

ORIGINAL

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)

Policy Branch
International Bureau

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-20000104-00042/43/44/45

To: The Commission

APPLICATION FOR REVIEW, IN PART

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Summary

Orbital Resources LLC seeks review of one part of the International Bureau's April 1, 2003 *MOO&A* concerning licenses held by Loral Space & Communications Corporation ("Loral). The part of the *MOO&A* at issue is the Bureau's conclusion, absent any basis in the record, that construction milestones imposed upon Loral's 47° W.L. Ku/Ka-band satellite six years ago were not intended to apply to the "Ku-band payload" on the satellite. As a result, the Order declares Loral's license to be null and void due to Loral's failure to construct the satellite, but also incongruously permits Loral's right to the Ku-band frequencies to be undisturbed by the nullification of the license.

The Bureau's decision concerning the impact of Loral's failure to meet its 47° W.L. construction milestones is patently defective. The *MOO&A* is legally deficient on its face because the Bureau has made no attempt to explain its decision. The courts have established that agency decisions must provide a rational connection between facts found and choices made. Decisions that fail to include such analytical underpinning are considered arbitrary and capricious. Such is the case here, where the Bureau has failed even to acknowledge the relevant facts, let alone explain how they give rise to the conclusion it abruptly announces. The Bureau's decision thus crosses the well-established boundary from "tolerably terse" explanation of agency action to "intolerably mute" failure to provide any adequate justification for agency decisionmaking.

More fundamentally, the *MOO&A* blatantly contradicts three prior orders related to this authorization, in which the Bureau made clear that satellite construction milestones, requiring satellite launch no later than May 2002, applied to Loral's 47° W.L. Ku/Ka-band license. Although Loral's predecessor in interest was originally granted a Ku-band-only authorization in 1985 that contained no milestones, it sought and received a modification of that

authorization in 1997, at which time the Bureau added the Ka-band frequencies to the license and imposed system milestone conditions on the modified license. The Bureau stated these facts unambiguously in its January 2000 CCC Order and again in its May 2001 Reconsideration Order. The Reconsideration Order states:

. . . when the Bureau granted Loral's application to add Ka-band capacity to its planned satellite at the 47° W.L. in 1997, it included a milestone schedule as a condition of the new license. This milestone schedule required Loral to commence construction of its hybrid Ku/Ka-band satellite by May 1998, to complete construction of the satellite by April 2002, and to launch the satellite by May 2002. The license further provided that failure to meet these dates would render the license null and void.

Moreover, during four years of proceedings concerning Loral's 47° W.L. license, the central question at issue was whether Loral had indeed complied with its initial milestone. Loral maintained that Columbia's Petition to Revoke Loral's Ku-band authority could not be granted because milestones applied to its authorization and that it was in compliance with the milestones at that time. Only when it became clear both that Loral would not complete construction of the satellite in compliance with its system completion milestone and that the Bureau would not grant Loral's request for extension of the milestones did Loral offer a new and different assertion, claiming that the milestones imposed on the Ku/Ka-band hybrid satellite five years earlier were never intended to apply to the Ku-band portion of the satellite. This position starkly contradicts six years of proceedings and Bureau decisions on this matter, and cannot stand.

Finally, the Bureau's decision is also contrary to the Commission's long-established policy of enforcing satellite construction milestones to prevent warehousing of orbital/spectrum resources, to which the Bureau has otherwise scrupulously adhered in all recent actions. If the Commission fails to overrule the Bureau's failure to enforce fully Loral's 47° W.L. milestones, it will encourage satellite licensees to manipulate the process and attempt

to hoard orbital slots for as long as possible, in anticipation that retention of these resources may prove beneficial at a later time.

Given the utter lack of foundation for the Bureau's conclusion that Loral's milestones do not apply to the Ku-band frequencies at 47° W.L., Orbital Resources urges the Commission to vacate this portion of the Order on an expedited basis.

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To: The Commission

APPLICATION FOR REVIEW, IN PART

Orbital Resources LLC (“Orbital Resources”), by counsel and pursuant to Section 1.115 of the Commission’s rules (47 C.F.R. § 1.115), hereby requests that the Commission review and vacate certain aspects of the International Bureau’s Memorandum Opinion, Order and Authorization in the above-captioned proceeding, released on April 1, 2003 (“*MOO&A*”).

Orbital Resources, which was a party in the proceedings below, seeks review of one aspect of the *MOO&A* relating to the validity of the Ku-band portion of the authorization of Loral Space & Communications Corporation (“Loral) for a hybrid Ku-/Ka-band satellite at 47° West Longitude. The portions of the *MOO&A* at issue are contained in paragraphs 24 through 26 of the order.

Therein, the International Bureau (the “Bureau”) concludes, absent a scintilla of evidence in the record, that construction milestones that the Bureau had previously imposed upon the single Ku/Ka-band satellite Loral was authorized to operate “were not intended to apply to the Ku-band portion of that satellite.” *MOO&A* at 15 (¶ 26). Thus, despite the fact that Loral has failed to construct a hybrid Ku/Ka-band satellite as authorized, the Bureau construes Loral’s right to the Ku-band frequencies to be undisturbed by the nullification of the license.

The Bureau’s decision concerning the impact of Loral’s failure to meet its 47° W.L. milestones is patently defective. First, it contradicts all previous Bureau declarations concerning Loral’s 47° W.L. authority. Second, it is at odds with four years of prior proceedings concerning Loral’s 47° W.L. license, throughout which all parties assumed the applicability to the license of milestones imposed in 1997, and the central question at issue was whether Loral had indeed complied with its initial milestone. Third, it is contrary to the Commission’s long-established policy of enforcing satellite construction milestones to prevent warehousing of orbital/spectrum resources, to which the Bureau has otherwise scrupulously adhered in all recent actions.

