld the Automatic License Cancellation

Petitioners concede that Section 303(r) authorizes the FCC to "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary."[3] They contend, however, that an automatic cancellation condition for failure to meet a milestone is inconsistent with the prohibition in Section 312 of the Communications Act (the Act") against revocation of a license without notice and a hearing, and is therefore "inconsistent with law."[4] Petitioners further allege that automatic cancellation is violative of Sections 1.91 and 25.160 of the Commission's rules,

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[3] 47 C.F.R. § 303(r), *cited in* Petition at 6-7; *see also Glendale Electronics, Inc.*, 19 F.C.C.R. 2540, ¶ 9 n.27 (2004) ("*Glendale Electronics*"); *Northstar Technology, LLC*, 19 F.C.C.R. 3015, ¶ 14 n.56 (WTB/MD 2004) ("*Northstar*"). As well, Section 301 of the Act states that no license "shall be construed to create any right, beyond the terms, conditions, and periods of the license." *See* 47 C.F.R. § 301; *see also Glendale* at ¶ 9 & n.27; *Northstar* at ¶ 14 & n.56.

[4] *See* Petition at 7; *see generally id.* at §§ II-III.

which implement Section 312 of the Act and contain similar safeguards, as well as Section 9(b) of the Administrative Procedure Act ("APA").[5] These assertions are without merit.[6]

Petitioners' argument is based on the flawed belief that automatic cancellation is the same as license revocation.[7] As a result, they contend a condition that provides for cancellation of a license automatically is contrary to Section 312, its implementing regulations, and Section 9(b) -- all of which call for notice and an opportunity to be heard prior to revocation.[8] There is,

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[5] *See* 47 C.F.R. §§ 1.91, 25.160; 5 U.S.C. § 558(c), *cited in* Petition at 5, 20-21. Petitioners also argue for the first time that nullification without a hearing was unlawful under Section 309(e), which directs the Commission to conduct a hearing when substantial and material questions of fact concerning an *application* are presented. *See* Petition at 12, 16 (citing 47 C.F.R. § 309(e)). Section 309(e) has no bearing on the lawfulness of the nullification of Globalstar's 2 GHz MSS conditional *license*. Petitioners attempt to invoke the section to resurrect the dismissed Globalstar modification application, but that application was properly denied once the underlying license was declared null and void, as there was nothing to modify. Section 309(e) comes into play only if the license nullification is revisited, and Section 309(e) is irrelevant to this question.

[6] *See also* 47 C.F.R. § 1.106(b)(2), (3) (petition which fails to rely on new facts or changed circumstances subject to dismissal).

[7] Petitioners cite to the *NextWave* cases for the proposition that courts treat "cancellation" the same as "revocation." *See* Petition at 5 n.7. The cases are inapposite. The discussion in the Supreme Court opinion occurred in the context of Section 525 of the Bankruptcy Code, and the question of whether cancellation is the same as revocation for Bankruptcy Code purposes was not even before the Court. *See FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 301 (2003) ("No one disputes that the Commission is a 'governmental unit' that has 'revoked' a 'license,' nor that NextWave is a 'debtor' under the Bankruptcy Act."); *see also, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (judicial decisions do not serve as precedent for points not raised and analyzed). The footnotes referenced in the two (mis-cited) Second Circuit decisions are *dicta*; the first deals only with the jurisdiction of the courts of appeals in cancellation cases, and not notice and hearing rights under Section 312(c) or Section 9(b), and the second contains nothing more than a prediction of possible future action by the FCC. *See In re: FCC*, 217 F.3d 125, 140 n.10 (2nd Cir. 2000); *In re: NextWave Personal Communications, Inc.*, 200 F.3d 43, 59 n.15 (2nd Cir. 1999).

[8] Section 312(c) provides that "[b]efore revoking a license . . . the Commission shall serve upon the licensee . . . an order to show cause why an order of revocation . . . should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon the licensee . . . to appear before the Commission at a time and place stated in the order . . . ." 47 U.S.C. § 312(c). Sections 1.91 and

however, a meaningful difference between (i) automatic cancellation for failure to meet an MSS milestone upon which the license was expressly conditioned and (ii) revocation for bad acts or rule violations.

