

ORIGINAL

Before the  
**Federal Communications Commission**  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Teledesic LLC Application for Authority  
To Construct, Launch, and Operate a  
Ka-Band Satellite System in the Fixed  
Satellite Service

File Nos. 22-DSS-P/LA-94  
43-SAT-AMEND-95  
127-SAT-AMEND-95  
195-SAT-MI-97

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**REPLY OF @CONTACT LLC**

Satellite Policy Branch  
International Bureau

@contact LLC (“@contact”), by its attorneys, hereby replies to the Response of Teledesic LLC (“Teledesic”)<sup>1</sup> to @contact’s Objection<sup>2</sup> with respect to Teledesic’s claim that it has complied with the construction commencement milestone in the above referenced proceeding. Teledesic acknowledges that it has abandoned its licensed system. Accordingly, the Commission should declare Teledesic’s license null and void. Moreover, Teledesic points to no relevant law or policy rationale to support its claim that it has satisfied a construction commencement milestone by virtue of executing a contract for an entirely unrelated and technically substandard system. Indeed, the Commission’s precedent and sound public interest considerations confirm that cancellation of Teledesic’s license for failure to comply with milestones would best ensure that valuable spectrum resources are most promptly put to use.

<sup>1</sup> *Response of Teledesic LLC to Objection of @contact LLC* (filed Mar.15, 2002) (“Teledesic Response”).

<sup>2</sup> *Objection of @contact LLC* (filed Mar. 5, 2002).

## I. TELEDESIC HAS FORFEITED ITS FIVE-YEAR-OLD LICENSE

One fact critical to the Commission’s consideration of whether Teledesic has satisfied the construction commencement milestone is crystal clear – Teledesic will not construct the system for which it has held a license for five years. Specifically, Teledesic advises that it does not “intend[] to build” its currently authorized satellite system, apparently because Teledesic has now concluded, half a decade later, that it does not “make[ ] sense.”<sup>3</sup> Instead, Teledesic proposes to operate, subject to approval of a pending modification application, an entirely different system. In Teledesic’s own words, the new concept would “*replace*” its authorized 288 low earth orbit (“LEO”) satellite system with a new two-stage constellation of 30 medium-Earth-orbit (“MEO”) satellites.<sup>4</sup> As @contact and others have shown, Teledesic proposes to change materially just about every system component. These changes would include a nearly tenfold increase in the orbital altitude of each satellite, reduce the coverage area from the prior system, and pose significant new interference problems to new entrants.<sup>5</sup> The facility for which Teledesic claims to have contracted bears little, if any, resemblance to its *authorized* system. Thus, there is no doubt that Teledesic has failed to meet its obligation to commence construction of the first two of its authorized 288-satellite system. In light of Teledesic’s decision to forfeit its licensed but defunct system, no justification remains for the FCC to allow Teledesic to retain its claim to Ka-band spectrum.

Teledesic essentially argues that the decision to abandon the licensed system is irrelevant to its compliance with the construction commencement milestone. According to Teledesic, the

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<sup>3</sup> *Teledesic Response* at 7.

<sup>4</sup> *Id.* at 1 (emphasis added).

<sup>5</sup> *See Opposition of @contact LLC*, at 3-11, File No. SAT-MOD-20020201-00011 (filed Mar. 18, 2002) (“@contact Modification Opposition”).

duty to commence construction of the *licensed* system was somehow satisfied simply by executing a contract to build a *proposed* system, without any consideration of what that new system entailed.<sup>6</sup> In effect, Teledesic argues that any contract for the construction of a satellite as part of any system redesign must satisfy the milestone for any license.<sup>7</sup> Stripped of its rhetoric, however, Teledesic’s pleading contains no applicable precedent or policy rationale to support its argument that it has satisfied a construction milestone notwithstanding its abandonment of that same system.

## II. AS A MATTER OF LAW, THE COMMISSION SHOULD REJECT TELEDESIC’S ATTEMPT TO TRANSFORM ITS NOW ABANDONED LICENSE INTO A NEW SYSTEM

The fundamental problem with Teledesic’s argument – that forfeiture of its licensed system is irrelevant to milestone compliance – is its reliance on a body of law that the Commission has held is irrelevant to Ka-band FSS milestone cases. For reasons that are unclear, Teledesic’s rationale is premised first and foremost on *Tempo Enterprises, Inc.*,<sup>8</sup> which involved the issue of whether a DBS licensee had satisfied the first prong of the Part 100 “due diligence”

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<sup>6</sup> In fact, Teledesic’s contract is not for the development of technically identical satellites as required by the terms of its authorization; rather the contract contemplates low-power, limited service satellites, which would enable Teledesic to continue to warehouse spectrum for as long as possible.

