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September 21, 2009

BY HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
455 12th Street, S.W.
Washington, D.C. 20554

FILED/ACCEPTED

SEP 21 2009

Federal Communications Commission
Office of the Secretary

**REDACTED
For Public Inspection**

**Re: ATCONTACT Communications, LLC, Petition for Reconsideration of
International Bureau Order DA 09-1850**

**REQUEST FOR CONFIDENTIAL TREATMENT - REDACTED - Petition for
Reconsideration of AtContact Communications, LLC**

Dear Ms. Dortch:

ATCONTACT Communications, LLC (“AtContact”), pursuant to the provisions of Sections 0.457 and 0.459 of the Commission’s Rules governing submission of confidential materials,¹ respectfully requests that the unredacted copy of its Petition for Reconsideration, Motion for Stay, and accompanying exhibits of the above-referenced *Order* be afforded confidential treatment and not be placed in the Commission’s public files. AtContact is submitting a redacted version of the petition, motion, and accompanying exhibits simultaneously.

The redacted portions constitute or discuss commercial arrangements between AtContact and third parties that are ongoing. These arrangements include the contract between AtContact and Space Systems/Loral (“Loral”) as well as the agreement to purchase certain Travelling Wave Tube Amplifiers (“TWTA”s) between AtContact and another company. That material qualifies as “commercial or financial information” that “would customarily be guarded from competitors” regardless of whether or not such materials are protected from disclosure by a privilege.² In

¹ 47 C.F.R. §§ 0.457, 0.459.

² See 47 C.F.R. § 0.457(d); *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (“[W]e conclude that financial or commercial information provided to the

(Continued ...)

addition, one of the redacted documents (a test report conducted by Loral for certain of the TWTAs) is said to include information that is controlled by the International Traffic in Arms Regulations (“ITAR”). Release of ITAR-controlled information has serious national implications and its confidentiality, therefore, must be protected.³ ITAR-controlled information may only be shared with U.S. persons, as the term is defined in the ITAR, unless authorization from the Department of State is received or a special exemption is issued.⁴ AtContact therefore requests that review of this material by Commission staff be confined to U.S. persons.

As an initial matter, most businesses do not publicly reveal their contracts or details about negotiations for proprietary and sophisticated equipment that enable them to provide services to the marketplace. Thus, this type of information would be the type of commercial information that “would not customarily be released to the public” and should be treated as confidential. In addition, companies, including AtContact, as well as (to AtContact’s knowledge) Loral and the company that has agreed to sell the TWTAs, routinely guard information about their future plans or operations from their competitors, including who they are doing business with. Thus, the Commission should treat the redacted information as confidential under Section 0.457(d).

In addition, the redacted portions of the materials also contain highly sensitive information that if disclosed could place AtContact, Loral, and the TWTA contracting party at a competitive disadvantage, including specific information regarding future actions and other obligations. There are a number of entities who would stand to benefit competitively from any knowledge of the redacted items in the petition and its exhibits.

In support of this request and pursuant to 47 C.F.R. § 0.459(b), AtContact hereby states as follows:

1. The information for which confidential treatment is requested includes information on commercial arrangements that are ongoing, with future

Government on a voluntary basis is ‘confidential’ for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.”); *see also DIRECTV, Inc.; Request for Special Temporary Authority to Relocate DIRECTV 3 to 82° W.L. and to Conduct Telemetry, Tracking and Command (“TT&C”) Operations for an Interim Period*, File No. SAT-STA-20030903-00300 (application in which the FCC accepted redacted contract as part of record).

³ 47 C.F.R. § 0.457(a).

⁴ 15 C.F.R. § 734.2(b)(2). A “U.S. person” means “a person . . . who is a protected individual as defined by 8 U.S.C. § 1324b(a)(3). It also means any corporation, business association, partnership, society, trust or any other entity, organization or group that is incorporated to do business in the United States. It also includes any governmental (federal, state or local) entity. It does not include any foreign person as defined in § 120.16 of this part.” 22 C.F.R. § 120.15.

obligations of the parties still to be finally determined. A redacted version of the petition and its exhibits is being filed simultaneously with this submission.

2. The redacted information is being submitted as part of AtContact's petition for reconsideration and motion for stay of the Bureau's *Order* nullifying its authorization for an NGSO/GSO Ka-band satellite system.
3. The redacted portions of the attachment contain sensitive commercial information. Specifically, the redacted information addresses the nature of the relationships between AtContact, Loral, and the TWTA contracting party that are ongoing and still subject to future definition. In addition, some of the redacted information is said on the face of the relevant document to be subject to ITAR control, as duly noted on the attachment, and must be protected for national security reasons. All of this information is commercial information that has not been made public and is not available to the parties' competitors.
4. The redacted information pertains to the construction of AtContact's satellite system. The satellite industry is a competitive market with a diversity of operators, providers and users.⁵ Various competitors could potentially use the redacted information to gain an advantage in the different satellite service and satellite construction markets.
5. Disclosure of the redacted information could result in substantial competitive harm to AtContact and the other parties concerned. The redacted information regarding future operations would give the parties' competitors advanced notice of future plans that have not previously been made public. This would allow these competitors to take steps to counter whatever advantage the parties may gain in the market based on the future operations of AtContact's satellite system. In addition, the redacted information regarding commercial terms and obligations could prejudice both parties in future service contract negotiations. It is easy to envision a competitor of AtContact, for instance, seeking to obtain certain terms in that company's own relationship with Loral based on the discussion of the relationship between AtContact and Loral, if this discussion were in the public domain.

⁵ See generally Second Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Service, IB Docket No. 07-252, *Second Report*, FCC 08-247 (rel. Oct. 16, 2008)

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6. AtContact and (to AtContact's knowledge) Loral and the TWTA contracting party take significant measures to ensure that this confidential information is not disclosed to the public.
7. The redacted material for which non-disclosure is sought is not available to the public.
8. AtContact requests that the redacted materials be withheld from disclosure for an indefinite period. Disclosure of this information at any time could jeopardize the competitive positions of the parties mentioned and could threaten national security due to the claimed status of some information as ITAR-controlled.
9. Finally, AtContact notes that a denial of its request that this information be kept confidential would impair the Commission's ability to obtain this type of voluntarily disclosed information in the future. The ability of a government agency to continually obtain confidential information was behind the legislative purpose in developing exemptions from the Freedom of Information Act.⁶ The U.S. Court of Appeals for the D.C. Circuit has recognized a "private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis."⁷ The Commission should extend a similar recognition to the redacted materials.

AtContact requests that the Commission return the relevant portions of the submissions if its request for confidentiality is denied. *See* 47 C.F.R. § 0.459(e). To the extent that the Commission concludes that the disclosure of some or all of the redacted terms should be made available to any parties to this proceeding, AtContact would be willing to discuss the terms of a Protective Order and provide a somewhat less redacted version of the Agreement for review by outside counsel for those parties.

⁶ *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 878 (D.C. Cir. 1992) ("Where, however, the information is provided to the Government voluntarily, the presumption is that [the Government's] interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation.").

⁷ *Id.* at 879.

Marlene H. Dortch
September 21, 2009
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Respectfully submitted,

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Enclosures

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
ATCONTACT Communications, LLC)	Call Signs: S2346, S2680, S2681, S2682,
)	and S2683
For Authority to Launch and Operate)	
a Non-Geostationary Orbit Fixed-Satellite)	
System in the Ka-band Frequencies)	
)	

EXPEDITED ACTION REQUESTED

To: The International Bureau

PETITION FOR RECONSIDERATION

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EXHIBITS

Before the
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In the Matter of)	
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EXPEDITED ACTION REQUESTED

To: The International Bureau

PETITION FOR RECONSIDERATION

ATCONTACT Communications, LLC (“AtContact”), by its counsel, seeks reconsideration of the *Order* issued by the Chief, International Bureau (“Bureau”) on August 21, 2009, nullifying all of AtContact’s Ka-band FSS satellite licenses.¹ First of all, the Bureau’s action sweepingly cancels AtContact’s licenses for its geostationary (“GSO”) and nongeostationary (“NGSO”) systems alike, based on a claimed failure to commence construction

¹ See *ATCONTACT Communications, LLC, Order*, DA 09-1850 (IB, rel. Aug. 21, 2009) (“*Nullification Order*”). See also *contactMEO Communications, LLC, Order and Authorization*, DA-06-864, 21 FCC Rcd. 4035 (rel. Apr. 14, 2006) (“*Licensing Order*”). The associated file numbers for the licenses are SAT-LOA-19971222-0022, SAT-LOA-20040322-00234/35/36/37, SAT-MOD-20060511-0057/58/59/60, SAT-AMD-20031030-00317, SAT-AMD-20040719-00141, SAT-AMD-20040322-00057, SAT-AMD-20051118-00243, SAT-MOD-20070924-00130, SAT-AMD-20071215-00176, SAT-MOD-20070924-00132, SAT-AMD-20080505-00100, SAT-AMD-20080505-00096, SAT-AMD-20080505-00099, SAT-MOD-20080813-00155, SAT-AMD-20080930-00195, SAT-AMD-20080930-00194. Today, AtContact is also filing a Motion for Stay of the *Nullification Order* and the related Notice of Default issued on August 26, 2009 instructing Safeco Insurance Company of America (“Safeco”) to remit the sum of \$3 million to the United States Treasury. See Letter from Mark Stephens, Chief Financial Officer, FCC, to Safeco Insurance Company of America (Aug. 26, 2009).

of its first NGSO satellite. This draconian sanction does not recognize the fact that the Commission decided to treat the two system authorizations (NGSO and GSO) as “separate.” It is moreover inconsistent with the Commission’s “three-strikes—you’re out” rule. AtContact should not, alone of all Fixed-Satellite Service (“FSS”) licensees, be expelled from the industry with a single strike.

