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Before The
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	MAR 04 2003)
GLOBALSTAR, L.P.	Policy Branch)
	International Bureau)
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For Modification of License for a Mobile)
Satellite Service System in the 2 GHz Band)
)
For Waiver and Modification of)
Implementation Milestones for)
2 GHz MSS System)
_____)

File Nos:
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 182-SAT-P/LA-97(64)

IBFS File Nos.
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 SAT-AMD-20001103-00154
 SAT-MOD-20020717-00116-119
 SAT-MOD-20020722-00107-110
 SAT-MOD-20020722-00112
 Call Signs S2320/21/22/23/24

EMERGENCY APPLICATION FOR REVIEW

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Date: March 3, 2003

EXECUTIVE SUMMARY

In this Emergency Application for Review, Globalstar, L.P. (“GLP”) establishes that the Commission should reverse the Memorandum Opinion and Order, DA 03-328 (released Jan. 30, 2003) (“MO&O”), in which the International Bureau, pursuant to delegated authority, cancelled GLP’s 2 GHz MSS authorization. GLP is contemporaneously filing a Request for Stay of the MO&O.

The Bureau cancelled GLP’s authorization because its satellite construction contract did not reflect the milestone implementation dates in the authorization issued in July 2001. GLP had submitted a request to modify those milestones, which the Bureau denied in the MO&O. The Bureau also refused to grant GLP an opportunity to reform its contract to reflect the original milestone dates. There are multiple grounds for reversal of the MO&O and reinstatement of GLP’s 2 GHz MSS authorization.

GLP’s 2 GHz MSS authorization consists of four GSO satellites and one NGSO constellation, each of which is authorized separately. GLP’s Extension Request only sought modification of the milestones for the NGSO constellation and three of the GSO satellites in its 2 GHz MSS system. GLP did not seek an extension for the milestones for the GSO satellite serving the United States (Call Sign S2321), and the contract indicated that the original milestones for that satellite would be met. The only reason identified by the Bureau for canceling GLP’s 2 GHz authorization was failure to submit a contract that met the milestones in the Order. Yet, the contract did comply with the milestones in the Order for the GSO satellite serving the United States, and so, the Bureau had no basis to cancel the license for that satellite.

The Bureau failed to follow the Commission’s existing policies on accepting non-contingent contracts as meeting the construction contract milestone. The Commission allows

licensees to meet the first milestone with a non-contingent contract with a request for modification of license, and it reviews the contract for contingencies affecting implementation, not whether future milestones will be met. The Bureau did not review GLP's contract under this standard, but rather applied a previously unannounced standard on what contracts will be deemed to meet the first milestone. The Bureau should have deemed GLP's contract as meeting the first milestone, or granted a brief waiver of the first milestone to allow the contract to be reformed to meet the original milestone schedule.

The Bureau's categorization of GLP's explanation for the milestone modification as "business decisions" did not fully consider the facts and the rationale for applying that policy to the facts. The Bureau should have recognized GLP's bankruptcy and the impact of the MSS business as unforeseeable circumstances beyond GLP's control in the context presented. Moreover, GLP's request was based on a realistic look at the economic and market conditions that are facing MSS systems generally and an operational MSS system specifically. The Commission has previously recognized that the complexity of proposed MSS systems may require review of the milestone schedule on an individualized basis.

The Bureau also failed to give meaningful consideration to GLP's request for a waiver of the milestone rule. In denying GLP's request, the Bureau failed to consider the unique circumstances related to GLP's status as a debtor-in-possession under Chapter 11 of the U.S. Bankruptcy Code, circumstances which the Commission has recognized as justifying waivers of rules in other contexts.

The Bureau also failed to recognize that GLP planned to use the 2 GHz MSS spectrum in the time frame required by the original milestone schedule, and so, GLP's proposed milestone plan would not have undermined the policy of the milestone rule to place spectrum into service

in a timely manner. The Bureau also did not consider the various public interest reasons that supported the requested extension. Moreover, the Bureau failed to consider GLP's intent to proceed with its 2 GHz MSS system, a factor that is critical in the Commission's prior decisions on similar requests.

The Bureau's decision not to grant GLP a reasonable opportunity to reform its contract is a violation of due process and fair notice and contrary to Commission precedent. The Commission's existing cases suggest that an opportunity to cure will be available, particularly since reforming the contract would have directly fulfilled the Commission's policy objective. The Commission's existing policies and cases give no indication that it will cancel a license if a licensee requests an extension of later milestones without actually missing any milestones.

The Bureau also erred in failing to consider and explain why its actions in the MO&O are consistent with Section 362(a) of the U.S. Bankruptcy Code which imposes a stay of any action to take property of a debtor-in-possession's estate on all entities, including governmental agencies. It is precisely to preserve assets for the estate that Section 362(a) of the Bankruptcy Code imposes an automatic stay on any action to remove property from a debtor's estate. The Bureau's failure to acknowledge GLP's status and to assess whether the automatic stay applies is reversible error.

