

RECEIVED

OCT 31 1990

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

Federal Communications Commission  
Office of the Secretary

RECEIVED

NOV 1 1990

Domestic Facilities Divis  
Satellite Radio Branch

In the Matter of	)	
	)	
AMERICAN SATELLITE COMPANY	)	File No. 61-DSS-EXT-90
d/b/a Contel ASC	)	
	)	
Modification of Authorization	)	
to Construct, Launch, and	)	
Operate Contelsat-1	)	

OPPOSITION TO PETITION TO DENY  
AND MOTION TO STRIKE

I. Introduction

American Satellite Company d/b/a Contel ASC ("Contel ASC"), by its attorney, hereby submits its Motion to Strike and Opposition to the Petition filed by American Telephone and Telegraph Company ("AT&T") to deny the Application that is captioned above. By this Application, Contel ASC seeks authority to modify its construction permit for the satellite known as Contelsat-1. As discussed in the Application, Contel ASC proposes to delay the date by which Contel ASC must commence construction of the satellite from August 31, 1990 to August 31, 1991. This request is necessitated by the pending merger of Contel ASC's parent company, Contel Corporation ("Contel"), with GTE Corporation ("GTE").

In its Petition, AT&T urges the Commission to deny Contel ASC's Application. In essence, AT&T contends that

Contel ASC's Petition cannot be granted consistent with Commission policies. As shown below, AT&T's Petition is procedurally defective and substantively without merit. Accordingly, the Commission should deny AT&T's Petition and grant Contel ASC's request for modification of its construction permit for Contelsat-1.

## II. AT&T's Petition

### a. Procedural Problems

AT&T's Petition is procedurally defective because AT&T failed to file its Petition in a timely manner. Public notice of Contel ASC's Application was given by the Common Carrier Bureau on September 12, 1990.<sup>1</sup> In that notice, the Common Carrier Bureau specified that comments on Contel ASC's Application were due on October 3, 1990.<sup>2</sup> However, AT&T did not file its Petition until October 11, 1990, eight days after the filing deadline. Since AT&T failed to file its Petition in accordance with the Bureau's requirements, the Petition must fail of its own accord.<sup>3</sup> As such, the Commission should strike AT&T's Petition from the record.

---

<sup>1</sup> See Report No. DS-1003.

<sup>2</sup> Id.

<sup>3</sup> AT&T states in its Petition that it makes its filing pursuant to Section 21.30 of the Commission's Rules. Petition at 1. Assuming the applicability of Section 21.30  
(Footnote Continued)

b. Substantive Defects

AT&T's Petition must also be denied because the claims AT&T makes therein do not justify denying Contel ASC's Application, when the circumstances of Contel ASC's request are considered as a whole. In its Petition, AT&T argues that Contel ASC is attempting to "warehouse" orbital locations.<sup>4</sup> AT&T bases this claim on Contel ASC's failure and inability to start construction of its expansion satellite. Contrary to AT&T's assertion, Contel ASC is not warehousing its orbital location for Contelsat-1. The simple failure of a licensee to meet its commencement of construction milestone is only an indicia of warehousing, not conclusive proof. In deciding whether a licensee is

---

(Footnote Continued)

to AT&T's Petition and the case at hand, then AT&T's Petition must also fail as a petition to deny because of AT&T's failure to comply with Section 21.30(a)(3). Paragraph (a)(3) provides that petitions to deny must:

Contain specific allegations of fact (except for those of which official notice may be taken), which shall be supported by affidavit of a person or persons with personal knowledge thereof, and which shall be sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant of, or other Commission action regarding, the application would be prima facie inconsistent with the public interest...

AT&T's Petition contains no such affidavit. Thus, in accordance with Section 21.30(b)(1) and assuming the applicability of this section as a whole, AT&T's Petition must be classified by the Commission as informal objections.

<sup>4</sup> Petition at 3.

warehousing an orbital location, the Commission looks at the totality of the circumstances to determine the licensee's intent.<sup>5</sup>

In view of the totality of the circumstances surrounding Contel ASC's Application, case, it is unreasonable to conclude that Contel is attempting to warehouse its orbital location for Contelsat-1. Contel ASC is an established satellite carrier that has demonstrated its commitment to the space communications industry. At this time, Contel ASC is not requesting a delay in its milestone commitment dates for the completion of construction or the launch of Contelsat-1. Thus, there is reasonable basis on which to assume that the orbital location assigned to Contel ASC will lie fallow for some period. Prompt and efficient use of the spectrum is the salient rationale for the Commission's policy against warehousing.<sup>6</sup> Accordingly, AT&T's assertion that Contel

---

<sup>5</sup> Thus, AT&T's failure to commence construction of Telstar 401 by its original milestone date of February, 1989 was not deemed by the Commission to constitute warehousing. Rather, the Commission looked at the reasons AT&T advanced for its requested delay - AT&T's assertion that it was unable to execute a construction contract by the required date, and its statement that the extension would not affect the construction completion and launch dates for the satellite - and found the grant of AT&T's request to be "consistent with Commission policies."

