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EX PARTE SUBMISSION

Filed Electronically

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: Petition for Reconsideration filed by AtContact Communications, LLC of
International Bureau Order DA 09-1850, Call Signs S2346, S2680, S2681, S2682, and
S2683**

Dear Ms. Dortch:

In accordance with Section 1.1206(b)(1) of the Commission's rules,¹ AtContact Communications, LLC submits this letter to supplement the record supporting its Petition for Reconsideration of International Bureau Order 09-1850.

Three pertinent factors are worth emphasizing in this proceeding. They are: the policy importance of endowing remote Alaska and other areas with broadband service; the recognition of the hurricane-strength financial crisis that has paralyzed many capital-intensive projects (but not AtContact's); and the fact that cancellation of AtContact's license is not necessary to satisfy the anti-warehousing policies informing the Commission's milestone rules, as AtContact stands in nobody's way. These factors all militate for resolving uncertain questions in favor of leniency and giving AtContact another chance. This chance can be partial. AtContact believes it will be able to move forward and accomplish its vision with a GSO-only system using only one slot – 121° W.L. – so long as its outstanding bond is not forfeited – a forfeiture that might well put AtContact out of business and bring its current Alaskan services to an end.

¹ 47 C.F.R. § 1.1206(b)(1).

Specifically, this petition for reconsideration raises several legal and factual questions. The *legal questions* include:

- whether the Bureau created a new standard for what it means to commence physical construction – as the Bureau put it, “[b]ased on our experience in reviewing milestone compliance, at this point in the construction process licensees have generally paid 25-50 percent of the total price in the manufacturing contract due to the cost of procuring parts.”²
- whether “commencement” can reasonably be read to mean being 25-50 percent of the way towards completion of the project;
- whether this decision deviates inexplicably from *Digital Globe*, where the Bureau applied the standard much more leniently;³
- whether the failure to satisfy a milestone for the NGSO portion of the system justified the draconian sanction of canceling AtContact’s license, particularly in light of the Bureau’s statement in the AtContact licensing order itself that the “[w]e will consider the NGSO and GSO portions of contactMEO’s applications separately.”⁴

The *factual questions*, in turn, include whether the evidentiary material submitted by AtContact with its petition cures the evidentiary lapses noted in the Bureau order. The Bureau faulted AtContact with not providing documentation linking the asset sales agreement for the Travelling Tube Wave Amplifiers (“TWTA”s) to its manufacturing contract with Loral; not including cancelled checks or other evidence of payments under the contract; and not providing evidence linking the photographs submitted by AtContact to its NGSO system.⁵ The declarations of Mr. Drucker, Loral’s Mr. Hoeber and by an official of AtContact’s contracting party supply illuminating evidence on each of these issues.

It is in resolving any uncertainties surrounding these questions, both legal and factual, that the three aforementioned factors are, in AtContact’s view, pertinent.

Satellite Broadband. Satellite technology has increasingly been recognized by the broadband stimulus agencies as an indispensable part of the solution to a problem that remains

² AtContact Communications, LLC, *Order*, 24 FCC Rcd. 10929, 10933 ¶ 9 (2009) (“*Nullification Order*”).

³ Digital Globe, Inc., Request for Determination of Compliance with Satellite Implementation of Milestones, File No. SAT-MOD-20040728-00151 at 7 (Oct. 2, 2006).

⁴ contactMEO Communications, LLC, *Order and Authorization*, DA 06-864 ¶ 12 (April 14, 2006) (“*Licensing Order*”).

⁵ *Nullification Order*, 24 FCC Rcd. at 10933-34 ¶¶ 11-14.

intractable in many remote areas such as the Alaskan hinterland – how to reach the broadband have-nots and have-littles.

For that reason, the RUS created, for the first time in the second Notice of Funds Availability (“NOFA”), released on January 15, 2010, a set-aside for satellite projects. As the RUS put it, “[g]iven the importance of efforts to reach unserved premises, a separate Satellite Project category has been established to reach premises left unserved by other technologies.”⁶ Within the category, one awardee is possible for each of eight U.S. regions – Alaska being one such region. AtContact is well, and indeed uniquely, positioned, to provide the kind of service envisioned by the RUS and the NTIA in Alaska.

At the January 26, 2010 meeting held between AtContact and officials from the Chairman’s office, General Counsel and International Bureau, questions arose regarding the size and scope of the stimulus grants. As for size, the satellite set-aside alone is for “[u]p to 100 million ... as well as any and all funds not obligated for Last Mile and Middle Mile projects.”⁷ This means that the set-aside would be much higher than \$100 million. Moreover, even though details are not known, nothing appears to foreclose that financing for satellite projects will also be available outside the “Satellite Projects” category (which is a grants-only category), for example in the form of a loan. As for the uses of grants under the Satellite Projects category, allowed eligible expenses under that category extend to the funding of customer-premises equipment up to \$750 per subscriber, the reduction of the monthly service cost and to the construction of the ground facilities.⁸ While these grants do not cover the construction of the satellite itself, this hardly makes them irrelevant. Such a grant can, and will, make the crucial difference between obtaining, and failing to obtain, private financing for the system. Indeed, many efforts to fund privately satellite broadband have stumbled precisely because of the high cost of the items that this grant category will cover – the high cost of the customer premises equipment. In addition, as mentioned, satellite construction seems to be eligible under other categories of the RUS and NTIA infrastructure programs. And AtContact has already secured a \$60 million funding commitment contingent on grant of its application (still pending with NTIA) involving a satellite at 121° W.L.

