

Atlanta
Beijing
Brussels
Hong Kong
London
Los Angeles
Milan
New York
Orange County
Palo Alto
Paris
San Diego
San Francisco
Shanghai
Stamford
Tokyo
Washington, DC

(202) 551-1791
taragiunta@paulhastings.com

February 17, 2006

BY HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

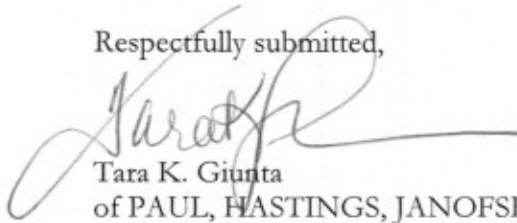
Re: Opposition of AfriSpace, Inc. to Application for Review
IBFS File No. SAT-LOA-20050311-00061

Dear Madame Secretary:

Transmitted herewith, on behalf of AfriSpace, Inc. ("AfriSpace"), is an Opposition to Ondas Spain, SL's Application for Review.

In the event that the Commission or its staff should have any questions concerning this filing, kindly refer them to the undersigned counsel for AfriSpace.

Respectfully submitted,



Tara K. Giunta
of PAUL, HASTINGS, JANOFSKY & WALKER LLP
Counsel for AfriSpace, Inc.

RECEIVED

58637.00002

FEB 17 2006

Federal Communications Commission
Office of Secretary

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

RECEIVED

FEB 17 2006

Federal Communications Commission
Office of Secretary

In the Matter of)
)

AfriSpace, Inc.)
)

Application for Authority to Launch and)
Operate a Replacement Satellite, AfriStar-2,)
at 21° E.L. and to Co-locate It with AfriStar-1)
_____)

SAT-LOA-20050311-00061

To: The Commission

OPPOSITION OF AFRISPACE, INC. TO APPLICATION FOR REVIEW
AND
REQUEST FOR EXPEDITED REVIEW

Tara K. Giunta
J. Steven Rich
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, NW
Washington, DC 20005
(202) 551-1700

Counsel for AfriSpace, Inc.

February 17, 2006

TABLE OF CONTENTS

	Page
SUMMARY	i
I. BACKGROUND	2
II. THE COMMISSION SHOULD DISMISS ONDAS'S REVIEW REQUEST FOR LACK OF STANDING	5
A. Ondas Has Not Demonstrated Any Injury	5
B. Ondas Did Not "Participate" in the Proceeding.....	6
III. THE BUREAU DID NOT VIOLATE ONDAS'S DUE PROCESS RIGHTS	8
IV. THE TECHNICAL ARGUMENTS MADE BY ONDAS RELY ON FLAWED PREMISES AND ARE PROCEDURALLY DEFICIENT	10
A. The Bureau Correctly Found That Other BSS (Sound) Systems That Might Serve Europe Would Be Incompatible With AfriStar-1	10
B. The Technical "Solutions" Proposed by Ondas for Minimizing Interference Are Based on Flawed Assumptions and, as a Procedural Matter, Should Have Been Presented to the Expert Bureau for Review	12
V. THE BUREAU'S WAIVER OF THE PROCESSING ROUND IS FULLY CONSISTENT WITH ESTABLISHED PRECEDENT AND JUSTIFIED IN THIS CASE	15
A. The Bureau's Decision Was Consistent With FCC Precedent and Policies	15
B. The FCC Acted Within its Authority in Choosing to Waive the NGSO-Like Processing Round Procedures on Its Own Motion.....	23
VI. CONCLUSION.....	25

SUMMARY

On January 3, 2006, the International Bureau (the “Bureau”) of the Federal Communications Commission (the “FCC” or “Commission”) granted AfriSpace, Inc. (“AfriSpace”) authority to launch and operate the AfriStar-2 satellite (the “*AfriStar-2 Order*”). Ondas Spain SL (“Ondas”) filed an application for review (the “Review Request”) asking the full Commission to reverse the Bureau’s decision, which decision was consistent with applicable FCC precedent and policies. The Review Request lacks any credible basis to justify reversal of the *AfriStar-2 Order*, and is nothing more than a last-ditch attempt by a disgruntled would-be competitor to misuse the Commission’s processes for potential financial gain.

Ondas clearly lacks standing to request review by the Commission of the *AfriStar-2 Order*. Ondas has failed to show any direct and concrete impairment of its economic interests, and alleges only that it is “developing” a competing Broadcasting Satellite Service (Sound) (“BSS (Sound)”) system to serve Europe. However, based on the record, Ondas has no satellites, no services, and no customers. Such a speculative and hypothetical “injury” does not give Ondas standing as an entity that has been “aggrieved” by the *AfriStar-2 Order*.

Moreover, Ondas failed to “participate” in the earlier stages of this proceeding as that term is defined by Commission precedent, and has failed to acknowledge—much less explain—its reasons for not doing so, as required by the Commission’s rules. Specifically, Ondas filed a procedurally-deficient so-called “petition to deny” that the Bureau could only consider as an informal objection under applicable rules. Commission precedent establishes that an informal objection does not confer party status for purposes of filing an application for review.

While Ondas claims that its due process rights were violated, it fails to establish which, if any, rights were implicated by the Bureau’s issuance of the *AfriStar-2 Order*. Ondas has not filed an application with the FCC during the 15 years that AfriSpace has been in existence, nor

has it provided any reason to believe that it intends to do so in the near future. While Ondas alleges that the Bureau's action "*discouraged* Ondas from timely filing a competing application," Ondas fails to explain why it did not do so in the past 15 years.

Ondas fails to cite any cases that would grant it any due process rights. Ondas cites two cases relating to the due process rights of parties whose license applications were denied, but fails to explain how these cases are relevant to an entity that has filed no such application. Further, the cases that Ondas cites regarding lack of notice relate to instances in which the FCC deviated from its published rules and procedures. There is no basis to argue here that the Bureau acted in a manner that was anything but consistent with prior decisions and established procedures and processes.

Ondas argues that the system it purportedly plans to construct would be compatible with the AfriStar-1 system. However, the so-called "engineering affidavit" supplied by Ondas relies on flawed assumptions regarding the authorized bandwidth and geographic coverage area for AfriStar-1 and therefore cannot be considered reliable. Further, as a procedural matter, Ondas was required to present the questions of fact contained in its Review Request to the Bureau.

Finally, Ondas contends that the Bureau's decision is inconsistent with prior precedent. However, the well-reasoned *AfriStar-2 Order* properly relied in part on the Bureau's prior *MSV Order*, which involved substantially identical factual and legal issues. Specifically, the Bureau waived the NGSO-like processing round where an applicant sought authority to operate on the same frequencies as the applicant's already-licensed satellite. The *AfriStar-2 Order* also is fully consistent with FCC policies, including the fundamental goal that underlay the *Space Station Reform* proceeding, *i.e.*, the expeditious grant of satellite applications in order to facilitate the efficient use of spectrum and promptly bring services to the public.

