

**ORIGINAL  
RECEIVED**

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

MAR 18 2003

In the Matter of	)	FEDERAL COMMUNICATIONS COMMISSION
	)	OFFICE OF THE SECRETARY
GLOBALSTAR, L.P.	)	File Nos:
	)	183/184/185/186-SAT-P/LA-97
	)	182-SAT-P/LA-97(64)
	)	
For Modification of License for a Mobile	)	IBFS File Nos.
Satellite Service System in the 2 GHz Band	)	SAT-LOA-19970926-00151-154
	)	SAT-LOA-19970926-00156
For Waiver and Modification of	)	SAT-AMD-20001103-00154
Implementation Milestones for	)	SAT-MOD-20020717-00116-119
2 GHz MSS System	)	SAT-MOD-20020722-00107-110
	)	SAT-MOD-20020722-00112
_____	)	Call Signs S2320/21/22/23/24

**Received**

MAR 25 2003

**COMMENTS IN SUPPORT OF  
EMERGENCY APPLICATION FOR REVIEW**

**Policy Branch  
International Bureau**

Tom Davidson, Esq.  
Phil Marchesiello, Esq.  
AKIN, GUMP, STRAUSS,  
HAUER & FELD, L.L.P.  
1676 International Drive  
Penthouse  
McLean, VA 22102  
(703) 891-7540

Attorneys for Official Creditors Committee  
of Globalstar, L.P.

Date: March 18, 2003

## EXECUTIVE SUMMARY

The Official Creditors Committee (“Committee”) of Globalstar, L.P. (“Globalstar”) respectfully requests the Federal Communications Commission (“Commission”) to reverse the *Memorandum Order and Opinion*, DA 03-328 (“*MO&O*”), issued by the International Bureau (“Bureau”) on Jan. 30, 2003. In its *MO&O*, the Bureau impermissibly rejected as inadequate the satellite construction contract that Globalstar executed in compliance with the first implementation milestone applicable to its 2 GHz MSS license (“License”). Consequently, the Bureau determined that Globalstar failed to satisfy its first implementation milestone and that, as a result, Globalstar’s License cancelled automatically.

As more fully set forth herein, the Bureau’s actions violate Section 706 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, which requires Commission actions, including actions pursuant to delegated authority, to be set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Accordingly, the Commission should reverse the *MO&O* under Section 1.115 of the Commission’s rules, 47 C.F.R. § 115(b)(2)(i), because it “conflicts with statute, regulation, case precedent, or established Commission policy.”

First, the Bureau impermissibly violated Globalstar’s right to administrative due process and utilized arbitrary and capricious decision making in violation of Section 706 of the APA by failing to provide Globalstar with adequate notice of the standard that it would use to adjudicate Globalstar’s compliance with its first implementation milestone. Globalstar satisfied the implementation milestone by doing exactly what was specified in its License—executing a non-contingent satellite construction contract. The Bureau, however, applied a novel interpretation of the implementation milestone by holding that Globalstar’s contract is required to contain a satellite construction schedule mirroring Globalstar’s future milestones. The Bureau did not provide Globalstar constitutionally adequate notice of this implementation milestone policy and

thus application of the policy to effectively cancel Globalstar's License violated Globalstar's substantive due process rights and was arbitrary and capricious.

Second, the Bureau failed to provide meaningful consideration of Globalstar's request for a waiver of the standard used to review satellite milestone extension requests set forth in Section 25.117(e) of the Commission's rules, 47 C.F.R. § 25.117(e). Rather than considering: (i) the special circumstances posed by Globalstar's bankruptcy; (ii) the fact that Globalstar's waiver request would not have resulted in spectrum warehousing; (iii) and the public interest benefits that would be obtained by Globalstar's commencement of 2 GHz service, the Bureau simply rejected Globalstar's waiver request without discussion. The courts are clear that the failure of an administrative agency to provide meaningful consideration of waiver requests constitutes reversible error.

Third, the Bureau also impermissibly treated Globalstar differently than Celsat by affirming Celsat's satellite construction contract, while rejecting Globalstar's contract. This violates the requirement that the Commission treat similarly situated licensees equivalently. Both Globalstar and Celsat executed construction contracts that call for the deployment of a single geostationary ("GSO") satellite in compliance with all applicable implementation milestones. The Commission should not permit the Bureau to penalize Globalstar for its ambitious attempt to additionally launch three other GSO satellites and an entire constellation of nongeostationary satellites.

Finally, the Bureau effectively revoked Globalstar's License without providing Globalstar with an opportunity to formally respond to the Commission's purported grounds for the revocation, as required by Section 312(c) of the Communications Act, 47 U.S.C. § 312(c).

For these reasons, the Committee respectfully requests the Commission to grant the Application for Review of the *MO&O* filed by Globalstar on March 3, 2003.