TABLE OF CONTENTS

	<u>Page</u>
EXECUTIVE SUMMARY	i
I. BACKGROUND	2
II. THE BUREAU UNLAWFULLY CANCELLED GLP’S LICENSE FOR THE GSO SATELLITE SERVING THE UNITED STATES.	3
III. GLP SHOULD HAVE BEEN DEEMED TO HAVE MET THE CONSTRUCTION CONTRACT MILESTONE.	5
IV. THE APPLICATION OF THE “BUSINESS DECISION” POLICY IN THE <u>MO&O</u> IS ARBITRARY AND CAPRICIOUS.	7
A. GLP Is Affected by Unforeseeable Circumstances.	7
B. The Business Decision Policy, as Applied Here, Precluded Meaningful Consideration of GLP’s Circumstances.	8
V. THE BUREAU FAILED TO GIVE MEANINGFUL CONSIDERATION TO GLP’S WAIVER REQUEST.	10
A. The Bureau Failed to Consider the Special Circumstances of GLP’s Bankruptcy.	11
B. Grant of GLP’s Requested Milestone Extension Would Not Have Undermined the Purpose of the Milestone Rule.	12
C. Grant of GLP’s Extension Request Would Serve the Public Interest.....	14
D. The Bureau Failed to Consider and Act on GLP’s Intent to Proceed to Construct Its 2 GHz MSS System.....	15
VI. THE BUREAU’S FAILURE TO GRANT GLP AN OPPORTUNITY TO CURE IS ARBITRARY AND CAPRICIOUS AND VIOLATES GLP’S DUE PROCESS RIGHTS.....	17
A. The Bureau’s Action Is Arbitrary and Capricious.	17
B. The Bureau’s Action Violates Due Process.....	18
VII. THE BUREAU’S CANCELLATION OF GLP’S 2 GHZ MSS LICENSE IS PRECLUDED BY THE AUTOMATIC STAY.....	19

VIII. CONCLUSION.....22

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To: The Commission

EMERGENCY APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115, Globalstar, L.P. (“GLP”), hereby applies for review of the Memorandum Opinion and Order, DA 03-328 (“MO&O”), adopted pursuant to delegated authority by the International Bureau, as released on January 30, 2003. Because of the unusually severe impact of the Bureau’s decision, GLP requests that the Commission expedite its review and also grant its contemporaneously filed “Request for Stay” pending review.

For the reasons set forth below, the Bureau’s decision is “in conflict with statute, regulation, case precedent, or established Commission policy” (47 C.F.R. § 1.115(b)(2)(i)) and “involves application of a precedent or policy which should be overturned or revised” (47 C.F.R. § 1.115(b)(2)(ii)).

I. BACKGROUND

On July 17, 2001, the Commission granted GLP's application to launch and operate a Mobile-Satellite Service ("MSS") system in the spectrum allocated for MSS at 2 GHz.¹ GLP's system consists of four geostationary ("GSO") satellites and a non-geostationary ("NGSO") satellite constellation. As required by the Order, as of July 17, 2002, GLP had entered into a non-contingent contract for construction of both the GSO and NGSO satellites with Space Systems/Loral, Inc. ("SSL").

In a "Request for Waiver and Modification of Implementation Milestones for 2 GHz MSS System" filed on July 17, 2002 ("Extension Request"), GLP requested modification in part of the milestone schedule for the NGSO constellation and three of the four GSO satellites (see Appendix A) and, if needed, a waiver of 47 C.F.R. § 25.117(e). The milestones for the GSO satellite serving the United States were unchanged, thereby placing GLP's spectrum assignment into use by the in-service date specified in the Order. If the Commission decided not to grant the extension, then GLP requested 90 days to renegotiate the terms of its contract with SSL.

GLP offered five reasons to justify modification of the milestone schedule. First, given the currently-depressed MSS business and the longer-than-anticipated life of the first-generation Globalstar satellite system, GLP does not anticipate a need for substantial additional MSS capacity by the full system operational date established in the Order. Second, GLP can bring its 2 GHz spectrum into use by the Commission's milestone deadline and fulfill its near-term coverage needs with the GSO satellites alone. Third, Globalstar's original business plan relied on the first generation satellite system to generate the bulk of the revenues to fund the second-

¹ Globalstar, L.P., 16 FCC Rcd 13739 (Int'l Bur./OET 2001) ("Order").

generation system. Due to the depressed MSS business, however, those revenues will not be available in the near future. Fourth, by “back-ending” the cost of construction and launch of the 2 GHz MSS satellites, GLP can afford to build its next-generation system even as it lowers subscriber prices today. Finally, on February 15, 2002, GLP filed for Chapter 11 reorganization in the U.S. Bankruptcy Court in Delaware. GLP’s spending profile for the 2 GHz system had to balance the financial requirements of the system with GLP’s fiduciary obligations as a debtor-in-possession to preserve its assets for the benefit of its creditors.

No party opposed GLP’s Extension Request. Yet, the Bureau denied GLP’s request for modification of the milestones and the waiver request, refused to grant a cure period for the contract with SSL, found that GLP had not met the first milestone, and deemed the entire 2 GHz MSS license null and void.

II. THE BUREAU UNLAWFULLY CANCELLED GLP’S LICENSE FOR THE GSO SATELLITE SERVING THE UNITED STATES.

In declaring GLP’s 2 GHz MSS license null and void, the Bureau made no distinction among the four GSO satellites and the NGSO satellite constellation. However, each of these five parts of GLP’s system requires a separate application, a separate application fee, separate spectrum rights (particularly for the feeder links) and a separate license with a separate call sign.

In its Extension Request, GLP specifically sought modification of the milestone schedule “in part,” and did not seek extension of the milestones for the GSO satellite serving the United States (Call Sign S2321). Also, as the Bureau is aware, the contract with SSL proposes to construct and launch this satellite on the schedule set forth in the Order.