<sup>6</sup> See American Telephone and Telegraph Company, DA 90-1221, Order and Authorization (released September 19, 1990), at paragraph 16.

ASC is warehousing its orbital location for Contelsat-1 is without foundation.

AT&T also argues that the Commission cannot grant Contel ASC's request because the delay is entirely within Contel ASC's control and the Commission "traditionally" grants milestone delays only when the delay is necessitated by reasons beyond the control of the licensee.<sup>7</sup> Contel ASC does not deny that its justification for the delay - the Contel/GTE merger - is arguably within its control, or that the Commission has, in the past, denied construction and launch delays when such delays are initiated by the licensee. But once again, there is no bright-line test. The simple fact that the licensee seeks a delay for reasons of its own making does not automatically doom the request to denial.<sup>8</sup> Rather, the issue considered by the Commission in acting on the licensee's request is whether grant of the delay will serve the public interest.

This fact is illustrated most vividly by the Commission's recent action on the request of Hughes Communications Galaxy ("HCG") for a delay in the construction completion and launch dates for HCG's C-band

---

<sup>7</sup> Petition at 3.

<sup>8</sup> If it did, then AT&T's request for a commencement of construction delay for Telstar 401 should have been denied.

Galaxy 4-R satellite.<sup>9</sup> HCG sought this delay because it wanted to abandon its original spacecraft design and construct a hybrid instead. According to HCG, it could not complete construction and launch of the hybrid satellite within the timetable required in the original Galaxy 4-R authorization.<sup>10</sup> Nothing forced HCG to change the design of its C-band satellite; HCG simply believed, for various economic and business reasons, that a hybrid design was better suited to its purposes. Nevertheless, the Commission granted HCG's requested delay, on the grounds that such action served the public interest.<sup>11</sup> Thus, despite AT&T's assertions to the contrary, the fact that Contel ASC's request is justified by reasons within Contel ASC's control does not necessitate the denial of Contel ASC's Application. The question that the Commission must answer in acting upon Contel ASC's Application is whether grant of Contel ASC's request will serve the public interest. As

---

<sup>9</sup> Hughes Communications Galaxy, Inc., 5 FCC Rcd. 3423 (1990). AT&T argues in its Petition that this decision does not provide precedent for the grant of Contel ASC's request because HCG had already commenced construction of Galaxy 4-R. Contel ASC submits that the nature of the delay requested by HCG is irrelevant to the principle for which the HCG decision stands, i.e., that milestone delays requested for reasons within the control of the licensee are justified if granting the requested delay will serve the public interest.

<sup>10</sup> Id.

<sup>11</sup> Id. at 3424.

Contel ASC demonstrated in its Application, the public interest will indeed be served by allowing Contel ASC to delay the start of construction of Contelsat-1.

Finally, AT&T argues in its Petition that Contel ASC's Application must be denied because it and other operators have a "need" for Contelsat-1's orbital location.<sup>12</sup> This argument is easily dismissed. To the best of Contel ASC's knowledge, there are no applications for new, non-replacement satellites presently on file with the Commission.<sup>13</sup> Certainly AT&T has no such application on file; rather, as AT&T states in its Petition, it is at present merely "evaluating" whether to launch its ground spare, Telstar 403.<sup>14</sup> As such, AT&T's "need" for another orbital location is speculative and vague. Should AT&T's "need" for a hybrid orbital location become tangible, Contel ASC's possession of its orbital location for Contelsat-1 would not "hamper" AT&T's application as AT&T contends. Despite AT&T's assertion to the contrary, there is an

---

<sup>12</sup> Petition at 4.

<sup>13</sup> And, to the best of Contel ASC's knowledge, none have been filed in the last three years.

<sup>14</sup> Petition at 4.

available hybrid orbital location with CONUS coverage -  
i.e., 67° W.L. <sup>15</sup>

### III. The Public Interest

AT&T's position, reduced to its essence, is that Commission policy requires Contel ASC's authorization for Contelsat-1 to be declared null and void, regardless of the circumstances, because Contel ASC has failed to commence construction of the satellite and to advance a justification for this failure that is based on events beyond Contel ASC's control. This position is not consistent with Commission policy. As discussed above, the essential question that the Commission must answer in addressing Contel ASC's request for a construction delay is whether grant of the request will serve the public interest. The facts of this case are such that grant of Contel ASC's Application would indeed serve the needs of the public.

Although the Commission has been faced with numerous requests for construction and launch delays through the years, the circumstances surrounding Contel ASC's request

---

<sup>15</sup> See Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 5 FCC Rcd. 179 (1990).



make the request unique.<sup>16</sup> Contel ASC's Application arises from the merger of two of the country's largest telecommunications companies and the resulting merger of two major satellite carriers. The transaction has given rise to countless issues and questions concerning the manner in

---

<sup>16</sup> Most of the requests the Commission has received in recent years for delays in milestone commitments have sought extensions of launch dates because of the Challenger disaster or Ariane launch difficulties. See, e.g., Letter from Chief, Domestic Facilities Division to The Western Union Telegraph Co., January 17, 1987, in File No. 2542-DSS-ML-86 (extension of time to launch Westar VI-S granted because of Shuttle disaster); Letter from Chief, Domestic Facilities Division to Satellite Transponder Leasing Corp., March 31, 1987, in File No. 172-DSS-MP/ML-86 (extension of time to launch SBS-5 because of failure of Arianespace V-18 mission). Delays in the commencement of the construction of satellites have also been granted on the same grounds. See Letter from Chief, Domestic Facilities Division to The Western Union Telegraph Co., March 31, 1987, in File No. 2551-DSS-MP/ML-86 (extension of time to execute construction contract for Westars A and B because of uncertainty regarding availability of launch vehicles). As a general matter, however, there have been few requests for delays in the commencement of construction milestone.

