ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Loral SpaceCom Corporation and Loral Space & Communications Corporation	)	File Nos. 123/124-SAT-MP-96;
	)	IBFS Nos. SAT-MOD-19960610-00082/83
	)	SAT-MOD-19991102-00106;
	)	SAT-MOD-19991101-00108/109
Applications for Modification of Fixed-Satellite Service Space Station Authorizations	)	Call Signs: S2159, S2160, S2205, T-402
	)	
	)	File Nos. SAT-MOD-19991101-00107
	)	SAT-MOD-20020408-00060
Applications for Extension of Milestone Dates	)	Call Sign: S2160
	)	
	)	File Nos. SAT-MOD-20000104-00042/43/44/45
Request for Extension of Time to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service	)	
	)	

To: The Commission

REPLY TO OPPOSITION CONCERNING APPLICATION FOR REVIEW, IN PART

Orbital Resources LLC ("Orbital Resources"), by counsel, hereby replies to the "Opposition to Application for Review, In Part" filed May 6, 2003 ("Opposition") by Loral Space & Communications Corporation and Loral Orion, Inc. (collectively "Loral"). In its Opposition, Loral struggles gamely both to provide a plausible explanation for the International Bureau's decision in the above-captioned proceeding to sustain Loral's Ku-band rights at the 47 W.L. orbital location,[1] and to refute the straightforward arguments presented in Orbital Resources' Application for Review. The effort fails.

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1 *See Loral SpaceCom Corporation*, DA 03-1045, slip op. at 13-15 (¶¶ 24-26) (IB, released April 1, 2001).

In its Application for Review, Orbital Resources demonstrated conclusively that the explicit terms of the *Orion Atlantic License*,[2] and all pleadings and decisions in this proceeding prior to July 2002 were premised fundamentally upon the fact that construction milestones applied to the Orion F2 Ku/Ka-band satellite. Loral's Opposition does not attempt to refute Orbital Resources' detailed legal and factual arguments, but instead tries to obscure the facts and distort Commission precedent in order to justify its retention of undeveloped Ku-band orbit/spectrum resources it was first granted nearly two decades ago. The Commission should not be deceived by Loral's machinations; it should vacate paragraphs 24 through 26 of the *MOO&A* and declare Loral's 47° W.L. satellite authorization NULL AND VOID in its entirety, as mandated by Loral's license.

I. The Record Established in This Proceeding Permits Only One Conclusion – Loral's Orion F2 Satellite License Was Rendered Null and Void As of April 30, 2002, When It Failed To Satisfy Its Construction Completion Milestone.

A. The *Orion Atlantic License* Established Construction Milestones That Apply To The Orion F2 Satellite.

The central theme of Loral's Opposition is that the April 1 *MOO&A* is "consistent with prior orders." Opposition at i. Yet nowhere does Loral offer any support for this conclusion – it simply repeats it over and over again without elaboration. *See* Opposition at i, 4, 5 (first full ¶), 5 (bottom of page), and 14. Instead of seeking to demonstrate that the Bureau's determination was consistent with prior statements through reference to these orders, Loral embarks on a series of increasingly strained and unsupported assertions concerning its 47° W.L. license, seeking to buttress its untenable claim that it "has two authorizations [licenses] at 47° W.L." (Opposition at 8), and that the milestones imposed in the *Orion Atlantic License* therefore do not apply to the Ku-band portion of the Orion F2 spacecraft.

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2 *See Orion Atlantic License*, 13 FCC Rcd 1416 (IB 1997).

