Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
GLOBALSTAR, L.P.	File Nos.: SAT-LOA-19970926-00151-154 SAT-LOA-19970926-00156; SAT-AMD-20001103-00154; SAT-MOD-20020717-00116-119 SAT-MOD-20020722-00107-110 SAT-MOD-20020722-00112
For Modification of License for a Mobile Satellite Service System in the 2 GHz Band	Call Signs S2320/21/22/23/24
For Waiver and Modification of Implementation Milestones for 2 GHz MSS System	

REPLY OF GLOBALSTAR LLC and GLOBALSTAR SATELLITE LP

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Date: August 20, 2004

REPLY OF GLOBALSTAR LLC and GLOBALSTAR SATELLITE LP

Globalstar LLC and Globalstar Satellite LP (collectively, "Globalstar") hereby reply to the Opposition of AT&T Wireless Services, Inc. and Cingular Wireless LLC (collectively, "the Carriers") to Globalstar's Petition for Reconsideration of the Memorandum Opinion and Order, FCC 04-126 (released July 26, 2004) ("FCC Order").[1]

I. THE CARRIERS LACK STANDING TO OBJECT.

Section 309(d)(1) of the Communications Act of 1934 requires a party objecting to the grant of a radio license to allege sufficient facts to demonstrate standing, specifically, that grant of the license would cause injury in fact to that party.[2] The Carriers have not demonstrated a legally sufficient injury that they would suffer if the 2 GHz MSS licenses originally issued to Globalstar, L.P. ("GLP") are reinstated. The Carriers are not competing applicants or licensees; the Globalstar Mobile-Satellite Service ("MSS") system is not a competitor in the cellular/PCS markets in which the Carriers provide service.[3] The Carriers have no right of access to any 2 GHz MSS spectrum that could be assigned to the GLP licenses.

The Carriers cannot establish standing by claiming that reinstatement of GLP's 2 GHz MSS licenses would impede their access to 30 MHz of Advanced Wireless Service ("AWS")

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[1] To the extent any argument in the Petition for Reconsideration might be deemed a "new" argument, as the Carriers claim, the Commission has the discretion to review such argument and correct legal errors in its decision. See 47 U.S.C. § 405(a).

[2] See, e.g., PCS 2000, L.P., 12 FCC Rcd 1681, 1685 (1997); Brian L. O'Neill, 6 FCC Rcd 2572, 2574 (1991).

[3] See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 17 FCC Rcd 12985, § II(A)(1) (2002) (defining "mobile telephony" as SMR, cellular and broadband PCS). The Commission considers MSS a complement to rather than a competitor of cellular/PCS. See, e.g., Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum For Use by the Mobile Satellite Service, 12 FCC Rcd 7388, 7394-95 (1997).

spectrum reallocated from 2 GHz MSS to terrestrial use.[4] The AWS allocation cannot now be nullified without completely independent action by the Commission outside this proceeding. Moreover, the Commission has not completed the AWS service rules; it is still speculative whether these Carriers are eligible for AWS, or if eligible, whether they will apply. Finally, the Commission has decided that at least 40 MHz of spectrum at 2 GHz must be preserved for MSS.[5] Globalstar would operate within that 40 MHz allocation, not in any spectrum available to the Carriers. Accordingly, the Commission should dismiss their Opposition for lack of standing.

II. THE COMMISSION UNLAWFULLY REVOKED GLP'S LICENSES WITHOUT A HEARING.

The Carriers argue that the Commission was not required to follow the hearing requirements of Sections 309 and 312 of the Communications Act, nor of Section 9(b) of the Administrative Procedure Act ("APA") because those statutes only apply to license *revocations,* and *cancellation* of a license for failure to meet a condition is not revocation of a license.

With respect to these terms, the Carriers are simply wrong. Notably, the Commission itself referred to the cancellation of GLP's licenses as a "revocation" in the FCC Order (¶ 1). And, "cancellation" of a license has been deemed a revocation by the Court of Appeals for the D.C. Circuit.[6] The Carriers espouse a theory that there is a meaningful difference between a

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[4] See Opposition of AT&T Wireless, Cingular Wireless and Cellco Partnership to Globalstar, L.P.'s Emergency Application for Review, at 1 n.2 (filed Mar. 18, 2003).

[5] See 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, 18 FCC Rcd 2223, ¶ 31 (2003). Both Carriers have joined an effort by CTIA to lobby the Commission not to authorize use of the 1995-2000 MHz band for AWS. See CTIA Ex Parte Letter to Ms. Marlene H. Dortch, WT Dkt. No. 00-258 (filed July 30, 2004).

