

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
NETSAT 28 COMPANY, L.L.C.)	File No. SAT-MOD-20040514-00092;
)	SAT-MOD-20030829-00290;
Application for Modification of Ka-Band)	SAT-LOA-19950929-00150
Space Station Authorization)	
)	Call Sign S2204

MEMORANDUM OPINION AND ORDER

Adopted: September 7, 2004

Released: September 9, 2004

By the Chief, International Bureau:

I. INTRODUCTION

1. By this Order, we deny the application of NetSat 28 Company, L.L.C. (NetSat 28) to extend or waive its construction completion and launch milestones for its satellite system in the Ka-band.¹ NetSat 28 has not met the milestone conditions of its authorization and has not justified an extension or waiver of these milestones. NetSat 28's failure to comply with the milestone conditions of its license renders its authorization null and void according to the terms of its license and the Commission's rules. Accordingly, the 95° W.L. orbit location and associated Ka-band frequencies that had been assigned to NetSat 28 are available for reassignment.

II. BACKGROUND

A. Initial Authorization

2. In May 1997, the International Bureau (Bureau) authorized NetSat 28 to construct, launch, and operate a single geostationary-satellite orbit (GSO) satellite at the 95° W.L. orbit location to provide fixed-satellite service (FSS) in the United States in the 19.7-20.2 GHz (downlink) and 28.35-28.6 GHz and 29.25-30.0 GHz (uplink) frequency bands.² This authorization was granted as part of the first "processing round" of Ka-band systems, in which the Bureau authorized a total of thirteen Ka-band systems, including NetSat 28's system.³ NetSat 28's authorization is conditioned on NetSat 28 meeting the following explicit construction and launch commitments, or "milestones":

¹ NetSat 28 Company, L.L.C., Application for Modification of Ka-band Space Station Authorization, File No. SAT-MOD-20030829-00290 (filed Aug. 29, 2003) (August 29 Modification Application). The term "Ka-band" generally refers to the space-to-earth (downlink) frequencies at 17.7-20.2 GHz and the corresponding earth-to-space (uplink) frequencies at 27.5-30.0 GHz. NetSat 28 was authorized to operate in a portion of these frequencies, as indicated herein.

² NetSat 28 Company, L.L.C., *Order and Authorization*, 13 FCC Rcd 1392 (Int'l Bur. 1997) (*Authorization Order*).

³ See Assignment of Orbital Locations to Space Stations in the Ka-band, *Order*, 11 FCC Rcd 13737 (Int'l Bur. 1996).

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

As clearly stated in the license and the Commission's rules, NetSat 28's authorization automatically becomes null and void if these milestone requirements are not met, unless an extension is granted by the Commission.⁴

B. Transfer of Control / Cancellation of License

3. In July 1999, NetSat 28 filed an application seeking authority to transfer control of its Ka-band license to EMS Technologies, Inc. (EMS).⁵ As part of its review of NetSat 28's transfer of control application, the Bureau requested that NetSat 28 provide a copy of its satellite construction contract in order to determine whether NetSat 28 had met its May 1998 construction commencement milestone by executing a non-contingent construction contract.⁶ In response to the Bureau's request, NetSat 28 supplied a contract that took effect on December 17, 1999 – approximately eighteen months after the expiration of NetSat 28's construction commencement milestone. NetSat 28 had not requested an extension of its construction commencement milestone, and the record at that time did not provide any basis for extending or waiving that milestone. In June 2000, the Bureau determined that NetSat 28 had not met the milestone condition of its authorization and declared NetSat 28's Ka-band authorization null and void.⁷ The Bureau also dismissed NetSat 28's transfer of control application as moot.⁸

C. Reinstatement / Grant of Transfer

4. In July 2000, NetSat 28 sought review of the Bureau's *Revocation Order*⁹ and also filed a petition for emergency stay of that order.¹⁰ While these matters were pending, NetSat 28 petitioned for waiver of the construction commencement milestone and for an extension of its other remaining milestones.¹¹ NetSat 28 asserted that it had provided "good cause" for a waiver of the construction

⁴ *Authorization Order*, 13 FCC Rcd at 1403 (para. 31); 47 C.F.R. § 25.145(f).

⁵ NetSat 28 Transfer of Control Application, File No. SAT-T/C-19990727-00080 (filed June 27, 1999) (Transfer Application). The Transfer Application was subsequently amended on October 7, 1999 (October 7 Amendment). The October 7 Amendment was placed on notice for comment by the public. See Satellite Policy Branch Information, Public Notice, SAT-00030 (rel. Dec. 23, 1999).

⁶ Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, FCC, to Albert Shuldiner, Esq., Vinson & Elkins, L.L.P., Counsel for NetSat 28, dated Dec. 9, 1999 (File No. SAT-T/C-19990727-00080).

