

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
**Loral SpaceCom Corporation and** )  
**Loral Space & Communications** )  
**Corporation** )  
)  
Applications for Modification of Fixed- )  
Satellite Service Space Station )  
Authorizations )  
)  
Applications for Extension of Milestone )  
Dates )  
)  
Request for Extension of Time to Construct, )  
Launch, and Operate a Ka-band Satellite )  
System in the Fixed-Satellite Service )

File Nos. 123/124-SAT-MP-96;  
IBFS Nos. SAT-MOD-19960610-00082/83  
SAT-MOD-19991102-00106;  
SAT-MOD-19991101-00108/109  
Call Signs: S2159, S2160, S2205, T-402  
File Nos. SAT-MOD-19991101-00107  
SAT-MOD-20020408-00060  
Call Sign: S2160  
File Nos. SAT-MOD-2000101-00042/43/44/45

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Policy Branch  
International Bureau

To: The Commission

**REPLY TO OPPOSITION CONCERNING  
MOTION FOR IMMEDIATE PARTIAL VACATUR**

Orbital Resources LLC ("Orbital Resources"), by counsel, hereby replies to the "Opposition to Motion for Immediate Partial Vacatur" filed May 1, 2003 ("Opposition") by Loral Space & Communications Corporation and Loral Orion, Inc. (collectively "Loral"). Although styled as an Opposition, Loral's pleading offers no basis for rejection of Orbital Resources' request that the Commission vacate immediately a patently defective portion of the International Bureau's April 1, 2003 Memorandum Opinion, Order and Authorization<sup>1</sup> ("*MOO&A*") in the above-captioned proceeding.

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

Stripped to its essential elements, the Loral Opposition has three components. It begins with a flawed recitation of the facts. Opposition at 2. Next, it offers an unconvincing repetition of the faulty conclusions in the *MOO&A* absent any attempt to provide legal or factual support for them. Opposition at 3-4. Finally, Loral engages in a gratuitous and diversionary attack on Orbital Resources' motives for bringing to the Commission's attention the errors in the Bureau's *MOO&A*. Opposition at 4-5.<sup>2</sup> Missing from the Opposition is any attempt to refute Orbital Resources' detailed arguments, or to offer any valid reason that the Commission should not immediately vacate paragraphs 24 to 26 of the *MOO&A*. Despite the fact that Orbital Resources incorporated by reference the arguments contained in its contemporaneously filed Application for Review (*see* Motion at 2), Loral simply chooses not to address these ample grounds for vacatur.

In fact, the errors contained in the Bureau's *MOO&A* are sufficiently apparent that, despite the length of the record and the many instances where the Bureau's past statements contradict the *MOO&A*, the Commission need examine only two paragraphs from Bureau orders to grant the requested relief. Specifically, the Commission need only compare the absence of explanation for the conclusion reached in paragraph 26 of the *MOO&A* with the clear conditions imposed in the 1997 *Orion Atlantic License*, conditions that the relevant portion of the *MOO&A* does not even reference, let alone analyze.

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<sup>2</sup> Typically, parties that participate in FCC proceedings have some financial interest in the outcome. Indeed, a party must have some identifiable interest, financial or otherwise, to have standing to participate in such a proceeding. Loral contradicts itself by first assailing Orbital Resources for participating in this proceeding to protect the financial interests of its principals, and then asserting that Orbital Resources lacks standing. *See* Opposition at 5. Loral further contradicts itself by stating that the Commission should "avoid being caught in the middle of a commercial dispute," when it is actually Loral that has raised this dispute, a matter irrelevant to Loral's milestone compliance, as an alleged justification for the Commission not to act. The question whether the construction milestones imposed on the Orion F2 satellite apply to both Ku- and Ka-band payloads is the only legal dispute that is relevant in this proceeding. Answering that question simply involves the Commission in the enforcement of its rules, it does not place it "in the middle of a commercial dispute."

It is undisputed that when the Commission granted Loral's predecessor-in-interest, Orion Satellite Corp. ("Orion"), permanent licenses for the 37.5° W.L. (Orion F1) and 47° W.L. (Orion F2) orbital locations in 1991, it did not impose construction milestones on either satellite. This was so because, at that time, international "separate systems" licensees were subject to a different licensing practice than domestic satellite systems. This changed in 1996, when the Commission eliminated the distinction between domestic and international satellite regulations in its initial Domestic and International Satellite Consolidation Order ("DISCO I").<sup>3</sup> A little more than a year later, the International Bureau modified Orion's 47° W.L. license, permitting it to add Ka-band capacity to the Orion F2 spacecraft. In doing so, it explicitly set forth a construction schedule for the satellite, stating as follows in paragraph 32 of the ordering clauses:

32. IT IS FURTHER ORDERED that unless extended by the Commission for good cause shown, each of the authorizations shall become NULL AND VOID in the event the space station is not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of the authorizations by the following dates:

	Construction Commenced	Construction Completed	Launch
Orion F2	May 1998	April 2002	May 2002 <sup>4</sup>

The only interpretation to which this language is susceptible is that Orion was authorized to build a single Orion F2 satellite to which the milestones applied. There is no language differentiating between the payloads on the satellite for purposes of construction deadlines. To emphasize this

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<sup>3</sup> See *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, 11 FCC Rcd 2429 (1996). In fact, the omission of milestones from Orion's 1991 final authorization appears to have been an oversight, 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.")