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

In the Matter of)

AfriSpace, Inc.)

Application for Authority to Launch and)
Operate a Replacement Satellite, AfriStar-2,)
at 21° E.L. and to Co-locate It with AfriStar-1)

SAT-LOA-20050311-00061

**OPPOSITION OF AFRISPACE, INC. TO APPLICATION FOR REVIEW
AND
REQUEST FOR EXPEDITED REVIEW**

AfriSpace, Inc. (“AfriSpace”) hereby submits its opposition to the Application for Review (the “Review Request”) filed by Ondas Spain, SL (“Ondas”)¹ of the decision by the International Bureau granting the above-referenced application for AfriStar-2.² As was the case in the so-called Petition to Deny (the “Petition”)³ filed by Ondas against issuance of the AfriStar-2 license, the Review Request relies on tortured arguments predicated on misstated and misconstrued facts and is devoid of any credible legal or regulatory basis to justify reversal of the *AfriStar-2 Order*. The International Bureau (the “Bureau”) of the Federal Communications Commission (“FCC” or “Commission”) properly authorized AfriSpace to launch and operate the AfriStar-2 satellite in a decision that was based on a solid legal and factual foundation, was fully supported by established precedent, and reflected informed, expert and sound judgment.

AfriSpace therefore respectfully urges that the Commission deny the Review Request.

¹ Ondas Application for Review, IB File No. SAT-LOA-20050311-00061 (filed February 6, 2006).

² *AfriSpace, Inc.*, Order and Authorization, DA 06-4, 2006 FCC LEXIS 10 (2006) (the “*AfriStar-2 Order*”).

³ Petition to Deny, IB File No. SAT-LOA-20050311-00061 (filed April 18, 2005) (the “Petition”).

AfriSpace respectfully requests that the Commission consider the issues raised in this proceeding on an expedited basis and dismiss the Review Request as soon as is reasonably practicable, and within a period of no more than 45 days if at all possible. The Review Request is clearly nothing more than a delay tactic by a would-be competitor. A protracted dispute before the FCC could jeopardize AfriSpace's ability to provide continued service to its customers because the useful life of the AfriStar-1 satellite has been shortened due to a power degradation problem. AfriSpace cannot prepare the AfriStar-2 satellite for launch until the AfriStar-2 authorization is final. The delay caused by Ondas's specious Review Request will cause real and immediate economic injury to AfriSpace, unlike the purely hypothetical harm that Ondas claims it might one day suffer if the Commission upholds the Bureau's correct and well-reasoned decision in the *AfriStar-2 Order*.

I. BACKGROUND

AfriSpace is a wholly-owned subsidiary of WorldSpace, Inc. ("WorldSpace"), a Delaware company that began publicly trading its securities on NASDAQ in August 2005. WorldSpace is largely credited with launching the digital satellite radio industry when, in 1990, it filed an application with the FCC to construct, launch, and operate its AfriStar-1 satellite to provide broadcast satellite sound service ("BSS (Sound)") to Africa and the Middle East.

When AfriSpace filed its initial application in 1990, there was no SDARS or BSS (Sound) industry. The Commission granted AfriSpace an experimental license under which it developed the technology for both the satellite and the radio receivers, developed a commercially achievable business plan, obtained financing, launched and started operating its satellite system, and began providing service. On December 17, 1999, the FCC granted AfriSpace a full ten-year license for AfriStar-1 at 21° E.L.

AfriStar has been fully coordinated for service throughout its service area, which includes not only the Middle East and Africa, but also portions of South Asia and Western Europe. Therefore, on April 8, 2004, AfriSpace notified the FCC that it intended to provide service to all regions within the satellite's footprint.⁴ On February 7, 2006, the ITU registered the AFRIBSS satellite network in the MIFR. Under current ITU spectrum priority rules, AfriStar-1 has a period of validity of *thirty years*, through October 2028.⁵ As a result, AfriStar-1 has priority for use of the relevant radio frequencies and the associated orbital position.

On April 13, 2004, AfriSpace submitted an application (the "AfriStar-2 Application") to the FCC to launch and operate AfriStar-2 in the same frequency band as, and co-located with, AfriStar-1.⁶ As discussed in the AfriStar-2 Application, the useful life of AfriStar-1 has been shortened due to a power degradation problem caused by a darkening of the cover glass of the solar arrays' cells. AfriSpace already has a constructed satellite in storage that it intends to launch and commence operations once the AfriStar-2 authorization is final. On April 21, 2004, the FCC submitted a request to the ITU for coordination with respect to AfriStar-2.

The AfriStar-2 Application was dismissed twice without prejudice to refile due to two minor technical problems. The final application was filed on March 11, 2005. On April 18, 2005, Ondas submitted the Petition, in response to which AfriSpace filed an Opposition.⁷ Ondas

⁴ Letter from Tara K. Giunta, counsel for AfriSpace, Inc., to Marlene H. Dortch, Secretary, FCC (April 8, 2004).

⁵ See ITU-BR-IFIC 2562 (dated February 7, 2006). Ondas's statement that the AfriStar-2 application would "extend and expand the existing spectrum priority of AfriStar-1 . . . for another 12-15 years," Review Request at 6, has no basis in fact or law. In fact, AfriStar-2 has no bearing whatsoever on AfriStar-1's 30-year period of validity. Separately, AfriSpace has requested, and expects to receive, a 30-year period of validity for AfriStar-2.

⁶ *AfriSpace, Inc., Application for Authority to Launch and Operate a Replacement Satellite, AfriStar-2, at 21° E.L. and to Collocate it with AfriStar-1*, File No. SAT-LOA-20050311-00061 (filed March 11, 2005).

⁷ Opposition of AfriSpace, Inc. to Petition to Deny (filed May 3, 2005) ("Opposition"). Ondas did not serve the Petition on AfriSpace or AfriSpace's counsel. Therefore, such filing was classified by the Commission as an informal objection. 47 C.F.R. § 25.154(b)(1). Nonetheless, as noted above, AfriSpace submitted a substantive, detailed Opposition to the Petition.

did not file a reply or otherwise respond to the Opposition, and the FCC issued the AfriStar-2 license on January 3, 2006. In accordance with its satellite licensing procedures and established precedent, the Bureau treated the AfriStar-2 application as a non-GSO-like system, waived the processing round, and granted the license. The Bureau also waived the bond requirement, but required that AfriSpace bring AfriStar-2 into operation before it decommissions AfriStar-1.