In rendering its decision, the Bureau has made no attempt to reconcile its action with the facts in the record, or to explain why clearly established satellite construction milestones should not apply to the Ku-band part of Loral’s license. In short, on this point, the *MOO&A* could not be more capricious in its ultimate finding, nor more arbitrary in its complete failure to provide a justification for its actions. Given the multiple failings of paragraphs 24 through 26 of the *MOO&A*, Orbital Resources urges the Commission to vacate these portions of the Order on an expedited basis, and it is filing separately a Motion for Immediate Partial Vacatur requesting that this relief be effected without delay.

BACKGROUND

On September 5, 1985, the FCC's Common Carrier Bureau granted Loral's predecessor-in-interest, Orion Satellite Corp. ("Orion"), a conditional authorization to construct, launch and operate two Ku-band satellites in the Atlantic Ocean Region.¹ Subsequently, in June 1991, Orion was granted final authority to operate at two orbital locations – 37.5° W.L. and 47° W.L.²

Nearly a decade after receiving its initial conditional license, Orion launched a single Atlantic region satellite at 37.5° W.L. in November 1994, commencing service two months later. In September 1995, Orion filed an application to modify its authority for the remaining Atlantic orbital location at 47° W.L., seeking to add authority to operate Ka-band frequencies on the same spacecraft.³

The International Bureau granted Orion authority to add Ka-band capacity to its existing Ku-band authorization for 47° W.L. in May 1997. *See Orion Atlantic, L.P.*, 13 FCC Rcd 1416 (IB 1997) ("*Orion Atlantic License*"). Under the modified authorization, Orion was given its first performance milestones, requiring it to commence construction of the authorized single hybrid satellite no later than May 1998, to complete construction by April 2002, and to launch the satellite by May 2002. *Id.* at 1426 (¶ 32). A few months later, Loral agreed to acquire Orion, a transaction that the Bureau approved on February 26, 1998 and which was consummated shortly thereafter.⁴

1 *See Orion Satellite Corp.*, File No. CSS-83-002-P, Mimeo No. 6871 (rel. September 6, 1985).

2 *See Orion Satellite Corp.*, 6 FCC Rcd 4201 (1991).

3 *See* FCC File No. 204-SAT-ML-95.

4 *See Loral Space & Communications and Orion Network Systems, Inc.*, 13 FCC Rcd 4592 (IB 1998).

On March 19, 1999, Columbia Communications Corporation (“Columbia”) filed a Petition to Revoke Loral/Orion’s 47° W.L. Ku/Ka-band hybrid authorization. The Petition was premised on Columbia’s observation that Loral/Orion was not proceeding with construction, and had thus rendered its authorization null and void. Two months previously, Columbia had been granted authority to operate a C-band satellite at 47° W.L., where it had been operating C-band capacity on the TDRS-6 satellite since July 1996.

Following up on its Petition, and the assumption that the Bureau would nullify Loral/Orion’s license, Columbia sought to amend a long deferred 49° W.L. Ku-band application by converting it to specify operation at 47° W.L., and to modify its existing single-band authorization at this location to include both C- and Ku-band capacity.⁵ The International Bureau quickly placed these applications on Public Notice.

While these applications were pending, Loral filed on January 4, 2000, an application seeking once again to modify its 47° W.L. license, this time to permit the use of inter-satellite links (“ISLs”), and to delay performance under its milestone schedule.⁶ Loral asserted that use of ISLs was now necessary to interconnect Ka-band satellites licensed to Loral’s CyberStar subsidiary with those originally licensed to Orion entities.⁷ Based on the fact that the CyberStar authorizations did not yet have system construction milestones because they were intended to incorporate ISLs, Loral asked the Bureau to defer the remaining milestones contained in the 1997 licenses granted to Orion.

5 See FCC File Nos. SAT-AMD-19990511-00052 and SAT-MOD-19990511-00051.

6 See FCC File No. SAT-MOD-20000104-00045 (“Loral Modification Application”).

7 See Loral Modification Application, Exhibit 1 at 1.

A few weeks later, on January 21, 2000, the Bureau issued an *MO&O* denying Columbia's Petition to Revoke the Orion 47° W.L. authorization, as well as the applications to modify Columbia's 47° W.L. authorization and to amend its 49° W.L. application. See *Columbia Communications Corp.*, 15 FCC Rcd 15566 (IB 2000) ("*CCC Order*"). The Bureau accepted at face value Loral's statement that it had commenced construction of a hybrid satellite for 47° W.L. Columbia filed a timely Petition for Reconsideration of this decision on February 22, 2000.⁸

Fifteen months after Columbia filed its February 22, 2000 Petition, the Bureau released an *MO&O* rejecting it. Although it noted "Loral's failure to build and launch a satellite that was authorized ten years ago," the Bureau continued to maintain, "Loral has not violated any of the terms of its licenses." *Columbia Communications Corporation*, 16 FCC Rcd 10867,10870 (¶ 7) (IB 2001) ("*CCC Recon Order*"). The Bureau relied on the existence of a satellite construction contract between Loral and its affiliated manufacturing arm as sufficient under the FCC's prevailing policies to satisfy the commencement of construction milestone for the Ku/Ka-band satellite. The Bureau noted, however, "Loral's next milestone is in April 2002, when it is required to have completed construction of the satellite. At that time, we will evaluate Loral's compliance with this license condition."⁹

Just three days after rejecting Columbia's challenge, the International Bureau denied Loral's separate request to extend its system construction milestones in connection with its request for ISL authority. The Bureau found that Loral's request to delay construction and launch of its 47° W.L. satellite, as well as other Ka-band satellites, "is not due to circumstances

8 See Petition for Partial Reconsideration, FCC File Nos. CSS-83-002-P-(M) *et al.* (filed February 22, 2000).

9 *CCC Recon Order* at 10873 (¶ 18).

beyond its control, nor to any other factor that would justify providing it with more time to hold these scarce orbital resources to the exclusion of others.”¹⁰

The *MOO&A* that is the subject of this Application for Review, despite again rejecting Loral’s effort to extend the construction milestones established in the *Orion Atlantic License*, and finding that Loral has failed to complete construction of its 47° W.L. satellite in accordance with these milestones, declared for the first time that the milestones did not apply to the “Ku-band payload,” but only to the subsequently added Ka-band payload.¹¹ Inexplicably, the Bureau rendered this decision despite the fact that only one satellite was to be constructed, and was intended to include both the Ku-band and Ka-band capacity.