Second, in deciding that AtContact failed to commence construction of its first NGSO satellite, the Bureau improperly heightened the bar set by the applicable standard. Based on “experience” that the Bureau acquired while implementing the Commission’s milestone rule, the Bureau took it upon itself to alter that rule. From now on, it seems to have decided, “commencement of construction” means that the licensee has paid at least 25% of the contract’s price. But being a quarter of the way there is not the same as starting; the test is not a comparative one, where a licensee will fail to meet a milestone if it has done less than some of the licensees who have been found to have met it; and most importantly, the Bureau lacked authority from the Commission to alter the test anyway.

Troublingly, third, this raising of the bar results in discrimination against AtContact in favor of other licensees. Only three years ago, the Bureau confirmed that Digital Globe had met the commencement-of-construction milestone simply on the ground that “long-lead equipment began to be procured from contractors” pursuant to precursor agreements of its then-current satellite construction agreements, and on a conclusory declaration from a company officer. AtContact has accomplished more than Digital Globe, and should not see all of its licenses cancelled when a similarly (indeed worse) situated licensee had its authorization reaffirmed.

But, in any event, AtContact has taken the evidentiary failings identified in the *Nullification Order* to heart. It supplies here additional evidence remedying these failings.

Among other things, the declaration from its satellite manufacturer makes clear that Loral was aware of AtContact's purchase of the [REDACTED] Travelling Tube Wave Amplifiers ("TWTA"s), had successfully tested those all-important satellite components already, and is prepared to incorporate them in AtContact's satellites.

AtContact's proposed use of the [REDACTED] TWTAs is a matter for applause, not castigation. Originally purchased by a company that has since abandoned its satellite construction plans, these components might have gone to the scrap heap if AtContact had not agreed to salvage them. Such creative recycling is necessary in an industry that has huge fixed costs before any service can start, and at a time when Wall Street is particularly disinclined to fund these costs. License cancellation is an undue punishment for AtContact's ability to find a bargain.

But most important of all, reconsideration is warranted by the Commission's public interest mandate. Today, there is no more obvious and more urgent manifestation of the public interest than the need for the Commission to ensure universal broadband availability throughout the nation, and to encourage the widest actual broadband adoption possible. Congress has said so, and so has the Commission. Poignantly, the *Nullification Order* comes on the heels of two applications, one filed by AtContact, the other by AtContact with a Native American partner, requesting federal funding for groundbreaking rural broadband projects using the Ka-band. As witnessed by the Declaration of Mr. Drucker, both of these projects entirely depend on, or would be dramatically enhanced by, use of two of AtContact's licensed GSO orbital locations. They would bring rich and fast Internet access service to the frontier states of Alaska and Hawaii, placing inhabitants of these faraway lands on an almost level field with New Yorkers and Los Angelenos. Nor is this a quixotic dream – AtContact has proved itself by starting to provide some Alaskans with the best satellite broadband service available using existing resources.

Today, AtContact serves more than 100 customers directly and thousands of end users, in Alaska and other rural areas. For example, Mr. Macpherson, whose Declaration is attached and who explains the harm he would suffer if AtContact were to be prevented from upgrading its service, is hardly the only Alaskan resident who is in the same position.

Finally, while advancing the public interest, the reconsideration requested by AtContact will not take away one iota from the goals underlying the Commission's milestone rules in the unusual circumstances of this case. AtContact does not stand in anyone's way, as it has only secondary rights to use of its GSO slots and has already coordinated its NGSO system with Viasat.

I. FAILURE TO MEET THE OCTOBER 15, 2008 NGSO MILESTONE IS ONLY RELEVANT TO THE NGSO LICENSE

A. AtContact's NGSO and GSO Licenses Are Separate.

In its application, AtContact sought authorization for an NGSO satellite system consisting of two components, an NGSO component using three highly elliptical orbit ("HEO") satellites and a GSO component using satellites at four different orbital locations. The Bureau, however, concluded that the proposed GSO FSS satellites are inherently different from NGSO FSS satellite operations and that Part 25 of the Commission's rules contains separate sets of technical requirements for NGSO FSS and GSO FSS. It also noted that the Ka-band plan contains separate designations for NGSO and GSO satellites. As a result, the *Licensing Order* explicitly and emphatically stated that the Bureau would "consider the NGSO and GSO portions of the [AtContact] applications separately."² The Bureau therefore set forth two separate milestone schedules, one for the NGSO satellites and another one for the GSO satellites.³

² *Licensing Order* ¶ 12.

³ *Id.* ¶ 68.

The Bureau did more than just bifurcate NGSO and GSO milestone schedules in its regulatory treatment for each satellite system: It also separated the authorizations issued in its *Licensing Order* by requiring additional application fees for **each** of the four GSO licenses, *i.e.*, in addition to the NGSO filing fee submitted with the system application. This required AtContact to pay additional application fees for four GSO satellites, a further liability of \$393,170.⁴ Further, the Bureau assigned unique call signs to each of the four GSO satellites, in addition to the call sign assigned to the NGSO component, a total of five call signs.

The *Licensing Order* explicitly stated that the “authorization” would become null and void if milestone dates were not satisfied.⁵ But which authorization was intended to apply to which milestone dates and to which call sign? The answer becomes clear and makes sense only if the milestone schedules and associated bifurcated authorizations are viewed as separate, a conclusion that is strongly supported by the Bureau’s saying so and by the exceptional effort the Bureau made to treat the NGSO and GSO components differently. The basis for the Bureau’s *Nullification Order* nullifying all of AtContact’s satellite licenses rests solely with the NGSO milestone schedule — construction commencement for the first NGSO satellite — and therefore should not affect any of the GSO authorizations. Accordingly, whatever the outcome of this Petition with respect to the NGSO milestones, the GSO component remains viable and subject to the Bureau’s further consideration of the matters set forth in AtContact’s February 6, 2009 letter.⁶

⁴ *Id.* ¶ 58.

⁵ *Id.* ¶ 68.

⁶ On February 6, 2009, AtContact responded to the Bureau’s request for information concerning AtContact’s demonstration of commencement of construction of its satellites. AtContact provided specific additional information regarding compliance with its milestones and also included, *inter alia*, a request for a three-year extension of the remaining milestones for its

B. AtContact Did Not Fail to Meet Its NGSO or GSO Milestone Requirements

The separate nature of the GSO and NGSO authorizations means that, whatever the Bureau decides with respect to the NGSO milestones, it should proceed separately also to assess AtContact's progress in connection with the GSO milestones. The evidence demonstrates that AtContact has met all of its commencement of construction milestones. Below, AtContact will discuss in more detail its agreement to buy ■ TWTAs.⁷ These TWTAs can be and were intended to be used for both the NGSO and GSO satellites.⁸ Consequently, AtContact's argument that it met the milestone for commencing construction of the authorized NGSO satellites applies with equal force to the GSO satellites.

Even if the Commission finds that the NGSO milestone was not met, however, the distinction between the NGSO and GSO portions of the authorization keeps the GSO authorization alive because AtContact still has not missed its GSO milestone as it filed a timely request to extend the milestone period. The GSO milestone date April 15, 2009.⁹ The extension request was filed on February 6, 2009, well before this deadline.¹⁰

As explained above, the distinction between the NGSO and GSO portions of the authorization and licenses is an important one. Because the alleged failure to meet the NGSO milestone applies only to the NGSO authorization, the GSO authorization should have been unaffected. This also means that the Commission must address AtContact's requests for

GSO satellites and waiver of the bond requirement, both supported with precedents. The *Nullification Order* failed to reach these issues or consider the array of other public interest considerations AtContact raised. The Bureau must reverse the *Nullification Order* and consider these matters. See Letter from James M. Talens, Counsel for AtContact Communications, LLC, to Marlene H. Dortch, Secretary, FCC (Feb. 6, 2009) ("February 6th Letter").

⁷ See *infra* Section III.B.

⁸ ■ Declaration ¶ 2.

⁹ *Licensing Order* ¶68.

¹⁰ February 6th Letter at 5.

modification of its authorization and extensions of certain GSO satellite milestones. And the public interest, as demonstrated in those requests, warrants that they be granted.

