

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

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MAR 18 1991

Federal Communications Commission
Office of the Secretary

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

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

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MAR 20 1991

Domestic License Division
Satellite Radio Branch

To: Chief, Common Carrier Bureau

OPPOSITION TO REQUEST FOR EXTENSION OF TIME

General Instrument Corporation ("GIC") hereby opposes the request of National Exchange Satellite, Inc. ("NEXSAT") for an extension of time to commence construction of its authorized spacecraft.

Introduction

NEXSAT's extension request revolves around its decision to explore the possibility of building four (4) smaller spacecraft instead of the two (2) larger spacecraft authorized by the Commission. NEXSAT is therefore making two separate requests of the Commission. First, NEXSAT wants to have until September 11, 1991 to decide whether to enter into a non-contingent contract with TRW Inc. ("TRW") for the construction of the four spacecraft. Second, if it decides to enter into that non-contingent contract with TRW, then, in that event, NEXSAT wants the construction commencement date moved to March 1, 1992.

There is no public interest basis to grant NEXSAT's requests. NEXSAT's new proposal is based on a voluntary business decision and not on circumstances beyond its control. A grant of NEXSAT's requests would enable NEXSAT to warehouse its authorizations until it tries to figure out what it should do. NEXSAT's extension requests should be denied and its authorizations cancelled without prejudice to NEXSAT's right to submit an application for its new proposal if and when it decides that the proposal is viable. To grant NEXSAT's requests would be tantamount to a repeal of existing Commission policy, which requires satellite licenses to proceed promptly with construction unless delayed by circumstances beyond the licensee's control.

I. Background

The background of NEXSAT's present extension request is set forth in GIC's Opposition to Request for Extension of Time, which was filed in the above-referenced matter on December 12, 1990. That opposition is incorporated herein by reference. However, it might be useful to summarize the chronology of events.

NEXSAT filed applications on September 15, 1987 requesting authority to construct, launch, and operate two (2) hybrid domestic fixed-service satellites and to construct one hybrid ground-spares. The application stated, inter alia, that a spacecraft contract would be executed in July 1989 and that

spacecraft construction would begin in August 1989. NEXSAT Applications at I-72.

The Commission granted NEXSAT's applications on December 7, 1988. National Exchange Satellite, Inc., 3 FCC Rcd 6992 (1988). The order conditioned NEXSAT's authorization on compliance with the construction schedule set forth in NEXSAT's application. In other words, NEXSAT was expressly advised that it would have to commence construction by August 1989.

The Commission's 1988 order did not grant NEXSAT the orbital slots which it had requested. NEXSAT subsequently asked the Commission to have its two satellites (SpotNet-1 and SpotNet-2) reassigned to orbital locations at 93° W.L. and 127° W.L. On January 11, 1990, the Commission granted that request. Assignment of Orbital Locations, 5 FCC Rcd 179 (1990).

The Commission's second order did not amend NEXSAT's proposed schedule of construction. By letter dated February 22, 1990, NEXSAT requested that "the construction milestones established in the Initial Authorization Order [of December 1988] be recalculated to reflect the fact that it has been only since January of 1990, that the uncertainty regarding orbital assignments has been resolved and that it has been able to begin in earnest to initiate steps towards construction of the SpotNet spacecraft."

By letter dated June 7, 1990, the Common Carrier Bureau granted NEXSAT's request and advised NEXSAT that it would "be granted until October 1990 to begin construction of Spotnet-1." Although it granted NEXSAT's request, the Bureau expressed skepticism about NEXSAT's explanation that it could not have begun any construction until clarification of the orbital assignments. According to the Bureau, NEXSAT could have commenced construction on the spacecraft bus, solar panels, tracking and other components while awaiting Commission resolution of the orbital assignment issues.

On October 31, 1990, NEXSAT advised the Commission that it had not yet entered into any contract for the construction of the spacecraft, let alone commenced construction. NEXSAT did not specifically ask for an extension of time within which to commence construction. Rather, NEXSAT requested "a six-month period of time within which to submit to the Commission a copy of the contracts and related documents for the construction of the SpotNet satellites."¹ NEXSAT assured the Commission, however, that "it was confident that it can reach an agreement with a manufacturer for a viable design and enter into a construction contract in the near future. . ." Letter

¹ As explained earlier, NEXSAT's 1987 applications specified one date for the execution of a contract (July 1989) and another date for the commencement of construction (August 1989). In other words, NEXSAT itself recognized that there is a distinction between the execution of a contract and the commencement of construction.

from Henry Goldberg to Donna R. Searcy, October 31, 1990, at 2.