DISCUSSION

Ignoring detailed filings in this proceeding by Columbia and Orbital Resources and a record assembled over a four-year period, the Bureau spends a mere four paragraphs dealing with the issue of Loral’s compliance with its 47° W.L. system construction milestones.¹² While finding that Loral has failed to construct the satellite it was authorized to build, it concludes curtly that the milestone deadlines established for Loral in 1997 “were not intended to apply to the Ku-band portion of that satellite, and we do not read the *Orion Atlantic License*, nor our discussion 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.”¹³ The *MOO&A* provides no further discussion as to why it has reached this conclusion.

10 *Loral Space & Communications Corporation*, 16 FCC Rcd 11044 (¶ 1) (IB 2001).

11 *MOO&A* at 15 (¶ 26).

12 *See MOO&A* at 13-15 (¶¶ 22 & 24-26).

13 *MOO&A* at 15 (¶ 26).

The Bureau's failure to explain its action is fatal to this portion of the *MOO&A* in that the finding that a single payload on the satellite was not subject to the construction milestones cannot be supported by reference to any of the three decisions the Bureau cites, or by the Commission's rules and practices generally. The clear language of the three orders, the substantive arguments offered by both sides in the proceedings leading up to the issuance of the *MOO&A*, the Commission's practice with respect to license modifications, and the Bureau's handling of other milestone enforcement matters all mandate the opposite conclusion – that Loral's failure to comply with the explicit milestone requirements imposed in its satellite license necessarily voids the license in its entirety.

A. The Bureau's Unexplained Determination That Construction Milestones Do Not Apply To Loral's Ku-Band "Payload" Is Contrary To The Record In This Proceeding And Every Relevant Aspect of FCC Policy and Practice

1. The Bureau's Determination That Construction Milestones Do Not Apply To The Ku-Band Portion of Loral's 47° W.L. Authority Is Arbitrary And Capricious On Its Face In That It Fails To Provide Any Basis For Its Unprecedented Conclusion.

One need not examine the *MOO&A* in great detail on the subject of Loral's Ku-band authority before spotting a fatal flaw in its reasoning. As described above, the Bureau states its current opinion in paragraph 26 that construction milestones never applied to the Ku-band portion of Loral's authorization, and that it does not read its prior rulings "to hold that Loral cannot pursue its original Ku-band-only payload at 47° W.L."¹⁴ The decision says nothing further on this issue, except to pronounce that it will make a determination about the validity of "the Orion F2 authorization" at some time in the future.¹⁵ Even without reference to the record

14 *MOO&A* at 15 (¶ 26).

15 *See MOO&A* at 15 (¶ 26). The Bureau states that it will make this determination "once the Commission has developed a mechanism to enforce build-out requirements for the 'separate system' satellites that do not have

in this proceeding, which as detailed below contradicts the Bureau's conclusion in every respect, this finding is defective on its face because it fails to offer any explanation at all for its conclusion, as required by the Commission's own rules¹⁶ and well-established precedent.

While administrative agencies have wide discretion, they do not have authority so broad as to permit regulation by unilateral decree. Both the D.C. Circuit and the Supreme Court have made clear that each agency decision must provide a "rational connection between the facts found and the choice made," and that orders that fail to include such analytical underpinning are arbitrary and capricious.¹⁷ This is manifestly the case here, where the *MOO&A* has not merely failed to provide a "rational connection" between the facts and its conclusion, but has failed even to provide any recitation of facts that might theoretically give rise to the bare conclusion it abruptly announces. The decision thus crosses the well-established boundary from "tolerably terse" explanation of agency action to "intolerably mute" failure to provide an adequate justification for agency decisionmaking.¹⁸

milestone requirements." *Id.* There is no need for the Commission to engage in the empty task of establishing such a "mechanism," as there are, to Orbital Resources' knowledge, no undeveloped "separate systems" authorizations except for Loral's Orion F-2 License, upon which milestones were imposed nearly six years ago, on May 9, 1997.

16 Section 1.106(j) of the Commission's Rules provides that, in deciding issues raised in a Petition for Reconsideration, the "Commission or designated authority" must provide "a concise statement of the reasons for the action taken." 47 C.F.R. §1.106(j).

17 See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). See also *Alabama Power Co. v. FCC*, 773 F.2d 362, 372 (D.C. Cir. 1985) ("We find . . . that the Commission's somewhat casual calculations exhibit at several points the sort of 'clear errors of judgment,' and absence of 'rational connections between the facts found and the choices made,' that render an order arbitrary and capricious.") (citations omitted).

18 See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

2. The Bureau's Determination That Construction Milestones Do Not Apply To The Ku-Band Portion of Loral's 47° W.L. Authority Is Contrary To Every Prior Bureau Statement On This Subject.

The egregiousness of the Bureau's failure properly to apply its prior decisions in the *MOO&A*, or otherwise to provide a rational basis for its action, is only amplified when the underlying facts are examined in detail. There is no doubt, under the three decisions cited in the *MOO&A*, that from the moment the Bureau modified Orion's 47° W.L. authorization to add Ka-band capacity, it intended that a single satellite incorporating these two payloads would be built, and that specified construction milestones would apply to that satellite, not just to one payload or the other.