The reality is that Orion asked the Commission in 1995 to modify its existing Orion F2 Ku-band 47° W.L. license to add Ka-band frequencies to the satellite. The International Bureau granted this request in 1997, and at the same time imposed construction milestones on the hybrid Ku/Ka-band Orion F2 satellite. Establishment of such milestones in connection with the additional authority was consistent with changes in FCC regulation made in 1996, after which construction milestone schedules applied to all satellite authorizations.[3] Loral accepted the new terms of its license without complaint, and later argued that the Bureau could not cancel its Ku-band authority because it was in compliance with the milestones that applied to the satellite.[4] In the *MOO&A*, however, the Bureau correctly found that Loral had failed to meet the construction milestones applicable to Orion F2.[5]

Loral is thus incorrect in asserting that Orbital Resources has argued "that the FCC modified Loral's Ku-band authorization in the Ka-band Order *sub silentio*," and in claiming that such a change could only have been made "after providing written notice of such intention and an opportunity to respond, in accordance with Section 316." Opposition at 6. In fact, the *Orion Atlantic License* was not silent on the applicability of milestones to the modified Orion F2 license,[6] and it was Loral itself that sought the additional authority by filing an application for

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3 *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBSC Petition for Declaratory Rulemaking Regarding the Use of Transponders to provide International DBS Service*, 11 FCC Rcd 2429 (1996) ("*DISCO I*"). In fact, the omission of milestones from Orion's 1991 final authorization appears to have been an oversight in the first instance, as the Commission stated in 1985 that international satellite authorizations would be subject to the same construction milestone requirements as domestic operators. *See Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046, 1176 & n.170 (¶ 264)(1985) ("As we have done with domestic satellite authorizations, we will condition the international satellite authorizations on the successful completion of certain requirements by certain dates in order to discourage the warehousing of orbital assignments.")

4 *See* Petition to Deny of Loral Space & Communications, Ltd., FCC File Nos. SAT-AMD-19990511-00052 and SAT-MOD-19990511-00051, at 3 (filed June 28, 1999). This language is quoted at length below.

5 *See MOO&A* at 13 (¶ 22).

6 *See Orion Atlantic License*, 13 FCC Rcd 1416, 1426 (¶ 32) (IB 1997).

modification of the license. Loral itself has not directly disputed that it sought and was granted a modification of the Orion F2 license, or that the result of that modification was a revised license applying milestones to the resulting Ku/Ka-band hybrid spacecraft.[7]

Loral further claims that Orbital Resources is being "disingenuous" by noting that Loral itself defended the validity of its Ku-band authority at 47° W.L. by claiming compliance with the very construction milestones it now claims to be inapplicable to this band. The statement to which Orbital Resources referred was contained in Loral's Petition to Deny Columbia's applications seeking Ku-band authority at 47° W.L. – a proceeding in which the Ka-band authority at 47° W.L. was not at issue. If there were indeed no milestones applicable to Ku-band capacity, as Loral now claims, certainly this would have been a relevant "fact" for it to raise at that time. If there were no milestones for Ku-band, Loral could also reasonably have claimed simply that commencement of construction of a hybrid satellite, in the form of contracting for its construction, evidenced that it was proceeding to implement this part of its authority. There was certainly no reason for it to specifically reference milestone compliance, if no milestones applied to the Ku-band authority. Instead, Loral stated as follows:

> Loral has final authority to construct, launch, and operate a Ku-band satellite at 47° W.L. *The authorization set forth explicit milestones* for the hybrid Ku/Ka-band satellite and requires that Loral commence construction on *the satellite* by May 1998, complete construction by April 2002 and launch a satellite by May 2002. Loral has fulfilled all of its current milestone obligations with respect to 47° W.L. and its FCC filings and annual FCC reports confirm its plans to launch *a satellite* into 47° W.L. by May 2002.[8]

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[7] It seems implausible in any case that the Commission would approve the grant of both a Ku-band license and a Ku/Ka-band license at the same orbital location, as the two licenses are mutually exclusive with each other. In other services, the Commission has barred "applications filed by the same applicant specifying facilities which, by themselves, would be mutually exclusive with each other." *Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 93 FCC 2d 952, 971 (¶ 54) (1983).

[8] Petition to Deny of Loral Space & Communications, Ltd., FCC File Nos. SAT-AMD-19990511-00052 and SAT-MOD-19990511-00051, at 3 (filed June 28, 1999) (emphasis added).