⁷ NetSat 28 Company, L.L.C., *Memorandum Opinion and Order*, 15 FCC Rcd 11321, 11323 (para. 7) (Int'l Bur. 2000) (*Cancellation Order*). As a result, the Bureau stated that the orbital assignment granted to NetSat 28 was available for reassignment. See *id.* at 11324 (para. 12).

⁸ *Id.* at 11323 (para. 9).

⁹ NetSat 28 Company, L.L.C., Application for Review, File Nos. SAT-LOA-19950429-00150 and SAT-T/C-19990727-00080 (filed July 26, 2000).

¹⁰ NetSat 28 Company, L.L.C., Emergency Motion for Stay, File Nos. SAT-LOA-19950429-00150 and SAT-T/C-19990727-00080 (filed Aug. 22, 2000).

¹¹ NetSat 28 Company, L.L.C., Petition for Waiver, File No. SAT-LOA-19950429-00150 (filed December 15, 2000) (Waiver Petition).

commencement milestone within the meaning of the Commission's rules.¹²

5. On May 25, 2001, the Bureau granted NetSat 28's request for waiver of the construction commencement milestone and reinstated NetSat 28's Ka-band authorization.¹³ The Bureau found that there were special circumstances that constituted good cause to support both the grant of NetSat 28's construction commencement milestone waiver request and the reinstatement of NetSat 28's Ka-band authorization.¹⁴ The Bureau further dismissed NetSat 28's pending stay request as moot¹⁵ and determined that the transfer of control application filed by NetSat 28 could be considered in a separate decision.¹⁶ The Bureau also extended NetSat 28's remaining construction milestones and conditioned reinstatement of NetSat 28's authorization on NetSat 28 meeting the following milestones:¹⁷

<u>Complete Construction</u>	<u>Launch</u>
August 2003	September 2003

6. Following the reinstatement of NetSat 28's authorization and extension of NetSat 28's milestone requirements, the Bureau separately considered NetSat 28's application to transfer control of its Ka-band authorization to EMS. On July 26, 2001, the Bureau approved the transfer of control of NetSat 28's Ka-band authorization to EMS.¹⁸

D. Application for Modification

7. On August 29, 2003, NetSat 28 applied for a modification of its Ka-band space station authorization to add a second satellite to its existing 95° W.L. orbital location.¹⁹ As part of this modification application, NetSat 28 also sought to extend the construction completion and launch milestones of its existing Ka-band authorization at 95° W.L. until June 2005 and July 2006, respectively.²⁰ The Bureau determined that the portion of the application to add a second satellite failed to provide the technical showing required under the Commission's rules and dismissed that portion of the application as defective.²¹ The Bureau found, however, that NetSat 28's milestone extension request

¹² See *id.* at 2 (citing 47 C.F.R. § 1.3).

¹³ NetSat 28 Company, L.L.C., *Memorandum Opinion and Order*, 16 FCC Rcd 11025 (Int'l Bur. 2001) (*Waiver & Reinstatement Order*).

¹⁴ As discussed below in paragraph 21, the Commission found that NetSat 28 faced difficulty in raising financing as a direct result of a Commission Order that the Commission later determined was overbroad. Because NetSat 28 faced hardship as a consequence of a Commission action, the Bureau found that equity considerations weighed in favor of granting NetSat 28 a waiver of its construction commencement milestone and reinstatement of its authorization. See *Waiver & Reinstatement Order*, 16 FCC Rcd at 11028-29 (para. 9).

¹⁵ *Id.* at 11032 (para. 23).

¹⁶ *Id.* at 11032 (para. 24).

¹⁷ *Id.* at 11033 (para. 29).

¹⁸ NetSat 28 Company, L.L.C., *Memorandum Opinion and Order*, 16 FCC Rcd 14471 (Int'l Bur. 2001) (*Transfer of Control Order*). For the sake of consistency, however, we will refer to the licensee as "NetSat 28" throughout this Order.

¹⁹ See August 29 Modification Application.

²⁰ See *id.* at 45-57.

²¹ Letter from Thomas S. Tycz, Chief, Satellite Division, FCC, to Robert A. Mazer, Counsel for NetSat 28 Company, L.L.C., DA 03-4043, dated Dec. 19, 2003 (File No. SAT-MOD-20030829-00290). On May 14, 2004, (continued....)

could be addressed separately from the other aspects of the modification application, and placed the extension request on public notice.²² No comments were filed in response to the public notice.