Significantly, when Orion filed for authority to operate Ka-band frequencies at 47° W.L. in September 1995, it sought this authority as a modification of its existing Ku-band authorization at this location, paying a \$5,740 application fee rather than the \$82,690 fee that would have been due had it sought a separate license to allow it to construct, launch and operate a new satellite using Ka-band frequencies.¹⁹ Orion received exactly what it requested – a modification of its existing Ku-band license, incorporating the authority previously granted. In its Order, the International Bureau made clear that Orion was being “AUTHORIZED to *modify* its Orion F-2 satellite, assigned to 47° W.L. to include a [Ka-band] package.”²⁰

Although the original Ku-band license had not included construction milestones, the modification changed the basic terms of the license, both adding authority to use an additional frequency band and imposing new system construction obligations, which by that time

¹⁹ See Orion Atlantic, L.P. Application, FCC File No. SAT-MOD-19950929-00159 (filed Sept. 29, 1995). Compare 47 C.F.R. § 1.1107(9)(a)&(b) (combined fee for authority to construct and to launch and operate a new fixed-satellite service space station).

²⁰ *Orion Atlantic License*, 13 FCC Rcd at 1426 (¶ 30).

were being imposed on all fixed-satellite service licensees. The Bureau made clear its intent “to rigorously enforce the system milestone schedule to ensure that Orion Atlantic does not tie up valuable spectrum to the exclusion of qualified applicants.”²¹ Removing any doubt that these new terms applied equally to the existing Ku-band portion of the license, the Order further stated in its 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:

	<u>Construction Commenced</u>	<u>Construction Completed</u>	<u>Launch</u>
Orion F2	May 1998	April 2002	May 2002 ²²

Given the fact that only one satellite was to be constructed at a single orbital location, both the reference to a “system milestone schedule” and the highlighted portions of the text above can only be understood to mean that the milestones apply both to the original Ku-band authority and to the modification of that authorization granted in the Order establishing the milestones. There is no other plausible explanation for the reference to a “system milestone schedule” and the inclusion of the phrase “each of the authorizations.”

The use of the phrase “each of the authorizations” was somewhat unusual in form in that license modifications are typically understood to result in a single modified system authorization that replaces the prior license entirely. The Commission has stated the general rule that “modification applications are usually filed with the intent to modify *and supersede* a

21 *Id.* at 1421 (¶ 13).

22 *Orion Atlantic License*, 13 FCC Rcd at 1426 (¶ 32).

construction permit or license already held by the applicant.”²³ Paragraph 32 nevertheless removed any doubt that the revised terms and conditions set forth in the modified authorization applied to the satellite as a whole, both the original Ku-band authority and the additional Ka-band capacity.

Moreover, regardless of whether the Bureau has referred to Loral’s 47° W.L. authority as “authorizations” or as a single hybrid authorization, it has always made plain that the construction milestones apply to the single dual-payload satellite that Loral was authorized to build. Indeed, it is axiomatic that the FCC licenses satellites, not satellite payloads,²⁴ such that any milestone requirements imposed on construction of a satellite necessarily apply to the spacecraft as a whole, and not differentially to distinct elements of the authorization. Only if two separate satellites are authorized for operation in different frequency bands at the same orbital location can two distinct sets of milestones be established.

Consistent with this reality, the Bureau unmistakably indicated in all subsequent decisions that it viewed Loral as holding one license for a single hybrid satellite. In the original *CCC Order*, for example, the Bureau stated that the *Orion Atlantic License* had “granted Loral authority to add Ka-band capacity to [its 47° W.L.] satellite, and required Loral to commence construction of the hybrid satellite by May 1998.”²⁵ The Bureau, however, gave full credit to Loral’s assertion in its 1998 Annual Status Report that it had “commenced construction of its

23 See *Global Broadcasting Group, Inc.*, 10 FCC Rcd 5437, 5439 (¶ 10) (1995) (emphasis added). In the cited case, the Commission explained an exception to this rule under which broadcast service licensees may obtain an “independent authorization” through modification, which allows the existing license to remain in effect without change, even though a modified license has also been granted. In such instances, the applicant must specifically request the issuance of an independent authorization, and the Media Bureau, in granting such a license, will explicitly specify that it is independent of the previously issued authorization for similar facilities.

24 Indeed, the term “payload” does not appear once in Part 25 of the Commission’s Rules, applicable to satellite regulation. While it is an important industry term, it does not have any significance within the Commission’s licensing scheme.

25 *CCC Order*, 15 FCC Rcd at 15567-68 (¶ 3).

satellite by the required May 1998 date.”²⁶ Accordingly, it observed, “[a]lthough we agree with Columbia that an unusually long time has passed since Loral received its original authorization for a Ku-band satellite at 47° W.L., Loral has met all the milestone conditions of its license to date.”²⁷ Indeed, the Bureau reiterated this point strongly in rejecting as irrelevant Columbia’s concern that Loral’s failure to launch a Ku-band satellite at 47° W.L. placed at risk U.S. rights before the International Telecommunication Union (“ITU”) to use the Ku-band frequencies at this location. The Bureau emphasized that “Loral’s license was not conditioned on it maintaining ITU priority . . . [but] was conditioned on it beginning construction in May 1998, and Loral has met that milestone.”²⁸ This discussion of the significance of the milestones with respect to the use of Ku-band frequencies makes crystal clear the Bureau’s understanding that the milestone conditions applied uniformly to the 47° W.L. license, both Ku-band and Ka-band payloads.

Moreover, as Columbia’s objections related only to Ku-band operation, the specific determination that Loral had met its milestones would have been unnecessary if the milestone schedule were applicable only to the Ka-band portion of the satellite. Any reference to satisfaction of the initial milestone requirement in this connection would have been superfluous.

