

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

In the Matter of	)	
	)	
ATCONTACT Communications, LLC	)	File Nos. SAT-LOA-19971222-0022
	)	SAT-LOA-20040322-
	)	00234/35/36/37
	)	
For Authority to Launch and Operate	)	Call Signs: S2346, S2680, S2681,
a Non-Geostationary Orbit Fixed-Satellite	)	S2682, S2683
System in the Ka-band Frequencies	)	
	)	

**EXPEDITED ACTION REQUESTED**

**To: The Commission**

**MOTION FOR STAY**

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**I. INTRODUCTION AND SUMMARY**

ATCONTACT Communications, LLC (“AtContact”), by its counsel, seeks a stay of: the June 3, 2010 *Commission Order*<sup>1</sup> denying AtContact’s Petition for Reconsideration of the August 21, 2009 *Bureau Order*,<sup>2</sup> thus nullifying AtContact’s satellite licenses for four geostationary (“GSO”) satellites as well as a non-geostationary (“NGSO”) satellite system;<sup>3</sup> or at

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<sup>1</sup> See ATCONTACT Communications, LLC, *Order*, FCC 10-100 (rel. June 3, 2010) (“*Commission Order*”).

<sup>2</sup> See ATCONTACT Communications, LLC, *Order*, DA 09-1850 (rel. Aug. 21, 2009) (“*Bureau Order*”).

<sup>3</sup> See contactMEO Communications, LLC, *Order and Authorization*, DA-06-864, 21 FCC Rcd. 4035 (2006) (“*Licensing Order*”).

least of the bond forfeiture resulting from the license cancellation and associated demand that the Commission has made on the surety.<sup>4</sup> At Contact requests a stay during the pendency of the appeal that it will file shortly with the Court of Appeals for the D.C. Circuit. Alternatively, AtContact requests a short stay of 15 days while the Commission considers the request for a longer stay.

The ground for the cancellation of AtContact's licenses was that AtContact failed to meet the third "milestone" prescribed by the Commission towards building and operating its non-geostationary system – commencement of physical construction of its first NGSO satellite. Unless stayed, this action of the Commission, and particularly the forfeiture of the \$3 million bond posted to secure against noncompliance with that milestone, will have an immediate and devastating result for AtContact. In that respect, by letter dated June 24, 2010, the Commission's Chief Financial Officer advised Safeco Insurance Company of America ("Safeco") of a Notice of Default and instructed Safeco to remit the sum of \$3 million plus interest to the United States Treasury.<sup>5</sup> Therefore, AtContact respectfully requests action on this motion on or before June 30, 2010, which would allow the timely filing of a stay request with the Court of Appeals for the D.C. Circuit if the Commission were to deny all of the alternative requests made herein.<sup>6</sup>

All of the prerequisites to a stay are met: AtContact will likely succeed on the merits: among other things, in denying relief from the bond forfeiture, the Commission overruled its

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<sup>4</sup> See Letter from Mark Stephens, Chief Financial Officer, FCC, to Safeco, at 1 (June 24, 2010) ("*Notice of Default*").

<sup>5</sup> *Id.*

<sup>6</sup> See Fed. R. App. P. 18(a).

prior precedent giving another licensee the same relief based on evidence that, the Commission recognized, was “generally the same” as that invoked here; the only distinction cited by the Commission between the two cases is factually flawed. The Commission also canceled AtContact’s license for both the NGSO and GSO systems, even though the milestone in question pertained to construction of the NGSO system only, and even though the Commission had decided to treat the two systems as separate. In explaining the inconsistency, the Commission Order draws a distinction between processing purposes, where separate treatment was warranted, and other purposes, where it was not, but cites no plausible or reasoned basis for such a distinction. In response to AtContact’s argument, made in its petition for reconsideration, that the Bureau was applying a new rule (at this stage, licensees must have paid at least 25% of the satellite contract price), the Commission does not assert that the standard is not new, but only that it is sensible, and does so based on a leap in logic – that since the start of any system implementation cannot be enough to satisfy the milestone, it therefore makes sense to require payment of at least 25% of the satellite contract’s price.

AtContact will suffer irreparable injury – no less than the likely destruction of its business – if the bond were to be forfeited. So will the public. Not only will consumers be deprived of an innovative plan to provide satellite service to the frontier state of Alaska, in furtherance of Congress’s and the Commission’s paramount goal of widening broadband availability. Existing customers of AtContact’s service will not be able to upgrade to the large-city-equivalent service that they yearn for, and may lose their current service. And the Treasury will not suffer any injury from a granted stay, as its claim will continue to be secured by the bond.