TABLE OF CONTENTS

**EXECUTIVE SUMMARY ..... i**

**I. BACKGROUND .....2**

**II. ISSUES PRESENTED FOR REVIEW.....3**

**III. THE BUREAU IMPERMISSIBLY FAILED TO GIVE GLOBALSTAR ADEQUATE NOTICE OF ITS INTERPRETATION OF THE REQUIREMENTS IMPOSED BY GLOBALSTAR’S FIRST IMPLEMENTATION MILESTONE .....5**

**IV. THE BUREAU FAILED TO PROVIDE MEANINGFUL CONSIDERATION OF GLOBALSTAR’S WAIVER REQUEST AS REQUIRED BY LAW.....11**

**A. Globalstar Demonstrated Special Circumstances Justifying its Waiver Request .....13**

**B. Globalstar Will Not Warehouse Spectrum and Thus its Waiver Request Does Not Undermine the Primary Objective of the Implementation Milestones .....14**

**C. Grant of Globalstar’s Waiver Request Would Better Serve the Public Interest Than Denial of the Waiver Request.....15**

**V. THE BUREAU IMPERMISSIBLY DISCRIMINATED AMONG SIMILARLY SITUATED LICENSEES IN ADJUDICATING COMPLIANCE WITH ITS 2 GHZ MSS IMPLEMENTATION MILESTONES .....16**

**VI. THE COMMISSION IS STATUTORILY BARRED FROM CANCELING GLOBALSTAR’S LICENSE WITHOUT A HEARING .....18**

**VII. CONCLUSION .....19**

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	File Nos:
GLOBALSTAR, L.P.	)	183/184/185/186-SAT-P/LA-97
	)	182-SAT-P/LA-97(64)
	)	
For Modification of License for a Mobile	)	IBFS File Nos.
Satellite Service System in the 2 GHz Band	)	SAT-LOA-19970926-00151-154
	)	SAT-LOA-19970926-00156
For Waiver and Modification of	)	SAT-AMD-20001103-00154
Implementation Milestones for	)	SAT-MOD-20020717-00116-119
2 GHz MSS System	)	SAT-MOD-20020722-00107-110
	)	SAT-MOD-20020722-00112
_____	)	Call Signs S2320/21/22/23/24

To: The Commission

**COMMENTS IN SUPPORT OF  
EMERGENCY APPLICATION FOR REVIEW**

Pursuant to Section 1.115 of the rules of the Federal Communication Commission (“Commission”),<sup>1</sup> the Official Creditors Committee (“Committee”) of Globalstar, L.P. (“Globalstar”), hereby supports the application for review (“Application”) filed by Globalstar<sup>2</sup> of the *Memorandum Opinion and Order* (“MO&O”) adopted by the Commission’s International Bureau (“Bureau”) on January 30, 2003 pursuant to delegated authority.<sup>3</sup> As explained by

---

<sup>1</sup> 47 C.F.R. § 1.115.

<sup>2</sup> See Emergency Application for Review, filed by Globalstar (March 3, 2003).

<sup>3</sup> The Committee has standing to participate in the instant proceeding. The Committee invested approximately \$3 billion of the \$4.5 billion expended by Globalstar to deploy its Big LEO MSS system and obtain its 2 GHz license. As a result, the Committee currently has direct

(continued...)

Globalstar in its Application, the Bureau's decision in the *MO&O* effectively canceling Globalstar's 2 GHz Mobile-Satellite Service ("MSS") license ("License")<sup>4</sup> is "in conflict with statute, regulation, case precedent, [and] established Commission policy."<sup>5</sup>

## I. BACKGROUND

On July 17, 2002, Globalstar certified that it complied with its first 2 GHz implementation milestone by entering into a non-contingent satellite construction contract

---

(...continued)

economic connection to, and substantial financial interest in, Globalstar. Moreover, the Committee will have a substantial equity and voting interest in Globalstar when Globalstar exits bankruptcy. Consequently, the Committee is directly and significantly aggrieved and injured by the cancellation of Globalstar's License because, had the License not been cancelled, the constituent members of the Committee would have been directly involved in the deployment of Globalstar's 2 GHz MSS system. *See Applications of WINV, Inc. and WGUL-FM, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 2032, ¶ 3 (1998) ("In order to show that it is 'aggrieved' by an action taken pursuant to delegated authority, as required by 47 C.F.R. § 1.115(a), an applicant for review must demonstrate an actual or threatened injury to itself as a direct result of the challenged action."); *Application of Lawrence and Nayereh Wrathall d/b/a Hanford FM Radio, and Rolando Collantes For Assignment of the Construction Permit of Station KGEN-FM, Hanford, CA*, Memorandum Opinion and Order, 11 FCC Rcd 8509, ¶ 4 (1996) (holding that an applicant for review must identify "direct economic or other connection" between its interests and grant of the challenged applications).

The Committee, however, has not yet had an opportunity to participate directly in the instant proceeding. Although the Committee participated extensively in the Commission's proceeding to consider granting ancillary terrestrial authority to 2 GHz MSS licensees in IB Docket No. 01-185, the Committee was not yet organized during public comment periods associated with the initial issuance of Globalstar's License. Also, because the Bureau did not provide any advance indication that it intended to cancel Globalstar's License, neither the Committee nor Globalstar were aware that Globalstar's License was at risk prior to the cancellation of the License and thus neither party recognized a prior need to intervene before the Commission.

<sup>4</sup> *See Application of Globalstar, L.P. for Modification of License for a Mobile-Satellite Service System in the 2 GHz Band*, Memorandum Opinion and Order, 18 FCC Rcd 1249 (IB 2003).

<sup>5</sup> *See* 47 C.F.R. § 1.115(b)(2)(i).

“Contract”) with Space Systems/Loral, Inc. (“Loral”).<sup>6</sup> Contemporaneously, Globalstar requested<sup>7</sup> the Bureau to: (i) modify the portions of the implementation milestone schedule in Globalstar’s License applicable to its non-geostationary (“NGSO”) satellite constellation and to three of the four geostationary (“GSO”) satellites that comprise Globalstar’s 2 GHz MSS system, and (ii) waive Section 25.117(e) of the Commission’s rules, which governs requests for extensions of construction and implementation milestones (collectively “Extension Request”).<sup>8</sup> Globalstar also requested the FCC to grant Globalstar 90 days to reform the Contract as necessary to make it consistent with Globalstar’s existing implementation milestones if the Commission refused to modify the milestones pursuant to the Extension Request (“Reformation Request”). In its *MO&O*, the Bureau denied both Globalstar’s Extension Request and Reformation Request and cancelled Globalstar’s License.