<sup>4</sup> See *Orion Atlantic License*, 13 FCC Rcd 1416, 1426 (¶ 32) (IB 1997).

point, the Bureau stated that “each of the authorizations shall become NULL AND VOID” if these deadlines were not met. This particular language is capable of only one reading in the context of this Order & Authorization, which granted authority for just one satellite. The use of this terminology makes sense only if it means the 1991 Ku-band authorization and the 1997 authorization modifying that license to add Ka-band frequencies.<sup>5</sup>

In the *MOO&A*, the Bureau not only ignores this explicit language, it ignores the fact that the ordering clause identifies the milestones as applying to the “Orion F2” satellite, not to one payload or the other. It further ignores the fact that Orion sought only a modification of its existing authority, paying the fee commensurate with a license modification, not a separate Ka-band license for 47° W.L.<sup>6</sup> Indeed, the *MOO&A* does not refer to the original language of the *Orion Atlantic License* at all, but instead offers only conclusory statements, and no explanation, in its concluding paragraph, which is reproduced below in its entirety:

26. We disagree with Orbital Resources that milestone enforcement of the Ka-band payload at 47° W.L. automatically nullifies the underlying Ku-band payload at that location. When the Commission granted the *Orion 47° W.L. Ku-band License* in 1991, it did not impose any specific system implementation milestones in that license. At that time, there were no milestone requirements in effect for the so-called “separate systems.” Rather, the Bureau imposed milestone requirements on Loral for the first time in 1997, in granting Loral authority to add Ka-band capacity to the Orion F2 satellite. In other words, the Bureau required Loral to commence construction of a hybrid satellite, ***and imposed milestones on the Ka-band portion of that satellite. Contrary to Orbital Resources’ assertion, those milestone deadlines were not intended to apply to the Ku-band portion of that satellite, and we do not read the Orion Atlantic License, nor our discussions of Loral’s 47° W.L. authority in the CCC Order or CCC Recon. Order, to hold that Loral cannot pursue its original Ku-band-only payload at 47° W.L., i.e., the payload that had no milestone.***

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<sup>5</sup> Even without this construction, the new authorization was specifically sought and granted as a modification of the prior authority, and all of the new terms applied to the Orion F2 satellite that Orion was authorized to launch and operate.

<sup>6</sup> See Application for Review at 9. Loral’s inability to articulate its own case credibly is evidenced by the following sentence – “In its Ka-band Order, the Commission merely modified the original license, with a second license, which imposed milestones on the Ka-band portion of a hybrid satellite.” Opposition at 3. It is self-evident that a single license that is “merely modified” cannot give rise to two licenses - let alone two separate licenses for just one satellite. Loral sought and obtained a modification, not a multiplication, of its license.

We will address milestone enforcement of the Ku-band payload on the Orion F2 satellite once the Commission has developed a mechanism to enforce build-out requirements for the “separate system” satellites that do not have milestones requirements. Although we agree with Orbital Resources that an exceptionally long time has passed since the Commission issued the *Orion 47° W.L. Ku-band License*, there remains no basis, at this time, to revoke Loral’s Ku-band authority.<sup>7</sup>

Bare assertions that “we disagree” and “do not read” the relevant orders to impose milestones on the entire Orion F2 satellite are no substitute for reasoned explanation of the Bureau’s conclusion.<sup>8</sup> As shown in Orbital Resources Application for Review, the absence of any attempt to reconcile this conclusion with paragraph 32 of the *Orion Atlantic License* renders the *MOO&A* defective as a matter of law.<sup>9</sup> Moreover, the language highlighted in bold italics above is fundamentally inconsistent with the unambiguous terms of paragraph 32, which make no provision for limiting the Orion F2 system milestones to the Ka-band payload, or to exempting the existing Ku-band payload from these conditions on the modified license. Indeed, there has never been any prior Bureau statement that supports the contention that the “milestone deadlines were not intended to apply to the Ku-band portion of that satellite.”<sup>10</sup>

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<sup>7</sup> *MOO&A* at 15 (¶ 26) (emphasis added).