In May 2001, the Bureau rejected Columbia’s Petition for Reconsideration of the *CCC Order* based, again, not on the absence of milestones with respect to Ku-band operation, but based on its belief that Loral was proceeding with construction in compliance with the milestone requirements. The Bureau stated unambiguously:

26 *Id.* at 15569 (¶ 6).

27 *Id.*

28 *CCC Order*, 15 FCC Rcd at 15569 (¶ 7).

. . . when the Bureau granted Loral's application to add Ka-band capacity to its planned satellite at the 47° W.L. in 1997, it included a milestone schedule as a condition of the new license. This milestone schedule required Loral to commence construction of its hybrid Ku/Ka-band satellite by May 1998, to complete construction of the satellite by April 2002, and to launch the satellite by May 2002. The license further provided that failure to meet these dates would render the license null and void.²⁹

In addition, the Bureau emphasized the importance of compliance with subsequent milestones.

Finding an absence of evidence upon which it could determine conclusively that Loral was not proceeding with construction, the Bureau noted, "Loral's next milestone is in April 2002, when it is required to have completed construction of the satellite. At that time, we will evaluate Loral's compliance with this license condition."³⁰

In the *MOO&A*, the Bureau fails to analyze, or even to acknowledge, any of these prior statements.³¹ It does not explain in any fashion how these statements could be consistent with its notion that the construction milestones contained in the *Orion Atlantic License* somehow did not cover the Ku-band part of the satellite. Not only does this failure render the decision fatally defective as a matter of law, as discussed above, but the conclusion is fundamentally

29 *CCC Recon. Order*, 16 FCC Rcd at 10869 (¶ 6).

30 *Id.* at 10873 (¶ 18).

31 Perversely, the sole decision that the Bureau directly cites in "support" of its conclusion that milestones did not apply to "the Ku-band payload" is an April 2002 Order that granted a Loral modification application filed six years earlier, allowing Loral to add southern hemisphere beams to its Ku-band space segment at 47° W.L. *See MOO&A* at 15 n.94, citing *Cyberstar 47° W.L. Ku-Band Modification Order*, 17 FCC Rcd 7019 (IB 2002). The Bureau comments that there is "no discussion of milestones" in this Order, which was "issued the same month that the construction completion milestone would have expired." *Id.* The absence of any reference to the *Orion Atlantic License* in the ordering clauses of this Order (*see* 17 FCC Rcd at 7022), however, is nothing more than an error of omission that cannot, by silence, alter the explicitly stated terms contained in the *Orion Atlantic License*, and consistently emphasized in both the *CCC Order* and the *CCC Recon. Order*. Moreover, milestones were simply not an issue relevant to the modification application that was granted, which was filed a full year before the applicable milestones were imposed and was unopposed by any party. Indeed, the fact that Loral did not push for action on this modification, allowing it to languish until the month that Loral was required to complete construction of the satellite affected, is just a further indication of its lack of diligence.

irreconcilable with all of the Bureau's prior declarations that the construction milestones applied to the single satellite Loral was authorized to operate at 47° W.L.

3. The Bureau's Determination That Construction Milestones Do Not Apply To The Ku-Band Portion of Loral's 47° W.L. Authority Is In Conflict With The Entirety of the Record Evidence In This Proceeding, Which Is Premised On The Applicability of Loral's Construction Milestones To The Single 47° W.L. Satellite Authorization It Held.

Consistent with the prior Bureau rulings, the record created by the parties in this proceeding, upon which the prior Bureau orders have been based, also demonstrates conclusively that all sides understood the 47° W.L. construction milestones to apply to a single hybrid satellite, which was Loral's sole authority to provide service at 47° W.L. In its original Petition to Revoke, Columbia argued that Loral/Orion was warehousing the Ku-band space segment at 47° W.L. in that, at that time, almost fourteen years had passed since its initial authorization without any evidence of progress toward deployment.³² It further noted that Loral/Orion's publicly available statements evidenced no actual plans to implement this authority in timely fashion.³³

In response to this charge, Loral argued that its Ku-band authority remained valid precisely because it was proceeding in accordance with the milestones that had been imposed on it in the *Orion Atlantic License*. The centerpiece of Loral's Petition to Deny the Columbia applications seeking Ku-band authority at 47° W.L. was the following statement:

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

32 See Petition to Revoke Authorization, FCC File No. CSS-83-002-P-(M), at 1 (filed March 19, 1999).

33 *Id.* at 4-6.

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 2002.³⁴

Subsequently, in its Reply filing, Loral reiterated more succinctly its position that it was “proceeding with its plans to launch and operate a satellite at 47° W.L. and has demonstrated its commitment to doing so by meeting all of its applicable milestones.”³⁵ In short, in its 1999 defense of its failure to build a satellite conditionally authorized in 1985, Loral made clear its understanding that it was licensed to operate a single Ku-/Ka-band hybrid satellite at 47° W.L., argued unambiguously that the construction requirements that applied to it were the milestones established in 1997, and maintained that it was in compliance with these conditions.

As a practical matter, if Loral had actually believed that these construction milestones were inapplicable to the Ku-band frequencies, it plainly would have been unnecessary to make any contention at all about milestone compliance. Instead, Loral could have stated that no milestones applied to Ku-band, that any inquiry into the status and nature of its construction of the satellite was irrelevant, and that it could take as long as it desired to implement Ku-band capacity at 47° W.L. Analysis of Loral’s actual milestone compliance would have been unnecessary with respect to Ku-band, and it would have been unnecessary for the parties to make the multiple filings that they have made over a period of four years to address these issues.

Because there was, in fact, never any dispute among the parties and the Bureau that the 47° W.L. Loral satellite was a single system subject to specific milestones, the availability of the Ku-band space segment for reassignment turned on whether Loral was in

34 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) (emphasis added). Loral did not respond directly to the Petition to Revoke, and addressed Columbia’s arguments instead in its Petition to Deny the two Columbia applications seeking the right to operate Ku-band space segment at 47° W.L.