III. DISCUSSION

8. It is longstanding Commission policy to impose milestones for satellite system implementation upon licensees.²³ Milestone schedules are designed to ensure that licensees are proceeding with construction and will launch their satellites in a timely manner, and that the orbit spectrum resource is not being held by licensees unable or unwilling to proceed with their plans.²⁴ Milestones ensure speedy delivery of service to the public and prevent warehousing of valuable orbit locations and spectrum, by requiring licensees to begin operation within a certain time.²⁵ Warehousing could hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately with the construction and launch of their satellite systems.²⁶ Moreover, warehousing undercuts decisions by the Commission to allocate scarce spectrum resources to satellite services over other competing services.

(...continued from previous page)

NetSat 28 re-filed its modification application to provide the technical showing that the Bureau found lacking in its previous modification request. See NetSat 28 Company, L.L.C., Application for Modification of Ka-band Space Station Authorization, File No. SAT-MOD-2003040514-00092 (filed May 14, 2004) (May 14 Modification Application). Given that NetSat 28 has failed to meet the milestone conditions upon which its authorization was conditioned, and in light of the failure of NetSat 28 to justify either an extension or waiver of the milestone conditions of its authorization, we find that NetSat 28's authority to operate a Ka-band system at 95° W.L. is null and void. Accordingly, there is no authorization to modify, and we dismiss NetSat 28's May 14 Modification Application as moot.

²² Satellite Policy Branch Information, *Public Notice*, Report No. SAT-00182 (rel. Dec. 23, 2003).

²³ See, e.g., Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites, *Report and Order*, 90 F.C.C.2d 676, 719 (para. 114) (1982) (adopting rule requiring DBS licensees to "begin construction or complete contracting for construction" of satellites within one year after receiving construction permits), and MCI Communications Corp., *Memorandum Opinion and Order*, 2 FCC Rcd 233, 233 (para. 5) (Com. Car. Bur. 1987) (*MCI Order*) (noting that a milestone schedule is included in each domestic space station authorization issued by the Commission). See also Norris Satellite Communications, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 22299 (1997) (*Norris Review Order*); Morning Star Satellite Company, L.L.C., *Memorandum Opinion and Order*, 15 FCC Rcd 11350 (Int'l Bur. 2000), *aff'd*, 16 FCC Rcd 11550 (2001) (*Morning Star Reconsideration Order*).

²⁴ See, e.g., Advanced Communications Corporation, *Memorandum Opinion and Order*, 10 FCC Rcd 13337, 13338 (para. 4) (Int'l Bur. 1995) (*Advanced Order*), *aff'd*, 11 FCC Rcd 3399 (1995) (*Advanced Review Order*), *aff'd*, *Advanced Communications Corporation v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996) (unpublished order available at 1996 WL 250460); National Exchange Satellite, Inc., *Memorandum Opinion and Order*, 7 FCC Rcd 1990 (Com. Car. Bur. 1992) (*Nexsat Order*); AMSC Subsidiary Corp., *Memorandum Opinion and Order*, 8 FCC Rcd 4040, 4042 (para. 13) (1993) (*AMSC Order*); Motorola, Inc. and Teledesic LLC, *Memorandum Opinion and Order*, 17 FCC Rcd 16543 (Int'l Bur. 2002) (*Motorola/Teledesic Order*).

²⁵ See The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band, *Report and Order*, IB Docket No. 99-81, 15 FCC Rcd 16127, 16177 (para. 106) (2000). See also Columbia Communications Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd 15566, 15571 (para. 11) (Int'l Bur. 2000) (*First Columbia Milestone Order*).

²⁶ Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order*, IB Docket No. 02-34, 18 FCC Rcd 10760, 10827 (para. 173) (2003) (*First Space Station Reform Order*), citing *PanAmSat Ka-Band License Revocation Review Order*, 16 FCC Rcd at 11537-38 (para. 12), citing *Nexsat Order*, 7 FCC Rcd at 1991 (para. 8); *MCI Order*, 2 FCC Rcd at 233 (para. 5); *First Columbia Milestone Order*, 15 FCC Rcd at 15571 (para. 11).

A. Request to Extend Milestones

9. NetSat 28 seeks to extend the construction milestones upon which its authorization is conditioned. The standard that licensees must meet to justify a milestone extension request is well-established. Generally, we grant milestone extensions to FSS licensees only when the delay in implementation is due to extraordinary circumstances beyond the control of the licensee,²⁷ or when there are unique and overriding public interest concerns that justify an extension.²⁸ NetSat 28 advances four reasons to justify its request for an extension of its construction completion and launch milestones. For the reasons discussed below, we find that none of NetSat 28's proposed reasons justifies an extension of NetSat 28's milestones.