[6] See NextWave Personal Communications, Inc. v. FCC, 254 F.3d 130, 140 (D.C. Cir. 2001), aff'd, FCC v. NextWave Personal Communications, Inc., 537 U.S. 293 (2003).

cancellation for failure to satisfy a license condition and a revocation for previously-unknown misconduct. But, this theory cannot be used now to justify an unlawful revocation because the D.C. Circuit and the Commission have equated cancellations and revocations.

Next, the Carriers claim that statutes cited by Globalstar are not applicable because GLP only held licenses conditioned on future performance which are "unperfected" licenses not subject to any notice-and-hearing requirement if the licensee fails to meet the condition. Again, the Carriers have misstated the applicable law. Assuming for this response that the Commission can impose an automatic cancellation condition on a license,[7] the cases cited by the Carriers involve situations where an agency did not have a pre-revocation hearing because it was not possible for the licensee to come into compliance with the rule for holding the license at issue.

For example, in Peninsula Communications, Inc. v. FCC, 2003 U.S. App. LEXIS 1713 (Jan. 30, 2003), the Commission cancelled certain FM translator station licenses after granting renewal *solely* so that the licensee could divest itself of those licenses through simultaneously-granted assignment applications. The Commission determined that Peninsula's stations violated a rule governing co-ownership of full-power and translator stations, and, therefore, that Peninsula was ineligible to continue to hold the licenses.[8] Four years later, when Peninsula still had not yielded ownership of the stations, the Commission cancelled the prior grants of renewal and assignment, and rescinded the licenses which Peninsula was ineligible to hold.[9]

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[7] See Petition for Reconsideration, at 5-12. The fundamental issue raised by Globalstar is whether the Commission has the authority to place a condition on a license that abrogates the licensee's right to a pre-revocation hearing under Section 312(c) of the Act. The Carriers present no answer to that argument.

[8] See Peninsula Communications, Inc., 13 FCC Rcd 23992 (1998).

[9] See Peninsula Communications, Inc., 16 FCC Rcd 11364 (2001).

The D.C. Circuit affirmed the Commission's decision to cancel the licenses. Peninsula argued that the cancellations constituted a revocation under Section 312 and required a hearing procedure. The court held that the conditions on the renewal eliminated the need for a Section 312 hearing.[10] The renewal had been granted solely for purpose of divestiture; there was no issue after that whether Peninsula should retain the licenses.

Similarly, in Atlantic Richfield Co. v. United States, 774 F.2d 1193 (D.C. Cir. 1985), the court concluded that the hearing requirement in Section 9(b) of the APA was not applicable to the Maritime Administration's cancellation of certain shipping licenses. Significantly, the court noted that the APA's due process requirements *are* applicable to short-term or restricted licenses, and that the hearing procedure is designed to allow the licensee to establish compliance or to change its conduct to meet the license requirements prior to revocation.[11] In this case, however, the license cancellation was the result of "an objective condition that [was] beyond the control of the licensee" to change since it involved the status of other companies' ships.[12] Moreover, the court noted that the appellants could immediately reapply for these shipping licenses and present any evidence in their applications to obtain the new licenses.

Peninsula and Atlantic Richfield are inapposite here where the Commission had to analyze whether GLP was in compliance with the milestone requirements and applied a new policy retroactively to determine that it was deficient, where GLP could have corrected, and

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[10] The court did not address the issue raised by Globalstar whether Congress has empowered the Commission to condition licenses in a manner inconsistent with Section 312. Moreover, by deciding not to publish the Peninsula decision in the Federal Reporter, "the panel [saw] no precedential value in that disposition." D.C. Cir. R. 36(c)(2).

[11] Atlantic Richfield, 774 F.2d at 1200-01.

[12] Id. at 1201.

indeed asked for the opportunity to correct, any deficiency found by the Commission in its compliance with milestones, and where, as a practical matter, there is no opportunity to reapply for a 2 GHz MSS license in the United States. Accordingly, a Section 312 hearing was required to allow GLP to establish compliance or to come into compliance with the milestone policy.