There was no reason for Loral to respond in this fashion unless it (correctly) believed that the construction milestones contained in the *Orion Atlantic License* applied, without differentiation by payload, to its Orion F2 authority for 47° W.L. This statement demonstrates beyond doubt that Loral accurately understood that its single satellite authorization at 47° W.L. contained specific construction milestones.

B. Loral Held Only One Satellite License For the 47° W.L. Orbital Location.

In light of the clearly expressed Orion F2 construction conditions contained in the *Orion Atlantic License*, Loral attempts to exempt the Ku-band portion of the license from these requirements by asserting that it held two licenses at 47° W.L. – a Ku-band only license finalized in 1991, and a Ku/Ka-band hybrid granted in 1997. This conveniently ignores that the alleged "second" license was merely a modification that added authority to the original Orion F2 license.

Loral's rather shameless effort seeks to sow confusion based on the dual meaning of the term "authorization." When the Commission either grants initial authority or modifies existing authority, it issues an *instrument of authorization*, typically called an "Order & Authorization." This instrument of authorization sets out key terms and conditions of the licensee's operating authority, but may not describe all aspects of its licensed operation. The full scope of a licensee's "authorization," meaning its license to operate a particular facility, may be laid out in several such instruments of authorization.[9] Loral's argument is premised on an

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[9] An example of this is Orbital Communications Corporation ("Orbcomm"), which holds a single license to operate a non-voice, non-geostationary mobile-satellite service ("NVNG MSS") system. This single license has been subject to multiple modifications subsequent to its initial grant in 1994. *Orbital Communications Corporation*, 9 FCC Rcd 6476(1994)(Licensing Order); *Orbital Communications Corporation,* 13 FCC Rcd 10828 (IB 1998) (1st Modification); *Orbital Communications Corporation,* 13 FCC Rcd 17525 (Sat. & Rad. Div. 1998) (2nd Modification); *Orbital Communications Corporation*, 15 FCC Rcd 1340 (Sat. & Rad. Div. 1999) (3rd Modification); *Orbital Communications Corporation*, 17 FCC Rcd 6337 (IB 2002)(4th Modification). Following the logic employed by Loral, the existence of all of these instruments entitled "Order & Authorization" would give Orbcomm five separate NVNG MSS "authorizations," rather than the one it actually holds.

attempt to construe two mere instruments of authorization that relate to the same satellite, as if they were two separate licenses for distinct satellites.

A critical flaw in this reasoning, however, is the specific language used in the *Orion Atlantic License,* which states that the construction milestones for Loral's 47° W.L. hybrid satellite apply to "each of the authorizations." Thus, even if Loral's strained reading were correct, the relevant Order nonetheless emphasizes the applicability of milestones not only to the new Ka-band authority being granted, but to the existing Ku-band portion of the satellite as well.[10] Loral's response to this problem is simply to assert that the Commission should ignore the specific language of its license as "inapt." Opposition at 7. Yet Loral offers no basis upon which the Commission could or should ignore the plain meaning of the operative language of its license. It is a basic tenet of legal interpretation that unambiguous terms must be given their plain meaning, and cannot simply be ignored.[11]

Loral proceeds to argue that language contained in other instruments of authorization granting Ka-band rights is somehow more relevant to the meaning of its license than the specific language of its own authorization. *See* Opposition at 7-8. It goes without saying that what the Bureau may have meant in using the terms "authorization" or "authorizations" in granting licenses to other entities has no bearing on Loral's 47° W.L. license. In the context of the *Orion Atlantic License*, the phrase "each of these authorizations" can only mean one thing – that the terms and conditions apply equally to each of the instruments of authorization issued with respect to this orbital location. The fact that other orders have used this

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[10] A second obvious flaw is that even had the Order stated that the milestones applied to a single authorization, the instrument of authorization so issued was merely a modification of pre-existing authority, not an entirely new license. *See* Application for Review at 9-11.