## II. ISSUES PRESENTED FOR REVIEW

Pursuant to Section 1.115(b)(2)(i) of the Commission’s rules,<sup>9</sup> the Committee seeks Commission review of the *MO&O*, specifically with respect to the following issues:

---

<sup>6</sup> See Letter from William D. Wallace, Counsel for Globalstar, to Marlene H. Dortch, Secretary, Commission, dated July 17, 2002. On July 17, 2001, the Commission granted Globalstar’s License and required Globalstar to comply with specified implementation milestones related to Globalstar’s deployment of its proposed MSS system. See *Application of Globalstar, L.P. for Authority to Launch and Operate a Mobile-Satellite Service System in the 2 GHz Band*, Order and Authorization, 16 FCC Rcd 13739, ¶ 60 (2001). The first implementation milestone deadline was July 17, 2002. By that date, Globalstar was required to have executed a non-contingent satellite manufacturing contract. See *id.*

<sup>7</sup> See Request for Waiver and Modification of Implementation Milestones for 2 GHz MSS System, filed by Globalstar, L.P. (July 17, 2002).

<sup>8</sup> See 47 C.F.R. § 25.117(e).

<sup>9</sup> See 47 C.F.R. § 1.115(b)(1).

- (1) whether the Bureau violated Globalstar's substantive due process rights and acted arbitrarily and capriciously by failing to give Globalstar adequate notice of the Bureau's interpretation of Globalstar's first implementation milestone;
- (2) whether the Bureau failed to give meaningful consideration to Globalstar's request for a waiver of Section 25.117(e) and, as a direct result, improperly denied Globalstar's Extension Request;
- (3) whether the Bureau impermissibly applied a different standard to Globalstar than to other similarly situated licensees to determine whether the licensees' satellite construction contracts satisfied their first implementation milestones; and
- (4) whether the Bureau was barred by Section 312 of the Communications Act of 1934, as amended ("Communications Act")<sup>10</sup> from canceling Globalstar's License without first providing Globalstar with a show cause order and an opportunity for a hearing.

Each of these issues warrant Commission consideration because the Bureau's action in each instance violates Section 706 of the Administrative Procedure Act ("APA"), which requires Commission actions, including actions pursuant to delegated authority, to be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>11</sup> Accordingly, the *MO&O* is in conflict with "statute, regulation, case precedent, or established Commission policy" and thus should be reversed by the Commission under Section 1.115(b)(2)(i).

---

<sup>10</sup> See 47 U.S.C. § 312(c).

<sup>11</sup> 5 U.S.C. § 706(2)(A); see, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements.").



### **III. THE BUREAU IMPERMISSIBLY FAILED TO GIVE GLOBALSTAR ADEQUATE NOTICE OF ITS INTERPRETATION OF THE REQUIREMENTS IMPOSED BY GLOBALSTAR'S FIRST IMPLEMENTATION MILESTONE**

The Bureau failed to provide Globalstar with adequate notice of the standard that it would use to adjudicate Globalstar's compliance with the first implementation milestone set forth in Globalstar's License, which impermissibly violated Globalstar's right to administrative due process and constituted arbitrary and capricious decision making in violation of Section 706 of the APA. The courts have been very clear that due process protections require administrative agencies such as the Commission to provide regulated entities with constitutionally adequate notice of the agencies' interpretations of their rules if application of the rules subjects the entities to sanctions.<sup>12</sup> According to the courts:

Traditional 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. . . . The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, *it must give full notice of its interpretation.*<sup>13</sup>

The Bureau's determination that Globalstar was required to execute a satellite construction contract that contained construction milestones aligned with Globalstar's future implementation milestones represented a novel standard for the adjudication of milestone compliance. Consequently, it is a violation of Globalstar's right to administrative due process

---

<sup>12</sup> See *Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 528 F.2d 645, 649 (5th Cir. 1976) ("If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.") (citations omitted).

<sup>13</sup> See *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3, 7 (D.C. Cir. 1987) (holding that dismissal of a license is "a sufficiently grave sanction to trigger this duty to provide clear notice") (emphasis added).

for the Bureau to cause the cancellation of Globalstar's 2 GHz license based on this interpretation of Globalstar's first implementation milestone.<sup>14</sup>

Globalstar's first implementation milestone merely states that Globalstar is required to "[e]nter [into a] non-contingent satellite manufacturing contract for [the] GSO and NGSO components" of its proposed system.<sup>15</sup> Globalstar's Contract is non-contingent and the Bureau does not assert otherwise anywhere in the *MO&O*. Instead, the Bureau argues that it has a policy that, although not referenced in any way in the text of the milestone, nevertheless requires Globalstar's Contract to mandate the construction of its satellites in strict conformance with future implementation milestones. The Bureau does not assert that this policy is stated anywhere in the Commission's rules, Globalstar's License, or in the Bureau order issuing the License. Rather, the Bureau cites a single sentence of dicta in *Mobile Communications Holdings, Inc.* ("*MCHI Order*"),<sup>16</sup> which was released just one month before Globalstar's Contract was due. This single sentence in the *MCHI Order* does not constitute constitutionally adequate notice of the Bureau's purported policy sufficient to justify effectively canceling the License that Globalstar devoted significant resources to obtain over the past six years.

