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READ INSTRUCTIONS CAREFULLY BEFORE PROCEEDING

FEDERAL COMMUNICATIONS COMMISSION REMITTANCE ADVICE

APPROVED BY OMB 3060-0589

(1) LOCKBOX # 358210

PAGE NO. 1 OF 1

SPECIAL USE
FCC USE ONLY

SECTION A - PAYER INFORMATION

(2) PAYER NAME (if paying by credit card, enter name exactly as it appears on your card) Televerde Communications, L.P.

(3) TOTAL AMOUNT PAID (dollars and cents) \$ 170,090

(4) STREET ADDRESS LINE NO. 1 10858 Warwick Boulevard

(5) STREET ADDRESS LINE NO. 2 Suite A

(6) CITY Newport News

(7) STATE VA

(8) ZIP CODE 23601

(9) DAYTIME TELEPHONE NUMBER (include area code) (757) 599-9470

(10) COUNTRY CODE (if not in U.S.A.)

IF PAYER NAME AND THE APPLICANT NAME ARE DIFFERENT, COMPLETE SECTION B IF MORE THAN ONE APPLICANT, USE CONTINUATION SHEETS (FORM 159-C)

SECTION B - APPLICANT INFORMATION

(11) APPLICANT NAME (if paying by credit card, enter name exactly as it appears on your card) KaStarcom. World Satellite, LLC

(12) STREET ADDRESS LINE NO. 1 P.O. Box 1471

(13) STREET ADDRESS LINE NO. 2

(14) CITY Evergreen

(15) STATE CO

(16) ZIP CODE 80439

(17) DAYTIME TELEPHONE NUMBER (include area code) (303) 526-1039

(18) COUNTRY CODE (if not in U.S.A.)

101/102-SAT-PLA 98

COMPLETE SECTION C FOR EACH SERVICE, IF MORE BOXES ARE NEEDED, USE CONTINUATION SHEETS (FORM 159-C)

SECTION C - PAYMENT INFORMATION

Table with 5 columns: (19A) FCC CALL SIGN/OTHER ID, (20A) PAYMENT TYPE CODE (PTC), (21A) QUANTITY, (22A) FEE DUE FOR (PTC) IN BLOCK 20A, FCC USE ONLY. Includes handwritten fee of \$5,045.00.

SECTION D - TAXPAYER INFORMATION (REQUIRED)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:)
)
KASTARCOM. WORLD SATELLITE, LLC)
)
Application for Authority to)
Construct, Launch and Operate)
A Geostationary Orbital Fixed)
Satellite Service System)
In the Ka-band)

File No.: _____

To: Managing Director

**PETITION FOR RECONSIDERATION AND
REINSTATEMENT NUNC PRO TUNC**

Received
FEB 2 1998
Sec. of Communications
Washington, D.C.

KASTARCOM. WORLD SATELLITE, LLC

Stephen E. Coran
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January 20, 1998

Its Attorneys

SUMMARY

KaStarcom. World Satellite, LLC (“KaStarcom”) seeks reinstatement *nunc pro tunc* of its application for Geostationary Orbit Fixed Satellite Service (“GSO-FSS”) facilities in the Ka-band. KaStarcom’s application, filed December 22, 1997, was returned by the Commission’s Fee Section on grounds that it did not include the appropriate filing fee for launch and operation. In fact, the application included an *overpayment* of the required filing fees. The Commission has never dismissed an application where the applicant paid more than the required amount. To do so here would be inconsistent with Commission rules and established precedent.

Moreover, the Commission has discretion to grant reinstatement where circumstances warrant. The Commission has exercised this discretion to grant reinstatement or waiver even where applicants have underpaid or not paid a required filing fee. In cases where the applicant submits the requisite fee but makes an error on the Remittance Advice or on the payment instrument, relief has been routinely granted. Here, KaStarcom *overpaid* the requisite filing fees and submitted a Remittance Advice with the correct fee code. Precedent thus compels reinstatement of the application.

KaStarcom relied in good faith on its counsel concerning the preparation and filing of the subject application, with all required fees. This good faith reliance constitutes yet another basis for reinstatement.

Reinstatement of KaStarcom’s application also will facilitate the entry of a new, innovative competitor into the satellite services market and allow for the fullest possible utilization of the spectrum, without disrupting application processing or prejudicing other applicants. The public interest thus strongly supports reinstatement under the unique circumstances of this case.

Accordingly, KaStarcom respectfully requests reinstatement *nunc pro tunc* of the subject application.

TABLE OF CONTENTS

	Page
SUMMARY	i
TABLE OF CONTENTS	ii
INTRODUCTION	2
BACKGROUND	3
DISCUSSION	8
I. Return Of KaStarcom’s Application Is Contrary To The Commission’s Rules Governing Overpayments.....	8
II. Reinstatement Of KaStarcom’s Application Would be Consistent With FCC Precedent Affording Discretion In Connection With Fee Filings.....	9
III. Reinstatement Is Appropriate Where, As Here, The Applicant Relied In Good Faith On Advice of Counsel	14
IV. Reinstatement Of KaStarcom’s Application Would Serve The Public Interest.....	16
CONCLUSION	18

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To: Managing Director

**PETITION FOR RECONSIDERATION AND
REINSTATEMENT NUNC PRO TUNC**

KaStarcom. World Satellite, LLC ("KaStarcom"), by counsel and pursuant to Sections 1.1118 and 1.106 of the Commission's Rules, hereby respectfully requests reconsideration of the Fee Section's (the "Section") return of its above-referenced application to construct, launch and operate a Ka-band satellite system in the Geostationary Orbit Fixed Satellite Service ("GSO-FSS"), and reinstatement *nunc pro tunc* of the application.¹ The Section apparently based its action on KaStarcom's inadvertent miscalculation and *overpayment* of the required filing fee. Submitted herewith is a new fee form and check in the amount of \$170,090, and attached as Exhibit A is KaStarcom's original application.² In support whereof, the following is respectfully shown:

¹ To the extent necessary, KaStarcom requests waiver of Sections 1.1109(c)(3), 1.1116(a) and 1.1118(b) for grant of this request for reinstatement *nunc pro tunc*, for the reasons set forth herein and good cause shown.