Nor will any one else: AtContact's proposed secondary use of the NGSO spectrum at certain GSO orbital slots will not stand in anyone's way, either during the stay or at all. Besides, no one entity has filed an application to use the orbital and spectrum resources covered by AtContact's license, even though everyone has been able to file such an application since August 21, 2009.

Indeed, after AtContact described substantially the same irreparable injury in its September 21, 2009 request for a stay of the *Bureau Order*, the Commission stated in a letter that "it would not act in further response to the Bond terms, or otherwise exercise any right thereto without first providing Safeco a courtesy notification of our intent" and a period of 10 days to comply – a courtesy notification that the Commission did not send until it denied AtContact's petition for reconsideration.<sup>7</sup> While that abeyance was not a formal stay, it seemed to reflect a recognition of the irreparable injury to be suffered by AtContact.<sup>8</sup>

## II. JUSTIFICATION FOR GRANT OF STAY

A stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm, absent a stay; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay.<sup>9</sup> As outlined below, a careful review of each of these factors warrants the grant of this motion.

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<sup>7</sup> See Letter from Mark Stephens, Chief Financial Officer, FCC, to Safeco, at 2 (Oct. 1, 2010) ("*Abeyance Letter*").

<sup>8</sup> *Id.* The abeyance also announced that the Commission would defer "exercise[ing] any right thereto" with regards to the Bond, which would seem to include the accrual of interest. See *id.*

<sup>9</sup> See, e.g. *Va. Petroleum Jobbers Assoc. v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) as modified by *Wash. Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). These factors are not prerequisites that must be met, but

### A. Likelihood of Success on the Merits

AtContact meets handily the first prong of the stay standard. as the Commission decision did not cure the Bureau’s errors, but instead compounded them with additional serious infirmities. Among other things:

First and foremost, the Commission improperly denied AtContact the relief from bond forfeiture that it had given in *Rainbow*,<sup>10</sup> and instead overruled that case. This makes *Rainbow* a one-licensee rule, in violation of the tenet that similarly situated entities should be treated the same,<sup>11</sup> and marks a departure from precedent that does not appear to meet the Administrative Procedures Act’s requirement of reasoned decisionmaking. Further, “agency action cannot stand when it is so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion.”<sup>12</sup>

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interrelated considerations that must be balanced together. *See Mich. Coalition of Radioactive Materials Users v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). In fact, under Commission precedent, a surplus of a showing under one factor offsets a deficit under another. *See Comark Cable Fund III*, 104 FCC 2d 451, 456 ¶ 9 (1986); *Dynamic Cablevision of Florida, Ltd.*, 10 FCC Rcd. 5156, 5156 ¶ 4 (1995).

<sup>10</sup> *Rainbow DBS Company, LLC, Memorandum Opinion and Order*, 22 FCC Rcd. 4272 (2007) (“*Rainbow*”).

<sup>11</sup> *Garrett v. F.C.C.*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (An agency “cannot act arbitrarily nor can it treat similar situations in dissimilar ways.”).

<sup>12</sup> *Id.* (internal citations and quotations omitted). *See also Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (concluding that the Commission's failure to explain its decision simply and clearly merited reversal of its refusal to renew license, and on remand it was to explain its reasons and do more than enumerate factual differences, between applicant’s case and other cases; it would have to explain relevance of those differences as they relate to the Federal Communications Act); *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (“An agency must provide adequate explanation to justify treating similarly situated parties differently. Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and

Notably, the overruling of *Rainbow* seems connected to the Commission’s apparent acknowledgment that distinguishing between these two cases is not easy: “True, AtContact invokes generally the same type of evidence as was presented in the *Rainbow* case,” the Commission recognizes.<sup>13</sup> The only distinction *the Commission Order* mentions – that AtContact’s spending represents “a small fraction of the large amount *Rainbow* expended”<sup>14</sup> – is itself factually infirm as it compares apples to oranges. Almost none of that large amount – just over one percent – was expended by *Rainbow* on the licenses in question – the licenses secured by the bonds – as opposed to *Rainbow*’s other licenses.<sup>15</sup> What is more, the comparison ignores all of the other circumstances at the two cases and the fact that, if anything, relief is more, not less, warranted here. After all, *Rainbow* was exiting the business outright while AtContact was and is still committed to make a go of it.<sup>16</sup> And *Rainbow* actually never certified that it spent any monies whatsoever on the construction of its licensed Ka-band satellites.