<sup>7</sup> Teledesic also assumes that the terms of its license mean something other than what they say. Thus, Teledesic argues that the ordering clause mandating the revocation of its authorization “in the event its space stations are not *constructed, launched, and placed into operation* in accordance with the technical parameters and terms and conditions of the authorization by [the milestone dates in the order],” does not, despite the plain language, actually apply to the construction milestones. *Teledesic LLC Application for Authority to Construct, Launch, and Operate a Ka-Band Satellite System in the Fixed-Satellite Service*, 16 FCC Rcd 2501, 2506 (2001) (Order and Authorization) (emphasis added) (“*Teledesic ISL Order*”); *Teledesic Response* at 2. There is no basis for the Commission to interpret Teledesic’s authorization as if certain words simply did not exist, or had no meaning.

<sup>8</sup> *Application of Tempo Enterprises, Inc., et al.*, 1 FCC Rcd 20 (1986) (Memorandum Opinion and Order) (“*Tempo*”).

requirement by signing a binding, non-contingent contract for the construction of a DBS satellite.<sup>9</sup> Teledesic argues that, since it allegedly satisfied the standard for the Part 100 DBS due diligence standard set out in *Tempo*, as a matter of law it met its Part 25 milestone obligation to commence construction.<sup>10</sup> To the contrary, in a case similar to Teledesic’s situation, the FCC specifically rejected the applicability of DBS due diligence case law and held that Norris Communications failed to demonstrate that its *signed contract* satisfied the Ka-band FSS construction commencement milestone requirement set forth in its license – the same rule applicable to Teledesic – simply because it allegedly met the DBS due diligence standard. In rejecting Norris’s claim, the FCC expressly held that “*Norris’s assertion that it has complied with DBS due diligence standards is irrelevant to this inquiry.*”<sup>11</sup> Since Norris was a fixed-satellite licensee, the FCC ruled that its “*reliance on DBS due diligence case authority [was] misplaced.*”<sup>12</sup>

Teledesic offers no rationale for the Commission to ignore directly relevant Ka-band precedent and reverse the *Norris* holding. Indeed, in strictly enforcing the Ka-band FSS construction commencement milestone standard, the Commission noted that, as a “new entrant” in the Ka-band, Norris had benefited from a waiver of the financial qualification requirement. Consequently, the FCC had warned Norris that it would “closely monitor its compliance with the Authorization construction milestones.” After enjoying “exclusive authorization to use the

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<sup>9</sup> *Teledesic Response* at 2-3.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Norris Satellite Communications, Inc., Application for Review of Order Denying Extension of Time to Construct and Launch Ka-Band Satellite System*, 12 FCC Rcd 22299, 22305 (1997) (Memorandum Opinion and Order) (emphasis added) (“*Norris*”). The Commission held that Norris’s contract contained unresolved contingencies, which did not meet the exacting FSS construction commencement requirement.

<sup>12</sup> *Norris*, 12 FCC Rcd at 22305 (emphasis added).

spectrum and orbit” resources for almost four years, the FCC held that Norris had made little progress in the development of its licensed system and, as a result, revoked its authorization.<sup>13</sup> Similarly, Teledesic was authorized pursuant to a waiver of the financial qualification rule, has held its license for five years, yet has made no demonstrable progress toward the construction of its authorized system. Thus, application of the law and policy concerns expressed by the Commission in the *Norris* decision seems particularly appropriate with respect to Teledesic.

Teledesic’s citation to the modification of the satellite DARS system of Sirius Satellite Radio Inc. (“Sirius”)<sup>14</sup> is similarly misplaced. According to Teledesic’s own statement of the facts, Sirius was party to a construction contract for *five years before* it proposed to modify the licensed system. In contrast to Sirius’s agreement, Teledesic’s last-minute contract does not merely propose the implementation of modifications to an existing authorization; rather, it contemplates the construction of an entirely new system. Thus, Sirius was making technical improvements to a system for which it unquestionably had demonstrated a commitment to construct, whereas Teledesic’s contract merely confirms that the licensee failed to take a single step toward the construction of the system for which it has held a license for years.<sup>15</sup> Thus, there is no legal support for Teledesic’s absurd notion that it complied with the milestones for its current license by allegedly executing a contract for a wholly unrelated system.