Despite the fact that GLP complied with all the Commission’s requirements for this one GSO satellite, the Bureau purported to cancel this license along with the licenses for the other three GSO satellites and the NGSO satellite constellation. (MO&O, ¶ 16.) The sole reason for

finding that GLP did not meet the first milestone and canceling the license was that the contract with SSL did not comply with the original milestone schedule. (MO&O, ¶ 13.) Yet, the schedule for one GSO satellite meeting all the requirements of 47 C.F.R. § 25.143 did comply with that schedule, a fact which the Bureau ignored.²

The Bureau's cancellation of GSO Satellite S2321 requires reversal of the MO&O at least in part. The fact that GLP's 2 GHz MSS system may be reduced to one GSO satellite is irrelevant for purposes of milestone compliance. Another 2 GHz MSS licensee, Celsat, was authorized initially to construct a single GSO satellite.³ And The Boeing Company has filed an application to modify its authorization from a 16-satellite NGSO system to a single GSO satellite.⁴ Celsat, Boeing and GLP have all submitted construction contracts that reflect milestone compliance for a single GSO satellite. Celsat's contract has already been deemed to meet the first milestone;⁵ GLP's similarly-situated contract cannot be treated differently for this one satellite, nor should GLP be penalized for contracting to construct a more complex system.⁶

² Since milestone compliance for GSO satellite S2321 was not at issue in the Extension Request, the cancellation of that license by the Bureau is an unlawful revocation without a hearing in violation of 47 U.S.C. § 312.

³ Celsat America, Inc., 16 FCC Rcd 13712 (Int'l Bur. 2001).

⁴ The Boeing Co., 16 FCC Rcd 13691 (Int'l Bur. 2001); see Application File No. SAT-MOD-2002072600133.

⁵ See Public Notice, Report No. SAT-00135 (released Feb. 10, 2003).

⁶ See, e.g., Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965) (similarly situated parties must be treated similarly).

III. GLP SHOULD HAVE BEEN DEEMED TO HAVE MET THE CONSTRUCTION CONTRACT MILESTONE.

The Bureau's decision that GLP did not meet the construction contract milestone is in direct conflict with existing Commission policy. The Commission allows licensees to file contracts to meet milestones that reflect modifications that must also be approved by the Commission.⁷ The Commission has ruled that a licensee can submit a contract to meet the construction milestone that reflects proposed license modifications, reasoning that submission of a contract, even if at variance from the authorization, "demonstrates [the licensee's] intent to use the spectrum consistent with the stated policy objective of the milestone requirement."⁸

For the construction contract milestone, the Commission is concerned whether there are contingencies that would delay implementation in the submitted contract, not whether future milestones would be met.⁹ Here, there are no contingencies in the GLP-SSL contract to the obligations of GLP and SSL, nor did the Bureau purport to find any. Therefore, in light of this existing policy, GLP's contract should have been accepted as satisfying the first milestone.¹⁰

If the only issue is whether future milestones will be met, the Bureau should have granted the requested short waiver to allow GLP to revise the construction schedule to conform to the milestone schedule in the Order. The Commission has repeatedly granted waivers of the contract

⁷ Teledesic LLC, 17 FCC Rcd 11263, 11265 (Int'l Bur. 2002).

⁸ Id.

⁹ GLP sought an extension for future milestones that could, in fact, still be met. Therefore, the Bureau's cancellation of the license is based on an assumption that future milestones will not or cannot be met. There is no milestone enforcement policy that relies on such assumptions.

¹⁰ Because GLP's construction contract should have been found to have met the first milestone requirement, cancellation of GLP's 2 GHz MSS licenses constitutes an unlawful revocation without a hearing in violation of 47 U.S.C. § 312.

submission milestone where the licensee had not entered into any binding contract, based on the licensee's perceived intent to proceed. In NetSat 28 Co., L.L.C., the Bureau rejected an argument that it should not consider a milestone waiver request because the licensee filed the request after the milestone had passed and the license had been cancelled.¹¹ NetSat 28 missed its satellite construction contract milestone by 18 months. Yet, the Commission granted a waiver of that milestone to allow submission of the contract. Similarly, in Echostar Satellite Corp., Echostar did not have any contract in place at the time of its construction contract milestone for its western DBS orbital slot. However, because of Echostar's perceived investment in and commitment to the system, the Commission waived milestone compliance and gave Echostar three months to sign a contract.¹²

Given that failure to submit a contract is not disqualifying *per se*, and submission of a non-conforming contract with a contemporaneous modification request is not disqualifying *per se*, it is arbitrary and capricious for the Bureau to find that GLP's actual submission of a non-contingent contract with a modification request is disqualifying *per se*. The Bureau's refusal to accept GLP's contract as meeting the first milestone is belied by the standard applied in other cases, which the Commission has not repudiated.¹³

¹¹ NetSat 28 Co., 16 FCC Rcd 11025 (Int'l Bur. 2001).

¹² Echostar Satellite Corp., 7 FCC Rcd 1765, 1771 (1992).

¹³ GLP had no notice that the policy announced in Teledesic LLC would not be applied with respect to its contract. If the Bureau intends to modify or clarify that policy, it may only do so on a prospective basis. See, e.g., Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235, 239 (D.C. Cir. 1985).

IV. THE APPLICATION OF THE “BUSINESS DECISION” POLICY IN THE MO&O IS ARBITRARY AND CAPRICIOUS.

The Bureau denied GLP’s request for milestone modification, finding that, under the Commission’s existing policies, GLP’s reasons for requesting the extension were ultimately related to “business decisions,” rather than events beyond its control. (MO&O, ¶ 8.) The Bureau’s application of this policy unlawfully failed to consider the “foreseeability” of the events affecting GLP and to consider the facts meaningfully.

A. GLP Is Affected by Unforeseeable Circumstances.

Commission’s policy on milestone enforcement has required a licensee to absorb the risk of voluntary technical and business changes in a planned system while granting leniency to licensees that are affected by unforeseeable circumstances beyond their control.¹⁴ For example, the Commission has granted extensions of milestones where unanticipated technical issues delayed construction.¹⁵ The Commission has used a similar rationale to grant a milestone extension because an unanticipated legal problem made it difficult for the licensee to raise financing for its system.¹⁶ In these cases, the Commission has determined that the ability to proceed with construction on the milestone schedule was impaired because of events thrust upon rather than directed by the licensee.

