

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

National Exchange                      File Nos. 4/5-DSS-EXT-90  
Satellite, Inc.

Application for Review of  
Order Denying Extension of Time  
to Construct and Launch Space  
Stations in the Domestic  
Fixed-Satellite Service

MEMORANDUM OPINION AND ORDER

Adopted January 13, 1993;              Released: January 27, 1993

By the Commission:

1. National Exchange Satellite, Inc. (Nexsat) has filed an Application for Review of the order by the Common Carrier Bureau denying requests for extensions of time to construct and launch its "SpotNet" satellites and revoking the licenses for the system.<sup>1</sup> For the reasons discussed below, Nexsat's application is denied.

2. Nexsat's satellite system was authorized in November 1988.<sup>2</sup> That authorization required Nexsat to begin construction of its three hybrid satellites by August 1989, July 1990 and January 1991, respectively. If these deadlines were not met or extended for good cause by the Commission, the authorization, by its own terms, would become null and void. Nexsat requested and was granted one extension of its milestone deadlines to begin construction of its satellites.<sup>3</sup> Subsequently, Nexsat filed three more extension requests.<sup>4</sup> These requests were denied by the Common Carrier Bureau and Nexsat's satellite authorizations were declared null and void.<sup>5</sup> The Bureau based its denial on the fact that Nexsat had failed to demonstrate that a further extension of time would be consistent with well-established Commission policies against warehousing scarce orbital locations<sup>6</sup> or that delay in implementation was due to circumstances beyond Nexsat's control.

3. In its Application for Review, Nexsat argues that the Commission's policies against warehousing were instituted at a time when satellite capacity was scarce. It contends these policies are no longer valid because, Nexsat claims, demand for domestic satellite capacity is significantly reduced and there has been a decrease in the number of competitors in this market. Nexsat states that as a new entrant in this service, it does not have the economic incentive to engage in warehousing. In addition, it claims that because no other satellite licensee objected to its extension requests,<sup>7</sup> there are no potential applicants for orbital locations at this time. Nexsat also disputes the Bureau's conclusion that the delay in implementation was due to factors within Nexsat's control.

4. We affirm the Bureau's findings. Nexsat has failed to demonstrate why the Commission's long-standing policies requiring satellite licensees to comply with milestone deadlines are no longer in the public interest. Despite Nexsat's assertions, it has not submitted any evidence of a glut of domestic satellite transponder capacity. In the recent *3<sup>rd</sup> Spacing* order, the Commission, focussing on C-Band services, rejected the claim that the demand for transponders in that band has so diminished that a 20% reduction in capacity was warranted.<sup>8</sup> There was no evidence submitted in that proceeding, or in this one, that demonstrates demand for Ku-Band transponders has significantly diminished.

5. Nexsat points to the fact that no applications have been filed for C or Ku-Band fixed-satellite space stations since 1988 and claims that this indicates a lack of interest in further expansion. We do not agree with Nexsat's assessment. In 1988, the Commission acted on a group of applications for facilities to be constructed within the next five years. Because Commission policy states that satellites will not be authorized more than five years in advance of their proposed launch date,<sup>9</sup> applicants have made long range plans accordingly and are now in the process of implementing their authorized facilities. The fact that additional applications have not been filed while licensees are constructing previously authorized satellites does not demonstrate that demand has, in fact, abated.

6. To the contrary, in order to accommodate the number of qualified applicants in the 1988 domestic fixed-satellite processing group, the Commission assigned most of the orbital locations remaining available at that time. In fact, the two orbital locations previously assigned to Nexsat's Spotnet satellites appear to be the among the few remaining unassigned locations offering 50 state coverage that are suitable for operation of hybrid satellites.<sup>10</sup> Given the expense involved in filing an application to construct and

<sup>1</sup> National Exchange Satellite, Inc., 7 FCC Rcd 1990 (1992) (*Extension Order*).

<sup>2</sup> National Exchange Satellite, Inc., 3 FCC Rcd 6992 (1988) (*Authorization Order*). See *Extension Order* for a detailed description of the facts surrounding Nexsat's extension requests.

<sup>3</sup> Letter from Chief, Domestic Facilities Division to Counsel, Nexsat, June 7, 1990.

<sup>4</sup> Before the Bureau acted on the second extension request, Nexsat filed two additional requests which, if granted, would have delayed the implementation of its system by three to four years. See *Extension Request* at paras. 4-6.

<sup>5</sup> *Extension Order*, *supra* note 1.

<sup>6</sup> American Telephone and Telegraph Co., 2 FCC Rcd 4431 (1987); MCI Communications Corp., 2 FCC Rcd 233 (Com. Car. Bur. 1987).