With automatic cancellation, prior notice was given in the 2 GHz MSS rulemaking, the Commission's rules, and the order authorizing the Globalstar MSS system, that failure to meet the condition would result in automatic cancellation of the license.[9] Globalstar was specifically given the option to reject the license as conditioned, which it did not do.[10] As a result, Globalstar was on notice from the time it accepted its license that failure to meet any of the milestone conditions, including the initial "non-contingent contract" or "construction commencement" milestone, would result in the license canceling by its own terms. Thus, Globalstar, like the other 2 GHz MSS licensees, had an opportunity to object to the condition in both the rulemaking establishing conditional licensing as well as in response to the authorization order imposing the condition.

25.160(d) of the Commission's rules contain similar provisions. Section 9(b) provides that "the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given . . . (1) notice by the agency in writing of the facts or conduct which may warrant the action; and . . . (2) opportunity to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558(c).

[9] *See Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 15 F.C.C.R. 16127, 16177-78 (2000) ("Non-compliance with implementation milestones will result in cancellation of the authorization."); 47 C.F.R. § 25.161 (2000) (failure to certify compliance with a "required action" specified in the authorization results in automatic termination "without further notice to the licensee"); *Globalstar, L.P., Order and Authorization,* 16 F.C.C.R. 13739, 13759 (IB/OET 2001) ("*GLP Authorization Order*") ("[T]his authorization shall become NULL and VOID with no further action required on the Commission's part in the event the space station is not constructed, launched and placed into operation in accordance with the technical parameters and terms and conditions of the authorization . . . .").

[10] *See GLP Authorization Order*, 16 F.C.C.R. at 13760 ("Globalstar, L.P. may decline this authorization as conditioned within 30 days . . . . Failure to respond . . . will constitute formal acceptance of the authorization as conditioned.").

By contrast, where a licensee has not been given specific prior notice that an act or omission *will automatically* result in loss of the license, Section 312 of the act requires prior notice and an opportunity to be heard before a license may be "revoked."[11] For example, all licensees are aware that misrepresentation or lack of candor *may* result in admonishment, forfeiture or, in extreme cases, license revocation.[12] Because licensees do no know where that dividing line occurs, however, Section 312 requires notice and an opportunity to be heard prior to the affirmative act of revoking the license.[13] Thus, revocation, where further fact-finding is required, is very different from the case where a licensee is told in advance that failure to meet a specific condition *will* cause it to *automatically* forfeit its license.[14]

The Commission's authority to adopt and enforce automatic cancellation conditions without a hearing is well established. Petitioners ignore that the D.C. Circuit made clear in its 1984 *Temmer* decision that an applicant who accepts a license that is conditioned on future performance accedes to such condition(s), which renders the applicant's rights contingent.[15] Only after satisfaction of the condition(s) do the contingent rights vest. In other words, where an entity fails to satisfy a requirement on which its authorization is conditioned, its rights under the license remain unperfected and it is not entitled to a hearing prior to cancellation for failure to meet that condition.[16] Globalstar's failure to satisfy the initial milestone upon which its license

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[11] 47 C.F.R. § 312(c).

[12] *See, e.g.*, 47 U.S.C. § 312(a); 47 C.F.R. §§ 1.17, 1.80.

[13] *See* 47 U.S.C. § 312(c).

[14] The Commission's passing reference to "revocation" is thus of no moment. *See FCC Order* at ¶ 1. It is not the label, but the content behind the label that is determinative.

[15] *P & R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984) ("*Temmer*").

[16] *See id.* Although *Temmer* arose in the context of Section 316 hearing rights, the case has long been applied in the context of Section 312. *See, e.g., Revision of Part 21 of the*

was conditioned meant that its rights under the authorization, including the right to a hearing (if all conditions had been met), never vested.[17]

The distinction between automatic cancellation, which does not require a hearing, and revocation, which does, was recently made clear in the D.C. Circuit's *Peninsula Communications* decision -- also ignored by Petitioners -- and the corresponding FCC order it affirmed.[18] In *Peninsula*, the grant of several FM translator station renewal applications was expressly conditioned on divestiture to rectify non-compliance with an FCC co-ownership restriction. Peninsula did not fulfill the condition despite an explicit warning when it received the grants that failure to divest would result in rescission. In rescinding the conditional grants, the Commission cited to the D.C. Circuit's decision in *Temmer*. On appeal to the D.C. Circuit, *Peninsula* argued that it had a right to a hearing under Section 312(c) prior to rescission. The court disagreed and affirmed the rescission, finding that:

> One of Peninsula's remaining challenges is that the 2001 order revoked the licenses without a hearing as required in 47 U.S.C. § 312(c). *But the Commission did not revoke any of the licenses. It*

Commission's Rules, 2 F.C.C.R. 5713, 5718 (1987) ("Contemporary has attacked our proposal that a license would automatically expire if a certification is not filed at the end of a construction period. We do not believe, however, that Section 312(c) is an impediment to this policy. Section 312(c) states that the Commission may not revoke a license pursuant to Section 312(a) without serving upon the licensee an order to show cause and conducting a hearing into the matter. Our proposal, however, is not to revoke a license. By conditioning the license upon the filing of a certificate, the failure to file a certificate would make a license expire automatically under its own terms. *Cf. P & R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984); *Music Broadcasting Co. v. FCC*, 217 F.2d 339, 342 (D.C. Cir. 1954)."); *see also* discussion *infra*.

[17] *See supra* note 16.

[18] *Peninsula Communications, Inc. v. FCC*, 2003 U.S. App. LEXIS 1713 (D.C. Cir. Jan. 30, 2003) ("*Peninsula Communications*") (unpublished), *affirming Peninsula Communications, Inc.*, 16 F.C.C.R. 11364 (2001); *cf.* D.C. Cir. R. 28(c)(1)(B) ("All unpublished orders or judgments of this court, including explanatory memoranda . . . entered on or after January 1, 2002, may be cited as precedent.").

> *conditionally granted the renewals and then rescinded the conditional grants for failure to satisfy the condition.*[19]

Similarly, in *Glendale Electronics*, the Commission affirmed the automatic cancellation of the license at issue for failure to maintain the operations upon which the license was expressly conditioned.[20] The former license holder argued that the Commission could not revoke its license for the permanent discontinuation of operations without being afforded a revocation hearing under Section 312.[21] The Commission rejected this argument, citing to both *Peninsula* and *Temmer*:

> [A] license that cancels for failure to satisfy a license condition is not revoked and does not trigger a hearing requirement.* GEI's argument that the Commission must hold a hearing to determine whether discontinuing station operations for one year or more should result in license cancellation is erroneous. As the Court of Appeals for the District of Columbia stated in *P&R Temmer v. FCC*, a Commission "licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. Acceptance of a license constitutes accession to all such conditions. A licensee may not accept the benefits of the license while rejecting the corresponding obligations."

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* *See Peninsula Communications, Inc. v. FCC*, No. 01-1273, slip op. at 2 (D.C. Cir. Jan. 30, 2003) (finding that rescission of the conditional grant of licenses for failure to satisfy the condition is not a revocation without a hearing as required under Section 312(c) of the Communications Act, 47 U.S.C. §312(c)).[22]

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[19] *Peninsula Communications*, 2003 U.S. App. LEXIS 1713 at *5 (emphasis added).

[20] *Glendale Electronics, Inc., supra* note 3. Specifically, the license automatically cancelled pursuant to Section 90.157 of the Commission's rules, 47 C.F.R. § 90.157, which provides that a license cancels automatically upon a station's permanent discontinuance of operations. Any station that has not operated for one year or more is considered to have been permanently discontinued.

[21] *See Glendale Electronics* at ¶ 8.

[22] *Glendale Electronics* at ¶ 10 & n.28 (citations omitted).

The Wireless Telecommunications Bureau adopted the same rationale as the Commission in *Glendale Electronics* earlier this year in the *Northstar* case.[23] *Northstar* is of particular relevance because it dealt with the failure to meet a buildout/construction benchmark -- the terrestrial wireless equivalent of a milestone. As is the case with MSS licenses conditioned upon compliance with milestones, a broadband PCS license terminates automatically as of the construction deadline if the licensee fails to meet its buildout requirements. In *Northstar*, the former licensee argued automatic termination of the license was effectively a revocation, which could not occur without notice and opportunity for hearing pursuant to Section 312.[24] The Bureau rejected this argument for the reasons stated above, citing *Peninsula, Glendale Electronics* and *Temmer*.[25] In both *Glendale Electronics* and *Northstar*, the Commission made clear that its authority to adopt automatic cancellation provisions is grounded in Section 303(r), as well as Section 301 of the Act, neither of which, as shown above, is inconsistent with Section 312.[26]

Section 9(b) of the APA (5 U.S.C. § 558(c)) contains the same basic requirements as Section 312, *i.e.*, notice and opportunity to be heard prior to revocation, and courts have found it similarly inapplicable to automatic cancellation cases. For example, in the 1985 *Atlantic Richfield* case, the appellants were shippers who had received domestic trading approvals "subject to the condition that they would terminate if any one of four unsubsidized ships was not

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[23] *See Northstar*, *supra* note 3.