GLP too has experienced unanticipated events that affect its ability to proceed at the same pace as the milestones in the Order. It was not predictable that its financial restructuring and

¹⁴ See United States Satellite Broadcasting Co., 3 FCC Rcd 6858, 6859-60 (1988); 47 C.F.R. § 25.117(e)(1).

¹⁵ AT&T Co., 9 FCC Rcd 2607 (1994) (extension granted to resolve technical problems resulting in failure of satellites constructed by same manufacturer).

¹⁶ NetSat 28, 16 FCC Rcd at 11028-29.

Chapter 11 bankruptcy would be so prolonged a process. Nor could GLP have predicted that the business for MSS would have been so depressed for so long a period. Now that GLP is in bankruptcy, it is obligated to avoid putting in place an unrealistic spending profile for the 2 GHz MSS system, or one that mismanages its assets. While bankruptcy and business downturns may be “economic” issues, so is the failure to obtain financing no matter what the cause. The Bureau cannot simply label causes “business decisions” without measuring the foreseeability in context.¹⁷ And, that alone requires reversal of the MO&O.

B. The Business Decision Policy, as Applied Here, Precluded Meaningful Consideration of GLP’s Circumstances.

The Bureau rejected GLP’s explanation of “special circumstances” for the milestone modifications as reflecting voluntary business decisions.¹⁸ (MO&O, ¶ 9.) And, the Bureau erroneously relied on a delay in spectrum use to distinguish GLP’s request from other cases where “special circumstances” were found to justify extensions. (MO&O, ¶¶ 9-10.) GLP had, in fact, committed to put the 2 GHz MSS spectrum into use on the time frame schedule by the Order.

The Bureau’s designation of the circumstances motivating GLP’s request as “business decisions” does not relieve it of its obligation to give meaningful consideration of the request.

¹⁷ See, e.g., Flagstaff Broadcasting Found. v. FCC, 979 F.2d 1566, 1570 (D.C. Cir. 1992) (“A reiteration of a policy is not a reason for it”); Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) (FCC must review application of policy in light of facts presented).

¹⁸ See 47 C.F.R. § 25.117(e)(2). Inexplicably, the Bureau comments that the separate technical modifications proposed by GLP to its 2 GHz MSS system on July 17, 2002, are “purely discretionary,” and finds that GLP did not explain why these technical modifications required additional time to make the system operational. (MO&O, ¶ 9.) The Bureau either misread GLP’s request or chose to ignore its substance. GLP did not rely on the technical changes to its system in its request. See Extension Request, at 6-11. The Bureau’s failure to note the distinction indicates that it did not rationally consider GLP’s Extension Request.

GLP's milestone modification request was based on a thorough, realistic look at the economic and market conditions that are facing MSS systems generally and an operational MSS system specifically. The Commission is obligated to consider these facts meaningfully, rather than to dismiss them out of hand, and to determine whether special circumstances exist that vitiate strict enforcement of the milestone schedule.¹⁹

Furthermore, the Commission has already noted that there may be special circumstances warranting milestone extensions in circumstances such as GLP's 2 GHz MSS system. The "business decision" policy was developed in the context of the Fixed Satellite Service ("FSS") and Direct Broadcast Satellite ("DBS") service to retrieve orbital slots from companies that do not proceed with construction and launch.²⁰ Because the Commission deems GSO orbital slots fungible,²¹ there is little or no prejudice to an FSS or DBS applicant that is deemed not ready to go forward because other orbital slots and spectrum will be available. By contrast, the licensees in each processing round for MSS licenses have been authorized for very distinct spectrum assignments, and the potential to replace a cancelled license is essentially nonexistent. In addition, the Commission itself has recognized that, due to the variety and complexity of NGSO

¹⁹ See Motor Vehicles Mfrs. Ass'n v. State Farm Auto. Ins. Co., 463 U.S. 29, 43 (1983); United States Satellite Broadcasting Co., 3 FCC Rcd at 6860 (granting extension of time where the facts and economic conditions indicated that "the timetable itself has proved to be inappropriate").

²⁰ See, e.g., MCI Communications, Inc., 2 FCC Rcd 233, 234 (CCB 1987); TEMPO Enterprises, Inc., 1 FCC Rcd 20, 20 (1986).

²¹ See Amendment of the Commission's Space Station Licensing Rules and Policies, 17 FCC Rcd 3847, 3874-75 (2002); Direct Broadcast Satellite Service, 95 FCC 2d 250, 253 (1983).

MSS systems, they require individually-tailored milestone schedules.²² Thus, indiscriminately applying the “business decision” limitation to GLP’s modification request is arbitrary and capricious because the policy was not developed for the circumstances affecting GLP’s licenses, and its application automatically precludes reasoned consideration of GLP’s individual circumstances, which the Commission has previously recognized is necessary.²³

V. THE BUREAU FAILED TO GIVE MEANINGFUL CONSIDERATION TO GLP’S WAIVER REQUEST.

A waiver of the Commission’s Rules may be granted when such action will not undermine the policy of the rule sought to be waived and will otherwise serve the public interest.²⁴ Waivers must be founded on an “appropriate general standard” and may be granted when circumstances warrant deviation from the general rule.²⁵ The Bureau’s decision is not consistent with this standard.