² Other than the new Remittance Advice and filing fee check, the re-submitted application attached as Exhibit A is identical to that filed on December 22, 1997.

INTRODUCTION

KaStarcom proposes to construct and operate a digital international GSO-FSS Ka-band satellite system at orbital locations 52° E.L. and 175° W.L., permitting it to provide inexpensive high-speed switched data, voice and video satellite communications services to individual and business users in Alaska, Hawaii, Latin America, Asia, Europe and India. To this end, following eighteen months of design and planning, KaStarcom filed an application with the FCC to provide such services on December 22, 1997, the cut-off date for the second processing round for Ka-band satellite authorizations. Through an inadvertent clerical error, KaStarcom placed the incorrect fee amount on its Remittance Advice and *overpaid* the total fee, resulting in the return of its application by the FCC's fee processing section in Pittsburgh, Pennsylvania.

KaStarcom respectfully submits that its application was returned in error and should be reinstated *nunc pro tunc*, permitting consideration of the application with those filed in the processing round that closed on December 22, 1997. Such reinstatement would: (1) comply with the Commission's rules governing overpayments; (2) comport with precedent granting reinstatement where the fee submission contains minor clerical errors; (3) accord with Commission decisions holding that, where circumstances warrant, a *bona fide* applicant will not be attributed with the ministerial error of its attorney; and (4) advance Commission policies and the public interest by facilitating the entry of a new, innovative competitor into the satellite services market.

BACKGROUND

In its application, KaStarcom proposes to provide inexpensive, high-speed switched and video telephony, data information, audio, video, messaging and other services to individual and business users utilizing orbital locations 52° E.L. and 175° W. L. KaStarcom will provide these services to Alaska, Hawaii, Latin America, Asia, Europe and India. As stated in its application, the proposed KaStarcom system:

will provide new, innovative and affordable satellite services across the United States and throughout the world, to a wide range of commercial and residential users. It will be known as the 'Global Interactive Satellite System.' The KaStarcom system will be a telecommunications switch in the sky. It will provide a wide range of video, audio, and data services at high transmission rates and will complement the existing telecommunications structure. . . .

KaStarcom's proposal to construct, launch and operate a digital international GSO FSS system in Region B of the Ka-band will serve the public interest by implementing efficient, economical, interference-free satellite delivered services. These services will include not only traditional switched telephony services, programming and ancillary information services, but also messaging and other services that will be utilized by end users as varied as Personal Communications Services ("PCS") licensees and providers to the commercial transportation industries.

KaStarcom Application at 8 & 9.

KaStarcom's proposed GSO-FSS system is designed to eventually operate in conjunction with KaStar Satellite Communications Corp.'s ("KaStar's") authorized satellites at 73° W.L. and 109.2° W.L. as a global broadband data communications network. Although separate entities, KaStarcom

and KaStar are commonly controlled by Messrs. David M. Drucker and Walter S. Segaloff.³ KaStarcom and KaStar also share communications counsel and consulting engineers.

In July of 1995, KaStar filed an application for two GSO-FSS satellites in the Ka-band. The Commission granted KaStar's application in May of 1997.⁴ KaStar already has begun designing and financing its satellite system, even though the Commission has not established milestone deadlines or assigned final frequencies for inter-satellite links or telemetry, tracking and control for its satellites.

As the Commission is aware, KaStar was an active participant in the negotiations leading to the resolution of orbital locations for the first-round Ka-band applicants. These negotiations occurred over an eighteen-month period from 1995 through 1997, and ultimately led to the successful assignment of orbital locations for KaStar and the eleven other applicants for GSO-FSS facilities in the Ka-band.⁵ KaStar prepared Appendices 3 and 4 for submission to the International

³ Mr. Drucker has extensive experience and an established track record as a Commission licensee in connection with his construction and operation of radio and television stations. Mr. Drucker has the following broadcast interests:

- Sole shareholder of GreenTV Corp., licensee of KSBS-TV, Steamboat Springs, Colorado; TV Translator Stations K63GB and K18ED, Denver, Colorado; KDMD-TV, Anchorage, Alaska; Station K41DP, Anchorage, Alaska; Station K22AG, Anchorage, Alaska; and Station K18ED, Fairbanks, Alaska.
- 50% shareholder of Cayo Hueso Television Corp., licensee of LPTV Stations W55BV, Homestead, Florida and W21BD, Pompano Beach, Florida.
- 100% shareholder of Polarcomm Corp., licensee of KXRE(AM), Manitou Springs, Colorado; WKIZ(AM), Key West, Florida; and KRRU(AM), Pueblo, Colorado.

⁴ See *KaStar Satellite Communications Corp.*, DA 97-972 (Int. Bur. 1997) ("*KaStar Order*").

⁵ See *Assignment of Orbital Locations to Space Stations in the Ka-band*, DA 97-967, released (continued...)

Telecommunications Union (“ITU”) not only for its requested orbital locations but for additional orbital locations as part of a joint effort among the applicants. KaStar subsequently prepared Appendices 3 and 4 for 73° W.L., for which KaStar ultimately received Commission approval.⁶

Further, KaStar is contributing to the development of the Ka-band industry through its participation in technical, rulemaking and international proceedings. KaStar is a member of the working group preparing recommendations for blanket licensing standards for Ka-band earth stations. It also participated in filing a petition for rulemaking seeking allocation of frequencies for tracking, telemetry and control operations for GSO-FSS systems,⁷ and has submitted comments on coordination between the United States and foreign administrations regarding proposed orbital locations that may cause interference to authorized GSO-FSS systems in the United States. KaStar also attended meetings at the Commission regarding proposed coordination between the United States and the United Kingdom, Canada, Japan and Russia regarding GSO-FSS systems.