[24] *See id.* at ¶ 13.

[25] *See id.* at ¶ 14 & nn.56-59. The assertion that cancellation also violated Sections 1.91 and 25.160(d) of the Commission's rules, which mirror the procedural safeguards required by Section 312 prior to license revocation, likewise fails for the same reasons.

[26] *See Glendale Electronics* at ¶ 9 & n.27; *Northstar* at ¶ 14 & n.56.

'fixed for suitable employment.'"[27] When the condition to the approval was not satisfied, the domestic trading approvals were deemed to have expired on their own terms. The shippers challenged the termination as contrary to Section 9(b).[28] The D.C. Circuit rejected this argument, holding that "the licenses were not withdrawn, suspended, revoked or annulled, *but rather terminated on their own terms*. We hold, therefore, that neither appellant was entitled to a hearing under section 9(b)."[29]

In any event, even assuming *arguendo* that Section 312 applies here, no purpose would be served in holding an evidentiary hearing because there is no factual dispute as to the terms of Globalstar's contract and its arrangements for construction of its 2 GHz MSS system. There is only a pure question of law as to whether those arrangements satisfied the initial milestone. Where there are no material questions of fact to be resolved, only questions of law, the FCC is not required to hold a purposeless evidentiary hearing.[30]

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[27] *See Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1197 (D.C. Cir. 1985) ("*Atlantic Richfield*").

[28] *See id.* at 1199-1200.

[29] *Id.* at 1202 (emphasis added). In conducting its analysis under Section 9(b), the D.C. Circuit drew parallels to the *Temmer* case. *See id.* at 1201.

[30] *See, e.g., U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 2002-05 (1956); *Alabama Power Company v. FCC*, 311 F.3d 1357, 1372 (11th Cir. 2002) ("APCo must therefore identify a material question of fact that warrants a hearing. But its dispute is only over . . . a legal issue that hardly warrants an evidentiary hearing since no material facts are disputed."); *RKO General, Inc. v. FCC*, 670 F.2d 215, 231 (D.C. Cir. 1981) ("*RKO*") (where the Commission needs only to "draw legal conclusions from 'facts already known,'" it is "not required to . . . reopen the proceeding for an evidentiary hearing that would have served no purpose") (quoting *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919, 924 (D.C. Cir. 1973)); *Network Project v. FCC*, 511 F.2d 786, 796 (D.C. Cir. 1975) (a hearing is not necessary where the Commission's decision is based on "inferences and conclusions drawn from undisputed facts"); *Citizens for Allegan County, Inc. v. Fed. Power Commission*, 414 F.2d 1125, 1128 & n.5 (D.C. Cir. 1969) ("The right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing."); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 171 (D.C. Cir. 1968) ("inferences to be drawn from facts already known and the legal conclusions to

B. The FCC Properly Found that Globalstar Was Afforded Fair Notice

Petitioners further contend that Globalstar was not afforded fair notice of the Commission's milestone standards as required by due process. The Commission is obligated to ensure that a regulated entity has fair notice of the agency's requirements for milestone compliance,[31] but is not required to "prescribe all-inclusive, specific, and detailed terms" for contractual arrangements.[32] The D.C. Circuit has made clear that questions of fair notice turn not only on the specific language of the applicable rule or condition, but also on "'other public statements issued by the agency.'"[33] As discussed below, based upon review of the regulatory requirement and relevant precedent and agency statements, the FCC and the Bureau properly found that Globalstar knew or should have known that its contract would not satisfy the initial milestone, resulting in the automatic cancellation of its license.

Petitioners contend that the license condition was unclear, because it stated that it would become null and void for non-compliance "if the station is not constructed, launched and placed

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be derived from those facts" may be made by the Commission without an evidentiary hearing); *TelePrompTer Cable Systems, Inc.*, 52 F.C.C.2d 1263, 1264 & n.2 (1975) ("[E]ven if Section 312 were applicable, it is difficult to see what there would be to hear, given our view of the case. . . . It seems to us beyond question that 'once evidentiary facts are undisputed, a hearing serves no purpose.'") (quoting Gellhorn & Robinson, Summary Judgment in Administrative Adjudication, 84 Harv. L. Rev. 612, 630 (1971)), *remanded on other grounds*, 543 F.2d 1379 (D.C. Cir. 1976).