The *Nullification Order's* amalgamation of the two system licenses that were previously held by the Bureau to be separate is erroneous for yet another reason. It means effectively that one missed milestone is enough to expel AtContact from the FSS industry. But the Commission rules, 47 C.F.R. § 25.159, state that it takes three strikes to banish an FSS licensee in that way, and even then only a presumption is created – a presumption that can be rebutted. What is more, assuming the three strikes have occurred and the presumption has not been rebutted, the punishment is less draconian even then: the Commission is only authorized to reduce the number of future applications a licensee can file, not revoke existing and valid authorizations.¹¹ By merging all of AtContact's authorized satellites into a single license, the Bureau would effectively apply a draconian one-strike-you're out rule to AtContact alone.

II. THE COMMISSION IMPROPERLY ESTABLISHED A NEW STANDARD AND TREATED ATCONTACT MORE SEVERELY THAN SIMILARLY SITUATED LICENSEES

A. The Bureau Announced, and then Applied, Never-Before-Announced Rules.

In the *First Come, First Served Order*, the Commission explained that it “would not establish a specific test in this Order. Rather, [the Commission] will require licensees to provide sufficient information to demonstrate to a reasonable person that they have commenced physical construction of their licensed spacecraft.”¹² Yet in the *Nullification Order*, the Bureau abruptly set a higher bar for the milestone.¹³ The Bureau explained that, “[b]ased on our experience in reviewing milestone compliance, at this point in the construction process licensees have

¹¹ 47 C.F.R. § 25.159(d).

¹² *In re Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd. 10760 ¶ 193 (rel. Apr. 23, 2003) (“*First Come, First Served Order*”).

¹³ *Nullification Order* ¶ 9.

generally paid 25-50 percent of the total price in the manufacturing contract due to the cost of procuring parts.”¹⁴

Construction commencement is not a comparative test whereby a licensee fails to meet a milestone if another licensee found to meet the test has done more. If it were, the yardstick would be set based on the conduct of the best-heeled licensee. If that entity has poured the riches of Croesus onto its project by the commencement construction milestone, then all others who fall short have by that token failed to meet the milestone. “Adequate progress” does not mean “no less” progress than that achieved by some other licensees. Rather, the purpose of this test is a different, and simple, one: to provide “additional assurance that licenses are making adequate progress towards constructing and launching their satellite systems”¹⁵

The Bureau’s mention of its acquired experience further confirms that it uses a different test now than it did before that experience was acquired. That is, the 25-50 percent requirement is a new standard that the Bureau has formulated only after six years of granting and denying construction commencement milestones. Those previous grants and denials, however, were not based upon the 25-50 percent requirement, but the Commission’s reasonable person standard. Without notice, the Bureau announced the new percentage-based requirement and applied it to AtContact’s milestone submission at the same time.

There are manifold problems with this standard. It is not consistent with common sense; the Bureau lacked authority to promulgate it; AtContact lacked any notice that this was the yardstick by which its conduct would be measured; and it retroactively upset AtContact’s settled expectations.

¹⁴ *Id.*

¹⁵ *First Come, First Served Order* ¶ 173.

The idea that, to have *commenced* construction, the licensee must have spent at least 25% of the system's total price is not only new, it sets a higher bar than any reasonable commencement standard and than suggested by the literal meaning of the verb "commence." The Oxford English Dictionary defines "commence" as "to make a start or beginning; to come into operation."¹⁶ Starting work is one thing; paying for or completing one quarter of the work is another. Moreover, the failure to even suggest a definition of "commencement" in the *First Come, First Served Order* points to a purposeful flexibility that is now being reversed for no apparent reason. Where the Commission has spoken, the Bureau does not have delegated authority to alter the rule or make a standard more stringent without giving AtContact notice of the new rules.¹⁷ It is only the Commission that has the authority to alter that standard by means of an evolving "common-law"-like jurisprudence.

AtContact did not have any notice of the Bureau's new requirement. A longstanding body of precedent keeps the agency from arbitrarily and capriciously canceling licenses on account of failings that are based on such new-minted standards.¹⁸ The Commission and the Courts have acknowledged that regulated entities should not be held to unclear rules, precisely because the lack of notice was a function of the rule's ambiguity meant the licensee or other regulated party lacked sufficient notice.¹⁹ In fact, in a similar case of ambiguity involving the

¹⁶ Oxford English Dictionary (2nd ed. 1989).

¹⁷ See 47 C.F.R. § 0.261 (setting forth the authority delegated to the International Bureau). 47 C.F.R. § 0.261(b) limits the International Bureau by declaring that it "shall not have the authority [t]o act on any application, petition, pleading, complaint, enforcement matter, or other request that . . . [p]resents facts or arguments which appear to justify a change in Commission policy." *Id.*

¹⁸ See, e.g., *Jelks v. FCC*, 146 F.3d 878 (D.C. Cir. 1998) (holding that the FCC must provide notice of changes in requirements for radio broadcast application).

¹⁹ See *Licensing Order* at n.97 (explaining that the Division issued a Public Notice clarifying the Commission's rules because contactMEO's and several other applicants' failures

rules for FSS applications, the Commission provided applicants with the opportunity to amend their applications to supply additional information.²⁰ Here, the lack of notice is more troubling: the standards enunciated in the decision were not merely of doubtful applicability; they were impossible to discern prior to the *Nullification Order*.

Even setting aside the question of the Bureau's delegated authority, the attempted departure from the *First Come, First Served Order* is improperly retroactive both in the primary and the secondary sense. It is primarily retroactive because it attaches new consequences to past action – the expenditures made on a system are no longer enough if less than 25% of its price.²¹ It is also retroactive in the secondary sense as it upsets AtContact's investment-backed expectations.²² The courts have set forth a non-exhaustive list of five factors to consider for this kind of retroactivity:

- (1) whether the particular case is one of first impression,
- (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law,
- (3) the extent to which the party against whom the new rule is applied relied on the former rule,
- (4) the degree of the burden with a retroactive order imposes on a party, and
- (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.²³

All of these factors point to reconsideration here. First, this is no case of first impression. The Bureau has adjudicated many times whether to grant a milestone for the commencement of

to submit a two-degree analysis were “based on a reasonable but incorrect interpretation of the Commission's rules”).

²⁰ *Id.* (“The Division therefore issued a Public Notice clarifying the rules and provided pending applicants with an opportunity to amend their applications to supply the needed information.”).

²¹ See *Georgetown Univ. Hospital v. Bowen*, 488 U.S. 204 (1988) (Scalia, J., concurring).

²² *Maxcell Telecom Plus Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C. Cir. 1987) (“[E]lementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected.”).

²³ *Clark Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 (D.C. Cir. 1987).

physical construction.²⁴ Second, as explained above, the new 25% rule is an unexpected departure from the Commission's longstanding flexible standard – a test permitting licensees to “provide sufficient information to demonstrate to a reasonable person that they have commenced physical construction of their licensed spacecraft” without needing to comply with “a specific test.”²⁵ Third, AtContact relied upon the Commission's well-established practice of confirming milestone compliance based upon this reasonable person standard, and to its detriment was unforeseeably denied that same confirmation.²⁶ As also discussed below, Digital Globe had recently been found to satisfy the commencement construction milestone in comparable circumstances, and there was no reason to believe that the Commission would not do the same for AtContact.²⁷ Fourth, the cancellation of AtContact's license imposes an extraordinary burden on AtContact by dealing a severe blow to (a) AtContact's plans to provide introduce high-priority broadband service in Alaska and other hard-to-reach places, and (b) AtContact's current customers for the upgraded and more affordable service than the proposed system would portend. Fifth, there is no apparent public interest in raising the bar of the construction commencement standard. Quite the contrary, this more stringent standard would frustrate the goals of all-American broadband access underlying the American Recovery and Reinvestment

²⁴ Here, the principle that “a number of reasons call[] for the application of a new rule to the parties to the adjudicatory proceeding in which it is first announced” does not apply because the milestone rule is not new, and the *Nullification Order* is not the first proceeding where the commencement milestone rule was interpreted. *Local 900, Int'l Union of Elec., Radio & Machine Workers v. NLRB*, 727 F.2d 1184, 1195 (D.C. Cir. 1984).

²⁵ *First Come, First Served Order* ¶ 93.

²⁶ *Clark-Cowlitz Joint Operating Agency*, 826 F.2d at 1082 (“The second factor . . . implicitly recognizes that the longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view.”).

²⁷ Digital Globe, Inc., Request for Determination of Compliance with Satellite Implementation of Milestones, File No. SAT-MOD-20040728-00151 at 7 (Oct. 2, 2006).

Act of 2009; and it is particularly gratuitous for AtContact's GSO satellites, because these satellites were exclusively authorized to operate on a secondary basis and hence they would not foreclose any primary use of the Ka-band NGSO spectrum.