35 Reply of Loral Space & Communications, Ltd., FCC File Nos. SAT-AMD-19990511-00052 and SAT-MOD-19990511-00051, at 2 (filed July 30, 1999).

compliance with the milestone conditions of its license, *i.e.*, the *Orion Atlantic License*. Indeed, Loral itself would later state that there was just one essential question for the Commission – whether “Loral met the construction commencement milestone for its Ku/Ka-band satellite at 47° W.L.?”³⁶ Thus, the adequacy of Loral’s spacecraft construction contract, which it has repeatedly advanced as evidence that it satisfied its construction commencement milestone, was the central question in this proceeding for several years – and one that has now been resolved adversely to Loral.

One aspect of this central dispute was Columbia’s effort to gain access, via the Freedom of Information Act (“FOIA”), to a copy of Loral’s construction contract for the purpose of determining whether it indeed made provision for construction of a satellite consistent with its 47° W.L. authorization. In its FOIA request, Columbia noted that an opportunity to review the contract was vital to its interests “as a recent applicant for Ku-band authority at 47° W.L.” because Loral had expressly relied on the contract as proof of its adherence to its system implementation milestones and the failure of Loral to meet these milestones “could leave idle [Ku-band] spectrum that might otherwise be available for Columbia’s use.”³⁷ In response, Loral maintained not that the contract was irrelevant to Columbia’s interests because no milestones applied, but rather that it had been conclusively determined that the relevant milestone had been met.³⁸

36 Opposition of Loral Space & Communication, FCC File Nos. CSS-83-002-P-(M), SAT-AMD-19990511-00052 and SAT-MOD-19990511-00051, at 2 (filed March 8, 2000).

37 Letter from Raul R. Rodriguez, David S. Keir and Sarah R. Iles, Counsel to Columbia, to Managing Director, FCC, at 2 (dated March 10, 2000).

38 Letter from John P. Stern, Associate General Counsel, Loral, to Andrew S. Fishel, Managing Director, FCC, at 3 (dated March 31, 2000) (“There is no need to release Loral’s satellite contract to assist the Commission in reaching a decision on this matter. The decision [that Loral has met its initial construction milestone] has already been made.”)

For its part, in granting Columbia's FOIA request to the extent of allowing it to review a redacted copy of the contract, the Bureau acknowledged Columbia's reasons for seeking to review the contract, and indicated that disclosure of the redacted version would serve the public interest. It provided no indication that Loral's milestone compliance might not be considered relevant to the status of its Ku-band authority.³⁹

As a result of its review of Loral's construction contract, Columbia filed a Supplement to its Petition for Reconsideration. The thrust of this supplement was that the redacted contract that Columbia was permitted to review contained no reference to a satellite with the Ku/Ka-band hybrid characteristics of the satellite Loral was required to build for the 47° W.L. slot; instead, only Ka-band capacity was referenced.⁴⁰ Loral responded to this pleading not by arguing that the milestones did not apply to Ku-band, such that inclusion of specific Ku-band parameters was immaterial, but that the relevant Ku-band references were in an annex to the contract not disclosed to Columbia –

Although Columbia was not permitted access to this portion of the contract, which has been accorded confidential treatment by the Commission because it contains competitively sensitive technical information, the Commission was provided a complete, unredacted copy of the exhibit. *This exhibit leaves no doubt that the contract explicitly contemplates construction of a Ku/Ka-band hybrid spacecraft to be located at 47° W.L. consistent with Loral's authorization.*⁴¹

³⁹ See Letter from Donald Abelson, Chief, International Bureau, FCC, to David S. Keir, Counsel to Columbia, at 1-2 (dated May 12, 2000).

⁴⁰ See Supplement to Petition for Partial Reconsideration, FCC File Nos. CSS-83-002-P-(M), SAT-AMD-19990511-00052 and SAT-MOD-19990511-00051, at 3-4 (filed July 14, 2000). Columbia further stated that "Throughout these proceedings, Loral has implicitly acknowledged that its milestones apply to a combined Ku/Ka-band satellite at 47° W.L. . . . Even if the contract offered by Loral could be construed to adequately describe the Ka-band portion of this satellite, it begs the question of the status of the Ku-band payload, the basis for Loral's original conditional license granted nearly fifteen years ago." *Id.* at 5.

⁴¹ Opposition of Loral Space & Communications, Ltd., FCC File Nos. CSS-83-002-P-(M), SAT-AMD-19990511-00052 and SAT-MOD-19990511-00051, at 4 (filed July 27, 2000) (emphasis added).

Only when it became clear that Loral would not meet its requirements to complete and launch its 47° W.L. satellite and would not be granted an extension of these milestones, did Loral change its position as to the significance of the milestones. Following the passage of the May 2002 launch milestone, on July 8, 2002, Orbital Resources filed a letter with the Bureau demonstrating, through reference to exhaustive information on recent satellite launches, that Loral had failed to satisfy the final milestone under its authorization.⁴² In response, Loral did not maintain that it had met its milestone, but argued in the alternative that either the milestone should be waived or extended, or that it had never existed in the first place with respect to its Ku-band authority. Loral claimed that the Ku-band and Ka-band aspects of its modified license actually constituted two separate and distinct authorizations. It argued that after the Ku-band-only license was issued, the Bureau “awarded a Ka-band license to Orion for a Ku/Ka-band hybrid satellite in a separate order, and imposed construction milestones, including a launch milestone of May 2002, with respect to the Ka-band payload on that satellite.”⁴³ Loral’s response went on to assert that “Even if the Commission’s Ka-band milestone extension denials are affirmed in an order on reconsideration and upon appeal, Loral will retain its Ku-band authorization at 47° W.L., which has never had milestones, and Loral would redesign the satellite to eliminate the Ka-band payload and proceed with construction of a Ku-band only satellite.”⁴⁴

Despite the fact that Loral’s Ka-band authority had been obtained as a modification of its Ku-band license and that it had consistently described itself as the licensee of

42 See Letter from Raul R. Rodriguez and David S. Keir, Counsel to Orbital Resources, to Donald Abelson, Chief, International Bureau, FCC, FCC File Nos. CSS-83-002-P-(M) and SAT-MOD-20000104-00045; and SAT-LOA-19870331-00061, SAT-AMD-19990511-00052, SAT-MOD-19990511-00051 (filed July 8, 2002).