<sup>7</sup> Nexsat's extension requests were opposed by General Instrument Corporation (GIC) based on issues relating to GIC's petition to change Commission orbital spacing policies. The issues were discussed in Amendment of C-Band Satellite Orbital Spacing Policies to Increase Satellite Video Service to the Home, 7 FCC Rcd 456 (1992) (*3<sup>rd</sup> Spacing*). These arguments were not addressed in the *Extension Order*; see note 1, *supra*.

<sup>8</sup> *3<sup>rd</sup> Spacing* at para. 24-25.

<sup>9</sup> Licensing Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (1985).

<sup>10</sup> Hybrid satellites operate in both the C and the Ku-Bands and thus corresponding orbital locations in both bands are required. Recently, satellite operators have shown increased interest in constructing and launching hybrid satellites and have applied to combine single band satellites into hybrid facilities.

launch space station facilities.<sup>11</sup> It is unlikely potential applicants would apply to use the orbital locations assigned to Nexsat before the Commission ruled on its extension request. The fact that there are no applications on file at this time does not support Nexsat's claim that no other entities are interested in using these locations or that demand for transponder capacity has significantly declined.<sup>12</sup>

7. Nexsat also disputes the Bureau's finding that delay in implementation of its satellite system was based on factors within Nexsat's control. Two of Nexsat's extension requests were based on assertions that more time was needed to resolve technical and design factors.<sup>13</sup> A third request cited Nexsat's negotiations with Edsat Institute (EDSAT) to provide transponder capacity to the national education community.<sup>14</sup> The Bureau noted that neither technical choices nor business or economic judgments constitute circumstances beyond a licensee's control sufficient to justify extension of milestone deadlines.<sup>15</sup>

8. We affirm the Bureau's conclusion. Nexsat has offered no evidence that its reconsideration of technical design or the contemplation of a possible contract with EDSAT were the result of circumstances distinguishable from those rejected as inadequate in precedent cited by the Bureau.<sup>16</sup> Nexsat was granted one extension after alleging that it could not begin construction of its satellites before action was taken on its request for reassignment of orbital locations.<sup>17</sup> Its requests for further open-ended extensions did not present any factors that could be considered beyond the control of the licensee and thus the Bureau was correct in denying the extensions.

9. Contrary to Nexsat's assertions, the Bureau did give a "hard look" to the circumstances presented by its case.<sup>18</sup> Based on this review, the Bureau correctly determined that granting further extensions would not be in the public interest. Nexsat is free to reapply for authorization to use available orbital locations after it has solidified its business and technical proposals and is ready to implement its system.

10. Accordingly, IT IS ORDERED that the decision of the Common Carrier Bureau denying National Exchange Satellite, Inc.'s requests for extensions of time and nullifying its licenses is affirmed and Nexsat's Application for Review IS DENIED.

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*See, e.g.,* Hughes Communications Galaxy, Inc. 6 FCC Rcd 72 (Com. Car. Bur. 1991); 5 FCC Rcd 3423 (Com. Car. Bur. 1990). Further, in the 3<sup>0</sup> Spacing proceeding, another licensee, GE Americom, expressed interest in applying to use one of these locations, 127<sup>0</sup> W.L., if Nexsat were not granted a further extension of time.

<sup>11</sup> The fee for authorization to construct and launch a space station is \$72,030, 47 U.S.C. § 158.

<sup>12</sup> It is not necessary to examine the issue of whether Nexsat, as a new entrant, had the economic incentive to warehouse orbital locations. The fact that milestone deadlines were not met, even after they had been extended, coupled with the conclusion that the policy for establishing and enforcing such deadlines continues to be in the public interest, is sufficient justification for affirming the Bureau's decision.

<sup>13</sup> See *Extension Order* at paras. 9-17.

<sup>14</sup> *Id.* at para. 18.

<sup>15</sup> See MCI Communications Corporation, 2 FCC Rcd 233 (1987); American Telephone and Telegraph Company, 5 FCC Rcd 5590 (1990); see also P&R Temmer, 743 F.2d 918 (1984)

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Donna R. Searcy  
Secretary

(*Temmer*). Nexsat attempts to distinguish *Temmer* on the basis that Nexsat's delay in implementation was not due to a failure of technology as in *Temmer* but was instead due to an inability to locate a vendor and that there were a number of other applicants on a waiting list to use the channels in question. However, Nexsat itself indicated that at least one extension request was necessary because it was reconsidering its choice of technology and design. *Temmer* is thus relevant because the court there reaffirmed the Commission's position that technical choices or decisions which cause delay are circumstances within the control of the licensee and do not justify extensions of time or waivers regardless of the number of other potential applicants waiting for frequencies. *Id.* at 930.

<sup>16</sup> *Id.*

<sup>17</sup> This extension was based on the possibility that Nexsat was confused about the requirement of meeting milestone deadlines pending an application for reassignment of orbital locations and not on circumstances deemed beyond Nexsat's control. See Letter, *supra* n.3.

<sup>18</sup> See *Wait Radio v FCC*, 418 F.2d 1153 (1969).