---

<sup>14</sup> See, e.g., *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 619, 628 (D.C. Cir. 2000) (vacating denial of license renewal application because FCC rule was not "ascertainably certain" and could not be applied against applicant); *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) ("The less forgiving the FCC's acceptability standard, the more precise its requirements must be."); *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968) ("When the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration").

<sup>15</sup> See *MO&O*, ¶ 60.

<sup>16</sup> See *Mobile Communications Holdings, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 11898, ¶ 11 & n.24 (IB 2002).

In the *MCHI Order*, which was released just one month prior to Globalstar's first implementation milestone deadline,<sup>17</sup> the Bureau did not hold that MCHI failed to incorporate into its satellite contract construction deadlines that mirror its implementation milestones. In fact, the Commission does not even substantively discuss the construction schedule contained in MCHI's contract. Instead, the Bureau very clearly held that MCHI's contract did not satisfy the first implementation milestone because the contract only required the construction of 2 of MCHI's proposed 14 satellites.<sup>18</sup> The Bureau's assertion in its *MO&O* that it has a policy requiring a satellite contract to contain construction milestones that correlate with a licensee's implementation milestones rests entirely on a footnote to a single sentence of dicta buried in the *MCHI Order* that states that satellite contracts are required to include a construction schedule consistent with the licensee's milestone schedule.<sup>19</sup>

However, even the decisions cited in the footnote do not support this proposition. The *MCHI Order* cites to *EchoStar Satellite Corporation* ("*EchoStar Order*")<sup>20</sup> and *Tempo*

---

<sup>17</sup> Given the incredible complexity and time required to negotiate satellite construction contracts (Globalstar's Contract is approximately 200 pages long and calls for the expenditure of several billion dollars), even if the policy claimed by the Bureau to be established by the *MCHI Order* was clearly articulated in the order, one month's prior notice of the policy is not sufficient to constitute constitutionally adequate notice.

<sup>18</sup> See *MCHI Order*, ¶ 10 ("Thus, instead of demonstrating that it made a binding contractual commitment to pay for full construction of the other *fourteen ELLIPSO satellites*, MCHI is asking us to rule that it met the milestone requirement to commence constructing them by signing a contract that expressly provided only for the construction and delivery of the *first two satellites*." (emphasis added)).

<sup>19</sup> *MO&O*, ¶ 6 n.3 (citing *MCHI Order*, ¶ 11).

<sup>20</sup> *Application of EchoStar Satellite Corporation for Assignment of Direct Broadcast Satellite Orbital Positions and Channels*, Memorandum Opinion and Order, 7 FCC Rcd 1765 (1992).

*Enterprises, Inc.* (“*Tempo Order*”),<sup>21</sup> both of which are Direct Broadcast Satellite (“DBS”) decisions. Although both decisions note in passing that DBS satellite construction contracts are required generally to contain, *inter alia*, construction and payment schedules, neither decision states that these schedules are required to be related to applicable implementation milestones.<sup>22</sup> In the *EchoStar Order*, the Commission adjudicated challenges to construction contracts relevant to two distinct DBS permits. The Commission denied a multi-faceted challenge to one EchoStar DBS permit by holding that the relevant construction contract qualified as non-contingent.<sup>23</sup> With respect to the other DBS permit, the Commission held that EchoStar’s “option” to purchase a satellite was insufficient to qualify as a construction contract in satisfaction of the due diligence requirement.<sup>24</sup>

Similarly, in the relevant portion of the *Tempo Order*, the Commission merely finds that Tempo satisfied its first due diligence requirement by entering into an appropriate satellite construction contract. Although the Commission notes that the contract contains reasonable payment and construction schedules, it does not apply any cognizable policy or analysis to its

---

<sup>21</sup> *Application of Tempo Enterprises, Inc.*, Memorandum Opinion and Order, 1 FCC Rcd 20 (1986).

<sup>22</sup> In fact, at the time that these decisions were issued, unlike MSS licensees, DBS permittees were not subject to a series of implementation milestones. Instead, DBS permittees were required by the FCC’s rules to comply with only two “due diligence” requirements—(i) to enter into a non-contingent satellite construction contract within one year of obtaining an initial permit, and (ii) to deploy an operational system within six years of obtaining the permit. *See* 47 C.F.R. § 25.148(b)(1). Subsequent to the *EchoStar Order* and *Tempo Order*, the Commission added a third due diligence requirement mandating that DBS permittees complete construction of their first satellite within four years of obtaining their permit. *See* 47 C.F.R. § 25.148(b)(2).

<sup>23</sup> *See EchoStar Order*, ¶ 26.

<sup>24</sup> *Id.*

mention of these schedules. Ultimately, neither of these DBS decisions set forth the policy attributed to the decisions by the Bureau.

Similarly, in *Morning Star Satellite Company, L.L.C. ("Morning Star Order")*,<sup>25</sup> the Commission cancelled Morning Star's Ka-band satellite license for failure to timely execute a non-contingent construction contract in compliance with its first implementation milestone. The Commission held both that Morning Star executed its satellite construction contract one month after the applicable deadline and that the contract was contingent because it contained "no terms that indicated a binding commitment for satellite construction."<sup>26</sup> By contrast, Globalstar's construction contract was timely executed and is non-contingent. The Commission does not state anywhere in its *Morning Star Order* that the construction schedule in a satellite construction contract must match implementation milestones.