²² See Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band, 14 FCC Rcd 4843, 4881 (1999) (“We propose to establish separate milestones for each system”); Amendment of the Commission’s Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 FCC Rcd 5936, 6008 (1994) (stating that different milestone schedules may be established for individual systems depending upon size and complexity); Amendment of the Commission’s Rules to Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile Satellite Service, 8 FCC Rcd 8450, 8458 (1993) (stating that individual circumstances will be considered in establishing each licensee’s milestone schedule).

²³ See State of Iowa v. FCC, 218 F.3d 756 (D.C. Cir. 2000) (remanding FCC decision for failure to consider whether factors raised by petitioner establish common carriage notwithstanding FCC’s analysis of common carriage).

²⁴ See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

²⁵ See Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

A. The Bureau Failed to Consider the Special Circumstances of GLP's Bankruptcy.

The Bureau rejected GLP's waiver request out-of-hand because GLP allegedly presented no special circumstances. (MO&O, ¶ 11.) However, the Commission has repeatedly recognized that a licensee operating in bankruptcy presents special circumstances that justify a waiver of otherwise applicable rules. For example, licensees in bankruptcy can obtain a waiver of annual regulatory fees.²⁶ And the Commission offered an exemption to broadcast licensees in bankruptcy for participation in an assignment of license that would otherwise violate the broadcast local ownership rules.²⁷ Although bankruptcy *per se* may not necessarily exempt a company from complying with the Commission's Rules, the Commission clearly must consider the impact of the application of a general rule to a licensee operating as a debtor-in-possession and attempting to reorganize its business.²⁸

In the Extension Request (at 10-11), GLP explained that it "could not, and did not, enter into its contract for a 2 GHz system without the concurrence of its creditors and approval of the Bankruptcy Court." GLP did not seek a waiver of the milestone rule based solely on its Chapter 11 status. Rather, it explained that its status in bankruptcy dictated the spending profile that it could contract for its 2 GHz MSS system. GLP was required to seek the concurrence of both its creditors and the bankruptcy court before committing to the financial obligations of the contract

²⁶ See, e.g., Implementation of Section 9 of the Communications Act, 10 FCC Rcd 12759, 12762 (1995).

²⁷ See, e.g., Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, 15 FCC Rcd 15376, 15422 (2000).

²⁸ See FCC v. NextWave Personal Communications Inc., 71 U.S.L.W. 4085 (Jan. 27, 2003).

with SSL. As GLP explained, an acceptable spending profile dictated a modest extension in the later milestones.

The Bureau completely ignored these facts. Based on its treatment of other licensees in bankruptcy, the Commission cannot fail to consider GLP's status as a Chapter 11 debtor along with its other support for the waiver request.²⁹

B. Grant of GLP's Requested Milestone Extension Would Not Have Undermined the Purpose of the Milestone Rule.

The Commission's policy on implementation milestones is designed "to ensure speedy delivery of service to the public and prevent warehousing of valuable orbital locations and spectrum."³⁰ As GLP repeatedly pointed out in the Extension Request, it is committed to putting its assigned 2 GHz spectrum into use in accordance with Part 25 of the Rules on the schedule specified by the Commission by launching and operating the GSO satellite serving the United States by the dates specified in the Order. As a result, the spectrum will be used in a timely manner and will not lie fallow.

Moreover, no other prospective MSS licensee would have been denied access to spectrum through warehousing as a result of grant of the requested extension.³¹ Even though GLP was authorized to launch and operate four GSO satellites and one NGSO satellite

²⁹ See, e.g., Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965) (similarly situated parties must be treated similarly).

³⁰ Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band, 15 FCC Rcd 16127, 16177 (2000) ("2 GHz MSS Rules Order").

³¹ Although the Commission has reallocated certain 2 GHz MSS spectrum to terrestrial services, it has ruled that 2 GHz MSS should have at least 40 MHz available, and each licensee is still entitled to 1/X MHz of spectrum. GLP's milestone extension would not affect access to spectrum by other services. See Amendment of Part 2 of the Commission's Rules to Allocate

(continued...)

constellation at 2 GHz, GLP is only authorized to operate with one “Selected Assignment,” amounting to 1/X of the available spectrum where X is the number of authorized 2 GHz licensees. GLP could thus use no more 2 GHz MSS spectrum in the United States than the domestic GSO satellite alone can access in the United States. And no other 2 GHz MSS licensee is automatically entitled to the 3.5 MHz of spectrum that the Commission assigned to GLP. Accordingly, there was never a possibility that the spectrum would lie fallow.

The Bureau completely ignored GLP’s commitment to use its spectrum assignment in the time frame required by the original milestones. Instead, it wrongly concluded that “Globalstar’s extension request would prolong the period for which the spectrum lies fallow rather than expediting service to the public.” (MO&O, ¶ 10.) Based on this erroneous view of GLP’s plans, and inconsistent with prior cases,³² the Bureau found that the extension proposal was “unreasonable” because the full system would not be operational until two years after the original milestones.

Failure to apply the relevant facts regarding GLP’s Extension Request to the stated policy of the rule sought to be waived means that the Bureau failed to give meaningful consideration to GLP’s request, as required.³³ The Commission has found that a licensee’s plans to put the spectrum into timely use demonstrate that the extension request is not contrary to the

(...continued)

Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advance Wireless Services, FCC 03-16 (released Feb. 10, 2003).

³² The Commission has previously found that an 18-month extension of the in-operation milestone was “not excessive” and “not contrary to our warehousing policy,” despite the fact that the extension request was not generated by circumstances beyond the licensee’s control. American Mobile Satellite Co., 8 FCC Rcd 4040, 4042-43 (1992).