The Applicant here, Ondas Spain SL, has not provided any information as to its ownership, officers, or directors, or any other substantive information as to its *bona fides* other than a footnote indicating that it is *planning* to develop a European BSS (Sound) system. We have not been able to identify any publicly-available information concerning Ondas Spain SL, but have located a website of a company called Ondas Media, which indicates that Ondas Media was formed in Madrid, Spain in 2004 – a year prior to the date of Ondas’s Petition (which, as we note, was submitted by Ondas Spain SL). While one might infer that Ondas Spain is related to Ondas Media since the President of Ondas Media, Celso Azevedo, is the individual who signed the Petition on behalf of Ondas Spain SL, Ondas provides no information to link itself to Ondas Media. It is therefore not clear what relationship, if any, exists between the two entities. Thus, Ondas may or may not be the same company that purportedly plans to offer BSS (Sound) service in Europe. The Review Request states that Delphi Corp. made a “significant strategic investment” of an undisclosed amount in “Ondas.”⁸ Ondas Media’s website indicates that Delphi is an investor, so perhaps this is the entity in which Delphi invested? Delphi filed for bankruptcy protection in October 2005.⁹

⁸ Review Request at 1, fn. 1.

⁹ “Delphi Corporation,” <http://www.delphidocket.com/delphi> (last visited Feb. 12, 2006).

II. THE COMMISSION SHOULD DISMISS ONDAS'S REVIEW REQUEST FOR LACK OF STANDING

Ondas lacks standing before the Commission to file an application for review contesting the *AfriStar-2 Order*. The Commission should therefore decline to consider Ondas's Review Request.

A. Ondas Has Not Demonstrated Any Injury

Under the Commission's rules, "[a]ny person *aggrieved* by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."¹⁰ The FCC has interpreted the term "aggrieved" to require applicants to prove "a direct and concrete impairment of [the applicants'] economic interest[s] . . . resulting from the grant."¹¹

In *PanAmSat, International Relay, Inc.* ("IRI") had filed an application for review of a waiver granted to PanAmSat that allowed PanAmSat to begin construction of its satellite. IRI, a "potential" competitor, made allegations concerning "competitive injury" that it would allegedly suffer as a result of the FCC's action.¹² The Commission determined that IRI's allegations concerning potential competitive harm were "speculative and unsupported by evidence."¹³ Based on IRI's failure to show "a *direct and concrete impairment of its economic interest* in both the earth station and space segments resulting from the grant," the Commission denied IRI's claim that it had been "aggrieved" and held that IRI lacked standing.¹⁴

¹⁰ 47 C.F.R. § 1.115(a) (emphasis added).

¹¹ *In The Matter Of Pan American Satellite Corporation*, 60 Rad. Reg. 2d (P & F) 398 (May 21, 1986) ("PanAmSat"); see also, e.g., *Applications Of WINV, Inc., (Assignor), and WGUL-FM, Inc., (Assignee)*, 14 FCC Rcd. 2032 (1998).

¹² *PanAmSat* at ¶¶ 6, 50-52.

¹³ *Id.* at ¶ 52.

¹⁴ *Id.*

Here, Ondas has not identified any tangible economic interest that would or could be directly and concretely impaired by the grant of the AfriStar-2 Application. Ondas has not alleged that it has any satellites or infrastructure, that it offers any services, that it has an application on file with the FCC, or that it has any customers. In fact, Ondas makes only a passing reference to working with the Spanish government to license a HEO system to provide service to Europe without providing any substantive information validating this claim. Clearly, Ondas currently not a competitor or even an imminently prospective competitor of AfriSpace. Even if it were a competitor, as directly addressed by the Commission in *PanAmSat*, that role by itself does not demonstrate a “direct and concrete impairment of an economic interest.”¹⁵

B. Ondas Did Not “Participate” in the Proceeding

Under the Commission’s rules, “[a]ny person filing an application for review who has not previously participated in the proceeding shall include with his application a statement . . . showing why it was not possible for him to participate in the earlier stages of the proceeding.”¹⁶ In order to have “participated in the proceeding,” the person must have filed a “valid petition to deny against the person whose grant the petitioner now seeks to have reconsidered.”¹⁷

The Petition was not a valid petition to deny. First, the Petition failed to meet the requirement that the Petition be served on AfriSpace and its counsel, as required by Sections 1.47 and 25.154(a)(3) of the Commission’s rules,¹⁸ which deficiency was noted in AfriSpace’s

¹⁵ See *PanAmSat* at ¶ 52.

¹⁶ 47 C.F.R. § 1.115(a). Ondas does not acknowledge, much less explain, its failure to participate.

¹⁷ *Applications of Vodafone AirTouch, plc and Bell Atlantic Corporation*, Memorandum Opinion and Order, 20 FCC Rcd 6439, ¶¶16-17 (2005) (“Vodafone”) (dismissing application for review of Timothy E. Welch on the alternative grounds that his *pro se* pleading failed to meet the pleading requirements for petitions to deny).

¹⁸ 47 C.F.R. §§ 1.47, 25.154(a)(3).

Opposition.¹⁹ Second, Ondas failed to “allege *facts* sufficient to demonstrate” that grant of the AfriStar-2 application would cause Ondas injury, or that the injury would be prevented or redressed by denying the AfriStar-2 application.²⁰ Ondas alleged no facts whatsoever, but made only an unsupported claim that “Commission grant of the Afrispace [sic] application *may* have a devastating impact on Ondas [and] [t]he net effect of an FCC decision granting the Afristar-2 [sic] application *could* be to preclude implementation of the Ondas system.”²¹ Further, Ondas did not present any arguments—much less *facts*—to show how the grant of the AfriStar-2 license would *cause* Ondas any injury, since the Petition ignored the question of whether Ondas could successfully coordinate with AfriStar-1. Unless Ondas could do so, there would be no way for Ondas to obtain its own FCC license, and no injury could result from the *AfriStar-2 Order*.

Third, Ondas failed to include a certificate of service with the Petition, as required by Section 25.154(a)(5) of the Commission’s rules.²² The Commission’s rules plainly state that any pleading not filed in accordance with the procedural requirements will be classified as an informal objection,²³ and the Bureau evidently treated the Petition as such. Commission precedent clearly establishes that an informal objection cannot be considered a valid petition to deny for purposes of establishing standing in later stages of a proceeding.²⁴ Therefore, Ondas did not “participate” in this proceeding and has no standing to request review now.

¹⁹ Opposition at 2, fn. 1.

²⁰ See *Vodafone Order* at ¶ 17 (internal citations omitted, emphasis added).

²¹ Petition at 4 (emphasis added).

²² See 47 C.F.R. §§ 25.154(a)(5).

²³ 47 C.F.R. § 25.154(b).

²⁴ See, e.g., *University of North Carolina*, Memorandum Opinion and Order, 4 FCC Rcd 2780 (1989) (dismissing petition for reconsideration filed by groups that had filed only an informal objection).