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<sup>13</sup> *Norris*, 12 FCC Rcd at 22306.

<sup>14</sup> *Teledesic Response* at 3-4; *Sirius Satellite Radio, Inc. for Minor Modification of License to Construct, Launch, and Operate a Non-Geostationary Satellite Digital Audio Radio Service System*, 16 FCC Rcd 5419 (2001) (Order and Authorization).

<sup>15</sup> In addition, Sirius operates in spectrum acquired by auction and reserved for its exclusive use and thus its system modifications caused no prejudice to the other licensee or future systems. Teledesic’s proposed modification would, in contrast, frustrate the potential for multiple entry.

Finally, @contact demonstrated in its objection that the Commission had revoked the “Big-LEO” license of Mobile Communications Holdings, Inc., for failure to “enter into a contract *for construction of the satellites in question.*”<sup>16</sup> Teledesic dismisses the relevance of *MCHI*, but misreads or ignores critical language in the decision that directly refutes the claim that Teledesic satisfied its milestone obligation by entering into a contract to build something entirely different than, and significantly substandard to, the system specified in its license.<sup>17</sup> Thus, MCHI was licensed to launch and operate a sixteen-satellite system, subject to the requirement to commence construction of the first two satellites by July 1998, and of the remaining fourteen satellites by July 2000. In ruling that MCHI did not satisfy the terms of its license, the FCC held that “MCHI did not meet *the milestone requirement to commence construction of all of its sixteen proposed satellites* by the end of July 2000.”<sup>18</sup> MCHI’s obligation to comply with milestones was very clear – that is, it was required to enter into a noncontingent contract to construct the system *specified in its license*. Teledesic fails to articulate any rationale for why it should be held to a different, and substantially lower, standard of compliance.

### **III. ALLOWING TELEDESIC TO CONTINUE TO WAREHOUSE SPECTRUM ON THE BASIS OF AN ABANDONED LICENSE IS CONTRARY TO SOUND PUBLIC POLICY**

Construction milestones ensure that “licensees are building their systems in a timely manner and that the orbit-spectrum is not being held by licensees unable or unwilling to proceed

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<sup>16</sup> @contact Objection at 8 (quoting *Mobile Communications Holdings, Inc.*, 16 FCC Rcd 11766, ¶ 10 (2001) (Memorandum Opinion and Order) (emphasis added) (“*MCHI Revocation Order*”).

<sup>17</sup> *Teledesic Response* at 5.

<sup>18</sup> *MCHI Revocation Order*, 16 FCC Rcd, ¶ 10. Contrary to Teledesic’s claim, the FCC also held that MCHI had not maintained compliance with the *first* milestone obligation as well. *Id.*, ¶ 7.

with their plans.”<sup>19</sup> This policy is properly intended to prevent warehousing that “could hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately with the construction and launch of their satellite systems.”<sup>20</sup> In light of these clear directives, and the existence of numerous other parties ready and willing to launch new NGSO Ka-band services, the public interest would be furthered by rejecting Teledesic’s continuing attempt to hang onto unused spectrum for an abandoned system.

Most critically, cancellation of Teledesic’s authorization would yield precisely the result intended by the Commission’s milestone rules by preventing a party from further warehousing spectrum. The Commission specifically stated it would “rigorously enforce the system milestone schedule to ensure that Teledesic proceeds in a timely manner and does not tie up valuable spectrum to the exclusion of qualified applicants.”<sup>21</sup> Accordingly, far from frustrating the development of satellite services, as Teledesic argues, strictly enforcing the requirement would free up capacity for use by other parties, like @contact, who stand ready to proceed with their own systems. Promoting such regulatory certainty is even more critical here, given that the

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<sup>19</sup> *PanAmSat Licensee Corp. Application for Authority to Construct, Launch, and Operate a Ka-Band Communications Satellite System in the Fixed-Satellite Service at Orbital Locations 58° W.L. and 125° W.L.*, 16 FCC Rcd 11534, 11534 (2001) (Memorandum Opinion and Order) quoting *PanAmSat Licensee Corp.*, 13 FCC Rcd 1405, 1412 (1997) (Order and Authorization).