B. The Order is Treating AtContact More Severely than Similarly Situated Licensees

Another result of the new-minted standard favored in the *Nullification Order* is the disparate treatment of AtContact compared to that of other Commission licensees. The Commission recently confirmed that Digital Globe had met its commencement construction milestone for Digital Globe based on a showing that, if anything, fell short of AtContact's, and without any evidence Digital Globe had paid 25% of its system's total price. Specifically, the only evidence Digital Globe offered for evidence of commencement was that "long-lead equipment began to be procured from contractors" pursuant to precursor agreements of the satellite construction agreement, and a declaration from the Vice President of Digital Globe.²⁸ AtContact has done no less, and indeed much more: AtContact submitted the asset sales

²⁸ *Id.*

agreement for the TWTAs, and photographs of these all-important components.²⁹ As a similarly (indeed better) situated entity, AtContact should be treated the same.³⁰

III. ADDITIONAL EVIDENCE ESTABLISHED THAT ATCONTACT HAS MET THE NGSO AND GSO CONSTRUCTION COMMENCEMENT MILESTONE

A. AtContact Satisfies the Standard Governing the Introduction of New Evidence on Reconsideration.

The Commission's rules permit the introduction of new evidence if the designated authority "determines that consideration of the facts relied on is required in the public interest."³¹ It is well settled that when a petition "on its merits is in the public interest," consideration is required.³² AtContact had no way of knowing that the Bureau would apply a new commencement of construction standard, and it is therefore in the public interest to permit AtContact to introduce new evidence with this petition for reconsideration. Even if the Bureau

²⁹ The Bureau suggests that the asset sales agreement for the purchase of 66 TWTAs should be considered as part of the critical design review ("CDR") process rather than the beginning construction phase. *Nullification Order* ¶ 10. But this is an erroneous, or at least overly stringent, interpretation of the construction commencement standard, for two reasons. First of all, the Bureau already had determined that AtContact successfully completed CDR before it secured the TWTAs. AtContact's proposed use of the TWTAs, therefore, could not be, and was not, a required part of the CDR process, but rather the next step – the start of the satellite's physical construction. Second, the Commission's finding that Digital Globe had met the same milestone was based exclusively on less (and less concrete) progress than that now deemed insufficient by the Bureau – Digital Globe had "beg[un]" to procure long-lead equipment.

³⁰ *Green County Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C. Cir. 1985) (reversing FCC strict enforcement of a rule because of inconsistent interpretation where "the Commission has not treated similar cases similarly"); 7 *Melody Music, Inc. v. Federal Communications Commission*, 345 F.2d 730, 732 (D.C. Cir. 1965) (finding that the FCC has an obligation to assure comparable treatment and to explain any different treatment of similarly situated parties); see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) ("[A]ll persons similarly situated should be treated alike" according to the Fourteenth Amendment).

³¹ 47 C.F.R. 1.106(c)(2).

³² *In re WIOO(AM)*, 23 FCC Rcd. 9362 (June 13, 2008).

were to take the view that this is not a new standard but an implementation of the existing one, it is hard to deny that AtContact lacked full notice of the manner in which the rule would be implemented. Prior to the roadmap of these claimed lapses provided by the Order, AtContact had no way of knowing with any certainty what any such defects might be. Finally, the public interest would be offended if, in fact, AtContact has commenced physical construction but were to be prevented from proving that fact by addressing any evidentiary shortcomings of its prior showing.

B. The New Evidence Addresses What the Bureau Saw as Key Infirmities of AtContact's Prior Showing

The Bureau dismissed AtContact's showing as infirm by suggesting its proffered evidence was insufficient. AtContact now provides new evidence remedying the shortcomings of proof identified by the Bureau.

The *Nullification Order* asserts that there is no documentation in the asset sales agreement that links the TWTAs to the manufacturing contract with Loral.³³ To dispel any uncertainty in this regard, AtContact submits the attached Declaration from Christopher Hoeber, Space/Systems Loral's Senior Vice President for Program Management and System Engineering. The Declaration demonstrates that Loral has been and is aware of the TWTA sales agreement; that it has tested the TWTAs; that it has reached a favorable conclusion on their suitability for NGSO satellites; and that it is prepared to credit AtContact for the value of the TWTAs.³⁴ Attached to the Hoeber Declaration is the report of the tests to which Loral has submitted two of

³³ *Nullification Order* ¶ 11.

³⁴ Hoeber Declaration ¶¶ 3-5.

the tubes. These facts are also confirmed in the attached Declaration of David Drucker, manager and founder of AtContact.³⁵

The *Nullification Order* faults AtContact's showing for not including canceled checks or similar evidence.³⁶ Here, again, AtContact provides evidence of the first payment made under the TWTA sales agreement.³⁷

The Bureau also discounts the four photographs submitted by AtContact as not supporting its claim that it has satisfied the milestone.³⁸ The Loral Declaration answers any questions about the connection between the equipment and the contract; furthermore, the Drucker Declaration and the attached Declaration of [REDACTED] attest to the provenance, authenticity, truth and accurate representations of the photographs.³⁹ Specifically, [REDACTED] confirms that "these pictures were taken by [REDACTED] at AtContact's request, as the TWTA devices are located in our [REDACTED]" and that "[t]hese components remain available to AtContact on an As-Is basis."⁴⁰

Thus, on each and every claimed evidentiary shortcoming, AtContact can demonstrate that its progress exceeded the stage that the Bureau might have inferred from the absence of this additional evidence. AtContact took advantage of another company's decision to abandon the satellite business in order to procure crucial components for its planned satellites at a discount. These components were no strangers to Loral, which had tested them, concluded they could likely be integrated in AtContact's satellites, and intended to proceed with integration and credit

³⁵ Drucker Declaration ¶ 2.

³⁶ *Nullification Order* ¶ 13.

³⁷ Drucker Declaration ¶ 8 and attachment.

³⁸ *Nullification Order* ¶ 14.

³⁹ Hoeber Declaration ¶ 3; Drucker Declaration ¶ 8; [REDACTED] Declaration ¶ 2.

⁴⁰ [REDACTED] Declaration ¶ 2.

AtContact for them. To the extent that these facts were not fully demonstrated in AtContact's prior showing, AtContact pleads with the Bureau that it accept this crucial additional and confirming evidence.

IV. RECONSIDERATION IS WARRANTED BY THE PUBLIC INTEREST

The cancellation of AtContact's satellite licenses also runs contrary to a paramount goal articulated both by Congress and the Commission - the availability of broadband services in unserved and underserved areas of the United States. It also thwarts competition in the broadband markets by an entrepreneurial new entrant, while not safeguarding the purposes behind the Commission's milestones – to avoid warehousing and allow others to use the FSS orbital and spectrum resources.

A. **The Nullification Order Hampers AtContact's Plans for Introducing Broadband Services in Alaska and Other Unserved and Underserved Areas and Ushering in Competition**

By not even reaching the public interest considerations contained in AtContact's February 6th Letter, the Bureau failed to acknowledge the overriding broadband policies that are at the heart of the Commission's and Congress's telecommunications agenda. In this regard, the Bureau failed to consider AtContact's commitment to focus its satellite system on providing rural broadband services to Alaska, Hawaii and other underserved and unserved areas of the United States. They cannot be ignored or dismissed in favor of procedural expediency founded on arbitrary and unduly stringent new standards.

As Chairman Genachowski recently stated in a *Wall Street Journal* interview, today's broadband services are what railroads, highways and electricity were to generations before us.⁴¹

⁴¹ *Interview with Julius Genachowski*, Wall St. J., July 20, 2009 (“I’m convinced that broadband is our generation’s major infrastructure challenge, akin to what railroads were, what the highway system was and universal electricity.”).

financial market conditions since the Great Depression.⁴⁴ AtContact noted that the current financial markets were so strained and depleted that it faced conditions that were tantamount to a capital market *force majeure*.⁴⁵ Financing for new satellite projects has dried up with investors withdrawing from projects or choosing to withhold capital.⁴⁶ Given these conditions and the Commission's mandate to foster the development of satellite communications capacity, AtContact observed that the public interest would be served by exercise of regulatory flexibility. The benefits of encouraging rapid development of the most efficient means of bringing broadband services to rural America could not be more compelling. The Bureau erred in not considering these public interest arguments.

This summer, AtContact became part of a consortium that has raised [REDACTED] of committed funds, contingent on the grant of federal funding, and is prepared to use those funds toward construction and operation of a satellite that is optimized to provide Ka-band broadband services to Alaska and Hawaii.⁴⁷ This consortium is managed by an American Native Corporation (“ANC”), a government-favored SDB (small disadvantaged business), in Alaska and the project would dramatically enhance on availability of AtContact's space segment at [REDACTED] [REDACTED].⁴⁸ Indeed, the unique alignment of public funding and private interests of a satellite system in the western orbital arc may be the only hope for broadband services to unserved areas in rural Hawaii and Alaska. In addition, AtContact has filed yet another application for federal funding

⁴⁴ February 6th Letter at 7.

⁴⁵ *Id.*

⁴⁶ *Id.* at 3.

⁴⁷ See Executive Summary of Grant Application of Native Broadband Satellite, LLC (attached to Ducker Declaration).