Second, the Commission canceled AtContact’s authorizations for its GSO system based on its claimed failure to commence construction of its first NGSO satellite, even though it had explicitly decided to treat the two system authorizations (NGSO and GSO) as “separate.”<sup>17</sup> In defense of this inconsistency, the *Commission Order* compounds it when it explains that the

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cannot be upheld.”) (citations omitted). *Cf. James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (“[S]elective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally.”).

<sup>13</sup> *Commission Order* ¶ 49.

<sup>14</sup> *Id.*

<sup>15</sup> *Rainbow* ¶ 10.

<sup>16</sup> *Rainbow* ¶ 4.

<sup>17</sup> *Commission Order* ¶¶ 32-33.



separate treatment was only “for processing purposes.”<sup>18</sup> The *Commission Order* does not cite, however, any basis for distinguishing between processing and other purposes, and treating the two systems as separate for the former but integrated for the latter category of purpose.

Third, the Bureau improperly applied a new standard going beyond the scope of its delegated authority,<sup>19</sup> to determine if AtContact has commenced physical construction of its NGSO system: “[b]ased on our experience in reviewing milestone compliance, at this point in the construction process licensees have generally paid 25-50 percent of the total price in the manufacturing contract due to the cost of procuring parts.”<sup>20</sup> To that charge, the Commission effectively responds by stating that the right standard for starting physical construction must be more than “starting *any* system implementation.”<sup>21</sup> That may indeed be the case, and the *Commission Order* seems to take target at a strawman – AtContact never in fact argued that the start of any system implementation is enough. But to say that the standard must be more than starting any system implementation is *not* to prove that the standard is payment of at least 25% of the contract’s price, nor does it prove that the standard was always set at this 25% minimum payment.

In fact, the standard always was what the Commission had said it was: not commencement of any system implementation, not payment of at least 25% of the contract’s price, but rather what seems to be a point in-between – commencement of physical

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<sup>18</sup> *Id.* ¶ 32.

<sup>19</sup> 47 C.F.R. § 0.261(a)(1).

<sup>20</sup> *Bureau Order* ¶ 10.

<sup>21</sup> *Commission Order* ¶ 25 (emphasis in original).

construction.<sup>22</sup> The Commission is free to change and elevate that standard if it complies with the requirement of a reasoned decisionmaking. But reasoned decisionmaking requires, at a bare minimum, a recognition that the standard is in fact being changed, and careful consideration of the retroactive aspects of such a change. Indeed, the *Commission Order* compounds the impropriety by supplementing the Bureau’s new 25% construct with another yet new standard – again without recognizing its novelty. As the *Commission Order* puts it: “licensees, like AtContact, that have not made significant progress at this point in the implementation schedule will have difficulty meeting the launch and operation milestone that occurs, in the case of NGSO satellites such as AtContact’s, only one year later.”<sup>23</sup> In other words, in evaluating whether a licensee has met a milestone, the Commission can consider if it will have difficulty meeting the *next* milestone. That is not the applicable rule – at least it was not prior to the date of the AtContact decision. Nor is it a reasonable standard – matters relating to meeting a future milestone are best evaluated at the time the licensee makes the showing that it has met that milestone. Speculation as to the likelihood of meeting a future obligation would appear to be palpably premature.

Fourth, the *Commission Order* appears to misconstrue the relevance of the new evidence submitted by AtContact, and to penalize AtContact for attempting to remedy the shortcomings in its prior showing – shortcomings that the Bureau had purported to identify. The Commission

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<sup>22</sup> Amendment of the Commission’s Space Station Licensing Policies and Rules, IB Docket No. 02-34, *First Report and Order*, FCC 03-102 ¶ 193 (“*First-Come, First-Served Order*”) (“[W]e will require licensees to provide sufficient information to demonstrate to a reasonable person that they have commenced physical construction of their licensed spacecraft.”).