There is an obvious alternative to the Bureau's novel interpretation of Globalstar's first implementation milestone. The first milestone means exactly what it says—Globalstar was required merely to enter into a non-contingent satellite construction contract by the applicable July 17, 2002, deadline. There is no disputing, and the Bureau does not dispute, that Globalstar's Contract is non-contingent. The Contract requires Loral to construct Globalstar's proposed MSS system and Globalstar is required to pay Loral to do so. Therefore, Globalstar satisfied its first implementation milestone.

---

<sup>25</sup> See *Morning Star Satellite Company, L.L.C.*, Memorandum Opinion and Order, 16 FCC Rcd 11550 (2001).

<sup>26</sup> *Morning Star Order*, ¶ 5. Specifically, the Commission noted that the contract was completely devoid of a construction schedule or payment schedule. *Id.*

The future milestones are just that—*future* milestones. They are intended only to set deadlines by which Globalstar must comply with later implementation milestones and do not establish additional criteria by which Globalstar’s compliance with its first implementation milestone should be judged. They are not relevant to whether Globalstar complied with its first implementation milestone because they have not yet occurred. This in no way prevents the Commission from strictly enforcing in the future that Globalstar comply with its future milestones by “construct[ing], launch[ing], and plac[ing] into operation [its proposed MSS system] in accordance with the technical parameters and terms and conditions of the [License].”<sup>27</sup> Instead, the Bureau effectively canceled Globalstar’s License based solely on speculation that Globalstar will not comply with requirements that have not yet vested. This result is arbitrary and capricious and should be overturned by the Commission.

As explained above, Globalstar requested the Bureau to modify its License to permit Globalstar to delay construction of certain portions of its proposed MSS system. Globalstar’s Extension Request was intended to take into account Globalstar’s perceived future capacity needs and to ameliorate the current dearth of available financing for MSS systems. Given the FCC’s extensive record of granting satellite milestone extension requests, it does not seem at all unreasonable for Globalstar to have made such a request.<sup>28</sup> Moreover, having met its first implementation milestone, Globalstar was fully capable of amending its Contract as necessary to

---

<sup>27</sup> *MO&O*, ¶ 60.

<sup>28</sup> See, e.g., *NetSat 28 Company, L.L.C. For Authority to Construct, Launch, and Operate a Ka-Band Communications Satellite in the Fixed-Satellite Service in Orbital Location 95° W.L.*, Memorandum Opinion and Order, 16 FCC Rcd 11025 (IB 2001) (granting a milestone waiver even though the waiver was requested after the milestone had passed); *EchoStar Order*, 1771 (granting EchoStar an extension of applicable due diligence requirements); *AT&T Co. Application for Modification of Construction Permit and License for the Telstar 402 Satellite*,

(continued...)

comply with future milestones if the Bureau denied the Extension Request. However, Globalstar could not have predicted based on available precedent that the Bureau's denial of Globalstar's Extension Request would result in the invalidation of Globalstar's timely executed non-contingent satellite contract.

In summary, constitutional due process considerations prevent the Bureau from interpreting Globalstar's first implementation milestone in accordance with a purported policy that was never clearly articulated by the Commission and that was first cognizably referenced by the Bureau only a month before the application of the policy to effectively cancel Globalstar's License. By contrast, Globalstar's strategy of timely executing a non-contingent construction contract while requesting an extension of future milestones represents a patently reasonable understanding of Globalstar's obligations under the first implementation milestone in light of Commission precedent. Consequently, the Bureau's determination that Globalstar's Contract failed to satisfy Globalstar's first implementation milestone represents unreasoned decision and should be reversed.

#### **IV. THE BUREAU FAILED TO PROVIDE MEANINGFUL CONSIDERATION OF GLOBALSTAR'S WAIVER REQUEST AS REQUIRED BY LAW**

As set forth above, it was reversible error for the Bureau to determine that Globalstar failed to comply with its first implementation milestone. Even if this determination was permissible, however, the Bureau nevertheless should have granted Globalstar's Extension Request. Section 25.117(e) of the Commission's rules establishes criteria generally used by the Commission to adjudicate requests for extension of satellite implementation milestones.

---

(...continued)

Order and Authorization, 9 FCC Rcd 2607 (IB 1994) (granting a milestone extension to resolve technical problems causing satellite failures).

Globalstar explained in its Application that it satisfied these criteria and that the Bureau's finding to the contrary was arbitrary and capricious.<sup>29</sup> In an abundance of caution, however, Globalstar also requested the Commission to waive this standard if necessary to grant Globalstar's Extension Request. Remarkable, rather than address Globalstar's waiver request on its merits, the Bureau concluded without any substantive discussion that Globalstar failed to present special circumstances justifying a waiver.

This conclusory determination does not comply with the mandate of the United States Circuit Court of the District of Columbia in *WAIT Radio vs. FCC* ("*WAIT*").<sup>30</sup> In *WAIT*, the court expressly held that the Commission "must articulate with clarity and precision its findings and the reasons for its decisions"<sup>31</sup> and provide "meaningful consideration"<sup>32</sup> of waiver requests. The complete dearth of discussion of Globalstar's waiver request demonstrates that the Bureau

---

<sup>29</sup> Generally speaking, Section 25.117(e) states that requests for extensions of implementation milestones by satellite licensees must state that "the additional time is required due to unforeseeable circumstances beyond the applicant's control" and that there "are unique and overriding public interest concerns that justify an extension." Globalstar explained in its Application for Review that it satisfied the standards set forth in Section 25.117(e) in that its bankruptcy and the recent poor market for MSS both were unforeseeable circumstances which the Bureau failed to adequately consider. Accordingly, Globalstar argued that the Bureau's failure to grant Globalstar's Extension Request under Section 25.117(e) was arbitrary and capricious. *See* Application, 7-10. The Committee fully supports Globalstar's position with respect to this matter but does not restate Globalstar's arguments herein.