[31] *See McElroy Electronics Corp. v. FCC,* 990 F.2d 1351, 1358 (D.C. Cir. 1993) (making clear that fair notice requires "not . . . that the agency [has] made the clearest possible articulation," but "only that, based on a 'fair reading' of its order, the petitioners knew or should have known what the Commission expected of them") (citing *RCA Global Communications, Inc. v. FCC*, 758 F.2d 722, 730-31 (D.C. Cir. 1985)).

[32] *FCC Order* at ¶ 12 (citing *Lakeshore Broadcasting, Inc., v. FCC*, 199 F.3d 468 (D.C. Cir. 1999) ("*Lakeshore*"); *Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618 (D.C. Cir. 2000) ("*Trinity*")).

[33] *Trinity*, 211 F.3d at 628 (quoting *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)).

into operation by the following dates."[34] According to Petitioners, although seven milestone deadlines were imposed, "only three concerned construction, launch and operation," and these three do not include the non-contingent contract milestone.[35] This new legal argument does not withstand scrutiny.[36] The Commission has long defined the commencement of construction as entering into a non-contingent construction contract.[37] Indeed, Globalstar itself has previously acknowledged as much, explaining that "GLP had in fact commenced construction by entering into a non-contingent satellite contract."[38] Globalstar was thus fully aware under the terms of its authorization that failure to enter into a compliant manufacturing contract was equivalent to failing to commence construction, which would render its license null and void.

Petitioners also reiterate prior assertions that no precedent existed holding that a construction contract that did not provide for completion of construction in accordance with the milestone deadlines would not meet the initial milestone.[39] According to Petitioners, the only applicable case law -- the decision in *The Boeing Company*, 18 F.C.C.R. 12317 (IB/OET 2003)

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[34] Petition at 18 (quoting *GLP Authorization Order*, 16 F.C.C.R.. at 13759).

[35] *See* Petition at 18-19.

[36] *See* 47 C.F.R. § 1.106(b)(2), (3) (petition which fails to rely on new facts or changed circumstances subject to dismissal).

[37] *See, e.g., Tempo Enterprises, Inc.*, 1 F.C.C.R. 20, 21 (1986) ("*Tempo*"); *AMSC Subsidiary Corp.*, 8 F.C.C.R. 4040, 4042 n.27 (1993); *Norris Satellite Communications, Inc.*, 12 F.C.C.R. 22299, 22303 (1997); *Morning Star Satellite Company, LLC*, 15 F.C.C.R. 11350, 11352 (IB 2000), *aff'd*, 16 F.C.C.R. 11550 (2001); *see also FCC Order* at ¶¶ 3, 5, 7.

[38] *See* Globalstar, L.P., Emergency Application for Review, re: File No. 183/184/185/186-SAT-P/LA-97 *et al.*, at 16 (Mar. 3, 2003) (asserting that "GLP had in fact commenced construction by entering into a non-contingent satellite contract").

[39] *See* Petition at 19; *see also* 47 C.F.R. § 1.106(b)(3) (repetitious petitions subject to dismissal).

-- came too late, after the milestone had passed.[40] Petitioners simply dismiss the long-standing *Tempo* case and its progeny, cited in the *FCC Order* and the *Bureau Order*, which made clear that the execution of a contract that does not provide for complete construction of the satellites by the deadlines specified in the license does not satisfy the initial construction commencement/non-contingent contract milestone.[41] These cases all preceded the milestone deadline. Thus, invocation of the *Boeing* case is a red herring.[42]

Finally, Petitioners assert that Globalstar lacked fair notice of what was expected of it under the rules, contending now that Section 25.164 codifying the non-contingent contract milestone did not become effective until after the milestone had passed.[43] Regardless of the effective date of Section 25.164, Section 25.161 was in place at the time Globalstar received its authorization, and clearly states that failure to certify compliance with a "required action" specified in the authorization results in automatic termination "without further notice to the licensee."[44] Here, Globalstar was unable to certify that it met the first milestone because, under the aforementioned precedent, its contract was noncompliant; thus, Globalstar was only able to certify to having executed a contract that provided for construction of the system in accordance with deadlines *inconsistent* with those in its authorization. Globalstar was therefore also on notice under Section 25.161 that failure to certify to the "required action" would render its license null and void.