<sup>8</sup> Loral cites just one case in its Opposition for the proposition that “the Bureau should be accorded significant deference when interpreting its own decisions.” Opposition at 4 & n.11. The case is inapposite to this circumstance, and Loral misreads its 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 180-degree turn in an agency’s reading of an unambiguous license condition. In general, the Bureau has little need to “interpret” its own orders; it simply needs to apply the terms as written.

<sup>9</sup> 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).

<sup>10</sup> The Bureau does cite an April 2002 order in which Loral was granted additional Ku-band authority for the Orion F2 satellite as a basis for inapplicability of the milestones to the Ku-band capacity. See *MOO&A* at 15 n.94, citing *Cyberstar 47° W.L. Modification Order*, 17 FCC Rcd 7019 (IB 2002). It finds meaningful the fact that there was “no discussion of milestones” in this order, which was “issued the same month that the construction completion milestone would have expired.” *Id.* As Orbital Resources noted in its Application for Review, however, there was no need to mention milestones in this order, which concerned an unopposed modification application filed in 1996, before the construction milestones were imposed. See Application for Review at 13 n.31. The Commission should be very uncomfortable with the Bureau’s implicit notion that an order can alter, by silence, the explicit terms of an existing authorization.

Loral nonetheless suggests that there is no reason to correct the Bureau's error quickly because "the public interest is not at stake here." Opposition at 4. Orbital Resources could not disagree more. What is at stake here is nothing less than the Commission's fundamental policy against spectrum warehousing and the regularity and efficiency of its processes.

As a policy matter, the illogical grounds upon which the Bureau has resuscitated the Ku-band portion of Loral's 47° W.L. authority make a mockery of the Commission's bedrock policy against spectrum warehousing, a policy which spans all areas of FCC regulation.<sup>11</sup> Loral, and Orion before it, have held rights to Ku-band spectrum at 47° W.L. for nearly two decades with no evident progress toward system deployment. Twelve years after these orbital/spectrum resources were originally set aside for Orion's use, milestones were imposed on the authorized satellite in 1997. Six years later – a full year after these milestones expired without being met – the Bureau has failed to reclaim the Ku-band resources on behalf of the public, even though it has reclaimed the more recently granted Ka-band rights at this location. If this is not warehousing, then the word has no meaning. And if the Commission does not compel the Bureau to enforce FCC policy in this instance, then the policy has no meaning.

Moreover, from the standpoint of procedural regularity, it is inappropriate for the Commission to let stand an order that is legally deficient on its face once the deficiency has been identified. The Commission should hold its constituent Bureaus to the same legal standards to which a reviewing court would hold the Commission itself. Any other policy excuses inadequate reasoning and explanation in decisions made on delegated authority, and imposes additional

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<sup>11</sup> See, e.g., *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11353 (¶ 44) (2002) (direct broadcast satellite service); *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 14 FCC Rcd 17525, 17539 (¶ 35)(1999) (broadcast services); *Reorganization and Revision of Parts 1, 2, 21 and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services*, 11 FCC Rcd 13449, 13465 (¶ 36)(1996) (fixed microwave services).

burdens on the Commissioners' staffs and the General Counsel's Office to correct errors made at the Bureau level. Where opportunities are available for immediate correction of patently deficient orders, the Commission should act on them expeditiously in order to minimize adverse administrative impact, and to avoid the pernicious precedential effect of faulty decisions on other proceedings. In this instance, that impact would include the probable foreclosure of Columbia Communications Corporation's opportunity to add Ku-band space segment to its current C-band only spacecraft for 47° W.L., with a consequent loss of potential capacity for users of trans-Atlantic satellite services.<sup>12</sup>

Loral has provided no rebuttal to Orbital Resources' arguments, and the justification for vacatur of the defective portions of the Bureau's *MOO&A* is manifest, as set forth above and in Orbital Resources' separate Application for Review. Accordingly, the Commission should vacate immediately paragraphs 24, 25 & 26 of the *MOO&A*, and declare the Orion F2 authorization NULL AND VOID in its entirety.

Respectfully submitted,

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<sup>12</sup> Columbia currently has pending at the FCC a modification application seeking authority to switch the milestones currently applicable to its 37.5° W.L. license to the 47° W.L. license, yielding a completion of construction deadline of November 2005. See Application of Columbia Communications Corporation, FCC File No. SAT-MOD-20020517-00079. Thus, if the Commission vacates the suspect paragraphs of the *MOO&A*, the Ku-band space segment would be available for assignment to Columbia in time for its satellite to be built as a hybrid, incorporating this capacity, in the event that the modification is granted.

CERTIFICATE OF SERVICE

I, Sharon Krantzman, hereby certify that a true and correct copy of the foregoing Reply to Opposition Concerning Motion for Immediate Partial Vacatur was sent by first-class, postage prepaid mail this 13<sup>th</sup> day of May, 2003, to the following:

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