III. THE BUREAU DID NOT VIOLATE ONDAS'S DUE PROCESS RIGHTS

Ondas contends that the Bureau failed to give Ondas adequate notice that it might waive Section 25.157(c) of the Commission's rules, and that this lack of notice violated Ondas's due process rights because it "precluded Ondas from having a meaningful opportunity to comment on or challenge the Bureau's proposed action . . . [and] also discouraged Ondas from timely filing a competing application."²⁵ This argument cannot be taken seriously.

As an initial matter, Ondas fails to identify exactly which of its due process rights were violated. Ondas cites two cases relating to due process, but they involve appeals of denial of license and renewal applications, not challenges thereto by third parties. In this case, there is no Ondas application at all—Ondas alleges only that the grant "*discouraged* Ondas from timely filing a competing application."²⁶ Further, nothing in the Review Request (or in the Petition, for that matter) suggests that Ondas has any real intention of seeking an authorization from the FCC. However, even if Ondas intended to file with the Commission, it has not, in fact, done so despite the fact that AfriSpace has been in existence for over 15 years. Moreover, in its Petition and on the Ondas Media website, Ondas continues to tout the alleged superiority of its HEO system that it ostensibly intends to license in *Spain*. Even if Ondas did intend to submit an application with the Commission, intentions do not rise to the level of cognizable interests or establish due process rights. In any event, the Commission has always discouraged "frivolous or speculative" applications, and Ondas provides no evidence that its hypothetical application would have been

²⁵ Review Request at 17.

²⁶ If Ondas cannot muster the enthusiasm necessary to timely file an application, it is difficult to imagine how Ondas will muster sufficient enthusiasm, let alone resources, to build an international satellite network and develop advanced telecommunications services.

anything other than frivolous or speculative.²⁷

Further, Ondas had a “meaningful opportunity” to comment on the AfriStar-2 application even though it chose to squander that opportunity by filing a procedurally-defective so-called “petition to deny” full of factual misstatements and tortured legal arguments, and also has had multiple opportunities to submit an application to the FCC had it truly desired to do so. For example, if Ondas truly believed that it could offer a BSS (Sound) service in Europe that would be compatible with AfriStar-1, it could have filed such an application before AfriSpace first submitted the AfriStar-2 application in April 2004.

In its Review Request, Ondas attempts to rely on the fact that the AfriStar-2 application was dismissed twice for minor deficiencies without prejudice to refiling. However, their lack of action at the time of those dismissals belies their late-announced urgency. Where was Ondas’s urgency when the first and second AfriStar-2 applications were dismissed due to minor technical errors in June 2004 and March 2005, respectively? Why didn’t Ondas file an application at one of those times? The stunning question is: why did Ondas wait *a full year* after the AfriStar-2 Application was first filed before making any filing to the Commission? Tellingly, that filing was not an application, but a procedurally-defective and baseless so-called “petition to deny.”

The fact pattern described above, Ondas’s specious Petition, and baseless Review Request, all underscore the fact that Ondas has no real interest in obtaining an FCC license and is merely trying to manipulate the Commission’s procedures to its own advantage. In light of Ondas’s failure to demonstrate any *bona fide* intention to file an application with the FCC, it is only logical to assume that the Review Request was filed for the purpose of delay or extracting a

²⁷ See, e.g., *Amendment of the Commission’s Space Station Licensing Rules and Policies*, IB Docket No. 02-34, First Report and Order, 18 FCC Rcd 10760 (“First Space Station Reform Order”) at ¶226.

profit from settlement.²⁸ As such, the Commission should sanction Ondas for abuse of process.

Ondas's arguments concerning lack of notice are equally specious. The cases cited by Ondas involved cases where the FCC had deviated from its published rules and policies. Here, on the other hand (and as described further below), it would be absurd to argue that the Bureau had acted in a manner that was anything but consistent with prior decisions. In fact, the Bureau had elected not to apply the NGSO-like processing round procedures when they would otherwise at least arguably apply on several other occasions prior to the *AfriStar-2 Order*.²⁹

IV. THE TECHNICAL ARGUMENTS MADE BY ONDAS RELY ON FLAWED PREMISES AND ARE PROCEDURALLY DEFICIENT

A. The Bureau Correctly Found That Other BSS (Sound) Systems That Might Serve Europe Would Be Incompatible With AfriStar-1

Ondas spills a great deal of ink asserting, but not substantiating, that the Bureau erred in the *AfriStar-2 Order* when it found that no other BSS (Sound) system could provide service to Western Europe without causing interference to AfriStar-1 and that circumstances therefore justified a waiver of the Bureau's NGSO-like processing rule.³⁰ Ondas further contends that it would be possible for two or more BSS (Sound) systems to share spectrum in the same orbital arc. As shown below, this argument rests on flawed technical premises and should be disregarded in favor of the expert analysis of the Bureau.

²⁸ See *Letter to Keith E. Lamonica, Esq.*, 2006 WL 305864 (Feb. 9, 2006) ("The Commission's abuse of process policies are designed to prevent the filing of non-bona fide pleadings or applications for purposes of delay or extracting a profit from settlement").

²⁹ See, e.g., *Mobile Satellite Ventures Subsidiary LLC*, Order and Authorization, 20 FCC Rcd 479 (2005) ("MSV Order"); *Lockheed Martin Corporation*, Order and Authorization, 20 FCC Rcd 11023 (2005) ("Lockheed Martin Order"). Note that neither of the Public Notices relating to these applications mentioned the fact that the applicants sought waivers of the NGSO-like processing round rules, and that, in any event, Ondas presents no legal basis for its apparent assumption that all waiver requests must be included in a public notice.

³⁰ Review Request at 9.

The Bureau correctly found that it would be impossible to authorize any separate BSS (Sound) satellite (GSO or HEO) in Europe due to interference with systems previously licensed by the FCC, *i.e.*, AfriStar-1. Significantly, the HEO system purportedly planned by Ondas³¹ would create even more interference problems than would most other systems. There are at least two insurmountable problems with such a system from an FCC perspective.³²

First, it is highly unlikely that Ondas's proposed BSS (Sound) system could avoid causing harmful interference to Mobile Aeronautical Telemetry Service ("MATS") in the United States. MATS is of vital importance to homeland security, defense, and civil aviation, as this service is used for the flight testing of aircraft, missiles, and major components thereof. As the Bureau is aware, the issue of MATS interference is the reason why AfriStar-1 is now located at 21° E.L. rather than its originally-proposed orbital location at 12° W.L. At the original orbital location, AfriStar-1 could not avoid MATS interference problems even though it was to operate as a GSO system that had no intended coverage at all of North America. The sidelobes of a BSS (Sound) satellite, at a location in space that is visible to U.S. MATS test sites, yet which serves territories far removed from the United States, such as Europe, will still cause harmful interference to U.S. MATS operations. The high altitude and northerly latitude of a HEO orbit apogee means that a HEO satellite providing high elevation BSS (Sound) service over Europe

³¹ See Petition at 4; *see also* "Technology & Systems Overview," <http://www.ondasmedia.com/technology-overview.htm> (last visited Feb. 8, 2006).