GIC opposed NEXSAT's second extension request. GIC pointed out that NEXSAT had not offered any affidavit of other evidence to support its claim that the delay was due to circumstances beyond its control. On that basis, GIC requested that NEXSAT's authorizations be cancelled. In the alternative, GIC requested that any action on NEXSAT's extension request be deferred pending Commission disposition of a petition (which GIC anticipated being filed in January 1991) proposing to change the orbital assignment policy from 2° spacing to 3° spacing. GIC pointed out that, with the exception of NEXSAT's assignment at 127° W.L., a 3° policy could be implemented without any significant impact on other orbital assignments. Therefore, if NEXSAT's authorization were cancelled or its orbital assignment changed, the Commission could adopt a 3° spacing policy with little or no adverse impact on authorized satellite carriers.

On December 20, 1990, NEXSAT filed a reply to GIC's opposition. NEXSAT did not offer the Commission any assurance, let alone any supporting evidence, concerning the precise date when it would commence construction.

By letter dated March 1, 1991, NEXSAT filed with the Commission a Satellite Purchase Contract ("Contract") which it had entered into with TRW on February 21, 1991. The Contract contemplates a complete revision of NEXSAT's satellite plans.

Instead of two operational satellites, the Contract would involve the construction of four smaller satellites. The Contract further contemplates that TRW would study the feasibility of the new satellite plans, issue a report to NEXSAT within six (6) months from the Contract date (February 21, 1991), and then provide NEXSAT with twenty-one (21) days after receipt of TRW's report to decide whether to accept or reject TRW's proposal. See Article 17 of the Contract. In other words, NEXSAT wants to wait until September 11, 1991 to decide whether to go forward with the construction.

In its letter of March 1, 1991, NEXSAT also requested that the "milestones for construction of the SpotNet satellites be extended to conform to the program schedule set out [in] Exhibit C of the Contract." Exhibit C contains a graph which indicates that construction on the first satellite would commence in March 1992.² That construction schedule, however, is conditioned on NEXSAT's acceptance of TRW's feasibility study.

In the meantime, GIC and other parties filed a petition with the Commission on January 29, 1991, seeking a change in the Commission's orbital spacing policy from 2° to 3°. On

² Exhibit C of the Contract contains a graph which purports to set forth the program schedule. Although the graph is not entirely clear, it appears that, if NEXSAT accepts TRW's six-month feasibility study, additional time would have to be spent reviewing the technical parameters of the proposal and procuring parts. No construction, however, would commence until March 1992. See Exhibit C, Payload Fab-F1.

February 15, 1991, the Commission issued a Public Notice seeking comment on the petition. Report No. 1838 (Feb. 15, 1991).

II. NEXSAT's Request Should Be Denied

NEXSAT's letter of March 1, 1991 constitutes its third request for an extension of time. Its first request for a 14-month extension was granted on June 7, 1990 by the Bureau. NEXSAT's second request of October 31, 1990 asked for a six-month extension of time until April 1991 to submit a contract. NEXSAT is now asking the Bureau to extend the time to commence construction until March 1992.

NEXSAT's third extension request should be denied for at least three separate reasons: (1) the delay in construction is not occasioned by circumstances beyond NEXSAT's control; (2) there is no assurance that an extension will result in the commencement of construction since NEXSAT is free to reject TRW's proposal after the conduct of a six-month feasibility study; and (3) even if NEXSAT were to accept the results of TRW's six-month feasibility study, the proposed configuration of the spacecraft would be completely different than the configuration authorized by the Commission and should therefore be re-submitted as a new application. Each of these factors warrants elaboration.

A. No Uncontrollable Circumstances

Satellite authorizations are predicated on the applicant's ability "to immediately proceed with the

construction and operation of the proposed domestic satellite system." Domestic Fixed Satellite Service, 77 FCC2d 956, 960 (1980). Accord Domestic Fixed Satellite Service, 90 FCC2d 1, 2 (1982). Consequently, extensions in the construction schedule "are granted only when delay in implementation is due to circumstances beyond the control of the licensee." MCI Communications Corporation, 2 FCC Rcd 233 (CCB 1987).