<sup>23</sup> *Commission Order* ¶ 25.

reads each piece of evidence – the Declaration of the seller offering information in connection with the asset sales agreement for the Travelling Tube Wave Amplifiers (“TWTA”s) and confirming the authenticity and context of the photographs that AtContact had previously submitted, the Declaration of the satellite contractor that the “TWTAs may be suitable for use in the Ka NGSO 18.8-19.3 GHz downlink band range” and the cancelled checks submitted by AtContact, in isolation, and finds it easy to conclude that each of them, standing alone, does not “provide evidence that a licensee has met the beginning construction milestone.”<sup>24</sup>

This is, as far as it goes, true. But this was *not* the purpose of these evidentiary submissions. Their purpose was, rather, to supplement the showing that AtContact had made by addressing directly and pointedly the precise shortcomings in that showing that the Bureau had identified. Thus, the Bureau had stated that AtContact had not provided documentation linking the asset sales agreement for the TWTAs to its manufacturing contract with Loral,<sup>25</sup> and AtContact submitted evidence of that link. The Bureau had criticized the lack of information on the photographs’ provenance and context,<sup>26</sup> and AtContact submitted evidence to elucidate these facts. The Bureau had said that AtContact has not included cancelled checks or other evidence of payments under the contract,<sup>27</sup> and AtContact submitted that missing evidence, too. But the Commission does not truly consider the extent to which the supplementary evidentiary submissions responded to the Bureau’s criticisms and appears to assume that these criticisms

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<sup>24</sup> *Id.* ¶¶ 19, 21, 23.

<sup>25</sup> *Bureau Order* ¶ 11.

<sup>26</sup> *Id.* ¶ 14.

<sup>27</sup> *Id.* ¶ 13.

were never leveled and that AtContact was offering each of these additional pieces of evidence hoping that each is sufficient to withstand the weight of the entire showing.

Fifth, the Commission does not respond to AtContact's point that it stands in no one's way, except by stating in a conclusory fashion that AtContact's continuing to hold its licenses would be "to the exclusion" of others.<sup>28</sup> But AtContact's licenses have prevented no one from utilizing the resources, and this is the unusual case where this fact need not be the matter of speculation but instead is supported by tangible evidence. Since August 21, 2009, the release date of the *Bureau Order*, any person was free to apply for the resources licensed to AtContact.<sup>29</sup> But no one did, and to date no one has. In addition, AtContact is only licensed to use the "NGSO" portion of the Ka-band. This band is almost entirely virgin and wide open. With two degrees spacing, there are 30 slots between 71° W.L. and 129° W.L., of which the vast majority remain fully available. Finally, AtContact's GSO satellites are licensed only to make secondary use of the spectrum. So, even assuming that a hypothetical additional user of the spectrum were to transpire, AtContact would not stand in its way, but rather would be required to not cause any interference to, and tolerate any interference from, such a user. The conclusion is hard to escape: there is no clamor for use of that spectrum, and there is nobody to be held up if AtContact's license is not cancelled.

Sixth, 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 as wide actual broadband adoption as possible. Congress has said

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<sup>28</sup> *Commission Order* ¶ 36.

<sup>29</sup> *First-Come, First-Served Order* ¶ 118.

so, and so has the Commission. But the *Commission Order* does not give sufficient weight to that public interest. While the *Commission Order* acknowledges that “promoting broadband services in rural areas is an important policy goal,”<sup>30</sup> and notes that AtContact has applied for stimulus funding under the American Recovery and Reinvestment Act of 2009, that could facilitate his policy objective, it dismisses the potential for harm by discounting AtContact’s potential contribution as a “mere possibility.”<sup>31</sup> Of course, every forward-looking plan, including every plan to provide service to Americans who do not now receive it, is by definition a “mere possibility,” but that does not justify discounting it on that basis alone. As witnessed by the Declaration of Mr. Drucker, its rural broadband stimulus application entirely depends on, or would be dramatically enhanced by, use of one of AtContact’s licensed GSO orbital locations.<sup>32</sup> The project 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.<sup>33</sup> As AtContact has already pointed out, this is no mere 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. McPherson, whose Declaration was attached to AtContact’s Reconsideration Petition<sup>34</sup> explains

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<sup>30</sup> *Commission Order* ¶ 36.

<sup>31</sup> *Id.* ¶ 35.

<sup>32</sup> Drucker Declaration ¶¶ 7, 10.

<sup>33</sup> *Id.* ¶ 6.

<sup>34</sup> The evidence submitted in support of that petition and its accompanying stay request is also incorporated here by reference.

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.