<sup>30</sup> *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>31</sup> *WAIT Radio*, ¶ 1 (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968): "The court's responsibility is not to supplant [a] Commission's balance of competing interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry.").

<sup>32</sup> *WAIT Radio*, ¶ 4.



did neither in its *MO&O*. Therefore the Bureau's denial of Globalstar's waiver request must be reversed as arbitrary and capricious. The Bureau acknowledges that Commission policy requires the grant of waiver requests if the requests satisfy two criteria: (i) special circumstances warrant a deviation from the general rule; and (ii) such deviation would better serve the public interest than would strict adherence to the general rule, while not undermining the policy objective of the rule in question.<sup>33</sup> As further set forth below, Globalstar's request met this standard.

#### **A. Globalstar Demonstrated Special Circumstances Justifying its Waiver Request**

The Bureau asserts that Globalstar did not demonstrate a special circumstance but entirely failed to discuss the special circumstance posited by Globalstar—the fact that it currently is in bankruptcy. Although the Bureau discussed at length its position that bankruptcy does not qualify as an unforeseeable circumstance under Section 25.117(e), the Bureau failed to consider whether bankruptcy constitutes a special circumstance with respect to application of the Commission's waiver policy. The Commission has determined in numerous contexts that the bankruptcy of a licensee constitutes a sufficient special circumstance to warrant grant of a waiver request.<sup>34</sup> For example, the Commission has created a presumption applied on a case-by-case

---

<sup>33</sup> *MO&O*, ¶ 11.

<sup>34</sup> See, e.g., *Geotek Communications, Inc.*, Order, 14 FCC Rcd 18860, ¶ 6 (WTB 1999) (granting Geotek a waiver of the deadline to file a selection as to how it will demonstrate compliance with a 900 MHz license construction requirement “[i]n light of the fact that Geotek is in bankruptcy. . . .”) (emphasis added); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, Order, 14 FCC Rcd 10735, ¶¶ 4-5 (CCB 1999) (granting a carrier a waiver of the Commission's slamming rules to change the presubscribed customers of another bankrupt carrier); *Pocket Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12968, ¶ 6 (WTB 1998) (temporarily waiving the debtor licensee's requirement to elect between disaggregation, amnesty, or prepayment to satisfy its debt to the Commission from a designated entity PCS auction in order to “promote a consensual resolution of the bankruptcy”); *Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction*, Public Notice, 1995 FCC LEXIS 3759, (continued...)

basis that it will waive its TV duopoly and TV-radio cross ownership rules to enable the purchase of a bankrupt licensee.<sup>35</sup> In addition, the Commission has a longstanding policy permitting waiver of regulatory fees for licensees in financial hardship, such as bankruptcy.<sup>36</sup> Also, on several recent occasions the Commission granted cable providers temporary waivers of its Emergency Alert System (“EAS”) rules because the cable providers were in bankruptcy and unable to finance the deployment of the necessary equipment to comply with the EAS rules.<sup>37</sup>

**B. Globalstar Will Not Warehouse Spectrum and Thus its Waiver Request Does Not Undermine the Primary Objective of the Implementation Milestones**

The Bureau did not dispute in the *MO&O* that grant of Globalstar’s waiver request does not undermine the primary policy objectives of its implementation milestone policies—the

---

(...continued)

\*10 (WTB rel. June 8, 1995) (granting a presumptive waiver of the Commission’s rule prohibiting transfer of an entrepreneurs’ block PCS licensee for three years from issuance of the license “to other qualified entrepreneurs if the licensee has made a sufficient showing of bankruptcy, foreclosure or financial distress to warrant a waiver. . . .”); *Application of King Kable, Inc.*, Order, 8 FCC Rcd 1515, ¶ 7 (MMB 1993) (waiving a cable anti-trafficking provision to enable a bankrupt assignor to prematurely sell certain cable systems).

<sup>35</sup> See 47 C.F.R. § 73.3555 note 7.

<sup>36</sup> See *Implementation of Section 9 of the Communications Act Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, Memorandum Opinion and Order, 10 FCC Rcd 12759, ¶ 13 (1995) (“We will grant waivers of the fees on a sufficient showing of financial hardship,” such as bankruptcy).

<sup>37</sup> See e.g., *Classic Communications, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 19350, ¶ 4 (EB 2002) (granting a cable provider a temporary waiver of the Commission’s Emergency Alert System rules with respect to 559 cable systems because the cable provider is in bankruptcy); *Adelphia Communications Corporation*, Order, 17 FCC Rcd 24544, ¶¶ 3-4 (EB rel. Dec. 4, 2002) (granting Adelphia a temporary waiver of the Commission’s EAS rules with respect to 65 cable systems because Adelphia’s “bankruptcy filing prevented Adelphia from pursuing its planned installation schedule for EAS equipment” and the temporary waivers “will serve the public interest by accommodating the objectives underlying the bankruptcy laws.”).

prevention of spectrum warehousing.<sup>38</sup> This policy objective is in no way undermined by grant of Globalstar's waiver request because Globalstar will fully utilize its 2 GHz MSS spectrum assignment as intended by the Commission. Although Globalstar requested milestone extensions with respect to most of its proposed MSS system, Globalstar's Contract calls for the timely deployment of a single GSO satellite in full compliance with all of the implementation milestones set forth in Globalstar's License. Globalstar explained to the Bureau in its Application that this GSO satellite will be capable of utilizing Globalstar's entire spectrum assignment to provide service to North America and the surrounding waters.<sup>39</sup> Thus, grant of Globalstar's extension request will not cause any spectrum to lie fallow.