[11] *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (statutes); *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998) (contracts).

phrase to convey other meanings, *e.g.*, referring to multiple licenses for more than one orbital location, cannot change the evident meaning of the phrase as used in Loral's authorization. There is no question that Loral was granted authority in the relevant authorizing orders to build just one satellite (Orion F2) at one orbital location (47° W.L.).[12]

Finally, contrary to Loral's claim, this is not an instance where the Bureau is merely "interpreting" or "clarifying" language.[13] In general, the Bureau has little need to "interpret" its own orders; it simply needs to apply the terms as written. In this case, there has never been an indication in any prior Bureau decision that the intent of the *Orion Atlantic License* was to impose milestones only on one part of the authorized satellite.[14] In the *MOO&A*, the Bureau nonetheless made a 180-degree change in its past treatment of the Loral license. This is a step it cannot make without providing a reasoned explanation for its new approach.[15]

C. The Commission Licenses Satellites To Operate On Specified Frequencies, It Does Not Merely License "The Use of Frequencies," As Loral Claims.

Loral's efforts to salvage its Ku-band authorization become further mired in rhetorical overstatement when it makes the inaccurate claim that "the Commission

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[12] It is also of no consequence that the original Ku-band Orion F2 authorization and the subsequent Ka-band modification were issued in the names of different entities, resulting in the fact that the former is now officially in the name of Loral Orion, Inc., while the latter is in the name of Loral itself. Although perhaps not the best procedural practice, the fact that the Bureau permitted Orion Atlantic, L.P. to modify a license originally granted to Orion Satellite Corp. simply reflected the reality that both entities were 100% controlled by the same parent company, which was ultimately responsible for launching the satellite.

[13] Loral cites just one case for the proposition that "the Bureau should be accorded significant deference when interpreting its own decisions." Opposition at 4 & n.13. In fact, the case is inapposite to this circumstance, and Loral has misread the holding. In the case cited, the D.C. Circuit held that the courts owe "substantial deference to the interpretation the Commission accords" "*ambiguous statutory terms*." *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) (emphasis added). This holding provides no support for an unexplained about-face in an agency's reading of an unambiguous, and heretofore consistently described, license condition.

[14] As a practical matter, where one satellite is authorized, milestones must necessarily apply to the entire satellite, as it is currently not possible to launch a satellite with a single payload and later to add frequencies in a different band.

[15] *See* Application for Review at 7-8, *citing Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *Burlington Truck Lines, Inc. v.U.S.*, 371 U.S. 156, 168 (1962); *Alabama Power Co. v. FCC*, 773 F.2d 362, 372 (D.C. Cir. 1985); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

fundamentally licenses payloads (i.e., the use of specific frequencies)." Opposition at 9. This statement ignores the fact that use of these frequencies is limited to the type of facility that Loral once expressed interest in constructing – *i.e.*, a satellite. Loral could not employ the frequency bands that it was authorized to use to operate a television station or to provide terrestrial communications services. Its license allows it to operate a geostationary fixed-satellite, just as other FCC licenses grant authority to operate other kinds of facilities.[16] Fundamentally, the Commission licenses *facilities* that make use of frequencies, not merely the frequencies themselves.

The specific examples cited by Loral undermine its argument rather than support it. *See* Opposition at 9. In each case, the ability of the licensees involved to combine authorizations to create hybrid satellites was premised on the fact that each entity had been granted one or more single band satellite authorizations.[17] In none of these cases, however, was an entity granted or permitted to retain a "payload license" unassociated with a specific satellite.

The post-grant combination of separate satellite licenses to permit operation of a single hybrid does not provide support for the post-grant partition of a single license to permit construction of two separate satellites.[18] In effect, Loral is asking the Commission to give it a second chance to build a 47° W.L. spacecraft by giving it two licenses for the price of one. There is no public interest benefit in such a post-grant reformation of a license, and FCC

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[16] In order for any entity to operate an in-orbit communications payload, it must be part of a satellite space station facility – *i.e.*, the licensing of a satellite is essential to the provision of service.