The Commission adopted service rules for entities proposing to operate Ka-band satellite systems in the Fixed Satellite Service on October 9, 1997.⁸ Pursuant to these rules, the Satellite

⁵(...continued)
May 9, 1997.

⁶ KaStar’s willingness to change orbital locations from its originally requested location of 95° W.L. to 73° W.L. was instrumental in reaching a successful agreement among the first processing round applicants because it made available an additional orbital location in Region A, the most congested portion of the Ka-band. It also required KaStar to prepare the necessary Appendices for submission to the ITU.

⁷ *See Amendment of Parts 2 and 25 of the Commission’s Rules to Designate Extended C-Band Spectrum for TT&C Functions of GSO-FSS Systems Operating in Bands Above the Ku-Band, Petition for Rule Making* (filed August 7, 1997).

⁸ *See Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission’s Rules to Redesignate*
(continued...)

Policy Branch (the “SPB”) on October 15, 1997 issued a Public Notice accepting for filing certain applications to provide GSO-FSS in the Ka-band and establishing December 22, 1997 as the cut-off date for filing applications for additional U.S.-licensed space stations on those frequencies.⁹

Through extensive technical review and discussions beginning approximately eighteen months before release of the *Cut-Off Notice*, principals of KaStarcom determined that, once the cut-off date for the second round of Ka-band processing was established, they would file a GSO-FSS application in the International Region B Ka-band for two satellites at the preferred orbital locations of 52° E.L. and 175° W.L. KaStarcom selected these locations to take commercial advantage of the global coverage that the combination of the KaStar and KaStarcom satellites would offer. Thus, in anticipation of the December 22, 1997 filing deadline, within days of release of the *Cut-Off Notice*, the principals of KaStarcom, its engineers and its counsel began preparing and assembling the FCC forms and the supporting exhibits necessary to file the subject application.

During final production of the application, KaStarcom’s communications counsel determined that a total fee of \$173,030, \$2,940 more than the correct fee of \$170,090, should be submitted with KaStarcom’s application. In an abundance of caution, it was concluded that construction permit filing fees (Fee Type Code: BBY) should be filed with the application. The Commission had indicated that prior construction authority would not be necessary in connection with applications for authority to

⁸(...continued)

the 27.5 and 29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service (Third Report and Order), FCC 97-378, released October 15, 1997.

⁹ See *Public Notice*, Report No. SPB-106, DA 97-22-2, released October 15, 1997 (“*Cut-Off Notice*”).

launch and operate satellite systems,¹⁰ and the SPB issued a Public Notice stating that the construction permit fee would be unnecessary.¹¹ However, based on informal discussions between KaStarcom's communications counsel and Section staff prior to the filing deadline, counsel believed that it would be most prudent to include the construction permit fee and thereafter seek a refund, consistent with FCC rules. Accordingly, \$4,940 (\$2,470 x 2) in construction permit fees were included with KaStarcom's application and noted in the Remittance Advice (FCC Form 159) with the appropriate fee code.

In the course of determining the total fee for KaStarcom's application, the fee code applicable to launch and operation of a GSO-PSS system (Fee Type Code: BNY) was correctly stated on the Remittance Advice, but the fee was mistakenly reported as \$168,090 (\$84,045 x 2) instead of \$170,090 (\$85,045 x 2). The \$168,090 launch and operation fee was added to the \$4,940 construction permit fee for a total filing fee of \$173,030. Accordingly, KaStarcom tendered a single check in the amount of \$173,030 with its application, even though it was required to pay a filing fee of only \$170,090.

Despite KaStarcom's submission of a *net overpayment* to the Commission for satellite applications, the Section returned KaStarcom's application as "unprocessable" by notice dated

¹⁰ See *Streamlining the Commission's Rules and Regulations for Satellite Application and Licensing Procedures*, 11 FCC Rcd 21581, 21584 (1996).

¹¹ See *Public Notice, Clarification and Corrections to Public Notices Report Nos. SPB-88 and SPB-89 establishing deadlines for applications, letters of intent and amendments to applications in the 2 GHz and 36-51.4 GHz Frequency Bands*, SPB-95, DA 97-1723, released August 13, 1997.

December 23, 1997.¹² KaStarcom received its original application and check from the Commission on Tuesday, January 6, 1998.

DISCUSSION

I. Return Of KaStarcom's Application Is Contrary To The Commission's Rules Governing Overpayments

The return of KaStarcom's application is at odds with the Commission's rules governing overpayments. KaStarcom's application included more than the necessary fees and a Remittance Advice containing the correct fee code. Accordingly, KaStarcom's application should have been accepted by the Section and KaStarcom in due course provided with a refund of the extra \$2,940 submitted with its application.

Section 1.1113(a)(1) mandates that refunds will be paid "[w]hen no fee is required for the application or other filing." Further, the Note to Section 1.1113(a)(5) specifies that "[p]ayments in excess of an application fee will be refunded only if the overpayment is \$8 or more." In accordance with these provisions, an application submitted with too much money such as KaStarcom's clearly is acceptable for filing.

The Commission routinely applies Section 1.1113(a)(1) to grant fee refunds, regardless of the reason for the overpayment.¹³ For example, the Commission refunded \$1,525 to Brown University when it inadvertently mailed a check directly to the FCC without attaching an application.¹⁴

¹² Attached as Exhibit B is a copy of the return notice. Attached as Exhibit C are copies of the Remittance Advice and check that were submitted by KaStarcom on December 22, 1997.

¹³ See also *Establishment of a Fee Collection Program*, 2 FCC Rcd 947, 949 (1987), *recon. denied*, 3 FCC Rcd 5987 (1988).