1. Modification of Satellite System

10. First, NetSat 28 asserts that an extension of its existing milestones is required to complete and implement technical changes to its system that are necessitated by NetSat 28's decision to add a second satellite to its system.²⁹ The Commission has repeatedly held, however, that a decision to modify an authorization does not justify extension of a licensee's milestones.³⁰ Decisions to incorporate additional technological capabilities into a satellite are business decisions within the control of the licensee, and therefore cannot justify a milestone extension.³¹ Extending milestones on this basis would allow licensees to extend indefinitely their nonperformance by repeated modification of their proposals, which could in turn facilitate warehousing of scarce orbital resources or, at a minimum, delay service to the public.³² Thus, NetSat 28's decision to modify its space station authorization to add a second satellite does not justify an extension of its existing milestones.

2. Prior Revocation of Authorization

11. NetSat 28 also argues that the cancellation and reinstatement of its license by the Bureau, and the resulting delay in the grant of its application to transfer control of its license to a new investor,

²⁷ 47 C.F.R. § 25.117(c)(1). See also *INTELSAT LLC, Order and Authorization*, 17 FCC Rcd 2391, 2392 (para. 5) (Int'l Bur. 2002); *Columbia Communications Corporation, Memorandum Opinion and Order*, 15 FCC Rcd 16496, 16497 (para. 5) (Int'l Bur. 2000) (*Second Columbia Milestone Order*); *Nexsat Order*, 7 FCC Rcd at 1991 (para. 8); *Hughes R and Galaxy A-R Domestic Fixed-Satellites, Order and Authorization*, 5 FCC Rcd 3423, 3424 (para. 11) (Com. Car. Bur. 1990); *MCI Order*, 2 FCC Rcd at 233 (para. 5).

²⁸ 47 C.F.R. § 25.117(c)(2).

²⁹ See August 29 Modification Application at 45, 50. As stated in Section II above, the Satellite Division has dismissed NetSat 28's application to add a second satellite as defective. See Letter from Thomas S. Tycz, Chief, Satellite Division, to Robert A. Mazer, Counsel to NetSat, File No. SAT-MOD-20030829-00290 (dated December 19, 2003). Although NetSat 28 has subsequently refiled its application to add a second satellite, this fact does not change the reasoning in our decision today.

³⁰ See, e.g., *PanAmSat Licensee Corp., Memorandum Opinion and Order*, 16 FCC Rcd 11534, 11538 (para. 13) (2001) (*PanAmSat Order*), citing *American Telephone and Telegraph Company, Memorandum Opinion and Order*, 2 FCC Rcd 4431, 4435 (paras. 30-31) (1987) (*AT&T Order*) and *Advanced Review Order*, 11 FCC Rcd at 3412 (paras. 30-32).

³¹ See *PanAmSat Order*, 16 FCC Rcd at 11543 (para. 25); *AT&T Order*, 2 FCC Rcd at 4435 (paras. 30-31); *EarthWatch Inc., Order and Authorization*, 15 FCC Rcd 18725, 18728 (para. 9) (Sat. and Radiocomm. Div. 2000) (*EarthWatch Order*).

³² See *PanAmSat Order*, 16 FCC Rcd at 11543 (para. 25). See also *Advanced Order*, 10 FCC Rcd at 13341 (para. 14); *Tempo Enterprises, Inc., Memorandum Opinion and Order*, 1 FCC Rcd 20 (1986) (*Tempo Order*); *First Columbia Milestone Order*, 15 FCC Rcd at 15571-72 (para. 12).

justifies a further extension of its existing milestones.³³ NetSat 28 asserts that, prior to the revocation of its authorization, it was prepared to proceed with the construction of its satellite and that sufficient financial resources had been committed to begin actual construction of the satellite.³⁴ NetSat 28 claims that the revocation of its authorization resulted in its financing being put on hold and in the diversion of its management's efforts away from fundraising and program management to seeking reinstatement of its authorization.³⁵ NetSat 28 claims that this set of circumstances was highly unusual and was beyond NetSat 28's ability to control.³⁶

12. NetSat 28's argument is without merit. When the Bureau reinstated NetSat 28's authorization in May 2001, it also extended NetSat 28's construction completion and launch milestones by 16 months in order to account for the approximately ten months that had passed since the Bureau cancelled NetSat 28's license, plus an additional two months to reassemble NetSat 28's construction team and an additional four months to account for the time that had passed since NetSat 28 filed its petition to reinstate its authorization.³⁷ This 16-month extension was greater than the 12-month extension NetSat 28 itself stated was necessary to remedy the cancellation of its authorization.³⁸ Thus, any delay or setback in the construction of its satellite that NetSat 28 might encounter as a result of the revocation of its authorization was addressed in the Bureau's *Waiver & Reinstatement Order*. NetSat 28 has provided no new information that would justify, once again, using the Bureau's 2000 revocation and 2001 reinstatement actions as a basis for extending NetSat 28's August 2003 construction and September 2003 launch milestones.³⁹

3. Unfavorable Market Conditions

13. NetSat 28 also argues that it was prevented from meeting its milestone conditions by the unfavorable market conditions that existed after the reinstatement of its authorization in 2001.⁴⁰ NetSat 28 claims that these unfavorable market conditions resulted in its inability to raise the financing necessary to proceed with construction of its system, and that these conditions constitute an unforeseen circumstance that justifies an extension of its milestones.⁴¹

14. It is a long-standing principle in Commission cases that a failure to attract investors or an

³³ August 29 Modification Application at 45-46.

