

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

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APR - 5 1991

In re Application of)
NATIONAL EXCHANGE SATELLITE, INC.)
For Authority to Construct, Launch)
and Operate Space Stations in the)
Domestic Fixed-Satellite Service)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

File Nos. 4/5-DSS-EXT-90

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TO: Chief, Common Carrier Bureau

Domestic Facilities Division
Satellite Radio Branch

REPLY TO OPPOSITION

National Exchange Satellite, Inc. ("NEXSAT"), hereby replies to the Opposition to Request for Extension of Time ("March Opposition") filed by General Instrument Corporation ("GIC") on March 18, 1991. GIC raises issues regarding the satellite construction schedule set out in NEXSAT's Satellite Purchase Contract ("Contract") with the Space and Technology Group of TRW, Inc. ("TRW"); the Contract was filed with the Commission by letter dated March 1, 1991 ("March Letter"). As is discussed below, there is no merit to GIC's Opposition.¹

I. GIC HAS NO STANDING TO CHALLENGE THE BRIEF EXTENSION CONTEMPLATED BY THE TERMS OF THE NEXSAT/TRW CONTRACT.

It is well established that, in order to have standing, a party must have suffered, or demonstrate the strong likelihood that it will suffer, concrete injury from a proposed administrative action. Under Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d), the following categories have been found to have standing to challenge Title III licensing

¹ NEXSAT was granted an extension of time, until April 5, 1991, within which to respond to the Opposition.

decisions: (1) the potential competitors of the subject applicant; (2) those whose facilities might suffer technical interference from the applicant's proposed operations; and (3) potential consumers of the applicant's proposed services. See generally Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966).

It is undisputed that GIC falls into none of those statutory categories. Indeed, it is difficult to imagine a more speculative, less concrete injury than GIC's in the context of the instant proceeding. GIC does not now operate a domestic fixed-satellite, nor is it seeking any permit or launch authorization from the FCC. It is not claim to be either a prospective competitor or customer of NEXSAT's. Except in one narrow and largely hypothetical sense, NEXSAT's proposed extension cannot possibly harm GIC.

GIC's alleged injury arises out of the fact that it has pending with the Commission a petition for rulemaking to change FCC policy, eliminating 2' spacing in favor of 3' for domestic satellites. See RM 7628 (filed January 25, 1991). NEXSAT, several other satellite companies, and numerous other parties have opposed the GIC petition, and, even if the Commission thought that the petition raised serious issues, the next step would be a notice of proposed rulemaking, not a change in policy. There is no reason to believe that the Commission is likely, at any time in the near future, to reverse a carefully considered judgment made fewer than ten years ago, and upon which the development of an entire industry has been predicated. See

Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 R.R.2d 577 (1983).

II. NEXSAT HAS PURSUED ITS CONTRACT ARRANGEMENTS WITH DILIGENCE.

In NEXSAT's October 31, 1991, request for an extension of time within which to enter into a contract for the construction of its SpotNet system, NEXSAT indicated that it believed a contract could be presented to the Commission by April 30, 1990. See Letter from Henry Goldberg to Donna Searcy, dated October 31, 1991. Two months in advance of that date, NEXSAT submitted its Contract with TRW (on March 1, 1991). Article 17 of the Contract affords TRW a six-month period within which to conduct a study; the purpose of the study is to confirm that the most efficient solution to the complex weight and power problems inherent in the SpotNet high-power, intense-frequency-reuse design is to position two smaller spacecraft ("lightsats") at each assigned orbital location, instead of the one large traditional satellite covered by NEXSAT's existing authorizations.² As was made clear in NEXSAT's March Letter (at 1), adoption of this plan would entail the filing of an application to modify the existing SpotNet construction permits.³

² As the Commission is aware, for the past several years there has been substantial interest in the potential advantages of using multiple lightsats in place of a single large satellite. TRW has played a leading role in the development of this technology.

³ Any such application would address in detail all relevant technical elements, including full frequency reuse and related considerations. GIC's questions in this regard, see March Opposition at 10-11, are hence premature. It is plain, moreover, that GIC does not appreciate the concept being explored by NEXSAT
(continued...)

In GIC's December Opposition (at 8), GIC alleged that NEXSAT was passively "await[ing] the outcome of . . . [unidentified] technological developments" before embarking on construction of the SpotNet system. Now that NEXSAT has come forward with its technology, GIC has reversed course, criticizing NEXSAT and TRW for attempting to establish lightsat technology as a viable alternative to traditional satellite design.⁴ Such criticism is entirely unwarranted, particularly when the source of the criticism is not at all involved in the provision of satellite service, and such criticism ill-serves the public interest in the development of new technologies. See 47 U.S.C. §§ 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public."), 303(g).