¹⁴ See *letter from Marilyn J. McDermott to Mitchell Lazarus, Esq.*, 6 FCC Rcd 7062 (1991).

Similarly, when Southwestern Bell Telephone Company submitted an unnecessary hearing fee in connection with a pole attachment complaint proceeding,¹⁵ and when Redwood Broadcasting, Inc. submitted a superfluous construction permit extension application,¹⁶ the Commission issued full refunds.

The Commission has never dismissed an application where the applicant has made an overpayment. Rather, as demonstrated above, the Commission grants refunds where a fee is submitted with no application or where unnecessary applications or fees are filed. Here, KaStarcom paid more than the requisite filing fee, submitted all appropriate forms with its application, including a Remittance Advice, and indicated the correct fee code for its application. Thus, KaStarcom's application was improperly returned and must be reinstated.

II. Reinstatement Of KaStarcom's Application Would Be Consistent With FCC Precedent Affording Discretion In Connection With Fee Filings

Under these unique circumstances, reinstatement of KaStarcom's application and/or waiver of the fee processing rules is well within the Commission's discretion,¹⁷ and would be entirely

¹⁵ See letter from Marilyn J. McDermott to Roger J. Metzler, Esq. dated July 30, 1997, Fee Control #9610168190423001.

¹⁶ See letter from Marilyn J. McDermott to Ms. Jane Knox dated May 2, 1997, Fee Control #9609258120136001.

¹⁷ Pursuant to Section 158(d)(2) of the Communications Act, as amended ("Act"), the Commission may "waive or defer payment of any charge in any specific instance for good cause shown, where such action would promote the public interest." See also *Fee Collection Program*, 2 FCC Rcd at 950.

consistent with FCC precedent.¹⁸ Indeed, the Commission has on numerous occasions reinstated applications with incorrect fee submissions upon a showing of good cause. The FCC even has granted relief in cases where the fee submission was insufficient or lacking entirely. A fortiori, a similar result is justified where the filing fee represents an *overpayment*.

In *Hefty Communications, Ltd.*,¹⁹ the Video Services Division (the “Division”) upheld reinstatement *nunc pro tunc* of Tuskegee Television’s (“Tuskegee’s”) contested commercial television application despite the applicant’s underpayment of the filing fee. Although two other applicants filing in the same window submitted the correct filing fee, the Division accepted Tuskegee’s statement that it had been given erroneous information by the FCC Fee Hotline as an adequate basis for reinstatement. The Division recognized the applicant’s *bona fide* nature and noted that, “once advised of its error, the applicant immediately submitted a check for the correct amount” and that “the competing applications for the channel would not be prejudiced by the acceptance of Tuskegee’s application.”²⁰

In *John Spencer Robinson*,²¹ the Review Board (the “Board”) similarly upheld the reinstatement of an application where a hearing fee was returned because it arrived at the Commission after the effective date of a fee increase from \$6,000 to \$6,760. The Board stated that

¹⁸ Section 158(c)(2) of the Act authorizes, but does not require, the Commission to impose the ultimate sanction of application dismissal “for failure to pay in a timely manner any application fee. KaStarcom respectfully notes that it did not fail to pay its application fee in a timely manner; rather, it submitted an *overpayment* with an incorrect Remittance Advice.

¹⁹ 3 FCC Rcd 6692 (Vid. Serv. Div. 1988)(“*Hefty*”).

²⁰ *Id.* at 6693.

²¹ 5 FCC Rcd 5542 (Rev. Bd. 1990)(“*Robinson*”).

dismissal under the circumstances would be “unduly harsh,” holding that the timing of the fee increase, the applicant’s mailing of the payment two weeks in advance of the effective date of the fee increase, and the applicant’s *bona fides* were equitable considerations calling for reinstatement. The Board noted that there was no evidence that the applicant “attempted to delay the filing of the hearing fee . . . abuse the Commission’s processes, engage in ‘gamesmanship,’ or seek to garner an unfair advantage.”²²

Hefty and *Robinson* clearly demonstrate that the Commission will grant relief from the fee processing rules, even in cases of underpayment or non-payment, where equitable considerations warrant. It is not surprising, then, that the Commission routinely grants reinstatement where an applicant enclosing more than sufficient payment has its application returned because of an error in the Remittance Advice or other ministerial error. The Office of Managing Director (“OMD”) in several instances has reinstated applications and preserved their timely status in a filing window where the application was returned on the basis of an incorrect or absent fee code. For example, Sauk Broadcasting Corp.’s application for a new FM station at Reedsburg, Wisconsin was reinstated *nunc pro tunc* even though it erroneously omitted the fee code on its application and despite the opposition to its reinstatement petition filed by a competing applicant.²³ The OMD similarly reinstated *nunc pro tunc* an application for a new FM station filed by Healdsburg Broadcasting, Inc. that specified an

²² *Id.* at 5544. See also letter from Marilyn J. McDermott to Vincent J. Curtis, Jr., Esq. and Anne Goodwin Crump, Esq., 9 FCC Rcd 1808 (1994) (fee processing rules waived where FM Branch requested rulemaking fee post-grant).

²³ See letter from Marilyn J. McDermott to Jerrold D. Miller, Esq., 8 FCC Rcd 8825 (1993)(“*Sauk*”).

incorrect fee code,²⁴ as well as an application filed by Seeway Broadcasters, Inc. for an LPTV major modification submitted with an incorrect fee code.²⁵ Significantly, the OMD recognized in *Seeway* that “inadvertent errors in the entry of fee codes will occasionally occur” and stated that “we believe that errors involving fee code entry will be insufficient in volume to hamper the Fee Section in its fee processing function or the individual Bureaus in their efforts to dispose of applications in a timely fashion.”²⁶ The *Seeway* reinstatement is particularly significant in light of the letter perfect standard then applicable to LPTV applications filed during a filing window.