43 Letter from John. P. Stern, Deputy General Counsel, Loral, to Donald Abelson, Chief, International Bureau, FCC, FCC File Nos. CSS-83-002-P-(M) and SAT-MOD-20000104-00045; and SAT-LOA-19870331-00061, SAT-AMD-19990511-00052, SAT-MOD-19990511-00051, at 3 (filed July 22, 2002).

44 *Id.* at 4.

a single hybrid satellite at 47° W.L., the company maintained in this proceeding for the first time in July 2002 that it, in effect, held two separate satellite authorizations – one permitting it to construct, launch, and operate a Ku-band satellite at 47° W.L., and an entirely independent authorization to construct, launch and operate a hybrid Ku/Ka-band satellite at the very same orbital location.⁴⁵ Even if the second authorization were null and void, Loral reasoned, the first authorization would remain in effect.⁴⁶

Incredibly, ignoring the record in this proceeding in its entirety, and all of its own previous discussions of the Loral 47° W.L. license, the Bureau seizes on this unsupported *post hoc* rationale in the *MOO&A* and, without actually citing it, makes it the apparent guidepost for its decision, in effect spontaneously rewriting the terms of Loral’s authorization to suit the company’s current desires. No aspect of this decision is consistent with the record in this proceeding, with the Commission’s rules, policies and practices, or with elementary common sense.

4. Because Loral’s 47° W.L. Authorization Provides For Construction Of A Single Hybrid Satellite, The Bureau’s Finding That Loral Has Failed To Comply With Its Milestone Schedule Necessarily Voids The Authorization In Its Entirety.

Elsewhere in the *MOO&A*, the Bureau considers the root question whether Loral has met the construction milestone requirements imposed in the *Orion Atlantic License*. In this

45 The first allusion to this rationale actually occurred in a March 12, 2002 letter from John P. Stern, Loral’s Deputy General Counsel, to Jennifer Gilsenan, the Chief of the Satellite Policy Branch within the International Bureau, responding to a request for information “regarding the launch schedule for Loral’s hybrid Ku/Ka-band satellite for 47° W.L.” This letter was not served on any party outside the FCC. Therein Mr. Stern stated that “the Commission granted Orion’s request to modify the authorization to add a Ka-band payload and it established construction completion and launch milestones – April 2002 and May 2002 respectively – *associated with the Ka-band authorization.*” Letter from John P. Stern, Deputy General Counsel, Loral, to Jennifer Gilsenan, Chief, Satellite Policy Branch, FCC, at 1 (dated March 12, 2002).

46 In making this argument, Loral effectively asked, nearly seven years after the 47° W.L. application was filed, and five years following its grant, that the Bureau treat that application as if it had sought and secured an entirely new and distinct system license, rather than just a modification of its existing license.

portion of the Order, the Bureau notes that all of the Ka-band authority granted to Orion, including the hybrid authorization at 47° W.L. “expressly provided that, unless extended upon a showing of good cause, the licenses would become null and void in the event the licensee failed to satisfy any one of the milestones.”⁴⁷ The *MOO&A* then goes on to find, based on the facts clearly in evidence, that “Loral did not complete construction of its *Orion Licenses* satellites by the requisite milestone, April 2002.”⁴⁸ As a consequence, the Bureau concludes that each one of these licenses, including the hybrid authorization at 47° W.L., is null and void.

Given the fact that the record in this proceeding demonstrates that Loral was authorized to build just a single satellite at 47° W.L., the Bureau’s conclusion that Loral failed to construct this satellite in accordance with its authorization necessarily means that the license is null and void in its entirety. The Bureau twice found no basis for extension of these milestones, and made no other findings suggesting that waiver of the Commission’s rules would be appropriate. Accordingly, there is no rational basis upon which to conclude that authority for some portion of the satellite can remain valid, when the Bureau has appropriately determined that the licensee failed to meet the explicit conditions imposed in the authorization. The Bureau’s finding that Loral failed to complete a Ku/Ka-band satellite for launch into the 47° W.L. orbital slot by April 2002 is thus dispositive of all Loral’s authority for this orbital location.

47 *MOO&A* at 13 (¶ 22).

48 *Id.*

B. The Bureau's Failure To Enforce Clearly Established System Milestones Undermines The Commission's Anti-Warehousing Policy and Is Inconsistent With Every Other Recent Bureau Decision Involving Satellite Construction Milestones.

The Bureau's failure to enforce fully the milestones that it imposed in the *Orion Atlantic Order* in 1997 is fundamentally inconsistent with the over-arching policy against orbit/spectrum warehousing that the Commission has long mandated. As the Bureau itself noted last year, "requiring licensees to adhere strictly to a milestone schedule prevents orbital locations from being warehoused by licensees to the exclusion of qualified entities that are prepared to implement systems immediately."⁴⁹ During the past few years, the Bureau has pursued a rigorous enforcement regime with respect to system milestones and the anti-warehousing policy that cannot be reconciled with its abdication of its enforcement authority in the *MOO&A*.⁵⁰ As the Bureau itself has observed, "Because it is in the public interest to ensure that licensees proceed expeditiously in completing construction of their systems and commencing service and are not blocking entry by other qualified service providers, the Commission has strictly enforced its milestone schedules."⁵¹ As a consequence of this enforcement posture, there has never been an instance where the Bureau or the Commission has simply ignored an established satellite construction milestone to exempt a licensee from the impact of failed performance. Even where strong grounds have existed for a waiver or extension of these requirements, the Bureau has

49 *EchoStar Satellite Corporation*, DA 02-1534, slip op. at 2 (¶ 5) (IB, released July 1, 2002).