**B. Irreparable Harm**

On June 24, 2010, the Commission sent the surety instructions to the bond surety requiring payment of \$3,000,000 based on the finding that AtContact has failed to meet its third milestone and invoking the bond forfeiture consequence that this finding entails. Absent a stay, the payment will have to be made notwithstanding AtContact's imminent appeal of the *Commission Order* and possible vindication.<sup>35</sup> At the very least, AtContact requests a stay of the bond forfeiture appropriate pending resolution of the Court appeal AtContact will file (or at least for 15 days as the Commission considers the request for a longer stay). The bond forfeiture would cause immediate, permanent and devastating damage to AtContact and to its current customers.

To appreciate the scope and irreversibility of the harm, it is useful to survey AtContact's current services and its plans for the future, both of which are at mortal risk. As AtContact's founder David Drucker testifies, AtContact's current communications services include teleport and VSAT services, content distribution and high speed Internet connectivity throughout Alaska and other underserved areas.<sup>36</sup> AtContact provides these services by leasing transponder capacity from established Fixed-Satellite Service systems such as Intelsat. AtContact now serves about one hundred direct customers in Alaska and the Continental United States, providing last-

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<sup>35</sup> By AtContact's calculation, the due date is July 6, 2010, the first business day that is no later than 10 calendar days from the surety's June 24, 2010 receipt of notice. *See* 47 C.F.R. § 1.4(j).

<sup>36</sup> Drucker Declaration ¶¶ 5-6.

mile broadband to thousands of end users — many of its customers are institutional, and each of them provides Internet access to dozens of local residents. AtContact also works closely with remote communities 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).<sup>37</sup> Indeed, to the Northwest Arctic Borough in the far Northwest region of Alaska, AtContact has recently added the Asa’carsarmiut Tribal Council, the Sauk-Suiattle Indian Tribe, the Native Village of Eklutna, Doyon Ltd. (Alaska Native Corporation), Sea Lion Corporation (Alaska Native Village Corporation), Quinalt Indian Nation, Gana-A’Yoo, Ltd. (Alaska Native Village Corporation), Qivliq Commercial Companies (owned by NANA Development Corporation, an Alaska Native Corporation), City of Galena, AK and Galena School Board, American Indian Higher Education Consortium (AIHEC), Alaska Native Tribal Health Consortium (ANTHC), Alaska State Library (ASL), National Urban Technology Center (NUTC), Center for International Development, Rivada Sea Lion, LLC, Rivada Networks, LLC (emergency responder telecommunications/public safety provider), Doyon, Limited (Native Alaskan Corporation), the Quinault Indian Nation, and the Spokane Tribe of Indians among its partners. This experience, these partnerships, and AtContact’s current services have laid the groundwork to make affordable broadband services a reality for the unserved and the underserved.<sup>38</sup>

The service provided by AtContact today continues to be the best, or the only, broadband alternative available to many of its customers. At the same time, that service suffers from

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<sup>37</sup> *Id.* ¶ 5.

<sup>38</sup> *Id.*

inadequate and affordable bandwidth and is still sluggish compared to the data speeds that the cable and phone companies offer in the big cities. AtContact's 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, 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.<sup>39</sup>

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, in Mr. Drucker's words, nothing less than a godsend, an essential element in the Government's objective of realizing the vision of rural broadband.<sup>40</sup>

The missed opportunity is, if anything, even more concrete now, than it was on September 21, 2009, when AtContact requested a stay of the *Bureau Order*. This is because the stimulus agencies have since confirmed that satellite entities will be eligible for stimulus funds. As part of the broadband funding contemplated by the American Recovery and Reinvestment Act, the Rural Utilities Service ("RUS") created a set-aside for satellite projects on January 15, 2010. As the RUS put it, "[g]iven the importance of efforts to reach unserved premises, a separate Satellite Project category has been established to reach premises left unserved by other

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<sup>39</sup> Drucker Declaration ¶ 7.

<sup>40</sup> *Id.*



technologies.”<sup>41</sup> Within the category, one awardee is possible for each of eight U.S. regions – Alaska being one such region. AtContact is well, and indeed uniquely, positioned, to provide the kind of service envisioned by the RUS in Alaska. And tapping these funds is, by the same token, essential to complete financing for AtContact’s system. AtContact is a party to a new application filed with RUS and requesting funding for a broadband project using its licensed Ka-band system. This application was specifically filed by a joint partnership between AtContact and Native Broadband Satellite, LLC, which will use 121° W.L. orbital location to provide much needed broadband service to Alaska and throughout the Western United States. In addition to the requested federal funds, the Applicant has secured a private funding commitment of \$80 million, contingent on receiving these funds. The application has received strong support from many quarters, including Governor M. Michael Rounds of South Dakota, the Asa'carsarmiut Tribal Council, Doyon, Limited (Native Alaskan Corporation), the Native Village of Eklutna, the Quinault Indian Nation, the Sauk-Suiattle Indian Tribe, and the Spokane Tribe of Indians.