Like the circumstances in *Sauk*, *Healdsburg* and *Seeway*, this case involves a ministerial error on the Remittance Advice form – *not an underpayment*. KaStarcom submitted more than enough money to cover the filing fee required for its application, but listed an incorrect fee amount on the section of its Remittance Advice form pertaining to launch and operation. Even more so than the typical fee code cases, the circumstances of this case are unique and unlikely to arise again. As in the fee code decisions, grant of reinstatement in this case will not hamper timely application processing.²⁷

²⁴ See letter from Marilyn J. McDermott to Peter A. Casciato, Esq., 6 FCC Rcd 7068 (1991) (“*Healdsburg*”).

²⁵ See letter from Marilyn J. McDermott to Mr. Robert Ladd, 6 FCC Rcd 7066 (1991) (“*Seeway*”).

²⁶ *Id.*

²⁷ The Commission has drawn a clear distinction between applicants that submit no fee form and those that merely make errors on the form. See, e.g., *Sauk*; *Healdsburg*; *LEOsat Corporation*, 71 RR2d 1410 (1993), *aff’d per curiam*, *LEOsat Corp. v. F.C.C.*, 52 F.3d 1122 (D.C. Cir. 1995) (upholding dismissal of applications for domestic LEO satellite system for failure to submit Remittance Advice form); *Elgar Partnership*, 9 FCC Rcd 361 (1993) (affirming dismissal of MDS applications for failure to submit a Remittance Advice form with each application). See also letter from Marilyn J. McDermott to Joseph E. Dunne III, Esq., 10 FCC Rcd 2424 (1995); letter from Marilyn J. McDermott to Ms. Carol Keightley, 7 FCC Rcd 4722 (1992); letter from Marilyn J. (continued...)

The OMD also has granted relief in connection with ministerial errors pertaining to payment instruments submitted with feeable applications. For example, the application of James M. Peroutek was reinstated despite the submission of a check made out jointly to himself and the FCC, in violation of Section 1.1108(a).²⁸ The OMD similarly has reinstated *nunc pro tunc* an application for cellular fill-in facilities submitted with a misdated check that predated the application by four years.²⁹

As in the fee code cases, the Commission afforded relief in *Peroutek* and *Beaverhead* because of the unique circumstances presented, the ministerial nature of the error, and the fact that full payment was submitted by the applicant on the date of filing. Here, where KaStarcom submitted a total fee payment *in excess of* what is required under FCC rules, an even stronger basis for reinstatement or waiver is presented.³⁰

In short, KaStarcom paid the requisite fee for its application on the date of filing, indeed *overpaid* the Commission, but made a clerical mistake on its Remittance Advice. Reinstatement of KaStarcom's application would be fully consistent with the long line of Commission cases granting reinstatement *nunc pro tunc* where an applicant has submitted full payment but committed a ministerial error in completing its Remittance Advice form or fee check. In accordance with this policy, KaStarcom's request for reinstatement *nunc pro tunc* should be granted.

²⁷(...continued)
McDermett to Mr. Felix Lopez, 7 FCC Rcd 3643 (1992).

²⁸ See letter from Marilyn J. McDermett to James M. Peroutek, 7 FCC Rcd 2437 (1991)(“*Peroutek*”).

²⁹ See letter from Marilyn J. McDermett to Harold Mordkofsky, Esq. and Robert M. Jackson, Esq., 10 FCC Rcd 8328 (1995)(“*Beaverhead*”).

³⁰ See Section I., *supra*.

III. Reinstatement Is Appropriate Where, As Here, The Applicant Relied In Good Faith On Advice Of Counsel

Reinstatement of KaStarcom's application would be consistent with Commission policy to not impose the ultimate sanction of disqualification where an applicant relies in good faith upon its attorney.³¹ It would be unreasonable in the extreme for the Commission to disqualify KaStarcom for relying in good faith upon counsel's advice as to completing the Remittance Advice, especially where the applicant has an established relationship with counsel of several years and has relied upon counsel's legal advice with successful results.³²

The Commission has refused to disqualify an applicant where it relies in good faith upon the advice of counsel. In *Cumberland Broadcasting*, the District of Columbia Court of Appeals affirmed the Commission's decision to not disqualify an applicant because of its attorney's threat to file a strike application during settlement discussions.³³ Similarly, in *Asheboro Broadcasting*, the Commission declined to revoke a broadcast license even though the applicant filed a strike application against a competing applicant. In *Professional Radio*, the Commission did not disqualify an applicant for a

³¹ See, e.g., *Cumberland Broadcasting Corporation*, 647 F.2d 1341, 1341 (D.C. Cir. 1980) ("*Cumberland Broadcasting*") (Commission must resist automatic disqualification sanction); *WEBR, Inc.*, 420 F.2d 158, 168 (D.C. Cir. 1969) (disqualification of applicant inappropriate where applicant relied in good faith upon advice of counsel); *Professional Radio, Inc.*, 2 FCC Rcd 6666, 6666 (1987) ("*Professional Radio*") (same); *Asheboro Broadcasting Co.*, 20 FCC 2d 1, 6 (1969) ("*Asheboro Broadcasting*") (same).

³² See *WKKG, Inc.*, 94 FCC 2d 484, 497 (ALJ 1983) ("*WKKG*").

³³ The Court also noted that upon learning of the impropriety of threatening to file a strike application, the applicant took the appropriate remedial steps. See *Cumberland Broadcasting*, 647 F.2d at 1344. Upon learning of the error in the Remittance Advice, KaStarcom has taken the appropriate remedial steps by re-filing the application along with this petition and the accompanying fee.

new broadcast license where the applicant, relying upon the advice of its counsel and consulting engineer, amended its application to specify a new transmitter site, even though the applicant did not have reasonable assurance for the new site.³⁴

As did the applicants in the above cases, the principals of KaStarcom have relied upon communications counsel for legal advice on satellite matters for several years. For over two years, counsel assisted KaStar in the preparation and successful prosecution of KaStar's application in the first processing round. Counsel has advised KaStar and KaStarcom on a wide variety of regulatory issues regarding satellites, including coordination of orbital locations, frequency allocation and filings with the FCC and ITU. KaStarcom appropriately relied upon counsel in good faith concerning the preparation and prosecution of the subject application, complicated matters to be sure. Such good faith reliance resulted in the error on the Remittance Advice and the overpayment. In these circumstances, it is patently unfair and contrary to the holdings in the above-cited cases to subject KaStarcom to the ultimate penalty of disqualification.