III. COMMISSION PRECEDENT SUPPORTS
GRANT OF NEXSAT'S REQUEST.

The GIC Opposition relies primarily on the Common Carrier Bureau's decision in MCI Communications Corp., 2 F.C.C. Rcd. 233 (1987). Quoting from this decision, GIC contends that NEXSAT's "voluntary decision [to pursue the lightsat alternative] does not constitute circumstances beyond NEXSAT's control." GIC March Opposition at 9; see id. at 8. Far from supporting GIC's

³ (...continued)
and TRW: that, by collocating two properly configured lightsats at one orbital location, even greater spectrum efficiencies may be realized than if one large spacecraft were deployed.

⁴ In the event that the TRW study reveals that the lightsat option is not an efficacious solution, NEXSAT will expeditiously move to employ one of the alternatives offered by several manufacturers involving more traditional spacecraft.

fields. In such circumstances, as the D.C. Circuit has approvingly stated, the Commission has consistently demonstrated flexibility and a willingness to accommodate entrepreneurial efforts:

Rapid technological advances, demand shifts, and changes in entrepreneurial judgments regarding satellite design and marketing have marked the period since 1974, when the first commercial domsat was orbited. Appropriately, the FCC has not attempted to impose an inflexible regulatory regime on an industry 'characterized by fluidity.' Instead, the Commission has proceeded . . . to develop sensible regulatory approaches responsive to the public interest.

Wold Communications, Inc. v. FCC, supra, 735 F.2d at 1468
(footnote and citation omitted).

The D.C. Circuit's approval of "approaches responsive to the public interest" is particularly relevant here. As mentioned above, the NEXSAT/TRW developmental efforts should lead to the introduction of lightsat technologies that could significantly change satellite communications, to the benefit of the public, which would enjoy higher quality, less expensive services. In this case, moreover, there are no competing public interest considerations, as there were in the MCI situation (and in the cases relied upon by the Bureau in MCI, see 2 F.C.C. Rcd. at 235 nn.7 & 9), where other satellite licensees opposed the extension request and could have made use of the orbital locations that MCI was seeking to retain. See id. at 234 ("[p]ermitting MCI additional time . . . could impede other qualified applicants in implementing their own plans"). As discussed above, GIC has no such other plans or any desire to use the NEXSAT orbital locations to provide satellite service to the public, but rather

seeks elimination of the NEXSAT orbital assignments as a means to a quite unrelated end, involving reversal of long-established FCC satellite policy.

Just three months ago, the Commission released a decision that involves facts far more similar to the instant one than were present in MCI. NEXSAT is here seeking to operate two lightsats in place of one conventional satellite; the licensee in Hughes Communications Galaxy, Inc., 6 F.C.C. Rcd. 72 (1991), was seeking the converse: to "[o]perat[e] a state-of-the-art hybrid satellite at a particular orbital location," rather "than operating two single-band satellites at that location." Id. at 72. Just as GIC accuses NEXSAT here of seeking "to warehouse its satellite authorizations," March Opposition at 12, Hughes in that case was accused of warehousing, albeit by another satellite licensee desiring orbital locations, rather than by a third party having no interest in providing satellite service to the public. 6 F.C.C. Rcd. at 72. The Commission expressly rejected this argument, however, noting that its "policy regarding warehousing is designed to prevent orbital locations from being retained by licensees who have not decided whether to proceed with their plans to the exclusion of others who would use the location." Id.

Here, of course, there is no evidence that the extension requested by NEXSAT would lead to "the exclusion of others who would use the location"; certainly, GIC does not fall in this category. NEXSAT's only decision relates, moreover, not to "whether to proceed," but rather to a choice of conventional

category. NEXSAT's only decision relates, moreover, not to "whether to proceed," but rather to a choice of conventional technology versus new, but potentially quite beneficial, technology. In the Hughes case, the Commission found that such technological benefits, combined with potential "cost savings to operators and customers with no decrease in technical performance," 6 F.C.C. Rcd. at 72, provided ample reason for granting the Hughes request and rejecting claims of warehousing. The Bureau should make the same findings here.

IV. CONCLUSION.

As the result of the foregoing, NEXSAT requests that GIC's March Opposition be rejected and the extension sought in the March Letter be granted.

Respectfully submitted,

NATIONAL EXCHANGE SATELLITE, INC.

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April 5, 1991

CERTIFICATE OF SERVICE

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