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 its plans to upgrade that service dramatically in the future, with total obliteration.<sup>42</sup>

AtContact initially borrowed five million dollars in order to post the performance bond, securing that loan by its stock in WildBlue.<sup>43</sup> AtContact has now paid down that loan by two million

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<sup>41</sup> Rural Utilities Service, Notice of Funds Availability, RIN: 0572-ZA01 (rel. Jan. 15, 2010). The RUS therefore dismissed satellite project applications filed in the first round, including the ones in which AtContact participated, and invited applications in the set-aside satellite round.

<sup>42</sup> Drucker Declaration ¶ 10.

<sup>43</sup> *Id.*

dollars. If the bond and, therefore, 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.<sup>44</sup>

Also, if the bond and associated security are forfeited now, and the Court eventually 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 and the loss of the associated security would either prevent or significantly hamper the prospects of AtContact proceeding with the projects for which it has requested federal funding and, in turn, the \$80 million private funding commitment contingent on that funding.<sup>45</sup> Nullification of AtContact's license also prevents it from using its proposed satellite at 121°W.L. to enhance its current services with a more robust, higher quality, and more bandwidth-intensive, and hence faster, Internet service.<sup>46</sup>

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.

### **C. Harm to Other Parties**

While denial of the stay would have nothing short of catastrophic consequences, grant of the stay will conversely cause no harm to any other interested party. The United States Treasury will face no risk whatsoever. Its claim will continue to be fully secured by the bond. Intelsat was the only other party to the Bureau proceeding below and it will likewise not face any harm

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<sup>44</sup> *Id.* ¶ 11.

<sup>45</sup> *Id.* ¶ 10.

<sup>46</sup> *Id.*

by grant of the requested stay, let alone an irreparable injury. This is because, as mentioned above, AtContact will not be in anyone's way, either during the requested stay or at all. Its rights to use the NGSO spectrum at its GSO slots are secondary, and therefore pose no hindrance to any primary user of the spectrum at these slots. Its NGSO system can likewise share with other NGSO spectrum users, and indeed has already been coordinated with Viasat's proposed system. Moreover, if all that is stayed is the bond forfeiture requirement, the Commission can proceed with licensing the spectrum licensed to AtContact in the event someone files an application for it – something that has yet to happen.

#### **D. Public Interest Factors**

While no other interested party would be harmed by a grant of this requested stay, the public could be harmed if it is not granted. Many of AtContact's current customers rely on it as their only source for broadband communications. They are in desperate need of more bandwidth at a lower cost. And, if the stay is not granted, they will be harmed because a rejection of the stay will make it more difficult for AtContact to move forward with its proposed enhancements to its current services and it is doubtful that any comparable service will become available for these communities in the foreseeable future from any other supplier.

In the broader policy context, there is a related reason why Commission spectrum policies militate against bond forfeiture. AtContact strongly believes that, despite an initial delay, satellite use of that spectrum will emerge and provide a vigorous ingredient of the nation's broadband armature. But a bond forfeiture would send precisely the wrong signal to capital markets from a spectrum policy standpoint: that the band, unused as it still largely is by satellite, is somehow ripe for reallocation to uses other than satellite service by means of a rulemaking.

Such a result would be bad, and possibly disastrous, for the cause of universal broadband availability.

### III. CONCLUSION

Accordingly, AtContact requests that its Motion for Stay of the aforementioned Order and Notice of Default (or at least the bond forfeiture) be granted pending AtContact's appeal of the *Commission Order*, to the Court of Appeals for the District of Columbia Circuit, or at least for 15 days until the Commission evaluates the request for a longer stay.