⁴⁸ *Id.*

The urgency and importance of national efforts to foster broadband services are critically important to the Chairman and to the future of our country. The President himself has said in the strongest terms that bringing broadband services to rural America is front and center in his national telecommunications policy.⁴² Congress is no less focused on these objectives. In furtherance of them, the American Recovery and Reinvestment Act of 2009 (“Recovery Act”) established stimulus funding at two federal agencies, the Department of Commerce’s National Telecommunications and Information Administration (“NTIA”) and the Department of Agriculture’s Rural Utilities Service (“RUS”), for quickly building infrastructure to satisfy the broadband needs of rural America.⁴³ Indeed, the Commission has established interconnection and anti-discrimination policies and requirements that are critical components in the application qualification process associated with Recovery Act funding.

For its part, AtContact stated clearly its intention to participate (as it has done) in the broadband stimulus process and asked the Bureau to take this into account in its evaluation of compliance with the Commission’s milestone requirements. In its February 6th Letter, AtContact outlined the principles and goals of its requests for milestone extensions, bond relief and satellite constellation changes based in large part on the focused objective of securing funding under the Recovery Act, the only realistic way to secure additional private funds under the most difficult

⁴² Weekly Address, *President-elect Barack Obama lays out key parts of Economic Recovery Plan* (Dec. 6, 2008) available at http://change.gov/newsroom/entry/the_key_parts_of_the_jobs_plan/ (“It is unacceptable that the United States ranks 15th in the world in broadband adoption. Here, in the country that invented the internet, every child should have the chance to get online, and they’ll get that chance when I’m President – because that’s how we’ll strengthen America’s competitiveness in the world.”).

⁴³ *American Recovery and Reinvestment Act of 2009*, Pub. L. 111-5, 123 Stat. 115, 118-19, 512-16 (2009). The Recovery Act tasked the Commission with creating a National Broadband Plan by February 2010 that “shall seek to ensure all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal.” *Id.*

to use the Ka-band at another of its licensed locations -- [REDACTED] -- for the purpose of serving unserved and underserved areas across the rest of the country.⁴⁹

AtContact's work does not end simply with making technology available. AtContact works closely with remote communities like the Northwest Arctic Borough in the far Northwest region of Alaska) to educate consumers about the cultural, instructional and other applications of broadband and to encourage their adoption.⁵⁰ By working on adoption as well as availability, AtContact is earning the trust of underserved communities, which is why the Northwest Arctic Borough has endorsed AtContact's deployment plan declared itself ready to enter into an agreement with AtContact's to serve its community's broadband needs.⁵¹

It is ironic that the Bureau has chosen this moment to issue its *Nullification Order*, just at the time when a Commission licensee is poised to provide a major solution to a national priority. The public interest does not merely suggest the Bureau should reverse its *Order* but truly requires it.

B. The Bureau's Order Also Thwarts the Expectations of AtContact's Current Customers for More Affordable Broadband Service

AtContact currently provides Internet services to over 100 customers directly, and thousands of end users, in rural areas of the United States, principally in Alaska.⁵² It does so by leasing satellite capacity and managing its network from its teleport in Sedalia, Colorado. To those customers, AtContact's service is the best, and in many cases the only, broadband

⁴⁹ See Executive Summary of Grant Application of AtContact Communications, LLC (attached to Ducker Declaration).

⁵⁰ Ducker Declaration ¶ 5.

⁵¹ Ducker Declaration ¶ 7; Northwest Arctic Borough Resolution 09-28 (adopted Aug. 9, 2009).

⁵² Included in this figure are many institutional subscribers, each of which provides Internet access to dozens of local residents. The total number of users, therefore, is in the thousands.

alternative. At the same time, they all clamor for higher speed, higher quality services.⁵³ Many Americans in cities, too, are passed by high-speed Internet access systems, but can ill afford them. They stand to benefit from new entrants ushering in competition to the duopoly of phone and cable companies. In many cases, such competition will make the difference between a household deciding to subscribe to the service or consigning itself to the wrong side of the information highway because of more pressing demands on its budget. Such services to unserved Americans, and competition for served ones, are the promise of AtContact's GSO satellite system.

An unintended consequence of the *Nullification Order* is virtual elimination of these subscribers' hopes for the lifestyle and business efficiency benefits that will come with satellite-based advanced broadband services. AtContact's NTIA and RUS applications propose the least costly option for such services, for these subscribers and the many thousands of others who are similarly limited by old technology and unavailability of terrestrial broadband options. As an example, John Macpherson of Satellite Alaska indicates that AtContact provides "the best Internet service available" to him and his customers but that he needs more bandwidth at lower costs.⁵⁴ Unfortunately, undercutting AtContact's plan would likely preclude broadband service for Mr. Macpherson and his community for the foreseeable future.⁵⁵

The Bureau must take into account the views of these customers in its evaluation of the public interest when it reconsiders its *Nullification Order*.

C. The Policies Behind the Commission's Milestone Requirements Are Not Endangered

⁵³ Satellite Alaska Declaration ¶ 4.

⁵⁴ *Id.* ¶¶ 2-3.

⁵⁵ *Id.* ¶ 4.

While furthering these important objectives, reconsideration of the Order will not detract one iota from the goals underlying the Commission's milestones in the rare, and possibly unique, circumstances of this case. In requiring this proof of progress, the Commission sought to prevent speculation and warehousing of scarce orbit and spectrum resources that "could hinder the availability of service to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately."⁵⁶

None of these goals is endangered here as it would be in a band where orbital slots are scarce and the licensee has primary rights to use a particular slot. AtContact does not stand in anyone's way. Its GSO satellites are only authorized to use the NGSO spectrum on a secondary, non-interference basis, and they must bow to the priority of any primary users. Moreover, with the exception of its four slots and two slots licensed to Viasat, all orbital locations in the geostationary arc are available for use in the NGSO Ka-band spectrum. As for AtContact's NGSO system, AtContact can easily share with others, as it has already demonstrated by reaching a coordination agreement with Viasat. Nor is AtContact a speculator. Rather, it has been focused on bringing its licensed spectrum into use and, through a creatively assembled combination of requested federal funds and committed private funding, is on the cusp of doing so.

In short, the *Nullification Order* can be reconsidered without any risk to the deterrent effect of the Commission's milestone rules.

V. AT A MINIMUM, THE BUREAU SHOULD RECONSIDER THE BOND FORFEITURE

If this reconsideration petition is granted and AtContact's licenses reinstated, then the Commission must cancel its forfeiture instructions to the surety under the \$3 million

⁵⁶ *First Come, First Served Order*, 18 FCC Rcd. at 10827 ¶ 73.

performance bond. In any event, the Bureau should give serious consideration to AtContact's previously filed request for a waiver of its bond requirements as set forth in its February 6th letter.⁵⁷ Although the Bureau dismissed this request as moot when it issued the *Nullification Order*,⁵⁸ it did not make any public interest findings. AtContact's waiver request documented the impact that the unprecedented national economic crisis has had on its ability to raise outside financing and how a waiver of the bond requirement during these financially difficult times would relieve some of the financial pressures felt by start-up companies like itself trying to provide advanced and needed communications services.⁵⁹ The Commission has waived this requirement in the past when confronted with a failure by a satellite licensee to meet one of its milestones.⁶⁰ And a waiver for AtContact would be justified to a far greater extent than it was in that case for at least two reasons: first, AtContact met the CDR milestone as opposed to Rainbow DBS, which had only been able to satisfy the contract execution milestone. Second, AtContact continues to provide service to its subscribers whereas Rainbow DBS had ended all operations by the time it filed its request to release its bond and had exited the business.

The Commission may grant a waiver under Section 1.3 of its rules if it finds "good cause."⁶¹ Good cause exists "where particular facts would make strict compliance inconsistent

⁵⁷ February 6th Letter at 5-8.

⁵⁸ *Nullification Order* ¶ 15 (concluding that the outstanding balance on the bond, \$3 million, is now due to the U.S. Treasury).

⁵⁹ February 6th Letter at 7.

⁶⁰ Rainbow DBS Company LLC, *Memorandum Opinion and Order*, FCC 07-11 ¶ 14 (rel. March 2, 2007).

⁶¹ 47 C.F.R. § 1.3. *See also* *ICO Global Communications (Holdings) Limited v. FCC*, 428 F.3d 264 (2005); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

with the public interest.”⁶² To make this public interest determination, the waiver cannot undermine the purposes of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule.⁶³ Here, the underlying purpose of the bond requirement would not be served by compelling AtContact to forfeit the bond for the license and the public interest in promoting deployment of broadband services in rural areas would be disserved by application of the rule.

The Commission established the bond requirement “to limit license grants to those that are able and willing to build their proposed systems.”⁶⁴ The bond requirement can act as a market-based mechanism to determine who has the financial wherewithal to succeed in establishing service,⁶⁵ provides incentives to ensure that the licensee has a good faith intent to apply for the spectrum rights for the purpose of establishing a satellite service,⁶⁶ and discourages behavior like the warehousing and speculative pursuit of spectrum.⁶⁷ None of these purposes would be undermined by granting a waiver of the bond requirement to AtContact.