³⁴ *Id.* at 47.

³⁵ August 29 Modification Application at 47.

³⁶ August 29 Modification Application at 48.

³⁷ *Waiver & Reinstatement Order*, 16 FCC Rcd at 11032 (para. 22).

³⁸ See Waiver Petition at 6 (requesting a 12-month extension of its construction completion and launch milestones to make up for delays in system development and to reassemble construction teams).

³⁹ NetSat 28's argument that its milestones should have been extended further to account for the delay between reinstating its authorization and granting its transfer of control application is likewise without merit. See August 29 Modification Application at 54 n.26. We observe that only two months passed between the reinstatement of NetSat 28's authorization and the grant of its transfer of control application. This brief period of time in no way accounts for the additional two-year extension requested by NetSat 28 for each of its remaining milestones. Furthermore, the filing deadline for reconsideration of the length of the milestone extension granted in the 2001 *Waiver & Reinstatement Order* has long passed, and NetSat 28 cannot seek reconsideration of that extension at this late date.

⁴⁰ *Id.* at 48.

⁴¹ *Id.*

unfavorable business climate does not warrant an extension of a licensee's milestones.⁴² As the Bureau has previously reminded NetSat 28, financing usually involves business decisions wholly within the control of the licensee, and the Commission does not grant waivers or extensions of milestones based on licensees' business decisions.⁴³ Accordingly, the state of the financial markets after the reinstatement of NetSat 28's license does not justify an extension of NetSat 28's milestone obligations.

4. Public Interest Considerations

15. NetSat 28 argues that public interest considerations justify an extension of its construction milestones, even if there are no circumstances beyond its control justifying an extension. Specifically, NetSat 28 claims that an extension will allow it to provide a "unique" package of broadband and multichannel video services to the public, including those residing in rural areas, and will permit NetSat 28 to provide new competition in the multichannel video and broadband markets.⁴⁴

16. Although we recognize that promoting broadband service to rural communities is a very important policy goal,⁴⁵ we disagree with NetSat 28 that it justifies a waiver of a milestone condition. A licensee cannot justify a milestone extension by merely asserting that its proposed service is more beneficial than services that might be provided by another satellite operator.⁴⁶ Choosing to provide a particular service is clearly within the licensee's control and cannot be used as a basis for a milestone extension.⁴⁷ Furthermore, denial of NetSat 28's extension request will not harm competition in the multichannel video and broadband markets, since NetSat 28's spectrum and orbital resources will become available for reassignment to a qualified satellite license applicant that is willing and able to proceed immediately with the implementation of its system. As the Bureau has previously found, new entrants and the innovative services that they might provide are of little public value if the proposed satellite services are not predictably and promptly made available.⁴⁸ In addition, if we were to accept NetSat 28's argument that a prospective increase in competition justifies an extension of a licensee's milestones, the result would vitiate our milestone policy entirely since every authorized system has the potential to increase competition in some market.

17. We also find that NetSat 28 misplaces its reliance on our decision in the 2000 *R/L DBS Order* to extend the milestones of a direct-broadcast satellite (DBS) licensee, R/L DBS Company LLC

⁴² See Constellation Communications Holdings, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 18822 (2003) (*Constellation Review Order*); United States Satellite Broadcasting Co., *Memorandum Opinion and Order*, 3 FCC Rcd 6858, 6859 (para. 11) (1988) (*USSB Order*). See also E-SAT, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 7662 (Int'l Bur. 2003); Constellation Communications Corp., *Memorandum Opinion and Order*, 17 FCC Rcd 23489 (Int'l Bur. 2002) (*Constellation Order*); EchoStar Satellite Corp. et al., *Memorandum Opinion and Order*, 17 FCC Rcd 8831 (Int'l Bur. 2002).

⁴³ See *Waiver & Reinstatement Order*, 16 FCC Rcd at 11028 (para. 9), citing *Advanced Review Order*, 11 FCC Rcd at 3417 (para. 45); *MCI Order*, 2 FCC Rcd at 234 (para. 7); *AT&T Order*, 2 FCC Rcd at 4433-34 (paras. 21-23); *Tempo Order*, 1 FCC Rcd 20.

⁴⁴ August 29 Modification Application at 51-52.

⁴⁵ *Waiver & Reinstatement Order*, 16 FCC Rcd at 11030 (para. 18).