AT&T in its Petition cites MCI Communications Corp., 2 FCC Rcd. 233 (1987) ["MCI"], and suggests that it is controlling in this case. In MCI, the Commission denied MCI's request for a delay in the commencement of construction deadlines for SBS-7 and SBS-8. MCI based its request on the grounds of business necessity. MCI is readily distinguishable from the case at hand. In MCI, MCI submitted its request for a delay after the deadline had passed and during a period in which there was still heavy demand for orbital locations. By contrast, Contel ASC submitted its request for an extension in a timely manner and during a period in which there are no outstanding requests for orbital locations. Further, the MCI acquisition of SBS does not compare in magnitude or complexity to the Contel/GTE merger. The sole essence of MCI's acquisition of SBS was the purchase of the SBS satellites. Contel ASC's spacecraft are only a very small part of the Contel/GTE merger.

which business will be conducted after the merger. While transition teams have been formed to address these issues, when a \$17.4 billion company merges with a \$3.1 billion company in a transaction valued at approximately \$6.2 billion, these issues cannot be resolved overnight.

The commitment of Contel ASC to the satellite market is beyond question. Contel ASC has owned and operated satellite capacity since the birth of this industry in the early 1970's. Further, Contel ASC has a reputation for offering high-quality, cost-efficient satellite services to the public. The satellite carrier that results from the merger will continue in this tradition.

But the ability of that carrier to continue offering such services will be hindered if Contel ASC is forced at this time to enter into a contract for the construction of its second-generation spacecraft. Such a contract will effectively commit the resulting satellite carrier to an expenditure of hundreds of millions of dollars. But more importantly, it will irrevocably commit the carrier to a particular satellite design and manufacturer, before the carrier can assess its collective needs and the needs of its customers for satellite capacity and for particular satellite services. Thus, Contel ASC cannot enter into a construction contract today for its second-generation spacecraft and at the same time adhere to sound business

practices or fulfill its obligation to serve the needs of the public in the best manner possible.

It is difficult to see what is achieved by denying Contel ASC's request. As noted above, there is no concern at this time about making timely use of the orbital location assigned to Contelsat-1. Further, there are no carriers waiting in the wings for orbital locations. If additional orbital locations are requested, there are suitable locations available. The only possible reason to deny Contel ASC's request is one alluded to by AT&T in its Petition, i.e., to dissuade other carriers from missing their milestone commitments. But such a reason does not form a valid basis for denying Contel ASC's request.<sup>17</sup> Each request for a construction or launch extension must be viewed on its facts. As demonstrated above, the facts of Contel ASC's request are such that grant of Contel ASC's Application will serve the public interest.

---

<sup>17</sup> This justification for denying Contel ASC's request must also fail because of the changes that have taken place in the satellite industry in recent years. In the 1990's, the risks and costs of constructing and launching satellites are such that the onslaught of speculators seen in the mid 1980's is gone and only the established carriers remain. Under these circumstances, the Commission should be taking steps to encourage the established carriers to construct and launch new satellites, rather than dissuading them from doing so.

IV. Conclusion

For these reasons, AT&T's Petition to Deny Contel ASC's request for a delay in the commencement of Contelsat-1 construction must be denied. The Commission should proceed to grant Contel ASC's Application as quickly as possible.

Respectfully Submitted,

AMERICAN SATELLITE COMPANY  
d/b/a Contel ASC

By:

  
Joan M. Griffin  
Its Attorney

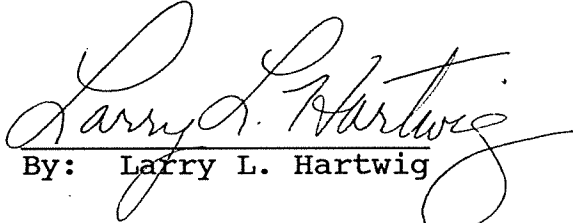
555-13th St. NW  
Suite 480 West  
Washington, DC 20004  
202-383-8704

October 31, 1990

CERTIFICATE OF SERVICE

I, Larry L. Hartwig, hereby certify that a true copy of the foregoing "Opposition to Petition to Deny" and "Motion to Strike" was served this 31st day of October, 1990 by first class mail, postage prepaid, upon the parties listed below:

Francine J. Berry  
David P. Condit  
Richard F. Hope  
AT&T  
295 North Maple Avenue  
Basking Ridge, NJ 07920

  
By: Larry L. Hartwig