³² AfriSpace further notes that under the rules of the International Telecommunications Union ("ITU"), any non-geostationary satellite in the 1452-1492 MHz band operates effectively on a secondary basis vis-à-vis geostationary satellites regardless of the relative dates on which the satellites are authorized. *See* International Telecommunications Union Radio Regulations §22.2 (2001). While the Commission does not prejudge the results of international coordination, it has the duty to act in the public interest. Consequently, AfriSpace respectfully requests that the Commission take notice of the likelihood that the system proposed by Ondas could be displaced at any time by an operator of an existing or future geostationary satellite. On the other hand, the AfriStar-1 satellite is fully coordinated and is already providing service, and the AfriStar-2 satellite would have priority over any later-filed geostationary satellites—and over all non-geostationary satellites, whether later-filed or not.

would be visible to the US MATS test sites, and would cause harmful interference to MATS operations by virtue of the sidelobes of the satellite antenna radiating unwanted energy toward these sites in a dynamic manner, by “sweeping” over these US MATS test sites three times a day.³³

The other insurmountable problem that would prevent the FCC from licensing the system by which Ondas allegedly plans to provide BSS (Sound) over Europe (whether GSO or HEO) is that such a system would not be able to avoid interference to AfriStar-1. Ondas clearly understands this, which is why its Review Request focuses more on AfriStar-1 than AfriStar-2 – the subject of the grant. As noted above, AfriStar-1 occupies that portion of the L-Band allocated for BSS (Sound) globally and provides service throughout Africa, the Middle East, and most of Western Europe. This would make even a GSO system with European coverage highly problematic from an interference perspective, let alone a HEO system.

B. The Technical “Solutions” Proposed by Ondas for Minimizing Interference Are Based on Flawed Assumptions and, as a Procedural Matter, Should Have Been Presented to the Expert Bureau for Review

Ondas alleges that various technical solutions could be used to allow another BSS (Sound) licensee to serve Western Europe. As discussed above, this argument relies on Ondas’s erroneous and misleading assumptions. Ondas attaches a so-called “affidavit” that purportedly supports its arguments.³⁴ Under even the most charitable reading of the “affidavit,” however, it is clear that the engineer retained by Ondas made no more than a cursory review of the AfriStar-1 application. In fact, it is not clear that he bothered to read the AfriStar-1 application or the

³³ See Recommendation ITU-R M.1459 (addressing sharing between GSO BSS and MSS systems vis-à-vis MATS operations).

³⁴ Review Request at 11 (quoting *AfriStar-1 Order* at ¶14) (emphasis added). AfriSpace notes for the record that the “affidavit” is not an affidavit at all, but instead is an unsworn statement. Nor does the so-called “affidavit” conform to the Commission’s requirements concerning unsworn declarations. See 47 C.F.R. § 1.16.

AfriStar-1 Order at all.³⁵ For example, Mr. DiFonzo states that “AfriStar-1 is only authorized for 2.6 MHz of spectrum in the 1457-1492 MHz band.”³⁶ In fact, the *AfriStar-1 Order* authorizes AfriSpace to operate AfriStar-1 in the 1452-1492 MHz frequency band,³⁷ and the *AfriStar-1 Order* does not limit AfriStar-1 to a particular band segment or a specific amount of bandwidth.

Not only is Ondas simply wrong in its assertion regarding AfriStar-1’s authorized frequencies, but Ondas’s weak attempt to infer a limitation to AfriStar-1’s coverage area to serve “only” Africa and the Middle East is similarly flawed. While the *AfriStar-1 Order* authorizes AfriSpace to provide service to Africa and the Middle East, nowhere does this order indicate that AfriSpace is “only” authorized to provide services to these areas. Rather, the *AfriStar-1 Order* plainly states that AfriSpace is authorized to operate AfriStar-1 “in accordance with technical specifications set forth in its application and consistent with our rules.”³⁸ Both the AfriStar-1 application and the ITU filing that covers the operation of the AfriStar-1 satellite indicate service contours that cover much of Western Europe, including -8 dB contours over all of Spain, Portugal, Italy, France, and Switzerland, and parts of other countries.³⁹ As AfriSpace has previously noted, AfriStar-1 actually provides service throughout its -8 dB coverage area and beyond due to the greater-than-expected sensitivity of the AfriSpace receivers.⁴⁰

AfriStar-1 has been fully coordinated for service throughout its service region, which includes not only the Middle East and Africa, but also portions of South Asia and Western Europe. Consistent with the *DISCO I Report and Order*, AfriSpace is authorized to serve any

³⁵ AfriSpace, Inc., *Order and Authorization*, 15 FCC Rcd 1632 (1999) (“*AfriStar-1 Order*”).

³⁶ Affidavit of Daniel F. DiFonzo, attached to Application for Review as Exhibit B, at 3.

³⁷ *AfriStar-1 Order*.

³⁸ *AfriStar-1 Order* at ¶14.

³⁹ Review Request at 8.

⁴⁰ AfriStar-2 Application, Exhibit A, at 4.

market within AfriStar-1's footprint, provided that the international obligations of the United States to coordinate the spacecraft are satisfied.⁴¹ Further, on April 8, 2004, AfriSpace notified the FCC that it intended to provide service accordingly.⁴² The assertion that the AfriStar-1 authorization includes "only" Africa and the Middle East is therefore specious at best, if not deliberately misleading.

Given that the purported "engineering analysis" submitted by Ondas relies on flawed premises concerning both the bandwidth and geographic coverage area for which AfriStar-1 is authorized, the Commission should disregard this "analysis." Instead, the Commission should rely on the expertise and experience of the Bureau. The Bureau fully considered the engineering data for both AfriStar-1 and AfriStar-2, and correctly concluded that no further BSS (Sound) systems could be authorized over Europe in the 1452-1492 MHz band without causing harmful interference to AfriStar-1.

Ondas's technical arguments ignore the key technical point: because AfriStar-1 blankets its coverage area in its stipulated frequency bands, Ondas cannot coordinate a BSS (Sound) system to provide service in Europe. While AfriStar-2 may extend the coverage area, Ondas still is unable to coordinate any such European system with AfriStar-1.

Moreover, as a procedural matter, Ondas's technical arguments rely on questions of fact that should have been presented to the Bureau if Ondas truly believed that they had any technical merit. Section 1.115(c) of the Commission's rules clearly states that "[n]o application for review

⁴¹ See *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, IB Docket No. 95-41, 11 FCC Rcd 2429 (1996).