**C. Grant of Globalstar's Waiver Request Would Better Serve the Public Interest Than Denial of the Waiver Request**

Even more fundamental than the Bureau's desire to prevent spectrum warehousing, the Commission intends through the adoption of implementation milestones, and through the very issuance of 2 GHz MSS licenses, to cause MSS applicants expeditiously to begin providing the public interest benefits associated with MSS services to consumers in the United States and worldwide. The Commission stated in 1995, when it issued service rules and a license assignment mechanism for the 2 GHz MSS allocation, that:

[t]hese satellite systems will provide new and expanded regional and global data, voice, and messaging services using the 2 GHz frequency band. . . . The 2 GHz

---

<sup>38</sup> *MO&O*, ¶ 6 (holding that the Commission adopts implementation milestones to "prevent spectrum and orbital assignments from being 'warehoused'"). Although the Bureau did not assert in the *MO&O* that Globalstar's proposed waiver request would result in spectrum warehousing, the Bureau did justify refusing to grant Globalstar's request for an extension of certain of its milestone, in part, by stating that the request "would prolong the period for which the spectrum lies fallow." *Id.* at ¶ 10. For the reasons discussed above in the text, this Bureau assertion is factually inaccurate.

<sup>39</sup> Application, 8-10.

MSS systems also will enhance competition in mobile satellite and terrestrial communications services, and complement wireless service offerings through expanded geographic coverage. 2 GHz MSS systems will thereby promote development of regional and global communications to unserved communities in the United States, its territories and possessions, including rural and Native American areas, as well as worldwide.<sup>40</sup>

Denial of Globalstar's waiver request and the resulting cancellation of Globalstar's License prevents Globalstar from offering these substantial public interest benefits without offering any concomitant public interest benefit to the American public. By contrast, grant of the waiver and modification of Globalstar's license to extend its implementation milestones permits an additional MSS licensee to compete in the nascent MSS market.

**V. THE BUREAU IMPERMISSIBLY DISCRIMINATED AMONG SIMILARLY SITUATED LICENSEES IN ADJUDICATING COMPLIANCE WITH ITS 2 GHZ MSS IMPLEMENTATION MILESTONES**

The Bureau's decision to deny Globalstar's Extension Request, and thereby effectively cancel its License, impermissibly treats Globalstar differently from similarly situated 2 GHz MSS licensees. As explained above, Globalstar's Contract calls for Globalstar to deploy a GSO satellite in full compliance with all applicable GSO implementation milestones and ensures that Globalstar will make full use of its assigned spectrum from the date by which Globalstar is required to deploy its MSS system. As a result, during the period that Globalstar is operating its GSO satellite in compliance with applicable milestones, but has not yet launched the remainder of its proposed system, Globalstar's deployed system will be indistinguishable for milestone compliance purposes from the MSS system proposed by Celsat America, Inc. ("Celsat"), which proposed to deploy only a single GSO satellite.<sup>41</sup> Despite this, the Bureau affirmed the

---

<sup>40</sup> *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, 15 FCC Rcd 16127, ¶ 1 (2000).

<sup>41</sup> *See Celsat America, Inc.*, Order, 16 FCC Rcd 13712, ¶ 1 (IB 2001).

compliance of Celsat's satellite construction contract<sup>42</sup> with Celsat's first implementation milestone while determining that Globalstar's Contract was insufficient to satisfy Globalstar's first implementation milestone.

The Commission is required to treat similarly situated licensees equivalently or to explicitly justify why it failed to do so.<sup>43</sup> Thus, the Bureau was barred from treating Globalstar and Celsat in diametrically different ways, especially given that the Bureau did not offer any justification for doing so. As of July 17, 2007 (i.e., 72 months after issuance of the 2 GHz MSS licenses—the deadline for compliance with the final GSO implementation milestone), both Globalstar and Celsat would have commenced serving the United States from a single GSO satellite using their respective spectrum assignments. The Bureau simply cannot justify affirming Celsat's implementation milestone certification while effectively canceling Globalstar's license, even though both licensees filed satellite construction contracts calling for the launch of very similar facilities in the same time frame.

Moreover, under the Commission's *Teledesic* decision,<sup>44</sup> the Commission permits satellite licensees to substantially reduce the number of satellites authorized by their license

---

<sup>42</sup> See *Satellite Division Information: 2 GHz MSS Systems in Compliance with First Milestone Requirement*, Public Notice, 18 FCC Rcd 1732 (2003) (holding that the satellite construction contract submitted by Celsat to the Commission satisfies Celsat's first implementation milestone).

<sup>43</sup> See *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965) (holding that the Commission's failure to "explain its different treatment" of similarly situated licensees constituted "error").

<sup>44</sup> *Application of Teledesic LLC, For Minor Modification of License to Construct, Launch and Operate a Non-Geostationary Fixed-Satellite Service System*, 14 FCC Rcd 2261 (IB 1999)  
(continued...)

through a minor modification if doing so does not pose any new interference concerns. Therefore, had Globalstar's license not effectively been cancelled by the Bureau, Globalstar could have filed a minor modification to its license to reduce its licensed system to a single GSO satellite, much like Celsat's licensed system. As a result, the construction schedule set forth in Globalstar's Contract would required Loral to deploy Globalstar's entire licensed system in compliance with all of Globalstar's future implementation milestones. Globalstar should not be penalized for proposing to launch, *in addition to its first GSO satellite*, three more GSO satellites and a constellation of NGSO satellites. Rather than sanctioning Globalstar for having the ambition to attempt to deploy a worldwide MSS system, the public interest requires the Bureau to apply its rules flexibly to encourage proposals such as Globalstar's.