³³ See WAIT Radio v. FCC, 418 F.2d at 1156-59.

warehousing policy and the goal of delivering timely service to the public.³⁴ The Bureau, in fact, attempted to distinguish these prior decisions in the MO&O (§§ 9-10) based on the proposition that the extensions granted in other cases would not have involved the spectrum lying fallow or being warehoused. Yet, using the spectrum in a timely manner was exactly the motivation for GLP's formulation of its Extension Request, which the Bureau completely ignored.

C. Grant of GLP's Extension Request Would Serve the Public Interest.

GLP offered several reasons why the extension of its 2 GHz MSS milestones schedule would serve the public interest. The Bureau considered none of them. These reasons are briefly restated here to assist the Commission's review.

The MSS industry and the entire telecommunications industry is experiencing low demand and consequent financial reversals. Grant of GLP's milestone proposal would ensure that the existing Globalstar system is fully utilized while bringing additional capacity online. As a debtor-in-possession, Globalstar needs to use all its resources and replace them efficiently.³⁵

The extension would also help preserve the ability of MSS to serve underserved and unserved populations now, one of the Commission's major goals in licensing MSS systems.³⁶ GLP proposed the dates in the Extension Request to assure continuation of critical telecommunications service over the existing system.

³⁴ See GE American Communications, Inc., 16 FCC Rcd 11038, 11041-42 (Int'l Bur. 2001); Dominion Video Satellite, Inc., 14 FCC Rcd 8182, 8186-87 (Int'l Bur. 1999); GE American Communications, Inc., 7 FCC Rcd 5169, 5170 (CCB 1992).

³⁵ See GE American Communications, Inc., 7 FCC Rcd at 5170 (granting milestone extension so "GE Americom will be able to avoid providing excess transponder capacity or prematurely terminating services on its existing . . . satellites . . . before the end of their useful lives").

³⁶ See 2 GHz MSS Rules Order, 15 FCC Rcd at 16128-29.

Ignoring these factors, the Bureau simply reached the conclusion that if a waiver were granted the policies of requiring licensees to enter non-contingent contracts and of licensing entities committed to providing prompt service to the public would not be fulfilled. (MO&O, ¶ 11.) As noted, GLP had already entered into a non-contingent construction contract and committed in the Extension Request to provide service using the 2 GHz MSS spectrum on the existing milestone schedule. As the D.C. Circuit pointed out in WAIT Radio v. FCC, a waiver request necessarily proposes deviation from the general rule; yet, the Commission is legally bound to consider whether all the relevant factors warrant such deviation.³⁷ As in WAIT Radio, the Bureau's consideration of the Extension Request falls well short of minimum legal requirements.³⁸

D. The Bureau Failed to Consider and Act on GLP's Intent to Proceed to Construct Its 2 GHz MSS System.

In considering whether licensees have met milestones, or should be granted a waiver of milestones, a critical factor for the Commission is the licensee's "intent to proceed." The Bureau also routinely grants waivers of the satellite construction milestone, when it finds that the licensee has demonstrated an "intent to proceed" with its business plan.

For example, the Bureau recently granted GE American Communications a waiver of a milestone to incorporate the business decision to add inter-satellite links to its system "because it has demonstrated, from early after licensing, its intent to proceed with its modified Ka-band

³⁷ WAIT Radio v. FCC, 418 F.2d at 1156-59.

³⁸ See KCST-TV, Inc. v. FCC, 699 F.2d 1185 (D.C. Cir. 1983) (failure to give consideration to facts showing rule should not be applied renders decision arbitrary and capricious); cf. Achenar Broadcasting Co. v. FCC, 62 F.3d 1441 (D.C. Cir. 1995) (Commission's failure to consider the very factors that its rules and policies set forth makes the decision arbitrary and capricious).

system.”³⁹ Last summer, the Bureau granted a waiver of the construction contract milestone for Astrolink even though it had no contract in place but had substantially completed construction of its first satellite because “it has shown a firm commitment to proceed with its business plan.”⁴⁰

These examples illustrate that a critical factor in determining whether a licensee should be granted a waiver is the licensee’s intent to proceed. The Bureau, however, did not consider GLP’s intent to proceed. Nor did the Bureau offer an explanation why it only considers “intent to proceed” to be a critical factor when it grants a waiver, but a factor that it may ignore when it denies a waiver.

The evidence of GLP’s intent to proceed at this point in time is just as strong as in prior cases. GLP has already established an operational satellite system, already has customers and has been planning its next generation system for over five years. GLP has entered into a non-contingent contract for construction of the complete 2 GHz MSS system, the essential terms of which were approved by both the bankruptcy court and GLP’s creditors for the actual commencement of funding. And, as the Bureau was aware, GLP actually paid its contractor several million dollars for design and development work to reach Critical Design Review (“CDR”) by the July 17, 2003, milestone date. The Bureau did not dispute that GLP had in fact commenced construction by entering into a non-contingent satellite contract, nor did it question GLP’s commitment to proceed with its plans for its authorized system, factors that have been cited to justify milestone extensions in other cases.⁴¹

³⁹ GE American Communications, Inc., 16 FCC Rcd at 11041.

⁴⁰ Astrolink International LLC, 17 FCC Rcd 11267, 11269 (Int’l Bur. 2002).

⁴¹ See American Tel. & Telegraph Co., 5 FCC Rcd 5590, 5591 (CCB 1990) (granting extension where contract work and payment had commenced and there was no reason to believe
(continued...)

The D.C. Circuit has made clear that it is arbitrary and capricious for the Commission to use different sets of considerations to decide cases for similarly-situated licensees.⁴² Moreover, the Bureau cannot be following an “appropriate general standard” in reviewing waiver requests, if different factors are applied to deny or grant waivers. It was, therefore, unlawful for the Bureau to ignore GLP’s unequivocal and undisputed intent to proceed in reviewing GLP’s request for a waiver. On this basis as well, the MO&O must be overturned.