⁴² Letter from Tara K. Giunta, counsel for AfriSpace, Inc., to Marlene H. Dortch, Secretary, FCC (April 8, 2004) (stating that AfriStar-1 had been "fully coordinated for service throughout its service region . . . which includes not only the Middle East and Africa, but also portions of South Asia and Western Europe"). Note that the operations of AfriStar-1 comply with the decisions of the European Conference of Postal and Telecommunications Administrations ("CEPT") governing Satellite and Terrestrial Digital Audio Broadcasting services.

will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”⁴³ This is consistent with the Commission’s traditional reliance upon the expertise and experience of the Bureaus with respect to technical and other matters that lie within their purview.⁴⁴ Ondas did not present any of its technical “solutions” to the Bureau, and its entire Review Request relies on the efficacy of such solutions. If Ondas cannot coordinate with *AfriStar-1*—as the Bureau properly concluded—then it cannot even demonstrate a potential, hypothetical injury as a result of the *AfriStar-2 Order*.

V. THE BUREAU’S WAIVER OF THE PROCESSING ROUND IS FULLY CONSISTENT WITH ESTABLISHED PRECEDENT AND JUSTIFIED IN THIS CASE

A. The Bureau’s Decision Was Consistent With FCC Precedent and Policies

Ondas argues that the Bureau’s decision was “unsupported by prior precedent” and that it “was at odds with the central purpose of the NGSO-like processing rules.”⁴⁵ As shown below, the Bureau acted in a way that was not only consistent with applicable precedent, but was also in full accordance with the policies underlying the *Space Station Reform* proceeding.

In 2002, the Commission commenced the *Space Station Reform* proceeding with the primary purpose of streamlining and expediting its procedures for licensing satellite systems, which the Commission observed had typically resulted in long delays in licensing new satellite

⁴³ 47 C.F.R. § 115(d).

⁴⁴ See, e.g., *Implementation Of Sections 309(J) And 337 Of The Communications Act Of 1934 As Amended*, 15 FCC Rcd 22709 (2000) (“[W]e defer to the Bureau’s expertise and experience in making such determinations”); *Applications of Agape Broadcasting Foundation, Inc.*, 2 FCC Rcd 5491(1987) (“[W]e believe that this non-routine engineering matter should be processed by the Media Bureau, upon whose technical expertise the Commission relies in matters of this nature.”); *Applications of Digital Paging Systems Of Philadelphia, Inc.*, 2 FCC Rcd 7226 (1987) (referring to “the Bureau, the Commission’s designated experts on technical matters”).

⁴⁵ Application at ii.

systems.⁴⁶ In so doing, the Commission sought to avoid the type of delays encountered under the prior processing round procedure, which had imposed “economic costs on society.”⁴⁷ The Commission determined that “good spectrum policy demands completion of licensing as rapidly as possible, in order to expedite the use of scarce spectrum resources by licensees or the reassignment of spectrum returned to or reclaimed by the Commission.”⁴⁸ Finally, the Commission reiterated its commitment to “improving its procedures whenever possible to further the public interest.”⁴⁹

In the *First Space Station Reform Order*, the Commission adopted a two-tiered process for licensing satellites. It adopted a “first-come, first-served” processing for “GSO-like” satellite systems and a processing round procedure for non-GSO-like satellite systems. Non-GSO-like satellites include “GSO satellites communicating with earth stations with omni-directional antennas.”⁵⁰ The *First Space Station Reform Order* did not alter the Commission’s established policy that “[w]hen the Commission receives NGSO-like applications that seek to use the same frequencies for which that applicant is already licensed, it processes that request immediately without instituting a modified processing round.”⁵¹ The Commission concluded that these

⁴⁶ *Amendment of the Commission’s Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking, IB Docket No. 02-34, 17 FCC Rcd 3847, ¶11 (2002) (“Space Station Reform NPRM”).

⁴⁷ *Id.* at ¶ 11.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *First Space Station Reform Order* at ¶21. For purposes of its licensing procedures, the Commission defined “GSO-like” as “GSO satellites communicating with earth stations with non-omni-directional antennas.” *Id.* at ¶ 48.

⁵¹ *MSV Order* at ¶8 (citing *EarthWatch, Inc.*, Order and Authorization, 12 FCC Rcd 21637 (1997) (“EarthWatch Order”).

procedures would allow it to act much more quickly on satellite applications than it had been able to do under the previous procedures.⁵²

In the *AfriStar-2 Order*, the Bureau relied in part on its earlier *MSV Order*, in which it had authorized MSV to launch and operate an L-band Mobile Satellite Service (“MSS”) satellite, MSV-2, that would provide service within South America and between South America and the United States.⁵³ MSV’s request did not include a license to use any additional frequencies, but was limited to the same frequencies on which its existing satellite—AMSC-1—was licensed.⁵⁴ The Bureau found that “[a]s a practical matter, any NGSO-like satellite serving South America in the bands licensed to AMSC-1 is likely to cause harmful interference to AMSC-1’s North American operations.”⁵⁵ In support of this finding, the Bureau explained that “the large North American and South American coverage areas are in close proximity to each other and, indeed, are likely to overlap. Thus, geographic separation is not sufficient to limit co-frequency interference between multiple NGSO-like systems serving each of these areas.”⁵⁶

Ondas also contends that the *MSV Order* is inapposite, by which it apparently means “distinguishable.” However, Ondas apparently considers any two orders involving different parties and even trivial differences in facts—but identical legal principles—“distinguishable.” In so doing, Ondas focuses on three immaterial differences between the two decisions: (1) “the public notice regarding MSV’s application gave interested parties adequate notice that the NGSO-like processing rules might be waived, as well as an opportunity to comment or file a

⁵² The Commission also noted that “we expect that the first-come, first served procedure will be faster than the modified processing round we adopt in this order above.” *First Space Station Reform Order* at ¶74.

⁵³ *MSV Order*, *supra* note 29.

⁵⁴ *MSV Order* at ¶ 8, *AfriStar-2 Application*, Exhibit A, at 7.

⁵⁵ *MSV Order* at ¶ 8.

⁵⁶ *Id.*

competing application in the event the waiver was not granted,” and MSV had expressly requested a waiver of the NGSO-like processing round procedures so that other parties had an opportunity to object; (2) no other parties did, in fact object; and (3) MSV had included an engineering analysis in support of its request to waive the NGSO-like processing round rules.⁵⁷

As with the other arguments raised in the Review Request, these arguments sink to the level of smoke and mirrors and nothing more. First, Ondas flatly misstates the Public Notice in the MSV case. That public notice made no mention of MSV’s request for a waiver of the processing round procedures, but only stated that the application had been accepted for filing and listed some of the *other* waiver requests made by MSV.⁵⁸ Moreover, the fact that MSV affirmatively requested a waiver, while the Bureau chose to grant a waiver *sua sponte* in the *AfriStar-2 Order* makes no difference from a legal standpoint since the FCC’s waiver standards are identical whether an applicant requests a waiver or the FCC grants a waiver on its own motion.⁵⁹

Second, the fact that no party filed an objection to the MSV application is irrelevant since there is no reason to believe that had someone in the MSV proceeding filed a specious objection such as the one filed by Ondas in this proceeding then the Commission would have reached a different result in the *MSV Order*. The Bureau observed in the *MSV Order* that the Commission “will not consider applications for new systems where the new system’s operations would cause interference to licensed systems.”⁶⁰ In light of the Bureau’s finding that “any NGSO-like satellite serving South America is likely to cause harmful interference to AMSC-1’s North

⁵⁷ See Review Request at 14-15.