⁶² *Northeast Cellular*, 89 F.2d at 1166; *ICO Global Communications*, 428 F.3d at 269 (quoting *Northeast Cellular*); see also *WAIT Radio*, 418 F.2d at 1157-59.

⁶³ See, e.g., *WAIT Radio*, 418 F.2d at 1157 (stating that even though the overall objectives of a general rule have been adjudged to be in the public interest, it is possible that application of the rule to a specific case may not serve the public interest if an applicant’s proposal does not undermine the public interest policy served by the rule); *Northeast Cellular*, 89 F.2d at 1166 (stating that in granting a waiver, an agency must explain why deviation from the general rule better serves the public interest than would strict adherence to the rule).

⁶⁴ *First Come, First Served Order*, 18 FCC Rcd. at 10825-26 ¶ 167; Amendment of the Commission’s Space Station Licensing Rules and Policies, *First Order on Reconsideration and Fifth Report and Order*, 19 FCC Rcd. 12637, 12646 ¶ 24 (2004) (“*Bond Reconsideration Order*”).

⁶⁵ *Bond Reconsideration Order*, 19 FCC Rcd. at 12646 ¶ 19.

⁶⁶ *Id.* at 12646 ¶ 19.

⁶⁷ *Id.* at 12646-47 ¶¶ 22-25.

AtContact and its principals have already invested substantial sums into its proposed satellite operations, including the purchase of the bond in question.⁶⁸ AtContact currently provides satellite broadband services to consumers using leased capacity and hopes to use its own satellite to provide a dramatically improved user experience to more subscribers, thereby demonstrating a *bona fide* intent to provide a full-fledged satellite service to the public.

Finally, AtContact cannot be accused of being a speculator or warehouser of spectrum, as shown by its stimulus applications. As discussed above, the geostationary arc is wide open for use in the NGSO spectrum, AtContact's geostationary satellites are secondary anyway, and its NGSO system can share with newcomers and has already been coordinated with Viasat's proposed system.

The public interest requires that AtContact's bond not be forfeited. As demonstrated in its previously filed bond waiver request, the negative financial impact on AtContact of a bond forfeiture "could even adversely impact AtContact's current broadband operations" and those underserved consumers who must rely on AtContact as their only potential broadband provider. In addition, bond forfeiture would undercut attempts by AtContact to put together a new plan that includes government stimulus money for financing and constructing a satellite that would provide its proposed upgraded broadband services to consumers. Additionally, AtContact provides and proposes to provide public safety services through its satellite broadband operations. While these public safety services were not sufficient for the Commission to waive the initial bond, they are certainly, as the Commission noted, "laudable goals."⁶⁹ And in

⁶⁸ February 6th Letter at 6.

⁶⁹ See *Licensing Order*, 21 FCC Rcd. at 4055 ¶ 55.

weighing the public interest in determining whether or not to forfeit AtContact remaining bond, it is a factor in AtContact's favor.

The purposes of the rules would not be undermined by a waiver of a potential bond forfeiture in this case. And the public interest in serving current, future and public safety customers would be served by a grant of the requested waiver.

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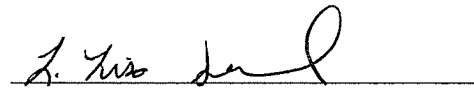
Counsel for AtContact Communications, LLC

CERTIFICATE OF SERVICE

I, L. Lisa Sandoval, do hereby certify that on this 21st day of September, 2009, I sent by U.S. first-class, postage prepaid mail, a copy of the redacted for public inspection version of the foregoing Motion for Stay to the following:

Phillip L. Spector
Executive Vice President,
Business Development & General Counsel Intelsat
3400 International Drive, NW
Washington D.C. 20008

Safeco Insurance Company of America
Safeco Plaza
1001 4th Avenue
Seattle, WA 98184



L. Lisa Sandoval

Exhibits

Exhibit A – Declaration of David Drucker – Redacted Version

Attachment 1 – Redacted

Attachment 2 – Executive Summaries of Broadband Stimulus Applications – Partially Redacted

Attachment 3 – Northwest Arctic Borough Resolution 09-28

Attachment 4 – Redacted

Exhibit B – Redacted

Exhibit C – Declaration of Satellite Alaska

Exhibit D – Redacted

Attachment 1 – Redacted

Exhibit A – Declaration of David Drucker – Redacted Version

DECLARATION OF DAVID DRUCKER

1. My name is David M. Drucker and I am the manager and founder of AtContact Communications, LLC (“AtContact”). I have been deeply involved with many companies in the satellite industry, including as a co-founder of EchoStar Satellite Corporation and the founder of WildBlue Communications Corp. This declaration details the steps AtContact has taken to physically construct its satellite and the injury it would incur if its satellite authorizations were nullified and the performance band associated with these authorizations were to be forfeited.

2. In short, AtContact has started construction of its system, and we provide here the evidence answering all the questions that the Bureau believed were left open by our prior submissions. Among other things, the photographs of the Travelling Wave Tube Amplifiers (“TWTA”s) we submitted to the Bureau show the very same transponders that are the subject of the Asset Sales Agreement between [REDACTED] and AtContact. Loral has tested the tubes, and fully intends to incorporate them in the AtContact satellite and to give us credit for them under the contract.

3. As for the threatened injury to AtContact, our customers and the public, it is great and irreparable. If the invalidation is left to stand and our bond forfeited, our business is faced with imminent destruction and our Alaskan customers with loss of service. Such a course of events would also strike a likely mortal blow for one or both of the applications that AtContact has filed with the NTIA and RUS, requesting funds for essential rural broadband projects.

AtContact Is Real And Its Plans Will Further the Public Interest

4. AtContact filed its initial FCC application in 1997 for the purpose of creating a satellite network to provide ubiquitous high speed Internet throughout our service areas. The teleport facility in Sedalia, Colorado was started in 1999 to further that project and provide immediate services to meet the demand for high-speed data, audio and video communication, including public safety services in remote and underserved areas of the United States, and with a particular focus on Alaska and rural areas in the lower 48.

5. AtContact’s current communications services include teleport and VSAT services, content distribution and high speed internet connectivity throughout Alaska and other underserved areas. AtContact provides these services by leasing transponder capacity from established FSS systems such as Intelsat. AtContact now serves about one hundred direct customers in Alaska and the Continental United States, providing last-mile broadband to thousands of end users. (Many of our customers are institutional, and each of them provides Internet access to dozens of local residents.) We also work closely with remote communities (for example, the Northwest Arctic Borough in the far Northwest region of Alaska) to educate consumers about the cultural, instructional and other manifold applications of broadband and to encourage their adoption (an issue nearly as important as availability). This experience and our current services have laid the groundwork to make affordable broadband services a reality for the unserved and the underserved.

6. The service provided by AtContact today is the best, or the only, broadband alternative available to many of our customers. At the same time, that service suffers from inadequate and affordable bandwidth and is still sluggish compared to the data speeds that the cable and phone companies offer in the big cities. I know that our customers and many others in the nation's faraway areas, who do not have any service today, yearn for the faster, richer service that Washingtonians and New Yorkers can enjoy. Moreover, I know that many suburban and city consumers, captive to the duopoly of cable and DSL today, would benefit significantly from a low-cost, no-frills satellite alternative.

7. There is, of course, a reason why some of the country's largest companies fall far short of providing the country with universal broadband service, leaving large swaths of geography and population unserved or underserved. The infrastructure is expensive, and private sector funding for such high capital cost ventures is scarce to say the least. For that reason, the stimulus funds allocated to promoting broadband deployment are nothing less than a godsend, an essential element in the Government's objective of realizing the vision of rural broadband. Tapping these funds is, by the same token, essential to complete financing for AtContact's system. Consistent with what we advised the FCC in April of 2009, AtContact filed two applications with the NTIA and RUS in August 2009 requesting funding for broadband projects using its licensed Ka-band system. One of them would use AtContact's licensed orbital location at [REDACTED]. The other was filed by a joint venture between AtContact and Native Broadband Satellite, LLC. That last project is set to use AtContact's licensed orbital location at [REDACTED] and is designed to address the needs of the remote unserved and underserved communities in Alaska and Hawaii (*see* attached executive summary of the project). In addition to the requested federal funds, the Applicant has secured a private equity commitment of [REDACTED], contingent on receiving these funds (*see* attached agreement). Moreover, the Northwest Arctic Borough has endorsed our plan and declared itself ready to enter into an agreement with AtContact to serve the Borough's broadband needs (*see* attached Northwest Arctic Borough Resolution 09-28). As I will discuss in greater detail below, these projects would be struck, perhaps mortally, by a Bureau invalidation of AtContact's authorizations.

AtContact Has Started Construction of Its First NGSO Satellite

8. On February 6, 2009, James M. Talens, Counsel to AtContact, provided photographs of TWTAs that AtContact agreed to purchase through an Asset Sales Agreement dated October 14, 2008 with [REDACTED]. I can confirm and attest that these photographs and the representations of their proposed use for the physical construction of the AtContact satellite system are true and accurate. They show the actual tubes that are the subject of the Asset Sales Agreement that we have with [REDACTED]. AtContact has duly made the first payment of \$250,000 under that contract (*see* canceled check). While further payments have been delayed, largely due to regulatory uncertainties, the TWTAs remain available to AtContact for our use in the construction of our satellites.