<sup>20</sup> *PanAmSat Licensee Corp.*, 16 FCC Rcd at 11538.

<sup>21</sup> *Teledesic Corporation Application for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the Domestic and International Fixed Satellite Service*, 12 FCC Rcd 3154, 3160 (1997) (Order and Authorization) (“*Teledesic Licensing Order*”) modified by *Teledesic LLC for Minor Modification of License to Construct, Launch and Operate a Non-Geostationary Fixed Satellite Service System*, 14 FCC Rcd 2261 (1999) (Order and Authorization) (“*Teledesic Modification Order*”), recon. pending.

system proposed in Teledesic's contract would frustrate multiple entry by increasing the potential for interference and creating new obstacles to spectrum sharing.<sup>22</sup>

Moreover, strictly enforcing the milestones would encourage the prompt investment in satellite systems and prevent licensees, like Teledesic, from using regulatory gamesmanship to hang onto unused spectrum. Teledesic objects that applying the milestones with respect to its licensed system would cause it to "waste precious capital."<sup>23</sup> To the contrary, Teledesic is free to pick and choose the systems in which it wishes to invest, but it must accept the predictable regulatory consequences of its independent business decision not to proceed with its authorization. No one is forcing Teledesic to build out its licensed system. The fact remains, however, that it chose not to develop the system for which it has claimed coordination priority for five years. In this case, Teledesic cannot reasonably continue to claim its place at the head of the line as an incumbent licensee after rejecting its license in favor of building something else. Otherwise, all other potential Ka-band providers could be forced to sit and wait for years while Teledesic made up its mind about what, if anything, it would actually propose to launch.

Finally, Teledesic grossly overstates its case by claiming that a strict application of the milestone rules would "mean the end" of most satellite modifications. Satellite licensees would continue to enjoy the same freedom they currently possess to modify their systems to incorporate new technology and enhance service to the public. Enforcing the milestones would merely

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<sup>22</sup> *Application of Teledesic LLC for Minor Modification of License to Construct, Launch, and Operate a Non-Geostationary Fixed Satellite System*, File No. SAT-MOD-20020201-00011 at A-1 to A-5 (filed Jan. 31, 2002); *Opposition of @contact LLC* at 6-9, File No. SAT-MOD-20020201-00011 (filed Mar. 18, 2002) (noting that Teledesic's proposal to implement "a technically-limited 12-satellite MEO system, followed by a second constellation of 18 dissimilar MEO satellites of highly speculative design" will increase the number of active visible satellites, reduce minimum elevation angles in some cases, require higher radiated power density and extend the duration of in-line events thus making sharing more burdensome).

<sup>23</sup> *Teledesic Response* at 7.



ensure that licensees proceed with the development of systems as required by their authorizations and in furtherance of the Commission's goal of prompt deployment of new service. It would only prevent what Teledesic improperly seeks to accomplish with its current contract—to resuscitate a defunct license with a different system.

Teledesic's contract does not demonstrate a commitment to proceed with the development of a system for which it holds a valuable license, or even to modify a system for which it has demonstrated an intent to construct. Rather, it reflects a fundamental change in direction from its existing license. Thus, Teledesic inappropriately seeks to maintain protected status, under a single license and contract, for essentially three separate satellite constellations – the licensed system, which it has no intention of building; a second, unlicensed and technically inferior 12-satellite system; and a third unlicensed and speculative 18-satellite system whose specifications and rollout dates are as of yet unspecified.

#### IV. CONCLUSION

Teledesic cannot mask the fact that strict enforcement of the milestones is consistent with the terms of its authorization, Commission precedent and sound public policy. Accordingly, Teledesic has failed to meet the construction commencement milestone set forth in its authorization, which the Commission should declare is null and void.

Respectfully submitted,

@contact LLC

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**CERTIFICATE OF SERVICE**

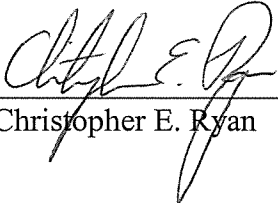
I, Christopher E. Ryan, a legal assistant in the law firm of Wiley Rein & Fielding LLP do hereby certify that I have on this 27<sup>th</sup> day of March, 2002 caused a copy of the foregoing "Reply of @contact LLC to Response of Teledesic LLC" to be served either by first class mail, postage pre-paid (\*), or by hand delivery upon the following:

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