[17] *See, e.g., Hughes Communications Galaxy et al.*, 6 FCC Rcd 72 (1990); Echostar Application, File Nos. SAT-AMD-20030127-00003 & 00004 and SAT-MOD-20010608-00054 & 00055. Loral effectively concedes this in a footnote, acknowledging that Echostar's applications seek the modification of two "separate 121° W.L. Ku-band and Ka-band space station authorizations." Opposition at 10 n.30.

[18] Because the Commission has recognized the potential efficiencies of hybrid operation, it has historically permitted an entity or several entities to combine individually licensed satellites as payloads on a single satellite.

acquiescence in such semantic flim-flam can only undermine FCC processes by encouraging licensees to seize upon any language in an Order that may be susceptible to different meanings in order to provide support for self-serving, unwarranted, results. Given Loral's own observations concerning apparently imprecise use of language in other International Bureau licensing Orders, this is a door that the Commission should be anxious to slam firmly shut.

II. Loral's Attack On Orbital Resources' Standing To Participate In This Proceeding Is Internally Inconsistent and Legally Unsupportable.

A claim that an opponent "lacks standing," and that its arguments can thus be ignored on procedural grounds, is often the last resort of a litigant with no meritorious legal or factual arguments to make in support of its own view. Such is the case here. Yet Loral cannot even quite bring itself to make a clear-cut argument on this point, contradictorily asserting that Orbital Resources has standing, but that it is "tenuous," only to claim later that Orbital Resources has no standing at all. Opposition at 11 & 13.

Loral further contradicts itself by attacking Orbital Resources' entitlement to participate by stating that its "interest in this proceeding is purely pecuniary." Opposition at 11. Yet it is precisely such a financial interest in the outcome of a proceeding that typically is held to endow a party with standing.[19] Loral's eventual assertion that Orbital Resources lacks standing to participate in this proceeding is therefore fundamentally in conflict with its disdainful observation that it is seeking "to promote its private, pecuniary interest." Opposition at 13. Moreover, Loral fails to provide any authority for its claim that Orbital Resources should suddenly be barred from a proceeding where it has been a party for nearly two years.

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[19] *See, e.g., WINV, Inc.*, 14 FCC Rcd 2032, 2033 (1998), *citing Hanford FM Radio*, 11 FCC Rcd 8509, 8511 (1996)(applicant for review must identify "direct economic or other connection" between its interests and grant of the challenged applications).

Finally, Loral suggests that "the Commission should steadfastly avoid being caught in the middle of a commercial dispute" between Orbital Resources and others, with the implication that rendering a decision on the Application for Review would somehow involve the Commission in such a dispute. Opposition at 12. In fact, it is only Loral that has raised this irrelevant issue as an alleged justification for the Commission not to act. The question whether the construction milestones imposed on the Orion F2 satellite apply to the satellite itself or differentially to the Ku- and Ka-band payloads is the only legal matter that is relevant in this proceeding. Answering that question simply involves the Commission in the enforcement of its rules and policies, it does not place it "in the middle of a commercial dispute."

III. Conclusion

Loral has provided no rebuttal to Orbital Resources' arguments, and the justification for reversal of the defective portions of the Bureau's *MOO&A* has been fully demonstrated above and in Orbital Resources' Application for Review. Not only did the Bureau fail to justify its conclusion in paragraphs 24, 25 & 26 of the *MOO&A*, there is no basis in the record to support its conclusion. Accordingly, the Commission should vacate these paragraphs of the *MOO&A*, and declare the Orion F2 authorization NULL AND VOID in its entirety.

Respectfully submitted,

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May 13, 2003

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CERTIFICATE OF SERVICE

I, Sharon Krantzman, hereby certify that a true and correct copy of the foregoing Reply to Opposition Concerning Application for Review, In Part was sent by first-class, postage prepaid mail this 13th day of May, 2003, to the following:

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