The Financial Environment. As for the sweeping financial crisis, AtContact is aware of the Commission’s statement that “[o]rdinarily, efforts to raise financing cannot justify an extension or a waiver of a milestone.”⁹ But there is nothing ordinary about this crisis. It would

⁶ Rural Utilities Service Broadband Utilities Program 75 Fed. Reg. 3820, 3826 (Jan. 22, 2010) (“*Second RUS NOFA*”).

⁷ *Id.* at 3826.

⁸ *Id.* at 3828.

⁹ Net 28 Company, L.L.C., *Memorandum Opinion and Order*, DA 01-1284 ¶ 9 (rel. May 25, 2001); see also Advanced Communications Corporation, *Memorandum Opinion and Order*, 11 FCC Rcd. 3399, 3417 ¶ 45 (1995) (delays related to negotiations with potential investors do

be nearly inconceivable for any policymaker to ignore the almost total drying up of private capital availability during late 2008 and 2009. The phenomenon has generated manifold government measures across vast swathes of regulation to alleviate the effect on prospective borrowers. It has also triggered the injection of more than \$1 trillion in public government funds into the economy. This is not a case of one party's funding difficulty or convenient excuse.

It is highly pertinent here, too, in three respects. First, as mentioned, it is extraordinary. Second, it is an "interpretive" factor that ought to be taken into account in resolving uncertainties. Third, AtContact has persevered, agreed to buy long-lead items and achieved conditional funding, despite it. The financing environment is thus relevant in properly weighing the scale and size of an achievement that must truly be judged to be against the odds.

Spectrum Warehousing. At the January 26 meeting, some questions also arose about the policies underlying the milestone rule, in particular the policy against spectrum warehousing. The Commission does not want licensees who cannot prove their diligence to hold up more productive use of that spectrum by future, more diligent licensees.

This policy is not implicated here for several reasons. First of all, AtContact is only licensed to use the "NGSO" portion of the Ka-band. This band is almost entirely virgin and wide open. With two degrees spacing, there are 30 slots between 71° W.L. and 129° W.L. Of these 30 slots, there is *not one* with a satellite operating in that spectrum. There are only *three* for which the Commission has issued an authorization to use that spectrum (two under AtContact's license at bar, and one licensed to Viasat).¹⁰ And Viasat has a pending application to use one other slot.¹¹ Thus, there are a total of 26 slots that can be used to serve the United States that are not licensed to anyone and that are not subject to any outstanding applications.

Second (in answer to a question raised at the January 26 meeting with Commission staff), no one has filed an application for, or expressed an interest in, any of AtContact's slots themselves. Under the Commission's rules, such an application could have been filed on the day the Commission released its *Nullification Order* canceling AtContact's license.¹² Yet no application was filed on that day, or since.

not justify extension of milestones). *See also* Columbia Communications Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd. 15566, 15571-72 n.35 (2000).

¹⁰ Assuming the Commission grants AtContact's pending Petition for Reconsideration, it would hold licenses at 34° E.L., 130° E.L., 87.2° W.L., and 121° W.L. Viasat holds an authorization to provide service to the U.S. from the 115.1° W.L. orbital location, for which it received a license from the Isle of Man.

¹¹ Viasat recently requested to use the NGSO Ka-band spectrum for an FSS GSO satellite at 77° W.L. *See* Viasat, Inc., File No. SAT-MOD-20091127-00129 (accepted for filing Jan. 15, 2010).

¹² *Amendment of the Commission's Space Station Licensing Rules and Policies*, 18 FCC Rcd. 10760 ¶ 113 (rel. Apr. 23, 2003) ("*First Come, First Served Order*").

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Third, other than Viasat, there are no licensees proposing to use that spectrum, and there are no applications for that spectrum either. Finally, fourth, AtContact's geostationary satellites are licensed only to make secondary use of the spectrum. So, even assuming that a hypothetical additional user of the spectrum were to transpire, AtContact would not stand in its way, but rather would be required to not cause any interference to, and tolerate any interference from, such a user. The conclusion is hard to escape: there is no clamor for use of that spectrum, and there is nobody to be held up if AtContact's license is not cancelled.

There is a related reason why Commission spectrum policies militate against cancellation. AtContact strongly believes that, despite an initial delay, satellite use of that spectrum will emerge and provide a vigorous ingredient of the nation's broadband armature. But the invalidation of yet another satellite license in that spectrum would send precisely the wrong signal from a spectrum policy standpoint: that the band is somehow ripe for reallocation to other uses by means of a rulemaking. Such a result would be bad and possibly disastrous, for the cause of universal broadband availability.

For these reasons, AtContact respectfully requests grant of its reconsideration petition.

Respectfully submitted,

/s/

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