⁴⁶ See *id.* at 11030 (para. 18).

⁴⁷ See *id.*

⁴⁸ See Final Analysis Communication Service, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 4768, 4784-85 (para. 42) (Int'l Bur. 2004) (*Final Analysis Order*), *pet. for recon. pending*. See also *NexSat Order*, 7 FCC Rcd at 1992 (para. 11).

(R/L DBS).⁴⁹ NetSat 28 argues that, like R/L DBS, it seeks to incorporate new technology into its system design. Nothing in the *R/L DBS Order*, however, stands for the proposition that incorporation of new technology alone justifies an extension of construction milestones. Indeed, such a proposition has already been clearly rejected by the Commission.⁵⁰

18. Moreover, in the *R/L DBS Order*, the Bureau applied the “totality of the circumstances” standard used for determining whether DBS permittees have proceeded with due diligence in constructing their systems. The “totality of the circumstances” standard is used exclusively for DBS permittees and is not applicable to FSS licensees, such as NetSat 28.⁵¹ Thus, while the incorporation of new technology may be a factor in whether to extend the milestones of a DBS permittee under the totality of the circumstances standard, it does not justify an extension of the strict milestone requirements upon which FSS authorizations are conditioned.

19. Even if the totality of the circumstances standard were applicable to NetSat 28’s license, an extension of NetSat 28’s license would still not be warranted in this case. In the *R/L DBS Order*, the Bureau observed that R/L DBS’ construction permit allowed operations on only a limited number of channels at an orbital position that can serve only half of the contiguous United States.⁵² It found that R/L DBS’ incorporation of new technology would allow it to overcome these spectral and geographic limitations and implement a viable service to the public, which it might otherwise be unable to do.⁵³ By contrast, NetSat 28 is not seeking to implement new technology to overcome any geographic or spectral limitations imposed by its license; rather, it seeks to implement technological changes in support of a change in its business plan. Thus, NetSat 28’s position is not analogous to that of R/L DBS, and no extension of its milestones is justified.

B. Request to Waive Milestones

20. As an alternative to its milestone extension request, NetSat 28 urges us to waive the rules in this instance to allow NetSat 28 additional time to complete its system.⁵⁴ Section 1.3 of the Commission’s rules authorizes the Commission to waive its rules for “good cause shown.”⁵⁵ Waiver is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than would strict adherence to the general rule.⁵⁶ Circumstances justifying waiver include conditions of hardship, equity, or a more effective implementation of overall

⁴⁹ R/L DBS Company, LLC, *Memorandum Opinion and Order*, 16 FCC Rcd 9 (Int’l Bur. 2000) (*R/L DBS Order*). Although NetSat 28 cites to a 2003 decision involving the same company, *R/L DBS Company LLC*, 18 FCC Rcd 7694 (Int’l Bur. 2003), the text quoted in NetSat 28’s application belongs to the 2000 decision and is not found within the 2003 decision.

⁵⁰ See *PanAmSat Order*, 16 FCC Rcd at 11543 (para. 25); *AT&T Order*, 2 FCC Rcd at 4435 (paras. 30-31); *EarthWatch Order*, 15 FCC Rcd at 18728 (para. 9).

⁵¹ Compare 47 C.F.R. § 25.148 with § 25.164. See also Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, 17 FCC Rcd 11331, 11354 n.166 (2002) (noting the current distinction between the totality of the circumstances standard applicable to DBS permittees and the strict milestone requirements applicable to FSS licensees).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ August 29 Modification Application at 53.

⁵⁵ See Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3. See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio*); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

⁵⁶ *Northeast Cellular*, 897 F.2d at 1166.

policy.⁵⁷ Generally, the Commission may grant a waiver of its rules in a particular case only if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.⁵⁸ NetSat 28 bases its waiver request on four grounds, none of which justifies a waiver of the Commission's rules.

1. Mobile Media Proceeding

21. First, NetSat 28 argues that a waiver of its milestones is warranted because of events arising from the Commission's 1997 investigation of MobileMedia Corporation and several of its subsidiaries (MobileMedia) for allegedly misrepresenting facts in several applications for Commission licenses, which raised a question as to MobileMedia's qualifications to be a Commission licensee.⁵⁹ Because one of MobileMedia's principals was the owner of a company with ownership interests in NetSat 28, the Bureau reconsidered the authorization of NetSat 28 on its own motion and conditioned the NetSat 28 authorization on the outcome of the investigation in the MobileMedia proceeding.⁶⁰ The Commission later clarified that the allegations of lack of candor should have been limited to only four MobileMedia officers, none of which were the holder of NetSat 28 interests identified in the reconsideration of NetSat 28's authorization.⁶¹ The Bureau terminated the condition on NetSat 28's authorization in April 1998.⁶² NetSat 28 claims that the MobileMedia investigation started a cascade of events, which resulted in the cloud on its authorization, the ensuing revocation of its license, and eventual reinstatement of its authorization in a new, unfavorable financial climate.⁶³ It asserts that these events have severely hampered its program and constitute unique circumstances that have not been faced by any other licensee.⁶⁴

22. As discussed above, the Bureau has already granted NetSat 28 one waiver of its milestones based on the difficulties faced by NetSat 28 as a result of the MobileMedia investigation.⁶⁵ Given the passage of time and the action the Bureau already took to remedy any hardship from the MobileMedia investigation, we find that NetSat 28 cannot rely yet again on the MobileMedia investigation for another waiver of its milestone obligations.