⁵⁸ Public Notice, Report No. SAT-00164, *Policy Branch Information; Space Station Applications Accepted for Filing*, at 2 (rel. Sept. 12, 2003).

⁵⁹ See *infra* Section IV.B.

⁶⁰ *MSV Order* at ¶8.

American operations[.]” the *MSV Order* left no room for the possibility that the Bureau would have reached a different conclusion if a disgruntled would-be competitor had claimed that it *might*, at some point, attempt to construct an incompatible system.⁶¹

Third, Ondas claims that there are substantive differences between the level of engineering data and analyses provided by AfriSpace versus that provided by MSV – in an attempt to infer an inability of the public to substantively evaluate the AfriStar system. This claim is patently false and intentionally misleading. In its application, MSV provided full technical details concerning the operations of MSV-2, as would any applicant for authority to launch and operate a new space station. However, MSV did not devote any part of its engineering analysis to the specific issue of its request to waive a processing round. AfriSpace provided technical information regarding AfriStar-2, just as MSV provided such data in the MSV-2 application. The engineering data and analyses supporting the applications for AfriStar-1 and AfriStar-2 are publicly available, so the allegation that “there was no opportunity to review” the engineering data relied upon by the Bureau in the *AfriStar-2 Order* has no basis and can only be viewed as a subterfuge for the real purpose underlying Ondas’s Review Request – to attempt to impede a perceived competitor by manipulating the Commission’s procedures.

The Bureau properly relied upon the *MSV Order* in deciding to waive the NGSO-like processing round procedures for AfriStar-2. As was the case with MSV, AfriSpace requested authority to “operate on the same frequencies as the applicant’s already licensed NGSO-like satellite.”⁶² In fact, the case for waiver in the *AfriStar-2 Order* was even stronger than in the *MSV Order*—in the case of MSV, the operations of the existing satellite were largely confined to

⁶¹ *See id.*

⁶² *AfriStar-2 Order* at ¶12.

North America. However, as the Bureau noted in the *AfriStar-2 Order*, AfriSpace already serves large portions of Southern and Western Europe via AfriStar-1. Thus, the Bureau was correct in finding that it “could not authorize another BSS (sound) operator’s space station in the 1457 – 1492 MHz band and above the horizon at the location of an AfriStar-1 receiver without resulting unacceptable interference to the AfriStar-1 network.”⁶³

Other precedent also supports the *AfriStar-2 Order*.⁶⁴ For example, in *EarthWatch Incorporated*, the Bureau authorized EarthWatch to modify its license to allow the construction, launch, and operation of two additional low-earth orbit satellites in the earth exploration-satellite service.⁶⁵ The Bureau did so without a processing round in light of the fact that EarthWatch was seeking authority to operate two new LEO satellites in the same frequencies in which its licensed satellites already operated.⁶⁶ This policy predates the *Space Station Reform Order*, but is cited, and is specifically relied on, in the *MSV Order* (released in 2005) clearly reaffirming the policy, and Ondas has presented no rationale in support of abolishing this policy. AfriSpace, like EarthWatch, requested authority to operate a new satellite in its currently-licensed frequencies. Such a scenario does not implicate the policy considerations that led to the NGSO-like modified processing round procedures, and Ondas has failed to provide a single example where the Bureau found that a processing round was appropriate for a satellite such as AfriStar-2.

Ondas argues that the Bureau’s decision was inconsistent with the policy goals underlying the *First Space Station Reform Order*. However, the Bureau’s *AfriStar-2* decision

⁶³ *AfriStar-2 Order* at ¶13.

⁶⁴ See, e.g., *Lockheed Martin Corp.*, Order and Authorization, DA 05-1747 (rel. June 23, 2005) (good cause found for waiver of NGSO-like processing round rules in light of the fact that licensed systems already operated in the relevant frequency band).

⁶⁵ See *EarthWatch Order*.

⁶⁶ *Id.*

clearly comports with the fundamental purpose and policy of the *Space Station Reform* proceeding: to expedite the licensing of satellites. Notably, the Bureau licensed AfriStar-2 within nine months of the date of application—a timeframe that was unheard-of under the prior licensing regime. On the other hand, in the single NGSO-like processing round that has been announced since adoption of the *First Space Station Reform Order*, the public notice was issued more than *six years* after the original cutoff date, which had preceded adoption of that order. After the inordinate amount of time that lapsed in the licensing process, all 14 of the applications involved in that processing round were either denied or dismissed. Significantly, by focusing the processing round procedure on those services justifying such a time-consuming procedure, the Bureau is able to act on applications that are timely filed or that are—like AfriStar—a request to “operate on the same frequencies as the applicant’s already-licensed NGSO-like satellite.”

Ondas also contends that the Bureau’s decision to waive the NGSO-like satellite processing rules was “unjustified because it frustrated the competitive rationale underlying the NGSO-like satellite processing rules.”⁶⁷ In the next sentence Ondas indicates that its motive is to file a competing application. In other words, Ondas apparently sees the rationale underlying the NGSO-like processing round procedures as a policy of giving would-be competitors a foothold in frequency bands that *are already licensed by the Commission and in use*. Were Ondas to prevail in this strategy, then every single U.S. satellite licensee would be alarmed to learn that their satellite licenses were meaningless – that once their licensed satellites needed to be replaced or their satellite systems augmented, they had absolutely no assurance that they would be able to do so even if they remained within their established technical and operating parameters.

⁶⁷ Review Request at 12.

