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

FEB 26 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
NATIONAL EXCHANGE SATELLITE, INC.)
)
For Extension of Time to Construct)
and Launch Space Stations in the)
Domestic Fixed-Satellite Service)

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

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To: The Commission

DOMESTIC FACILITIES DIVISION
SATELLITE RADIO BRANCH

PETITION FOR RECONSIDERATION

Pursuant to 47 C.F.R. § 1.106, National Exchange Satellite, Inc. ("NEXSAT") hereby requests that the Commission reconsider its Memorandum Opinion and Order ("MO&O"), FCC 93-24 (Jan. 27, 1993). The MO&O denied NEXSAT's Application for Review, thereby upholding the Common Carrier Bureau's decision below, DA 92-294 (March 20, 1992). The Bureau had denied NEXSAT's request for an extension of the milestones for the construction and launch of NEXSAT's domestic fixed-satellite system. NEXSAT demonstrates below that the Commission should, on reconsideration, grant NEXSAT's request that its milestones be extended.

I. BACKGROUND

NEXSAT was the sole new entrant to come forward in the 1987 domestic satellite processing round. Except for NEXSAT, all of the applicants in that round proposed spacecraft of traditional

configuration and capability.¹ NEXSAT, however, proposed a high-power, spot beam configuration that promised enormous increases in frequency reuse and other efficiencies.

Because of the "cutting edge" nature of its proposal, NEXSAT was required to make a supplemental demonstration of its ability to coordinate its "SpotNet" satellites with adjacent spacecraft at 2° orbital spacing prior to being assigned orbital positions in the primary eastern and western arcs. See National Exchange Satellite, Inc., 3 FCC Rcd 6992 (1988). Failure to make this additional showing would have consigned the SpotNet satellites to the then-newly established high-power arc for video carriers, an environment inherently incompatible with the SpotNet design. The uncertainty caused by the imposition of this additional requirement made it impossible for NEXSAT to go beyond the most rudimentary planning stages until the matter was resolved.²

¹ The other applicants included both the remaining giants of the industry -- AT&T, Hughes, GTE and GE -- as well as smaller companies subsequently absorbed by the giants -- SBS, Contel/ASC, Western Union. See Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988).

² It has been suggested that NEXSAT could have gone forward with constructing its satellites while the matter of its precise orbital assignments was being resolved, the theory being that the spacecraft bus and much of the internal hardware is not specific to a particular orbital location. See Letter from James R. Keegan, Chief, Domestic Facilities Division to Henry Goldberg, dated June 7, 1990. This is only half correct. If the high-power arc, to which NEXSAT initially was consigned, had provided a viable environment for the provision of NEXSATs proposed services, it might have been able to go forward. However, as NEXSAT made clear at the outset, its high-speed, narrow-beam data carriers could not co-exist with the high-power video carriers for which that arc was established. See, e.g., Reply of National Exchange, Inc. (filed February 23, 1988) at 10-11. Put simply, had NEXSAT been forced to remain in the high-power arc, it most
(continued...)

Finally, in January of 1990, the SpotNet satellites were assigned to viable orbital locations and NEXSAT was able to proceed with the contracting process. See Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 5 FCC Rcd 179 (1990). Initially, NEXSAT could not locate a satellite manufacturer able to provide reasonable assurances that it could meet NEXSAT's design and performance specifications. See Letter from Henry Goldberg to Donna R. Searcy, Secretary, dated October 31, 1990.

NEXSAT eventually found that TRW, a company not traditionally involved in the commercial satellite market, although possessing great expertise in military satellite construction, was willing to work with NEXSAT to explore design alternatives. NEXSAT, therefore, funded a study by TRW to ascertain the relative merits of "lightsats" versus the traditionally-sized domestic satellites. See Letter from Henry Goldberg to Donna R. Searcy, Secretary, dated March 1, 1991. The study was concluded in the fall of 1991, at which time NEXSAT began the final process of selecting a spacecraft design.

Shortly thereafter, NEXSAT was approached by EDSAT, an organization seeking to establish a national instructional satellite network. See Letter from Henry Goldberg to Donna R. Searcy, Secretary, Dated January 6, 1992. EDSAT wished to explore whether NEXSAT could support EDSAT's goal of using a

²(...continued)
likely would have abandoned the project altogether, because neither its spacecraft design nor basic business plan would have been viable operating from that arc.

satellite system for the nationwide distribution of instructional programming and support materials. Id. In furtherance of that goal, NEXSAT agreed to postpone its final design decisions until EDSAT, and its affiliate, the National Education Telecommunications Organization ("NETO"), had an opportunity to evaluate NEXSAT's capabilities, in comparison with those of other satellite system suppliers. Contemporaneously, legislation -- S.2377 -- was introduced in the Congress to provide a means of funding such an instructional network.

While the legislation was pending before the Congress and EDSAT/NETO were considering proposals from NEXSAT and others, the Bureau's decision denying NEXSAT's extension requests was released, and the MO&O followed. This state of affairs has prevented NEXSAT from completing the process of selecting a final spacecraft design.

II. THE COMMISSION'S RATIONALE

The MO&O denied NEXSAT's Application for Review based primarily on the Commission's policies against warehousing of orbital slots. The MO&O focused mainly on whether NEXSAT's claim that the demand for domestic satellite capacity has reduced significantly since 1987 is accurate. The MO&O, however, largely overlooked other factors that NEXSAT brought to the Commission's attention, and misconstrued the significance of other factors.

For example, NEXSAT demonstrated in its Application for Review that new entrants generally lack the incentive to engage in warehousing. Such entrants, in order to warehouse, would have

to incur costs without obtaining offsetting revenues or other competitive advantages, which would be contrary to their financial interests. The MO&O did not meaningfully address this policy consideration.³

The MO&O also misconstrued the significance of the fact that there have been no new domestic satellite applicants since 1987. The Commission considered the absence of new satellite applicants only in the context of the issue of whether demand for satellite capacity has abated. MO&O ¶ 5. The true significance of the fact that there have not been any new domestic satellite applicants is that, when combined with the fact that concentration in the industry has increased to an alarming degree since 1987, new entrants have become critical to the Commission's "open skies" and pro-competitive policies. NEXSAT is the only new entrant on the horizon, and its request for a milestone extension should be viewed in that context.

In sum, the MO&O gave insufficient weight to the unique policy considerations associated with new entrants in the domestic satellite industry, particularly in light of the increasing concentration in that industry. Proper consideration of these factors dictates a different outcome.

³ The MO&O (at n.12) merely stated that "[i]t is not necessary to examine the issue of whether NEXSAT, as a new entrant, had the economic incentive to warehouse orbital locations," because, according to the MO&O, "the policy for establishing and enforcing such [milestone] deadlines continues to be in the public interest." This statement overlooks the fact that whether it is in the public interest to apply the antiwarehousing milestone policy to NEXSAT depends upon whether NEXSAT has the economic incentive to warehouse.

CONCLUSION

The MO&O reflexively invokes an anti-warehousing policy against one who has no incentive to warehouse, in circumstances in which no would-be applicant or existing licensee has raised an objection. The MO&O thereby sacrifices the substantial public interest benefits to be derived from NEXSAT's extension request, solely in order to preserve the precedential integrity of a policy the application of which in this case advances no identifiable public interest goal. In view of these circumstances, NEXSAT respectfully requests that, on reconsideration, NEXSAT's request for an extension of its construction and launch milestones be granted.

Respectfully submitted,
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February 26, 1993

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Reconsideration was sent, by first-class mail, on this 26th day of February 1993, to the following:

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