2. Parity with Other Ka-band Licensees

23. NetSat 28 also claims that a waiver of its milestones is warranted in order to achieve

⁵⁷ *WAIT Radio*, 418 F.2d at 1159.

⁵⁸ *Id.* at 1157.

⁵⁹ August 29 Modification Application at 54. See also *MobileMedia Corp., Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture*, WT Docket No. 97-115, 12 FCC Rcd 14898 (1997).

⁶⁰ *NetSat 28 Company, L.L.C., Order on Reconsideration*, 12 FCC Rcd 7727 (Int'l Bur. 1997).

⁶¹ *MobileMedia Corporation, Order*, WT Docket No. 97-115, 12 FCC Rcd 11861 (1997).

⁶² *NetSat 28 Company, L.L.C., Order*, 13 FCC Rcd 16434 (Int'l Bur. 1998).

⁶³ August 29 Modification Application at 54.

⁶⁴ *Id.* at 54-55.

⁶⁵ *Waiver & Reinstatement Order*, 16 FCC Rcd at 11033 (para. 29) (ordering the extension of NetSat 28's construction completion milestone from April 2002 to August 2003, and NetSat 28's launch milestone from May 2002 to September 2003).

parity with other Ka-band licensees.⁶⁶ NetSat 28 argues that some Ka-band first round licensees received launch milestones of 2005 because their initial proposals involved the use of inter-satellite links (ISLs).⁶⁷ It observes that all these licensees have since abandoned plans to implement ISLs, and NetSat 28 is the only one with a 2003 launch milestone.⁶⁸ As a result, NetSat 28 argues that equity requires that NetSat 28 be provided the same milestones as other first-round Ka-band licensees.⁶⁹

24. We disagree that NetSat 28's position is inequitable compared to other first-round Ka-band licensees. Some of the Ka-band first round applicants proposed initially to operate ISLs among multiple satellites in a constellation.⁷⁰ The Bureau, however, deferred assigning ISL frequencies at that time because there was no suitable spectrum allocated for ISL operations.⁷¹ Consequently, the Bureau issued licenses without construction milestones to those Ka-band first round applicants requesting ISLs due to the fact that the licensees would not be able to proceed beyond the initial phases of construction until the ISL issues were resolved.⁷² Although the Bureau did not impose specific milestones at the time of authorization, it stated that it would hold the licensees to a strict milestone schedule once its ISL frequencies were authorized.⁷³ The Bureau assigned ISL frequencies in 2001 and imposed implementation milestones at that time.⁷⁴

25. The position of those licensees who were given until 2005 to complete construction of their systems is fundamentally different from that of NetSat 28. In the former instance, the Bureau deferred imposing milestones pending proceedings to allocate ISL frequencies. This delay prevented the licensees from immediately proceeding with construction of their systems and justified the later milestone deadlines. By contrast, NetSat 28 did not request ISLs as part of its system design and received all the authority it requested in 1997. This fact resulted in earlier milestones for NetSat 28 than for licensees requesting ISL frequencies to complete their systems. In both instances, however, once the licensees received all the authority necessary to build their systems, they received the same amount of time to construct their systems. Thus, there is no inequality in the milestone conditions of NetSat 28's authorization and those of Ka-band first-round licensees who requested the use of ISL frequencies.

3. No Intent to Warehouse Spectrum

26. NetSat 28 asserts that it is working diligently towards completion of its system, and that this fact justifies a waiver of its construction milestones.⁷⁵ NetSat 28 states that the public policy

⁶⁶ August 29 Modification Application at 55.

⁶⁷ *Id.* Inter-satellite links permit satellites to communicate directly with each other.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Third Report and Order*, 12 FCC Rcd, 22310, 22330 (para. 51) (1997) (*Ka-band Third Report and Order*).

⁷¹ See *id.* at 22332 (para. 55).

⁷² See, e.g., *EchoStar Satellite Corp., Order and Authorization*, 13 FCC Rcd 5664, 5672 (Int'l Bur. 1997).

⁷³ See *Ka-band Third Report and Order*, 12 FCC Rcd at 22332 (para. 55).