VI. THE BUREAU’S FAILURE TO GRANT GLP AN OPPORTUNITY TO CURE IS ARBITRARY AND CAPRICIOUS AND VIOLATES GLP’S DUE PROCESS RIGHTS.

The Bureau declined to grant GLP time and an opportunity to reform its contract with SSL to comply with the original milestone schedule, stating that to grant such an opportunity “would be tantamount to granting any licensee that seeks a milestone extension an interim extension until 90 days after the Commission acts on the extension request.” (MO&O, ¶ 12.)

A. The Bureau’s Action Is Arbitrary and Capricious.

The Bureau’s reasoning is utterly without basis in fact or logic. GLP has already entered into a non-contingent contract with SSL. It was already paying for work on construction of the satellites, and the Critical Design Review would have met the next milestone deadline of July 17, 2003. GLP only sought to change later-in-time milestones, not the proximate ones. If GLP were

(...continued)

licensee would abandon system); cf. TEMPO Enterprises, 1 FCC Rcd at 20-21 (noncontingent contract with firm construction and payment terms demonstrates commitment to proceed).

⁴² See Fresno Mobile Radio, Inc. v. FCC, 165 F.3d 965 (D.C. Cir. 1999) (Commission’s disparate treatment of incumbent and new SMR licensees was not justified with rational explanations, and so, regulatory regime that treated the two differently was arbitrary and capricious); Orion Communications Ltd. v. FCC, 131 F.3d 176 (D.C. Cir. 1997) (Commission’s failure to consider factors that it stated were important to similar licensing decisions and giving shortshrift to other factors relevant to other cases made its decision arbitrary and capricious).

granted an opportunity to renegotiate the contract, the most likely change would be to conform the later milestones to those in the Order and revise the payment schedule accordingly. GLP gained nothing by the so-called “interim extension,” because GLP requested no extension of any milestone dates that have already passed or are in the immediate future.

The Bureau’s only justification is that it gave 2 GHz MSS licensees notice that the milestones would be “strictly enforced.” (MO&O, ¶ 12.) However, neither GLPs construction contract nor conduct could have violated any future milestone because satisfaction of such milestones is not yet required. The Bureau merely assumed that GLP will not comply with future milestones if the Extension Request is denied because the contract does not reflect those milestone dates. The policy of strict enforcement suggests that GLP would have to comply with the original milestones, if the Extension Request is denied, as GLP would through a reformed contract, rather than to lose its license altogether. The Bureau’s failure to provide a sufficient explanation for rejecting GLP’s effort to comply with the future milestones demonstrates a lack of rational decisionmaking.⁴³

B. The Bureau’s Action Violates Due Process.

The Bureau identified the “no cure” policy in the context of denial of an extension request as a new one, deciding to overturn an earlier decision. (MO&O, ¶ 12.) Based on the Commission’s caselaw and lack of any explicit statement in Part 25, GLP had no reason to expect that the Bureau would deny it an opportunity to reform its contract with SSL if the Extension Request for the later milestones was not granted. Nor could it have anticipated that a contract with a milestone schedule that did not conform exactly to the Order, submitted with a

⁴³ See Office of Communications of the United Church of Christ v. FCC, 779 F.2d 702, 714 (D.C. Cir. 1985).

request for milestone modification that was accepted for filing, would result in cancellation of the license if the modification request were denied.

It is well settled that “[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”⁴⁴ Indeed, when announcing policies affecting milestone enforcement in prior decisions, the Commission has made the policy prospective only.⁴⁵ By revising long-standing policy and precedent without prior notice, the MO&O violated GLP’s right to due process.⁴⁶

VII. THE BUREAU’S CANCELLATION OF GLP’S 2 GHZ MSS LICENSE IS PRECLUDED BY THE AUTOMATIC STAY.

In its Extension Request (at 3), GLP noted that it was -- and remains -- a debtor-in-possession under Chapter 11 of the U.S. Bankruptcy Code. Inexplicably, nowhere in the MO&O does the Bureau even mention GLP’s status as a Chapter 11 debtor, nor the relation of its status to the rationale for the Extension Request. Yet, as the Commission recently learned in the U.S. Supreme Court’s NextWave decision,⁴⁷ the Bankruptcy Code, where its provisions are

⁴⁴ Satellite Broadcasting Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987). Obviously, had the Bureau established a “no cure” policy prior to GLP’s filing date, GLP, its creditors and the bankruptcy court may have applied a difference calculus to the filing. See, e.g., Eastern Carolina Broadcasting Co. v. FCC, 762 F.2d 95, 101 (D.C. Cir. 1985); Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618, 632 (D.C. Cir. 2000).

⁴⁵ See TEMPO Enterprises, 1 FCC Rcd at 20-21; CBS, Inc., 99 FCC 2d 565, 569 (1984).

⁴⁶ See Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d at 632 (FCC may not penalize applicant when rules and policies are unclear).

⁴⁷ FCC v. NextWave Personal Communications Inc., 71 U.S.L.W. 4085 (U.S. Jan. 27, 2003). See generally Dale J. Parsons, Jr., 10 FCC Rcd 2718, 2720 (1995) (FCC has an affirmative obligation to reconcile its policies under the Communications Act with policies of the U.S. Bankruptcy Code).

applicable, trumps the Commission's policies and decisions when those policies and decisions would deny a debtor-in-possession rights provided to it by the plain terms of the Bankruptcy Code.