## **VI. THE COMMISSION IS STATUTORILY BARRED FROM CANCELING GLOBALSTAR'S LICENSE WITHOUT A HEARING**

Section 312(c) of the Communications Act, as amended, prohibits the Commission from revoking a license without first serving upon the licensee an order to show cause why the license is not subject to revocation and first providing the licensee with an opportunity to present evidence why its license should not be revoked.<sup>45</sup> In a recent decision related to the FCC's cancellation of Nextwave's PCS licenses, the court held that automatic license cancellation for failure to comply with license terms has the same "effect" as formal license revocation by Commission action.<sup>46</sup> In fact, the court found that the FCC's issuance of a public notice

---

(...continued)

(authorizing Teledesic to reduce its proposed satellite constellation from 840 satellites to 208 satellites through a minor modification of its license).

<sup>45</sup> 47 U.S.C. § 312(c).

<sup>46</sup> See *Nextwave Personal Communications Inc. v. FCC*, 254 F.3d 130, 140 (D.C. Cir. 2001).

announcing the automatic cancellation of a license pursuant to the license's terms qualifies as a regulatory event capable of being judicially reviewed. This is true even if the automatic cancellation purportedly occurred long before the issuance of the public notice and, as a result, the period of time to challenge the automatic cancellation already expired if measured by the purported date of the automatic cancellation.

Thus, the Bureau's determination that Globalstar's License automatically cancelled pursuant to its term on July 17, 2002, when, according to the Bureau, Globalstar failed to satisfy its first implementation milestone, is tantamount to a revocation of the License by the Bureau under Section 312 of the Communications Act. As such, Section 312 provides an absolute bar to the Bureau's cancellation of the license prior to providing Globalstar with a show cause order and an opportunity for a hearing to respond to the Bureau's allegations.

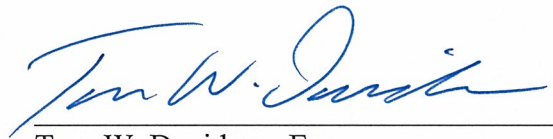
## **VII. CONCLUSION**

For the reasons set forth herein, the Committee respectfully requests the Commission to review and reverse the Bureau's *MO&O Order*. In its *MO&O*, the Bureau impermissibly violated Globalstar's right to administrative due process and utilized arbitrary and capricious decision making in violation of Section 706 of the APA by failing to provide Globalstar with adequate notice of the standard that it would use to adjudicate Globalstar's compliance with the first implementation milestone set forth in Globalstar's License. In addition, the Bureau failed to provide meaningful consideration of Globalstar's request for waiver of Section 25.117(e)'s standard for the grant of a satellite milestone extension request. The Bureau also impermissibly treated Globalstar differently than similarly situated licensees in a manner highly adverse to Globalstar. Finally, the Bureau effectively revoked Globalstar's License without providing Globalstar with an opportunity to formally respond to the Commission's purported grounds for

the revocation, as required by Section 312(c) of the Communications Act . Each of these claims is in conflict with “statute, regulation, case precedent, or established Commission policy” and thus should be reversed by the Commission under Section 1.115(b)(2)(i).

Respectfully submitted,

OFFICIAL CREDITORS COMMITTEE OF  
GLOBALSTAR, L.P.

A handwritten signature in blue ink, appearing to read "Tom W. Davidson", is written over a horizontal line.

Tom W. Davidson, Esq.  
Phil Marchesiello, Esq.  
AKIN, GUMP, STRAUSS, HAUER  
& FELD, L.L.P.

1676 International Drive  
McLean, VA 22012  
703-891-7540

Its Attorneys

March 18, 2003



## CERTIFICATE OF SERVICE

I, Judie Johnson, hereby certify that I have on this 18th day of March, 2003, caused to be served true and correct copies of the foregoing “Comments in Support of Emergency Application for Review” upon the following persons via hand delivery (marked with an asterisk (\*)) or first-class United States mail, postage prepaid:

The Honorable Michael K. Powell \*  
Chairman  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

The Honorable Kathleen Q. Abernathy \*  
Commissioner  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

The Honorable Michael Copps \*  
Commissioner  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

The Honorable Kevin Martin \*  
Commissioner  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

The Honorable Jonathan S. Adelstein \*  
Commissioner  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

John Rogovin \*  
Office of General Counsel  
Federal Communications Commission  
445 12th Street, S.W., Room 6-A665  
Washington, D.C. 20554

Donald Abelson \*  
International Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 6-C750  
Washington, D.C. 20554

Thomas S. Tycz \*  
International Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 6-A665  
Washington, D.C. 20554

Karl A. Kensinger \*  
International Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 6-A663  
Washington, D.C. 20554

Howard Griboff \*  
International Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 6-C467  
Washington, D.C. 20554

Fern J. Jarmulnek \*  
International Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Joseph A. Godles  
Goldberg, Godles, Wiener & Wright  
1229 19th Street, N.W.  
Washington, D.C. 20036

Cassandra Thomas \*  
International Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

William D. Wallace  
Crowell & Moring, LLP  
1001 Pennsylvania Avenue, NW  
Washington, DC 20004-2595



---

Judie Johnson