⁷⁴ See, e.g., *EchoStar Satellite Corp., Order and Authorization*, 16 FCC Rcd 2453 (Int'l But. 2001).

⁷⁵ August 29 Modification Application at 55.

objective of the Commission's milestone policy would not be undermined, because it is not warehousing spectrum or orbital resources. In support of this contention, NetSat 28 states that it has successfully raised capital, enlisted investors, built strategic relationships, refined its business plan, and redesigned its satellite system.⁷⁶

27. Entirely absent from NetSat 28's modification application is any evidence of actual physical construction of a satellite during the seven years since NetSat 28's authorization was first granted and almost three years since the authorization was reinstated and its transfer of control application was granted. As the Commission has previously held, preliminary efforts involving design, engineering, and business development are not substitutes for the construction and implementation of a satellite system.⁷⁷ NetSat 28 claims that its failure to implement its system is due to its inability to proceed because of the unfavorable state of the economy that existed when its authorization was reinstated. It is, however, precisely this type of inability, or unwillingness, to proceed that our milestone requirements are intended to address.⁷⁸ Because our milestone requirements are designed to ensure that scarce spectrum resources are not held by licensees unable or unwilling to proceed with their plans,⁷⁹ waiver of the NetSat 28's milestone conditions would undermine the policy objective of the Commission's milestone requirements and is thus inappropriate in this case.

4. Public Policy Objectives

28. Finally, NetSat 28 argues that grant of its waiver request will further the public policy objective of the Commission of promoting the introduction of new competitive multichannel video and broadband services. For reasons discussed previously,⁸⁰ the possibility of new competition in the multichannel video and broadband markets does not outweigh the public interest benefit in ensuring that licensees are building their systems in a timely manner and that the orbit-spectrum is not being held by licensees unable or unwilling to proceed with their plans. Thus, we conclude that waiver of NetSat 28's milestones would undermine the policy objective of our milestone requirements and must therefore be denied.

IV. CONCLUSION

29. Based on the foregoing, we conclude that NetSat 28 has failed to meet its satellite construction and launch milestones as required by its authorization, and that neither an extension of time nor a waiver of the Commission's rules is justified in this instance. Accordingly, we find that NetSat 28's failure to meet these milestones renders its authorization null and void, and that the 95° W.L. orbit location and associated Ka-band frequencies that had been assigned to NetSat 28 are available for reassignment.⁸¹

⁷⁶ *Id.*

⁷⁷ See *Advanced Review Order*, 11 FCC Rcd at 3412 (para. 31). See also *Constellation Order*, 17 FCC Rcd at 22589 (para. 11), *aff'd Constellation Review Order*, 18 FCC Rcd at 18831 (para. 18).

⁷⁸ See *Constellation Review Order*, 18 FCC Rcd at 18831 (para. 18).

⁷⁹ See, e.g., *MCI Order*, 2 FCC Rcd at 233 (para. 5).

⁸⁰ See *supra*, Section III.A.4.

⁸¹ Because there is no underlying authorization to modify as a result of this failure, we dismiss NetSat 28's May 14 Modification Application as moot.

V. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED that the request of NetSat 28 Company, L.L.C. to extend or waive its construction completion and launch milestones contained in its Application for Modification of Ka-band Space Station Authorization, File No. SAT-MOD-20030829-00290, is DENIED.

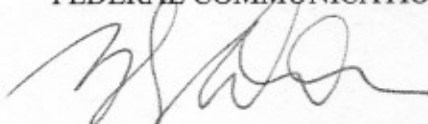
31. IT IS FURTHER ORDERED that the authorization held by NetSat 28 Company, L.L.C. to launch and operate a geostationary-satellite orbit fixed-satellite service system in the Ka-band at the 95° W.L. orbital location, File No. SAT-LOA-19950929-00150 (Call Sign: S2204), is DECLARED NULL and VOID.

32. IT IS FURTHER ORDERED that the request of NetSat 28 Company, L.L.C. to modify its authorization to launch and operate a geostationary-satellite orbit fixed-satellite service system in the Ka-band at the 95° W.L. orbital location, File No. SAT-MOD-20040514-00092, is DISMISSED as moot.

33. IT IS FURTHER ORDERED that the orbital assignment at 95° W.L. and the frequencies at 19.7-20.2 GHz (downlink) and 28.35-28.6 GHz and 29.25-30.0 GHz (uplink) granted to NetSat 28 Company, L.L.C. in 13 FCC Rcd 1392 (Int'l Bur. 1997) are available for reassignment as of 11:00 am EST on the date this Order is released.

34. This Order is issued pursuant to Section 0.261 of the Commission's rules on delegated authority, 47 C.F.R. § 0.261, and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION



Donald Abelson
Chief
International Bureau