P&R Temmer v. FCC, 743 F.2d 918 (D.C. Cir. 1984), also relied on by the Carriers, was decided under Section 316, not Section 312, but is inapposite for other reasons as well. In that case, the court ruled that the notice-and-hearing requirement in Section 316 of the Communications Act for modification of licenses was not triggered when the Commission re-issued the appellants' licenses with fewer channels for failure to meet a service-based loading condition. To retain access to 20 channels, the licensees were required to meet a certain subscriber population on five channels after two years. Accordingly, this case also represents a situation where a hearing would have resolved no controverted issues because the licensees were fully aware of the loading policy, and became ineligible to hold a 20-channel license after two years. In contrast, GLP's licenses did not cancel automatically; the Commission had to interpret its rules to determine whether the initial milestone was met. Moreover, GLP had no notice of the rationale for the revocation of its MSS licenses, and the facts underlying the milestone extension requests were not known when GLP's licenses were issued. The failure to grant a hearing to the licensees' in P&R Temmer is of no relevance to the Commission's imposition of the extreme sanction of license revocation in the circumstances encountered by GLP.[13]

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[13] In any event, the licensees in P&R Temmer did not lose their licenses, as did GLP; the licensees were still "licensed" after the loss of 15 channels. Indeed the court concluded that the licensees' failure to satisfy the condition did not effect a modification of their "rights under their licenses." 743 F.2d at 928. The Carriers also refer to Commission cases where it has decided that Section 312 is not triggered by cancellation of a license for failure to meet a condition. See Glendale Electronics, Inc., 19 FCC Rcd 2540 (2004). Those cases rely on P&R Temmer and

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Even if the Carriers are correct that a Section 312 hearing is unnecessary in some cases, that is not true in this case because the Commission itself indicated that a hearing was required. In explaining why it denied GLP's milestone extension requests (FCC Order, ¶ 31 (emphasis supplied)), the Commission indicated that there were unresolved factual issues regarding GLP's ability to implement its authorized 2 GHz MSS system that figured significantly in the decision:

> Finally, we are not convinced by Globalstar's claims that a milestone waiver was warranted . . . by its statements of its intent to proceed. Given that Globalstar has entered into bankruptcy, *we have questions* regarding whether Globalstar has the financial ability to proceed with its business plan. Moreover, based on Globalstar's stated difficulties in constructing its entire system, and its lack of any statement that it was willing to proceed with a system modified to a single satellite, *we also question* whether Globalstar in fact intended to construct the entire 2 GHz MSS system it proposed in its original license application or its 2002 modification application. *These questions* preclude us from basing a milestone waiver on Globalstar's assertions of its intent to proceed with its satellite system and to provide service.

Section 309(e) of the Communications Act states that if "a substantial and material question of fact is presented or the Commission for any reason is unable to make a finding . . . , it shall formally designate the application for hearing on the ground or reasons then obtaining. . . ."[14]

GLP's milestone extension requests proposed changes to the 2 GHz MSS licenses that were considered "major" under the Commission's Rules; hence, the Commission's disposition of the applications were governed by Section 309(e) of the Act, which requires a hearing to resolve

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Peninsula, discussed above, and do not explain the question raised by Globalstar in its Petition regarding the Commission's authority to eliminate pre-revocation hearing rights.

[14] 47 U.S.C. § 309(e). Section 309(e) applies to applications subject to Section 308 including applications for "station licenses, or modifications." The Carriers mistakenly assume that Section 309(e) only applied to GLP's applications for technical modification. Opposition, at 3 n.5. The applications for modification of the milestones were also subject to this requirement.

substantial and material questions of fact. Whether GLP had the intent to proceed with construction of its proposed system and its financial ability to proceed were the ultimate facts underlying the decision of the Commission whether to grant the milestone extension requests or a waiver of the milestone requirements.[15]

Similarly, as a prerequisite to revocation of a license, Section 312(c) directs the Commission to afford the licensee notice and hearing that complies with the procedural requirements of the APA. Even if some of the facts are known, the Commission has recognized that "[a]pplication denial and license revocation cannot proceed as a matter of law without a hearing on all the relevant facts."[16] The Commission released the FCC Order based on substantial doubt regarding relevant and material facts. Accordingly, pursuant to the Act, the Commission was obligated to notify GLP why the Commission believed GLP had not met the first milestone and to give GLP an opportunity for a further hearing.[17]

III. THE FCC ORDER UNLAWFULLY APPLIED NEW POLICIES RETROACTIVELY TO GLP'S EXTENSION REQUESTS.

In canceling GLP's 2 GHz MSS licenses, the Commission decided that a satellite construction contract, submitted to meet the first milestone, incorporating variations from the space station authorization that are reflected in a simultaneously filed modification application, cannot meet the satellite construction milestone if the Commission denies the modification

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[15] For example, the Commission has previously found that entering into a non-contingent construction contract constitutes intent to proceed with the authorized satellite system. See GE American Communications, Inc., 16 FCC Rcd 11038, 11041-42 (Int'l Bur. 2001); GE American Communications, Inc., 7 FCC Rcd 5169, 5170 (CCB 1992).