There is no evidence whatsoever that the delay in NEXSAT's construction schedule is due to circumstances beyond its control. Indeed, the record on NEXSAT's applications is completely barren of any explanation as to why the construction schedule authorized by the Bureau in June 1990 could not have been honored. Quite the contrary. At each juncture NEXSAT has offered rosey predictions to the Commission that construction is just around the proverbial corner. Thus, in requesting a six-month extension in October 1990, NEXSAT assured the Commission that it was "confident that it can reach agreement with a manufacturer for a viable design and enter into a construction contract in the near future. . ."

The facts now show otherwise. NEXSAT is contemplating a major revision to its construction plans and has asked TRW to take six months to study the feasibility of its new proposal. Under Article 17 of the Contract, NEXSAT will then have the option to decide whether to go forward with the proposal being studied by TRW.

NEXSAT's actions do not reflect circumstances beyond its control. Rather, NEXSAT's contract with TRW reflects nothing more than a voluntary business decision to consider a spacecraft configuration different than the one originally proposed to and authorized by the Commission. That voluntary decision does not constitute circumstances beyond NEXSAT's control and cannot be the basis for the grant of its extension request. See High Point Community Television, Inc., 2 FCC Rcd 2506 (1987) (broadcast permittee's failure to locate a new transmitter site within a reasonable time after loss of the first site precludes an extension of time to construct based on circumstances beyond the permittee's control); New Dawn Broadcasting, 2 FCC Rcd 4383, 4384 (MMB 1987) (broadcast permittee's decision to move to a new site "would be a business judgment and could not constitute circumstances beyond [its] control" to justify an extension of time to construct); Cidra Broadcasters, Inc., 2 FCC Rcd 230 (MMB 1987) (broadcast permittee would not be granted extension of time to construct when permittee made "independent business decisions" to modify proposal in response to loss of tower site); Duluth Media, 2 FCC Rcd 2929, 2930 (MMB 1987) (broadcast permittee's "failure to construct at [its] authorized site and [its] decision to seek a different site were business judgments wholly within [its] control" and could not justify an extension of time to construct).

Although the precise parameters of NEXSAT's proposal will have to await the outcome of TRW's feasibility study, the Contract itself raises questions which should be explored through the kind of full review which occurs in the context of the submission of a new application. For example, Section 3.2.5.3.1. of Exhibit B of the Contract states that the four NEXSAT satellites will use only six (6) transponders at 72 MHz. This specification suggests that the NEXSAT satellites would not be achieving any frequency re-use by means of dual polarization -- a defect that would justify dismissal of the application. See Reduced Orbital Spacing, 54 RR2d 577, 598 (1983), recon., 99 FCC2d 737, 741-42 (1985). NEXSAT's proposed use of the 72 MHz transponders also flies in the face of the Commission's prior recognition that a 72 MHz transponder approach is technically inefficient. Alien Carrier Interference, 2 FCC Rcd 762, 791 n.24 (1987). Other parameters of the proposal (if NEXSAT decides to go forward with it) will also warrant scrutiny.

D. Other Public Interests Justify Denial

As explained in GIC's opposition of December 12, 1990, cancellation of NEXSAT's orbital assignment of 127° W.L. would facilitate adoption of a 3° spacing plan. NEXSAT's contract with TRW only reinforces the wisdom of that cancellation.

NEXSAT's plans are obviously in flux. It cannot commit now to the construction of any satellite at any point in time -- let alone by the dates set forth in Exhibit C of its

contract with TRW. In effect, NEXSAT wants to warehouse its satellite authorizations until at least September 1991 before it decides how it wishes to proceed.

NEXSAT should not be allowed to use its private business interests to frustrate any decision the Commission may want to make on the 3rd petition. See MCI Communications Corporation, 2 FCC Rcd 233 (CCB 1987). The larger public interest dictates that the Commission retain the flexibility to serve all existing and prospective users in the home satellite television market rather than the select few who could benefit from NEXSAT's service if and when it is able to complete construction.

Conclusion

WHEREFORE, in view of the foregoing, it is respectfully requested that NEXSAT's application be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of March, 1991, caused a copy of the foregoing Opposition to be mailed via first class mail, postage prepaid, to the following:

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