IV. Reinstatement Of KaStarcom's Application Would Serve The Public Interest

Compelling public interest considerations warrant reinstatement of KaStarcom's application. First, like its affiliate KaStar, KaStarcom is a new entrant in the satellite industry. The Commission has time and again recognized that encouraging new satellite entrants promotes diversity of service,

³⁴ See *Professional Radio*, 2 FCC Rcd at 6666.

and thereby advances an important policy goal.³⁵ KaStarcom's business plan is to augment PCS and other communications industries with satellite-based interactive services. KaStarcom's research shows that there is sufficient demand for such services, and that future demand will grow over time as new technologies become available.

Second, reinstatement of KaStarcom's application would further competition in the satellite marketplace.³⁶ In addition to increasing resale and leasing opportunities for other satellite service providers, the deployment of KaStarcom's satellite and business plans (as further described in its application) would promote facilities-based competition with other technologies. This would be especially true as the demand and uses for PCS and interactive services grow, and other technologies offer competing services.

Third, KaStarcom is a *bona fide* applicant committed to the construction, launch and operation of its proposed satellite system. As discussed *supra*, KaStarcom's affiliate, KaStar, was one of the first-round Ka-band permittees authorized by the Commission and has actively participated in U.S. and international proceedings concerning GSO-FSS systems in the Ka-band. KaStar has

³⁵ See *Orion Network Systems, Inc.*, 11 FCC Rcd 20434, 20437 (Int. Bur. 1996) (granting conditional authorization for domestic fixed satellite service to a new applicant serves public interest by increasing competition and service options to public). See also *National Exchange Satellite, Inc.*, 3 FCC Rcd 6992, 6992 (1992) (new entrant assigned two orbital locations in new frequency band); *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 3 FCC Rcd 6972, 6974 (1988) (new entrant given priority when assigning orbital locations providing fifty-state coverage); *Hughes Communications Galaxy, Inc.*, 103 FCC 2d 663, 666 (1985) (Hughes granted two orbital locations in 12/14 GHz band as new entrant).

³⁶ See *Satellite Business Systems*, 98 FCC 2d 762, 769-70 (1984); *Advanced Business Communications, Inc.*, 94 FCC 2d 1, 3 (1983); *Space Station Licensing*, 58 RR 2d 577, 581 (1983); *Hughes Communications, Inc.*, 84 FCC 2d 578, 581 (1981); *Space Station Licensing*, 88 FCC 2d 318, 321-22 (1981); *Establishment of Domestic Communications Satellite Facilities by Non-Governmental Entities*, 35 FCC 2d 844 (1972).

attracted substantial interest from both potential strategic partners and the investment community in connection with its efforts to develop its Ka-band satellite system. KaStarcom expects to attract similar interest in the satellites proposed in its subject application. Moreover, as demonstrated in KaStarcom's application and above, KaStarcom's and KaStar's principals hold broadcast licenses for operating radio and television stations throughout the country. This long and successful track record of operating communications facilities to serve the public interest further underscores KaStarcom's *bona fides*.

Fourth, reinstatement in these circumstances would promote full and efficient use of the Ka-band frequencies without disrupting application processing or prejudicing other applicants. As demonstrated in the table attached as Exhibit D, there are more than enough orbital locations in Region B to accommodate all second round Ka-band applicants, and retain vacant slots for future applicants.³⁷ Where this has been the case in other satellite proceedings, the Commission waived its rules to encourage new entry and promote competition.³⁸ There is no sound reason to depart from this policy. Disqualification of KaStarcom would result in additional orbital locations remaining

³⁷ KaStarcom's review of the GSO-FSS applications filed for the second processing round and the present authorizations for GSO-FSS systems, as reflected on Exhibit D, indicates that KaStarcom is the only applicant for 175° W.L. and there is one other applicant proposing 52° E.L., but that there are more than a sufficient number of orbital locations to accommodate all of the second-round applicants as well as future applicants for Region B. Given the Commission's determination that all orbital locations are "fungible," it is reasonable to conclude that accommodations can be made for each applicant and still leave slots available. In this regard, KaStarcom would consider amending its application for 52° E.L. to propose a nearby orbital location (*i.e.*, 50° E.L., 46° E.L. or 58° E.L.), subject to its review of coverage characteristics, its satisfaction of international coordination issues and any required Commission consent.

³⁸ See *KaStar Order* at 4-5; *Teledesic Corporation*, DA 97-527 at 5-6 (Int. Bur. 1997); *Lockheed Martin Corporation*, DA 97-973 at 5 (Int. Bur. 1997); *Loral Space & Communications, Ltd.*, DA 97-974 at 5 (Int. Bur. 1997); *PanAmSat Licensee Corp.*, DA 97-978 at 4-5 (Int. Bur. 1997); *Hughes Communications Galaxy, Inc.*, DA 97-971 at 5-6 (Int. Bur. 1997).

vacant. Without prejudicing other applicants or disrupting application processing, reinstatement would ensure that the orbit-spectrum resource will be more fully utilized.³⁹

CONCLUSION

This is not a case where an applicant tendered insufficient funds, intended to delay the payment of the filing fee, or otherwise abuse the Commission's processes to seek an unfair advantage over other applicants.⁴⁰ Rather, KaStarcom submitted a net *overpayment* with its application. Because it included more than sufficient fees and the Remittance Advice, KaStarcom's application was acceptable as filed and should not have been returned under the Commission's rules. F o r KaStarcom to suffer the ultimate penalty of application return under these circumstances would contravene a long line of cases granting relief from the fee processing rules where dismissal was based on a ministerial or clerical mistake, as opposed to insufficient or missing fees, or a missing Remittance Advice. Furthermore, reinstatement would be consistent with Commission precedent holding that application dismissal is not warranted due to its counsel's error where, as here, the applicant relied in good faith on its attorneys. Finally, reinstatement would be fully consistent with the public interest in promoting diversity of service options, competition, and full and efficient use of spectrum.