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[40] *See id.* at 19.

[41] *See FCC Order* at ¶¶ 7-11, 20-22 (citing precedent); *Bureau Order* at ¶ 6 (same).

[42] *See FCC Order* at ¶ 22.

[43] *See* Petition at 17; *see also* 47 C.F.R. § 1.106(b)(2), (3) (petition which fails to rely on new facts or changed circumstances subject to dismissal).

[44] *See* 47 C.F.R. § 25.161 (2000).

C. The Decisions Do Not Contravene the Bankruptcy Code or Its Policies

Petitioners contend that the Globalstar license should be reinstated now that Globalstar has emerged from bankruptcy. Petitioners argue that the cancellation of the Globalstar license contradicts the purpose of the Bankruptcy Code for entities to survive bankruptcy,[45] yet that is exactly what Globalstar has done *without* the license -- emerge from bankruptcy as a going concern. The FCC also properly concluded that nullification was not contrary to the automatic stay provision in Section 362 of the Bankruptcy Code because it fell under the agency's regulatory power exception.[46] As Petitioners admit, the purpose of the regulatory exception is to permit governmental entities to "pursue legitimate regulatory objectives" and not to impair a debtor's estate "simply because it is in bankruptcy."[47] As the *FCC Order* explained, the license nullification did not occur because Globalstar was in bankruptcy, it occurred because Globalstar failed to comply with a known regulatory requirement and express licensee condition.[48] The

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[45] Petition at 4.

[46] *FCC Order* at ¶ 33. Section 362(a) preludes "any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate." *See* 11 U.S.C. § 362(a)(3). Section 362(b)(4), however, states that a bankruptcy petition does not stay the "commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . regulatory power." *See* 11 U.S.C. § 362(b)(4). The Second Circuit has held that the cancellation of licenses as null and void for noncompliance with a license condition falls within Section 362(b)(4)'s regulatory exception of the automatic stay. *See In re: FCC*, 217 F.3d at 138 n.8; *accord NextWave Personal Communications., Inc. v. FCC*, 254 F.3d 130, 147-48 (D.C. Cir. 2001) ("The Second Circuit spoke clearly and unequivocally about this issue, stating that . . . 'we hold that the FCC's regulatory decisions fall within [subsection] 362(b)(4).' . . . [W]e will thus assume that the *license cancellation falls within the regulatory power exception to the automatic stay.*") (emphasis added). The Supreme Court later found that a government agency's regulatory powers were trumped under a separate section of the Bankruptcy Code, 11 U.S.C. § 525, when the non-payment of a debt dischargeable in bankruptcy is at issue. *See FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003). Here, however, as the FCC found, there is no debt at issue. *See FCC Order* at ¶ 33.

[47] Petition at 4.

[48] *See FCC Order* at ¶ 33.

regulatory condition existed to ensure licensees were proceeding with their licensed systems for the benefit of the public -- a valid regulatory objective.[49]

D. The FCC Properly Treated Globalstar's System as an Integrated System

Petitioners also assert that the cancellation of the single GSO satellite that Globalstar intended to construct within its milestone deadlines -- out of the 64 NGSO and 4 GSO satellites it was licensed to build -- was wrongly cancelled based on an "integrated system" policy of which it lacked fair notice.[50] The *FCC Order*, however, properly upheld the nullification of Globalstar's authorization, which was based upon construction of a 64 NGSO/4 GSO "satellite system" by certain deadlines.[51] This is not a "new" policy, but a recognition that the execution of a contract for the timely construction of only 1% of the licensed system is plainly not in accordance with the "satellite system" it was authorized to construct. Accordingly, the FCC properly concluded that "by not contracting to construct its integrated satellite system within the timeframe required by its license, Globalstar did not comply with the first milestone."[52]

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[49] *See FCC Order* at ¶¶ 1, 3, 7.

[50] *See* Petition at 24-25.

[51] *See GLP Authorization Order* at ¶ 50.

[52] *FCC Order* at ¶ 25.

CONCLUSION

For the reasons stated above and in prior submissions by the Carriers in this proceeding, the "Petition for Reconsideration" should be rejected and the *FCC Order* upheld.

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CERTIFICATE OF SERVICE

I, Patrice Wilson, hereby certify that copies of the foregoing "Opposition to the Petition for Reconsideration" have been served this 10th day of August, 2004, by United States mail, first class postage prepaid, on the following:

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