9. The TWTAs, originally procured by [REDACTED] for use in its then-planned GSO satellites, are also suitable for use in NGSO satellites. Specifically, based on a test of two of the TWTAs, Loral has concluded that they "may be suitable for use in the [REDACTED] downlink band range."

10. Payments have been made under both the manufacturing contract with Loral and the Asset Sales Agreement with [REDACTED]. Loral also is prepared to issue a credit to AtContact for the TWTAs under the Asset Sales Agreement.

Potential Harm Due to Nullification of Licenses

11. AtContact pursued and obtained its satellite authorization so it would be able to affordably reach the unserved and underserved markets with high-quality broadband services. A bond was not required when the initial filing was made some nine years before the grant.

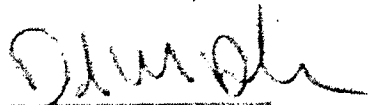
12. It is no surprise that the current economic crisis has caused the private financing prospects for AtContact's NGSO/GSO hybrid satellite system to deteriorate. We have discovered the same harsh realities that led Congress to earmark federal stimulus funds for broadband deployment: potential investors are currently withdrawing and choosing to withhold capital investment, for any projects with large upfront costs whose commercial success and cost recovery prospects are not already tested and demonstrated. Broadband satellites fall in that category. We have persevered, however. As we have indicated to the Commission, the system will likely have to be modified and streamlined. But we are very serious about deployment, and as discussed, have turned to the stimulus funding opportunities to supplement the private funds that may still be available.

13. Nullification of the satellite license and forfeiture of the associated performance bond threatens both AtContact's current business, the service AtContact provides today to Alaska, and our plans to upgrade that service dramatically in the future, with total obliteration. [REDACTED]

[REDACTED] We have now paid down that loan by two million dollars. If the bond and the security for the corresponding loan are forfeited, it is highly doubtful that AtContact can continue to be in business and provide its current services. Also, if the bond is forfeited now, and the Bureau agrees with AtContact that its licenses ought not to have been canceled, it would be too late. It would no longer be possible to use the same security to raise additional funds to supplement stimulus funds in order to proceed with construction of the system. By the same token, forfeiture of the bond would either prevent or significantly hamper the prospects of AtContact proceeding with the projects for which it has requested federal funding, the [REDACTED] private equity commitment contingent on that funding, and the availability of broadband services to the Northwest Arctic Borough. Nullification of AtContact's license also prevents it from using the satellite to enhance its current services with a more robust, higher quality, and more bandwidth-intensive, and hence faster, Internet service.

14. And all of that would severely curtail (if not take away) AtContact's current ability to provide broadband services to many unserved and underserved communities. This includes the underserved Alaskans who rely on AtContact as their only broadband option.

I declare under penalty of perjury that the foregoing is true and correct.



David M Drucker

Executed on September 29, 2009

Attachments

Attachment 1 –Redacted

**Attachment 2 – Executive Summaries of Broadband Stimulus Applications – Partially
Redacted**

StimUSAt: National Rural Broadband Gapfiller Program

EasyGrants ID: 475

Applicant: AtContact Communications, LLC

Contact Person: David J. Goldstein

Contact Phone: (303) 862-8745

C. Executive Summary

Executive Summary of Project for BIP and BTOP:

8. Infrastructure Projects Executive Summary

Providing affordable broadband to rural America is a challenge due to the sheer expanse of our nation. While BIP/BTOP wireline and terrestrial wireless projects will improve access, inevitably some will remain underserved due to the vastness of the geography involved.

A satellite network dedicated to rural broadband will fill the gaps after BIP/BTOP implementation and will directly support wireline and terrestrial wireless with middle mile service. There is value in starting now; given the time to build and launch a rural broadband satellite and the flexibility to offer service anywhere in the lower 48, this ensures “gapfiller” access as soon as possible after the last round of funding.

It is not enough to simply place a satellite in the sky—if so, BIP/BTOP would not be needed. [REDACTED]

[REDACTED]

AtContact Communications, LLC was founded SPECIFICALLY to deliver broadband to rural and underserved users. Since 1997, AtContact has delivered satellite broadband to remote and underserved areas of the US and overseas. [REDACTED]

[REDACTED]

The proposed “StimUSAt” GSO satellite program will provide reliable and affordable rural broadband to nearly all the contiguous US beginning in 2012, with a “Quickstart” in 2010 providing early service to community anchors. The project is committed to providing service only to qualifying rural census blocks not covered by other successful BIP/BTOP applicants, with a focus on community anchors and rural healthcare. StimUSAt maximizes taxpayer value with a 100% loan application.

StimUSAt provides an open, non-proprietary “fiber in the sky” to deliver broadband to rural residents that lack access and provide them a choice of last mile providers through wholesaling and non-exclusive distribution arrangements.

The project maximizes US content, creating thousands of jobs not only in satellite construction, but [REDACTED] with thousands of distributors, installers, and maintenance staff based in rural service areas. [REDACTED]

With a StimUSAt loan, RUS will deploy a dedicated satellite to serve those left behind in rural America, with a single-minded business focus on rural communities and institutions, and with an open, non-proprietary set of incentives that ensures the best use of taxpayer resources.

a. Opportunity

While BIP/BTOP funding will go a long way towards delivering rural broadband, it cannot fund service to every underserved census block through wireline and terrestrial wireless alone. Many rural or remote areas will never receive broadband from any provider other than satellite. Providing broadband via satellite to nearly all the lower 48 states is a highly efficient way to fill the gaps remaining after BIP/BTOP program funding.

b. Service areas

This project can provide broadband access to every rural unserved and underserved census block in nearly all the lower 48. It will only deploy equipment to census blocks which do not have new options after allocation of BIP/BTOP funding. [REDACTED]

[REDACTED] in the 47 states we will serve, qualifying service areas before BIP/BTOP funding is allocated encompass over 4.5M households and 675,000 businesses.

c. Households / businesses passed

A majority of census blocks identified above will be served by other BIP/BTOP projects. While the StimUSAt gap filler project will pass all 4.5M underserved households in its coverage area, it has the capacity to connect up to 384,000 households, businesses and institutions. The application is conditioned so it will only hook up in areas not served by other BIP/BTOP-funded providers.

d. Community anchors

StimUSAt expects to link ~5,000 community anchors, public safety entities, and critical community organizations not served by other BIP/BTOP-funded providers. We will especially work with rural healthcare facilities to ensure they can send and receive the records they need to deliver the highest quality of healthcare at the lowest cost.

StimUSAt will also be working closely with schools throughout the coverage area. There are 13,280 schools that fall into the "low technology index" published by [REDACTED]. In just our sample states, OH has 530, MN has 193 and TN has 316 schools on this list.

e. Services

AtContact will offer several service levels, providing a choice of last mile providers and supporting all the applications normally used. The open network platform is scalable because it can provide broadband service of 1.5Mbps x 512kbps for a single user as well as support Emergency Services, community anchor institutions, Local and State Government, fixed and mobile broadband networks

for Telco's providing voice and broadband solutions to their customers at rates >100 Mbps. AtContact will provide these benefits to all last mile providers on attractive terms. A "Quickstart" program using existing satellite capacity will offer service to community anchors in 2010.

f. Non-discrimination and interconnection

AtContact commits to all principles in the FCC's Internet Policy Statement including their application to interconnection with the public Internet and physical interconnection for the exchange of traffic. We will negotiate in good faith with all parties. We will not discriminate against subscribers using third-party devices or applications. We will rely on technically neutral standards as set by the Internet Engineering Task Force. Network management will assess service levels on a per-customer basis in the administration of service-level agreements. No discrimination will be permitted with regard to the use of applications or access of end points on the network, nor will any service provider be permitted to block competitive applications such as file sharing software or services. Except for discounts to certain community anchor institutions, all service offerings will be offered to everyone on the same terms and conditions. All policies will be published on our website and updated regularly, along with contact information and prompt response time.

g. Type of system

The StimUSAt system will be based on best of breed open architecture that enables the most efficient use of bandwidth. [REDACTED]

[REDACTED] The system supports improvements to broadband tool sets and technology platforms. The full access network provides a high-speed connection via a GSO Ka-Band satellite. The network equipment can connect at speeds in excess of 100 MB/sec through a satellite dish and a modem. The infrastructure costs to maintain this satellite system are reasonable compared to terrestrial networks.

h. Qualifications

AtContact was founded in 1997 to create a satellite network and teleport for servicing rural and underserved areas, including public safety in remote and underserved areas of the globe. The team has 150 years of combined satellite and network design, engineering, management, federal regulatory and operations experience. Among the team are people who have started major satellite companies, such as EchoStar and WildBlue, and others who have spent their working lives providing satellite services to Alaska and other rural areas. AtContact currently provides comprehensive data services using fiber, microwave and satellite technologies from its secure satellite earth station in Colorado. AtContact provides affordable VSAT IP services to rural locations, including remote cities and towns in Alaska through its Alaska Internet Hub.

i. Overall cost

The total project cost is \$299.3MM. This includes design, construction, launch, deployment, and the Quickstart phase. It also includes gateway and ground equipment and all required software. A loan of \$286.4MM is requested, with additional debt of \$12.9MM to be provided by AtContact.

j. Subscriber projections

AtContact conservatively estimates its middle mile service will result in service to 245,000 underserved households across the lower 48 states. It estimates that it will provide higher speed service to 5,000 businesses and 5,000 community anchor institutions, plus 400 in the Quickstart phase.

k. Number of jobs

The project will create over 4,000 jobs. The requirement for field technicians to service user equipment will create hundreds of rural jobs. Trainers will be required to assist community institutions. Satellite design, construction and launch will create jobs that would not otherwise have existed without funding. These are skilled positions in the currently slack aerospace industry. Most importantly, access will create a new cadre of Internet-based jobs fostered by entrepreneurship programs and business incubators. As broadband impacts accrue, new opportunities among all levels of business will flourish. These new positions are permanent and will grow in number.