Further, Ondas asserts that “the Bureau erred in prejudging the results of any future international coordination process,”⁶⁸ apparently based on the Bureau’s statement in the *AfriStar-2 Order* that “we could not authorize another BSS (sound) operator’s space station in the 1457-1492 MHz band and above the horizon at the location of an AfriStar-1 receiver without resulting in unacceptable interference to the AfriStar-1 network.”⁶⁹ Displaying what could best be described as “creative” logic, Ondas disingenuously argues that authorizing AfriStar-2 “will greatly reduce the option for future coordination of a European BSS (sound) satellite.”⁷⁰

Ondas has thoroughly confused two separate principles in arguing that the FCC has somehow “prejudged” the international coordination process. The first principle, which Ondas correctly articulates, is that the FCC will not prejudge the international frequency coordination process, and that space station licensees bear the risk for any failure to coordinate their satellites. The Bureau indicated as much in the *AfriStar-1* and *AfriStar-2 Orders*.⁷¹ Under the second principle, which is fully consistent with the first, the FCC “will not consider applications for new systems where the new system’s operations would cause interference to *licensed systems*.”⁷²

Consistent with the first principle described above, the Commission should disregard Ondas’s argument that authorizing AfriStar-2 would harm the coordination of future European BSS (Sound) systems. This is a red herring. As noted above, AfriStar-1 is fully coordinated and registered, and AfriStar-2 is in the process of being coordinated. Under Ondas’s reasoning,

⁶⁸ Review Request at 11.

⁶⁹ See *AfriStar-2 Order* at ¶13.

⁷⁰ Review Request at 11, fn 32.

⁷¹ See *AfriStar-2 Order* at ¶41 (noting that “no protection from interference caused by radio stations authorized by other administrations is guaranteed unless coordination and notification procedures are timely completed or, with respect to individual administrations, by successfully completing coordination agreements”).

⁷² See *Mobile Satellite Ventures Subsidiary LLC*, Order and Authorization, 20 FCC Rcd 479, 482 (2005) (“MSV Order”) (emphasis added) (citing *First Space Station Reform Order* at ¶113).

apparently the Commission should prejudge the international coordination process to the extent required to make a finding that authorizing AfriStar-2 would interfere with the process of establishing BSS (Sound) in Europe. On the other hand, Ondas would have the Commission ignore the effect of the allegedly proposed Ondas system on previously-licensed and operating systems. Such an approach defies logic and turns well-established Commission policy on its head. To give credence to this argument would, in fact, prejudge the international process because it would require the Commission to make assumptions concerning future, hypothetical actions by European regulators and/or satellite operators.

Contrary to Ondas's assertions, the Bureau's statements concerning the impossibility of authorizing multiple BSS (Sound) systems in the coverage area and frequencies covered by AfriStar-1's license relate to the second principle noted above, *i.e.*, interference between systems *that the FCC has already licensed*. This has nothing to do with *future international coordination*. The Bureau's consideration of the effect on *FCC-licensed systems* of the FCC authorizing further BSS (Sound) systems in the same frequency band and geographic area served by AfriStar-1 was therefore fully consistent with established Commission policy.

B. The FCC Acted Within its Authority in Choosing to Waive the NGSO-Like Processing Round Procedures on Its Own Motion

Pursuant to Section 1.3 of the Commission's rules, the FCC has the authority to waive "[a]ny provision of the rules . . . on its own motion . . . if good cause therefor is shown." The right of the FCC to exercise this authority is only limited by the necessity to show good cause. In the *AfriStar-2 Order*, the Bureau explained that an NGSO-like satellite system like Afristar-2 "would typically be considered in a modified processing round where competing applications are

invited and considered concurrently.”⁷³ The Bureau noted, however, that it has previously waived the modified processing round procedure when an applicant’s proposed satellite “was able to operate on the same frequencies as the applicant’s already licensed NGSO-like satellite.”⁷⁴ The Bureau concluded that it “could not authorize another BSS (sound) operator’s space station in the 1457-1492 MHz band and above the horizon at the location of an Afristar-1 receiver without resulting [in] unacceptable interferences to the Afristar-1 network.”⁷⁵ Based on this conclusion, the Bureau determined to waive the modified processing round procedure and awarded AfriSpace the authority to construct and launch Afristar-2.⁷⁶

Through this analysis, the Bureau clearly sets forth the “good cause” underlying its decision to waive the modified processing round procedure for AfriStar-2. In a different proceeding, the FCC articulated the same rationale in support of a *sua sponte* order: “[C]ertainly this agency has the power to take [the action in question] on its own motion, even in the absence of complaint. To hold otherwise would be to negate our power to act in the public interest to further the more effective use of radio.”⁷⁷ Having satisfied the “good cause” requirement, the Bureau acted consistent with its authority in waiving the procedure *sua sponte*.

Ondas also accuses the Bureau of having acted in an “arbitrary and capricious” manner.⁷⁸ Generally, the “traditionally deferential” arbitrary and capricious standard only requires agencies “to examine the relevant data and articulate a satisfactory explanation for [their] action[s],

⁷³ Order at ¶11.

⁷⁴ *Id.* at ¶ 12.

⁷⁵ *Id.* at 8.

⁷⁶ *Id.*

⁷⁷ *Amendment Of The Rules With Respect To Hours Of Operation Of Standard Broadcast Stations*, 8 FCC2d 698 (1967).


⁷⁸ Application at 17.

including a rational connection between the facts found and the choice made.”⁷⁹ The Bureau did far more than merely examine the relevant data and articulate a satisfactory explanation. The Bureau’s decision reflected detailed analysis and a decision based on established precedent and well-reasoned logic. Based on this evidence, the Bureau concluded that it should grant AfriSpace the authority to construct and launch Afristar-2. The Bureau’s decision is well-supported by the facts on the record, and is eminently logical and reasonable.

VI. CONCLUSION

For the foregoing reasons, AfriSpace respectfully requests that the Commission deny the Review Request on an expedited basis.

Respectfully submitted,



Tara K. Giunta
J. Steven Rich
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1791

Counsel for AfriSpace, Inc.

February 17, 2006

⁷⁹ *Petition For Forbearance From E911 Accuracy Standards*, 18 FCC Rcd 24648 (2003).

CERTIFICATE OF SERVICE

I, Tara K. Giunta, hereby certify that on this 17th day of February, 2006, copies of the foregoing "*Opposition to Application for Review*" were sent via hand delivery to the following:

The Honorable Kevin Martin
Chairman, Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

The Honorable Michael Copps
Commissioner, Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

The Honorable Jonathan Adelstein
Commissioner, Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

The Honorable Deborah Taylor Tate
Commissioner, Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Donald Abelson
Chief, International Bureau
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Cassandra Thomas
International Bureau
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Fern Jarmulnek
International Bureau
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Gardner Foster
International Bureau
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Robert Nelson
International Bureau
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Jim Ball
International Bureau
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Sam Feder
General Counsel
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Emily Willeford
Office of Chairman Martin
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Jordan Goldstein
Office of Commissioner Copps
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Barry Ohlson
Office of Commissioner Adelstein
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Aaron Goldberger
Office of Commissioner Tate
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Robert A. Mazer
Gregory C. Staple
Scott W. Woodworth
Vinson & Elkins L.L.P.
1455 Pennsylvania Avenue, NW
Suite 600
Washington, DC 20004-1008
(Counsel for Ondas Spain, SL)



Tara K. Giunta