50 *See Globalstar, L.P.*, 28 CR 308 (IB 2003); *Constellation Communications Holdings, Inc.*, DA 02-3086 (IB 2002); *Mobile Communications Holdings, Inc.*, 16 FCC Rcd 11766 (IB 2001); *PanAmSat Licensee Corp.*, 15 FCC Rcd 18720 (IB 2000); *Morning Star Satellite Company, L.L.C.*, 15 FCC Rcd 11350 (IB 2000)

51 *Astrolink International LLC*, 17 FCC Rcd 11267, 11268-69 (¶ 5) (Sat. Div. 2002), *citing Advanced Communications Corp.*, 10 FCC Rcd 13337 (IB 1995).

proceeded carefully, and has granted such dispensation only rarely, and pursuant to carefully parsed decisions.⁵²

In contrast to its peculiarly lax treatment of Loral, the Bureau has continued to take tough enforcement action against other companies, none of whom has held an orbital authorization for nearly as long as Loral. For example, the Bureau issued Orders late last year declaring null and void for failure to satisfy milestone requirements satellite licenses granted to Constellation Communications Corporation⁵³ and Motorola, Inc.⁵⁴ Constellation's license was granted in July 1997, more than a dozen years after Loral was first granted initial authority at 47° W.L. Motorola's license was granted in May 1997, at the same time as Loral's Ka-band modification authorization for 47° W.L. There is no plausible reason for the Bureau to take full enforcement action against these licensees, yet not against Loral. Loral was given explicit performance milestones in May 1997, either earlier or contemporaneously with these two licensees, yet it is no closer to providing service than Constellation or Motorola. Moreover, it has held the undeveloped Ku-band portion of its authorization, the part which the Bureau has inexplicably allowed it to retain, for 18 years and counting, already more than a decade longer than either of these other licensees whose authority has been nullified.

Loral's effort to obscure its failure to comply with its milestones, through strategic modification of its authority and the fabrication of a *post hoc* rationale for retaining the Ku-band portion of its license, contrasts sharply with the forthright disclosures and license

52 See, e.g., *Astrolink International LLC*, 17 FCC Rcd 11267, 11269 (¶ 6) (Sat. Div. 2002) (granting waiver if the non-contingent contract requirement for fulfillment of the commencement of construction milestone based on *sua sponte* finding that construction of the space craft was 90% complete); *Hughes Communications Galaxy, Inc.*, 5 FCC Rcd 3423 (CCB 1990) (granting request for an extension of a C-band launch milestone to allow consolidation of separate C-band and Ku-band satellites into a single hybrid).

53 See *Constellation Communications Holdings, Inc.*, 17 FCC Rcd 22584 (IB 2002).

54 See *Motorola, Inc. and Teledesic, LLC*, 17 FCC Rcd 16543 (IB 2002).

surrenders of other licensees that have been unable to meet construction milestones. In the past year, four major companies, Lockheed Martin Corporation, Hughes Network Systems, Inc., PanAmSat Corporation, and TRW Inc. (now Northrop Grumman Space Technology & Mission Systems Corp.) have filed letters requesting cancellation of almost two-dozen Ka-band-only authorizations that they have determined not to construct.⁵⁵ These acts of corporate good citizenship should be strongly encouraged because voluntary surrender of unused orbital/spectrum resources frees up these opportunities for other possible users.

If the Commission fails to overrule the International Bureau's arbitrary and capricious failure fully to enforce Loral's 47° W.L. milestones, however, it will only encourage satellite licensees to game the process and attempt to hoard orbital slots for as long as possible, in anticipation that retention of these resources may prove beneficial at a later time. Such games violate the Commission's anti-warehousing policy, and must not be tolerated.

⁵⁵ See Letter from Gerald Musarra, Vice President, Trade and Regulatory Affairs, Lockheed Martin, to Marlene H. Dortch, Secretary, FCC (dated August 2, 2002) (relinquishing licenses for Call Signs S2332, S2333, S2334, S2335 and S2336); Letter from John P. Janka, Counsel to Hughes, to Marlene H. Dortch, Secretary, FCC (dated December 20, 2002) (relinquishing licenses for Call Signs S2186 and S2189); Letter from Henry Goldberg, Counsel to PanAmSat, to Thomas S. Tycz, International Bureau (dated January 14, 2003) (relinquishing licenses for Call Signs S2192, S2220, S2221, S2223, S2224, S2225, S2226, S2425, S2426, S2427, S2428, and 2429); Letter from Stephen D. Baruch, Counsel to Northrop Grumman Space Technology & Mission Systems Corp., to Marlene H. Dortch, Secretary, FCC (dated March 5, 2003) (relinquishing licenses for Call Signs S2255, S2256, S2257 and S2258).

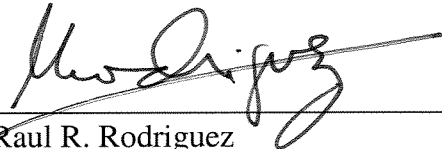
CONCLUSION

For all of the foregoing reasons, Orbital Resources urges the Commission to promptly review and vacate paragraphs 24 through 26 of the *MOO&A* as patently inconsistent with Commission policy and precedent. Unexplained action undertaken on delegated authority that contradicts well-established Commission policy and is fundamentally inconsistent with past Bureau statements, record evidence, and sound judgment cannot be permitted to stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sharon Krantzman, hereby certify that a true and correct copy of the foregoing Application for Review was sent by electronic mail and by first-class, postage prepaid mail this 21st day of April, 2003, to the following:

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