WHEREFORE, the premises considered, KaStarcom respectfully requests that the Commission reconsider its action returning KaStarcom's application to construct, launch and operate

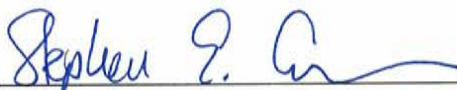
³⁹ The OMD reinstated Montana 8 - Beaverhead Limited Partnership's cellular fill-in application for similar reasons, finding that the applicant had "shown that the public interest would be served by the grant of the waiver [to permit reinstatement of application filed with erroneously predated check], by ensuring that service to the public continues, in a rural regions, without any disruption or delay." *Beaverhead* at 8329.

⁴⁰ *See Robinson* at 399.

a Geostationary Orbital Fixed Satellite Service system in Region B of the Ka-band, and reinstate the application *nunc pro tunc*. To the extent waiver of Sections 1.1109(c)(2), 1.1116(a) or 1.1118(b) or any other rules are required to permit such reinstatement, KaStarcom respectfully request such waivers for good cause shown.

Respectfully submitted,

KASTARCOM. WORLD SATELLITE, LLC

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Its Attorneys

January 20, 1998

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EXHIBIT A

EXHIBIT B

FEDERAL COMMUNICATIONS COMMISSION
UNPROCESSABLE APPLICATION RETURN FORM

DATE: 12-23-97

TELEVERGE COMM
10858 WARWICK BLVD
SUITE A
NEWPORT NEWS VA.
23601

Dear

This is to notify you that your application package is being returned for the following reason(s):

- No application/filing accompanied your submission.
- No remittance accompanied your submission.
- No Remittance Advice Form (FCC Form 159) accompanied your submission.
- The amount remitted and/or Payment Type Code is incorrect. ^{FEE FOR EAC} BYX 85,045
- The Remittance Advice Form is incomplete.
- Multiple transactions are not accepted for this Payment Type Code. Each transaction must be listed separately on the Remittance Advice Form.
- When filing for more than one applicant and paying with a single remittance, you must include them all on one Remittance Advice Form. Please use Advice (Continuation Sheet) (FCC Form 159-C) if additional entries are necessary.
- Other:

Please refer to the enclosed fee filing guide for further instructions, and mail your corrected application, Remittance Advice Form, and payment to the appropriate P.O. Box in Pittsburgh, Pennsylvania.

If you have further questions, please contact the Billings & Collections Branch at

1-888-225-5322

Enclosure

CK # 1005
FCC 159

G-110
210
1907

EXHIBIT C

EXHIBIT D

Ka-Band Orbital Assignment Plan¹

REGION A

<u>Location</u>	<u>Company</u>
147° W.L.	Morning Star Satellite Company, L.L.C.
145° W.L.	Vacant
143° W.L.	Vacant
141° W.L.	Vacant
<i>139° W.L.</i>	<i>Motorola Global Communications, Inc.</i>
137° W.L.	Vacant
135° W.L.	Vacant
133° W.L.	Vacant
131° W.L.	Vacant
129° W.L.	Vacant
<i>127° W.L.</i>	<i>Lockheed Martin Corporation</i>
125° W.L.	PanAmSat Licensee Corporation
123° W.L.	Vacant
121° W.L.	Echostar Satellite Corporation
119° W.L.	Vacant
<i>117° W.L.</i>	<i>Hughes Communications, Inc.</i>
115° W.L.	Loral Space & Communications, Ltd.

¹ Permit Holders are listed in normal typeface while applicants are listed in bold and italicized.

113° W.L. <i>113° W.L.</i>	VisionStar, Inc. <i>TRW, Inc.</i>
109.2° W.L.	KaStar Satellite Communications Corp.
107° W.L.	Vacant
105° W.L.	GE American Communications, Inc.
103° W.L. <i>103° W.L.</i> <i>103° W.L.</i> <i>103° W.L.</i>	PanAmSat Corporation <i>CAI Data Systems, Inc.</i> ² <i>DirectCom Networks, Inc.</i> <i>Pegasus Development Corporation</i>
101° W.L.	Hughes Communications Galaxy, Inc.
99° W.L.	Hughes Communications Galaxy, Inc.
97° W.L.	Lockheed Martin Corporation
95° W.L.	NetSat 28 Company, L.L.C.
93° W.L. <i>93° W.L.</i> <i>93° W.L.</i> <i>93° W.L.</i>	Loral Space & Communications, Ltd <i>CAI Data Systems, Inc.</i> <i>DirectCom Networks, Inc.</i> <i>Pegasus Development Corporation</i>
91° W.L.	Comm, Inc.
89° W.L. <i>89° W.L.</i>	Orion Network Systems <i>Pacific Century Group (Letter of Intent)</i>
87° W.L.	Comm, Inc.
85° W.L.	GE American Communications, Inc.
83° W.L. <i>83° W.L.</i>	Echostar Satellite Corporation <i>TRW, Inc.</i>
<i>82° W.L.</i>	<i>Pacific Century Group (Letter of Intent)</i>

² CAI Data Systems, Inc. requests one authorization, either at 103 or 93.