The 2 GHz MSS license that the Bureau purported to declare null and void is unquestionably an asset of GLP's estate.⁴⁸ As a matter of policy, the Commission has supported bankrupt licensees in their efforts to restructure with their licenses in the estate on the belief that the public interest favors taking all reasonable steps to utilize spectrum licenses and to foster the competitive provision of services.⁴⁹

Except as specifically authorized in the Bankruptcy Code itself, the FCC's cancellation of a Chapter 11 debtor's spectrum license, or any other authorization, would violate the automatic stay provision in Section 362(a) of the Bankruptcy Code (11 U.S.C. § 362(a)). Section 362(a) stays, among other conduct, "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." The stay applies to "all entities" – there is no general exception for governmental authorities.⁵⁰

A governmental unit may avoid the stay if its actions are deemed to fall within its "police and regulatory power" under Section 362(b)(4) of the Bankruptcy Code (11 U.S.C. § 362(b)(4)). However, the legislative history of the Bankruptcy Code makes clear that Congress intended to place narrow limits on the exercise of such power against a debtor:

⁴⁸ In re Nextwave Personal Communications, Inc., 244 B.R. 253, 267 (Bankr. S.D.N.Y. 2000) (citing cases).

⁴⁹ E.g., Orbital Communications Corp., 17 FCC Rcd 4496, 4497 (Int'l Bur. 2002); Space Station System License, Inc., 17 FCC Rcd 2271, 2291 (Int'l Bur. 2002).

⁵⁰ See 11 U.S.C. § 101(15) (definition of entity includes governmental units); NextWave Personal Communications, Inc. v. FCC, 254 F. 3d 130, 135 (D.C. Cir. 2001).

Section 362(b)(4) . . . is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.⁵¹

Section 362(b)(4) has been found not to permit the FCC simply to cancel a spectrum license because “[t]he revocation of a license by the FCC does not affect the health or safety of the public, so there is no exemption to stay under this section of the Code.”⁵² In GLP’s case, there was clearly no threat to public health or safety. If mere “regulatory” acts are grounds for cancellation of licenses that are assets of the estate, then there would be virtually no grounds to which the regulatory exemption could not be applied.⁵³ Moreover, since GLP had not yet missed any milestones, the company still had an opportunity to meet all future milestones set forth in the Order and retain the license as an integral part of its reorganization, consistent with the policies underlying the automatic stay and the Bankruptcy Code.

Even if the regulatory exemption applies to the Bureau’s action with respect to the Extension Request, it would not apply to the cancellation of the license for the GSO satellite serving the United States. The Bureau did not identify or articulate any basis for a “regulatory”

⁵¹ 124 Cong. Rec. H11089 (Sept. 28, 1978) (statement of Rep. Edwards), reprinted in 1978 U.S.C.C.A.N. 6436, 6444-45; 124 Cong. Rec. S17406 (Sept. 28, 1978) (statement of Sen. DeConcini), reprinted in 1978 U.S.C.C.A.N. 6505, 6513.

⁵² In re Fugazy Express, 124 B.R. 426, 431 (S.D.N.Y. 1991), appeal dismissed, 982 F.2d 769 (2d Cir. 1992). But see Nextwave Personal Communications, Inc. v. FCC, 217 F.3d 125, 128 (2d Cir. 2000) (reading Section 362(b)(4) broadly in the context of PCS license installment payment dispute).

⁵³ The Supreme Court appeared skeptical of any expansive interpretation of governmental power, and noted that “where Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly.” FCC v. Nextwave Personal Communications, 71 U.S.L.W. at 4087.

cancellation of this license. Accordingly, the cancellation of this license clearly violated the automatic stay.

Having failed to recognize in its MO&O that GLP is a Chapter 11 debtor, the Bureau obviously did not purport to address the automatic stay provision and whether Section 362(b)(4) permitted cancellation of GLP's 2 GHz MSS license. Any action in violation of the automatic stay provision is null and void, requiring reinstatement of the license.⁵⁴

VIII. CONCLUSION

For reasons set forth above, GLP requests that its Application for Review be granted, and its 2 GHz MSS license reinstated.⁵⁵

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March 3, 2003

⁵⁴ In Re Nextwave Personal Communications, Inc., 244 B.R. at 266-67 (citing cases).

⁵⁵ See 47 C.F.R. § 25.163(a). GLP also requests that its applications to modify technical parameters of the 2 GHz MSS system be reinstated *nunc pro tunc*. See MO&O, ¶ 17.

APPENDIX A

Milestone	July 2001 Order	Proposed Date
Enter Non-Contingent Construction Contract	7/17/02	SAME
Complete Critical Design Review for NGSO System	7/17/03	SAME
Begin Physical Construction of NGSOs	1/17/04	SAME
Begin Physical Construction of GSOs	7/17/04	SAME
Launch First Two NGSO Spacecraft	1/17/05	4/17/07 (27 months later)
Launch First GSO Satellite (U.S. coverage)	7/17/06	SAME
Entire System Operational	7/17/07	GSO 1/17/09 (tentative—subject to acceleration) NGSO 7/17/09 (18 and 24 months later)

**Existing and Proposed Milestone Schedule
For Globalstar 2 GHz MSS System**

CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 3rd day of March, 2003, caused to be served true and correct copies of the foregoing "Emergency Application for Review" upon the following persons via hand delivery (marked with an asterisk (*)) or first-class United States mail, postage prepaid:

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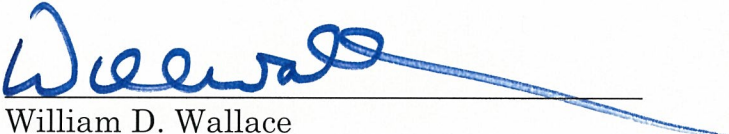
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