[16] MobilMedia Corp., 12 FCC Rcd 14896, 14901 (1997) (citing §§ 309(e), 312(a), 312(c)).

[17] See Anchustegui v. Department of Agriculture, 257 F.3d 1124, 1129 (9th Cir. 2001) (reversing license revocation for failure of agency to meet APA's requirement of adequate notice and hearing prior to license revocation).

application. The Carriers claim that GLP should have been able to divine this policy from GLP's 2 GHz MSS license. To the contrary, that policy was not stated in any rule, or in GLP's 2 GHz MSS license, or in any prior cases, or in "other public statements issued by the agency." (Opposition, at 10, quoting Trinity Broadcasting of Florida v. FCC, 211 F.3d 618, 628 (D.C. Cir. 2000).) Six months after the cancellation decision (June 24, 2003), the International Bureau formally announced the policy in an order granting a modification application for the 2 GHz MSS system of The Boeing Company.[18] The inescapable conclusion from the Bureau's *ex post facto* articulation of its policy in the Boeing Order is that satellite licensees were unaware of this policy when GLP negotiated its satellite construction contract in 2002.

Certainly, the 2 GHz MSS satellite licenses do not even begin to explain the gloss that the Commission places on the various satellite construction milestones, much less explain what the Commission requires to enter into a satisfactory non-contingent contract. The Carriers claim, based on Tempo Enterprises, Inc. and its progeny,[19] that the Commission properly canceled GLP's licenses because its satellite construction contract failed to reflect the milestone dates set forth in GLP's 2 GHz MSS licenses. But, as Globalstar explained in its Petition, there is no such standard for *per se* disqualification. The contract terms varied from the original milestone schedule, and GLP submitted the milestone extension requests in reliance on the policy that a

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[18] The Boeing Company, 18 FCC Rcd 12317, 12328 n.56 (IB/OET 2003) ("Boeing Order") ("Had we denied the request for license modification, on the other hand, we could not have found that Boeing's arrangements for construction of a GSO system satisfied the first milestone requirement.").

[19] See Tempo Enterprises, Inc., 1 FCC Rcd 20 (1996).

contract that does not exactly reflect the authorization, accompanied by a modification request, is not automatically deemed non-compliant with the satellite construction milestone.[20]

The Carriers are unable to point to one published decision (in all the Tempo line of cases) that explicitly held that a 2 GHz MSS licensee could not enter into a non-contingent construction contract that provided for completing construction within the milestone schedule proposed in a simultaneously-filed application for a modification of license. The Carriers and Commission cannot seriously entertain the assumption that a licensee who diligently negotiated and executed a contract and commenced paying several million dollars for construction of satellites would have done so if Commission precedent indicated a substantial risk that the licenses would be cancelled. The fact is that there was no "precedent" for the cancellation of GLP's licenses.

To impose the sanction of revocation, the Commission must provide explicit notice of the rule being enforced. As the D.C. Circuit has noted: "The less forgiving the FCC's acceptability standard, the more precise its requirements must be."[21] Notice of the Commission's policy on milestones applied to GLP was not given until the Boeing Order – one year after GLP had entered into its satellite construction contract in reliance on existing rules and policies and filed its milestone modification applications, and six months after GLP's licenses were cancelled. Prior to that time, not only was there no indication that the Commission had adopted such a policy, but there was significant evidence to the contrary. "The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules."[22] This is exactly the consequence of the FCC Order in

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[20] See Teledesic LLC, 17 FCC Rcd 11263, 11265-66 (Int'l Bur. 2002).

[21] Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 1985).

[22] Satellite Broadcasting Co., Inc. v. FCC, 824 F.2d 1, 3-4 (D.C. Cir. 1987).

contravention of a long line of precedent. It is arbitrary and capricious and an abuse of agency discretion.[23]

IV. CONCLUSIÓN

For the reasons set forth above, Globalstar LLC and Globalstar Satellite LP petition the Commission to reconsider the FCC Order, modify that order, and reinstate GLP's 2 GHz MSS licenses.

Respectfully submitted,

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[23] The Carriers attempt to rebut Globalstar's arguments regarding the effect of GLP's bankruptcy on the Commission's decision and the unlawful application of a *post hoc* "integrated system" policy used to cancel GLP's North American geostationary satellite. Opposition, at 13-14. In both instances, the Carriers simply repeat statements from the FCC Order which already have been refuted in Globalstar's Petition.

CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 20th day of August 2004, caused to be served true and correct copies of the foregoing "Reply of Globalstar LLC and Globalstar Satellite LP" upon the following persons via hand delivery (marked with an asterisk (*)) or first-class United States mail, postage prepaid:

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