81° W.L.	Orion Network Systems
79° W.L.	<i>Lockheed Martin Corporation</i>
77° W.L.	Comm, Inc.
75° W.L.	Comm, Inc.
73° W.L.	KaStar Satellite Communications Corp.
69° W.L.	<i>Hughes Communications, Inc.</i>
69° W.L.	<i>Pegasus Development Corporation</i>
67° W.L.	[under consideration]

REGION B

62° W.L.	Morning Star Satellite Company, L.L.C.
60° W.L.	Vacant
58° W.L.	PanAmSat Corporation
56° W.L.	Vacant
54° W.L.	Vacant
52° W.L.	Vacant
49° W.L.	Hughes Communications Galaxy, Inc.
47° W.L.	Orion Atlantic, L.P.
<i>45° W.L.</i>	<i>PanAmSat Corporation</i>
<i>43° W.L.</i>	<i>PanAmSat Corporation</i>
<i>39° W.L.</i>	<i>Orion Asian Pacific Corporation</i>
<i>37° W.L.</i>	<i>Vacant</i>
<i>35° W.L.</i>	<i>Vacant</i>
<i>33° W.L.</i>	<i>Vacant</i>
<i>31° W.L.</i>	<i>Vacant</i>
<i>29° W.L.</i>	<i>Vacant</i>
<i>26.2° W.L.</i>	<i>Hughes Communications, Inc.</i>
23° W.L.	Vacant
21.5° W.L.	Lockheed Martin Corporation
19° W.L.	Vacant
17° W.L.	GE American Communications, Inc.

<i>15° W.L.</i>	<i>Orion Atlantic, L.P.</i>
13° W.L.	Vacant
11° W.L.	Vacant
<i>7.5° W.L.</i>	<i>Motorola Global Communications, Inc.</i>
5° W.L.	Vacant
3° W.L.	Vacant
2° E.L.	Lockheed Martin Corporation
4° E.L.	Vacant
6° E.L.	Vacant
8° E.L.	Vacant
10° E.L.	Vacant
12° E.L.	Vacant
<i>15° E.L.</i>	<i>TRW, Inc.</i>
18° E.L.	Vacant
20° E.L.	Vacant
22° E.L.	Vacant
25° E.L.	Hughes Communications Galaxy, Inc.
<i>26.2° E.L.</i>	<i>Pegasus Development Corporation</i>
30° E.L.	Morning Star Satellite Company, L.L.C.
32° E.L.	Vacant
34° E.L.	Vacant
36° E.L.	PanAmSat Corporation

38° E.L.	Vacant
40° E.L.	PanAmSat Corporation
42° E.L.	<i>Motorola Global Communications, Inc.</i>
44° E.L.	Vacant
46° E.L.	Vacant
48° E.L.	PanAmSat Corporation
50° E.L.	Vacant
52° E.L.	<i>KaStarcom. World Satellite, LLC</i>
52° E.L.	<i>Lockheed Martin Corporation</i>
54° E.L.	Hughes Communications Galaxy, Inc.
56° E.L.	GE American Communications, Inc.
58° E.L.	Vacant
60° E.L.	Vacant
62° E.L.	Vacant
64° E.L.	Vacant
66° E.L.	Vacant
68.5° E.L.	<i>PanAmSat Corporation</i>
72° E.L.	<i>PanAmSat Corporation</i>
74° E.L.	Vacant
76° E.L.	Vacant
78° E.L.	Orion Network Systems, Inc.
80° E.L.	Vacant

82° E.L.	Vacant
84° E.L.	Vacant
86° E.L.	Vacant
88° E.L.	Vacant
90° E.L.	Vacant
92° E.L.	Vacant
94° E.L.	Vacant
97° E.L.	<i>Motorola Global Communications, Inc.</i>
99° E.L.	<i>Hughes Communications, Inc.</i>
99° E.L.	<i>Lockheed Martin Corporation</i>
99° E.L.	<i>Pegasus Development Corporation</i>
101° E.L.	Hughes Communications Galaxy, Inc.
103° E.L.	Vacant
105.5° E.L.	Loral Space & Communications, Ltd.
107.5° E.L.	Morning Star Satellite Company, L.L.C.
109° E.L.	Vacant
111° E.L.	Hughes Communications Galaxy, Inc.
112° E.L.	<i>TRW, Inc.</i>
114.5° E.L.	GE American Communications, Inc.
118° E.L.	Vacant
120° E.L.	Vacant
122° E.L.	Vacant
124.5° E.L.	PanAmSat Corporation

126.5° E.L.	Orion Network Systems, Inc.
130° E.L.	Lockheed Martin Corporation
132° E.L.	Vacant
134° E.L.	Vacant
136° E.L.	Vacant
138° E.L.	Vacant
140° E.L.	Vacant
142° E.L.	Vacant
144° E.L.	Vacant
146° E.L.	Vacant
149° E.L.	Hughes Communications Galaxy, Inc.
<i>151.5° E.L.</i>	<i>Lockheed Martin Corporation</i>
154° E.L.	Vacant
156° E.L.	Vacant
158° E.L.	Vacant
<i>160° E.L.</i>	<i>Motorola Global Communications, Inc.</i>
162° E.L.	Vacant
164° E.L.	Hughes Communications Galaxy, Inc.
<i>166° E.L.</i>	<i>PanAmSat Corporation</i>
<i>169° E.L.</i>	<i>PanAmSat Corporation</i>
171° E.L.	Vacant
173° E.L.	PanAmSat Corporation

175.25° E.L.

Lockheed Martin Corporation

175° W.L.

KaStarcom. World Satellite, LLC

CERTIFICATE OF SERVICE

I, Yvette King, a secretary with the law firm of Rini, Coran & Lancellotta, do hereby certify that I have caused a copy of the foregoing "Petition for Reconsideration and Reinstatement Nunc Pro Tunc" to be mailed, first-class, postage prepaid this 20th day of January 1998 to the following persons:

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