Respectfully submitted,

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/s/  
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June 29, 2010

**CERTIFICATE OF SERVICE**

I, Christopher Bjornson, do hereby certify that on this 29th day of June, 2010, I sent by hand delivery, electronic mail or facsimile, a copy 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

/s/  
\_\_\_\_\_  
Christopher Bjornson

## **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 repeats, updates and supplements matters included in the Declaration I executed on September 20, 2009, with an emphasis on the injury AtContact would incur if its satellite authorizations were nullified and the performance band associated with these authorizations were to be forfeited. To the extent certain statements from my earlier Declaration are not repeated in this one, I incorporate them by reference and confirm their continuing validity.

2. The threatened injury to AtContact, our customers and the public 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 the application that AtContact has filed with the Rural Utilities Service (“RUS”), requesting funds for essential rural broadband projects.

### **AtContact Is Real And Its Plans Will Further the Public Interest**

3. 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.

4. 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 continues to serve 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 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). We specifically continue to work with the Northwest Arctic Borough in the far Northwest region of Alaska. Since I offered my first Declaration in this proceeding, we have added the Asa’carsarmiut Tribal Council, the Sauk-Suiattle Indian Tribe, the Native Village of Eklutna, Doyon Ltd. (Alaska Native Corporation), Sea Lion Corporation (Alaska Native Village Corporation), Quinalt Indian Nation, Gana-A’Yoo, Ltd. (Alaska Native Village Corporation), Qivliq Commercial Companies (owned by NANA Development Corporation, an Alaska Native Corporation), City of Galena, AK and Galena School Board, American Indian Higher Education Consortium (AIHEC), Alaska Native Tribal Health Consortium (ANTHC), Alaska State Library (ASL), National Urban Technology Center (NUTC), Center for International Development, Rivada Sea Lion, LLC, Rivada Networks, LLC (emergency responder telecommunications/ public safety provider),

Doyon, Limited (Native Alaskan Corporation), Quinault Indian Nation, and the Spokane Tribe of Indians as our partners. This experience, our partnerships, and our current services have laid the groundwork to make affordable broadband services a reality for the unserved and the underserved.

5. 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.

6. 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. On January 15, 2010, RUS confirmed that stimulus funds will be available for satellite projects. In fact, RUS created a set-aside for satellite projects. Thus, RUS rejected satellite applications that had been filed in the first round, including the ones in which we had participated, and it invited applications in the satellite set-aside category. Within the category, one awardee is possible for each of eight U.S. regions – Alaska being one such region. AtContact is uniquely positioned to provide the kind of service envisioned by the RUS and the NTIA in Alaska. Tapping these funds is, by the same token, essential to complete financing for AtContact's system.

7. Pursuant to the Notice subsequently issued by RUS, AtContact is a party to a new application requesting funding for certain aspects of a \$230 million broadband project using its licensed Ka-band system. This application, like the one in the first round, was filed by a joint venture between AtContact and Native Broadband Satellite, LLC, which will use the 121° W.L. orbital location to provide much needed broadband service to Alaska and throughout the Western United States. In addition to the requested federal funds, the Applicant has secured a private funding commitment of \$80 million, contingent on receiving these funds. 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. The application has received strong support from many quarters, including Gov. M. Michael Rounds (South Dakota, the Asa'carsarmiut Tribal Council, Doyon, Limited (Native Alaskan Corporation), the Native Village of Eklutna, the Quinault Indian Nation, the Sauk-Suiattle Indian Tribe, and the Spokane Tribe of Indians. As I will discuss in greater detail below, these projects would be struck, perhaps mortally, by a Bureau invalidation of AtContact's authorizations.

### **Potential Harm Due to Nullification of Licenses**

8. 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.

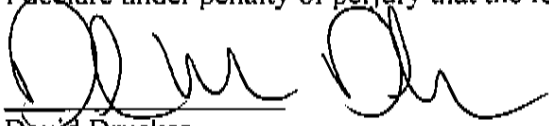
9. It is no surprise that the current economic crisis has caused the private financing prospects for AtContact's NGSO/GSO hybrid satellite system to deteriorate. We have discovered the same harsh realities that led Congress to earmark federal stimulus funds for broadband deployment: potential investors 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.

10. 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. AtContact initially borrowed five million dollars to post the performance bond, securing that loan by our stock in WildBlue. 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 appropriate court eventually 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 \$80 million private funding commitment contingent on that funding, and the availability of broadband services to the Northwest Arctic Borough and our other Alaskan partners. 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.

11. 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.

A handwritten signature in black ink, appearing to read 'David Drucker', written over a horizontal line.

David Drucker

Executed on June 29, 2010