Attachment 3 – Northwest Arctic Borough Resolution 09-28

**NORTHWEST ARCTIC BOROUGH
RESOLUTION 09-28**

**A RESOLUTION OF THE NORTHWEST
ARCTIC BOROUGH APPROVING NEGOTIATION
AND EXECUTION OF MEMORANDA OF
AGREEMENT WITH AtContact IN SUPPORT OF A
BOROUGH BROADBAND GRANT APPLICATION
AND FOR RELATED PURPOSES**

WHEREAS: the Northwest Arctic Borough is submitting a grant application under the American Recovery and Reinvestment Act ("ARRA") to the National Telecommunications and Information Administration ("NTIA") for funding under the Broadband Technology Opportunities Program ("BTOP"), and

WHEREAS: the borough's BTOP application is intended to support development and usage of increased broadband internet capacity to promote borough educational, cultural, marketing and economic development goals, including an Entrepreneurial Business Incubator ("EBI") project, and

WHEREAS: telecommunication providers may also apply for ARRA funding from the Rural Utilities Service ("RUS") to fund construction and development of broadband infrastructure under the Broadband Infrastructure Program ("BIP") as well as NTIA BTOP projects, and

WHEREAS: grant funding for BIP/BTOP has the potential to support and enhance the borough's proposed BTOP grant application, and

WHEREAS: the borough published a Request for Proposals ("RFP") on July 9, 2009 that invited telecommunication providers to submit proposed Memoranda of Agreements to support the borough's BTOP grant proposal, and


WHEREAS: AtContact responded to the RFP and provided a complimentary proposal that would support the borough's BTOP grant proposal, EBI and related economic development goals, and

WHEREAS: the borough has retained independent counsel to review the AtContact proposal and proposed MOA, and

WHEREAS: the borough assembly has also reviewed the AtContact proposed MOA accompanying this resolution and finds that it is in the borough's best interest to endorse and support it.

NOW THEREFORE BE IT RESOLVED by the Northwest Arctic Borough Assembly that the Mayor, with such advice and assistance as she deems necessary, is authorized to negotiate and execute an MOA with AtContact in substantially similar terms as accompany this resolution.

PASSED AND ADOPTED THIS 5th DAY OF AUGUST 2009.



Walter G. Sampson, Assembly President

PASSED AND APPROVED THIS 5TH DAY OF AUGUST 2009.

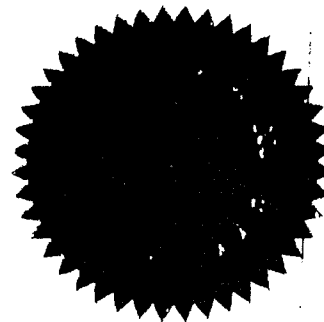


Siikauraq Martha Whiting, Mayor

SIGNED AND ATTESTED TO THIS 5TH DAY OF AUGUST 2009.



Helena Hildreth, Borough Clerk



MEMORANDUM OF AGREEMENT

This Memorandum of Agreement is entered into this 5th day of August, 2009 between the Northwest Arctic Borough (Borough) and AtContact Communications, LLC (AtContact), collectively the parties.

BACKGROUND:

The agreement results from AtContact's consideration of the Borough's Request for Proposals No. 09-01 (the RFP) that asks that the parties ultimately agree on a document that defines the duties and rights of the parties in applying for BIP/NTIA¹ funds and then, if successful, the budgeting of funds to accomplish deployment of broadband capability in a manner that will meet Borough goals.

AGREEMENT:

1. The parties are agreed to collaborate in the application for BIP/NTIA funds to accomplish the following purposes.
 - a. To address the Borough's goal: to achieve economic advantage for the residents of the Borough and enterprises operating within the borough in whole or part through the expanded capacity, capabilities and reliability of broadband services.
 - b. To address the Borough's goal, beginning with broadband services, of increasing economic development through the use of advanced technologies.
2. AtContact will provide capacity on a competitively neutral, non-discriminatory basis to telecommunication providers.
3. AtContact will price its wholesale services significantly lower than what rural telecom providers typically pay today.
4. AtContact will include in its operations and maintenance manual, the requirement that a person be retained to live and work in Kotzebue in order to provide support for local operations and for the implementation of this agreement.
5. AtContact will utilize an open network design, supporting development of applications using video, voice and data transmission through high-speed, broadband technology. Among the technological advances to be addressed, and for which AtContact will provide support are satellite-based adult education, enhanced elementary education, e-commerce training and stimulation, telemedicine, virtual psychiatry and other quality-of-life supporting services.
6. AtContact shall enter a collaborative arrangement with OTZ Telephone Cooperative, Inc., the local telephone service with the purpose of advancing the

¹ BIP: Broadband Infrastructure Program; NTIA: National Telecommunications and Information Administration, (US Department of Commerce)

agreed goals and will include in its budget \$89,800 to help fund the local equipment budget for the Borough's EBI and will reimburse the Borough directly for this expense.

7. AtContact will cooperate in supporting the development of a technological curriculum that will develop excellence in academics, encourage higher order thinking skills, enlarge, enrich and enhance job function, heighten cultural awareness and enhance community involvement and cohesiveness.
 - a. To the ends outlined, AtContact will make a meaningful investment in assessment and identification of best practices utilizing broadband content and applications, drawing on its knowledge of related successes.
 - b. AtContact will provide speeds of up to 15 Mbps download and up to 3 Mbps upload to each of the Borough villages and commence deployment immediately upon award of funding.
8. The Borough will endorse and cooperate with AtContact's applications for federal funding for its expanded services. This agreement does not prevent the Borough from endorsing other applications for funding by any provider of services.
9. AtContact will support Borough applications for funding for services to implement the opportunities offered by AtContact's expansion of broadband transmission.
10. The parties agree to establish a standing committee consisting of at least one member appointed by AtContact and at least one appointed by the Borough with appointments by the borough of other stakeholders which committee shall meet on a frequency of not less than once a quarter with the functions of exploring community defined needs necessary to expand adoption of broadband digital technology services and products. AtContact will participate for a five year period with the Borough: the two year duration of the EBI project, if funded by NTIA under BTOP, followed by an additional three years that the Borough anticipates will be needed to fully discover the community defined needs necessary to expand adoption of broadband digital technology services and products.
11. The standing committee created under paragraph 10 shall assess the progress being made towards the goals defined in this agreement, discuss additional opportunities for implementing the objectives of the agreement and the sharing of resources to that end.
12. The parties will from time to time discuss additional collaborative opportunities created by federal broadband funding and in furthering the borough's goals in supporting broadband based development in the community.

Attachment 4 – Redacted

Exhibit B – Redacted

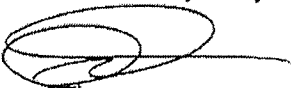
Exhibit C – Declaration of Satellite Alaska

REDACTED
For Public Inspection

Affidavit of Satellite Alaska

1. My name is John Macpherson and I live in Anchorage, Alaska. Since 2005 I have been a reseller of AtContact's current Internet service to Alaska.
2. AtContact provides the best Internet service available to me and my customers and I have become reliant on it for my business and its continuing expansion. While the service is generally adequate, it is often not nearly as fast as I would prefer. Sometimes it just takes too long to download or upload large multimedia files. My customers complain about that all the time. Some of the customers are located in areas where alternative services are non-existent.
3. I understand that the next-generation satellite system planned by AtContact will cure these problems and allow me to provide my customers with robust, higher quality, and more bandwidth-intensive, and hence faster, Internet service. More than that, the higher speeds are required to derive benefits from the richer, multimedia applications that customers increasingly demand. We need more bandwidth at lower cost.
4. If AtContact's project cannot move forward, it is doubtful that any comparable service will become available in my location in the foreseeable future from another supplier.

I declare under penalty of perjury that the foregoing is true and correct.



John Macpherson

Executed on September 16, 2009

Exhibit D –Redacted

Attachment 1 – Redacted