Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Globalstar Licensee LLC	)	Call Sign S2115
GUSA Licensee LLC	)	Call Sign E970381
	)	
Iridium Constellation LLC	)	Call Sign S2110
	)	
Iridium Satellite LLC	)	Call Sign E960132
Iridium Carrier Services	)	Call Sign E960622
	)	
Modification of Authority to	)	
Operate a Mobile Satellite System in the	)	
1.6 GHz Frequency Band	)	
	)	

PROTEST OF GLOBALSTAR LICENSEE LLC AND GUSA LICENSEE LLC

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June 6, 2008

S2115 **SAT-MOD-20080516-00106** **IB2008001202**
Globalstar Licensee LLC

S2115 **SAT-MOD-19960308-00044**
Globalstar Licensee LLC
S2115

S2110 **SAT-ASG-19971114-00181**
IRIDIUM CONSTELLATION LLC
S2110

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SUMMARY

Globalstar protests the Commission's May 7, 2008, *Modification Order* modifying the licenses and authorizations held by Globalstar and Iridium for the operation of their respective Big LEO MSS systems. Globalstar requests rescission of the order or, failing that, designation for a hearing pursuant to section 316 of the Communications Act.

In issuing the *Modification Order*, the Commission failed to provide prior notice and opportunity for comment, as required by the Administrative Procedure Act, that it intended to give global effect for the first time to the Big LEO MSS band plan it has adopted for provision of service in the United States. The Commission's *2004 Further Notice* in IB Docket No. 02-364 did not raise in any way the possibility that the Commission might attempt to restrict Globalstar's and expand Iridium's authority to provide service worldwide, with the effect of preventing Globalstar from providing service in other countries on frequencies permitted by the band plans in effect in those countries. This action comes on the heels of the Commission's decision to reassign to Iridium certain of the frequencies on which Globalstar is authorized to operate in the United States, which itself was taken without adequate notice, and which now is the subject of an appeal pending in the D.C. Circuit.

This protest, brought pursuant to section 316 of the Act, is no substitute for the notice and comment required by the APA. The APA requires that all interested persons be given an opportunity to comment on the Commission's proposal *before* the Commission has acted; by contrast, the *Modification Order* decides on a course of action, subject only to a limited, after-the-fact opportunity for Globalstar – and not other interested persons – to protest. Globalstar and everyone else who stands to be substantially affected by the assertion of extraterritorial authority in the *Modification Order* has been denied an opportunity to comment before a decision is made,

"while the decisionmaker is still receptive to information and argument." *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (D.C. Cir. 1979). To cure this APA violation, the Commission should rescind the *Modification Order* and initiate a rulemaking proceeding to consider the legal and policy issues implicated by any attempt to dictate the MSS band plans that apply to US-licensed carriers when they operate in other countries.

The Commission's assertion that the U.S. Big LEO band plan as revised in the *Big LEO Spectrum Sharing Proceeding* automatically determines the frequencies on which Globalstar and Iridium may provide service in other countries is an abrupt departure from the Commission's longstanding prior practice under Title III of the Communications Act and is contrary to law. Under the International Telecommunication Union ("ITU") regime, each country has the authority to regulate the use of radiofrequencies within its borders. Consistent with international treaties and laws, the Commission has made clear since the creation of the Big LEO MSS service that the band plans it adopts apply only within the United States, and that other countries retain their sovereign rights to determine the use of frequencies to provide service within their borders. The only precedent on which the *Modification Order* relies – *DISCO I* – did not even address nongeostationary satellite systems such as Globalstar's, and in any event provides no support for the decision here. When an agency changes a longstanding policy, it must supply a reasoned analysis for the change. The Commission here failed even to acknowledge the departure, let alone provide any analysis for it.

The *Modification Order* also is wholly at odds with the Commission's sound goal of encouraging US-licensed Big LEO carriers to provide service around the world. In support of this goal, the Commission has *required* Big LEO systems to be designed to provide global coverage, in order to create a global information infrastructure. The Commission's decision here

to restrict Globalstar's ability to provide MSS service in other countries on frequencies specifically reserved for such service in those countries runs completely counter to that policy. In fact, it compromises Globalstar's ability to fulfill the Commission's mandate to provide a global service. Moreover, the harm the Commission's action would inflict on Globalstar and its customers would garner no countervailing benefit for Iridium since, like any other carrier, Iridium may provide service only where a national administration authorizes it to do so. The Commission's action here cannot and does not authorize Iridium to provide service in any country on frequencies that have not been designated for Iridium's service by the regulatory administration in that country.

If the Commission does not rescind the *Modification Order*, Globalstar requests that the Commission designate the proposed license modifications for hearing. The proposed modifications raise factual issues relating to the current Big LEO MSS band plans in countries other than the United States and the impact that the modifications would have on Globalstar's present and future operations in those countries. Because the Commission gave no notice of its intent to give global effect to the revised US band plan, the record in the *Big LEO Spectrum Sharing Proceeding* and the *Modification Order* itself lack any consideration of the serious impact such an action would have on Globalstar, other licensing administrations, Globalstar's independent gateway operators, and its customers.

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1.6 GHz Frequency Band	)	
	)	

PROTEST OF GLOBALSTAR LICENSEE LLC
AND GUSA LICENSEE LLC

Globalstar Licensee LLC and GUSA Licensee LLC,[1/] by their attorneys, and pursuant to section 316 of the Communications Act ("Act"), 47 U.S.C. § 316, and section 1.87(a) of the Commission's rules, 47 C.F.R. § 1.87(a), hereby protest the Commission's proposed modification[2/] of the licenses and authorizations held by Globalstar and Iridium[3/] for the operation of their respective Big LEO Mobile Satellite Service ("MSS") systems.

1/ Globalstar Licensee LLC is the authorized licensee of the Globalstar satellite constellation (call sign S2115). An affiliated company, GUSA Licensee LLC, holds licenses for Globalstar's earth station gateways located in the United States, holds a blanket license for the operation of Globalstar mobile earth station terminals, and is responsible for the provision of Globalstar MSS services to end users in the United States. For purposes of this Protest, Globalstar Licensee LLC and GUSA Licensee LLC are referred to collectively as "Globalstar".

2/ *See* Globalstar Licensee LLC, Call Sign S2115; GUSA Licensee LLC, Call Sign E970381; Iridium Constellation LLC, Call Sign S2110; Iridium Satellite LLC, Call Sign

In addition, in accordance with section 316 of the Act and section 1.87(e) of the Commission's rules, Globalstar respectfully requests that the Commission designate the proposed license modifications for hearing so that the Commission may consider the factual issues relating to the Big LEO MSS band plans in place in countries other than the United States and the impact that the proposed modification of Globalstar's authority would have on Globalstar and other affected entities.

I. THE COMMISSION FAILED TO GIVE NOTICE AND AN OPPORTUNITY FOR COMMENT AS REQUIRED BY THE APA BEFORE ISSUING ITS DECISION PARTIALLY REVOKING GLOBALSTAR'S AUTHORITY.

The Administrative Procedure Act, 5 U.S.C. § 500, *et seq.* ("APA"), requires that the Commission give notice and an opportunity for comment before substantially changing or reversing a longstanding policy, in this case, giving extraterritorial effect to its Big LEO band plan or revoking, in whole or in part, Globalstar's satellite authorization.[4/] The Commission has failed to do so.

E960132; Iridium Carrier Services, Call Sign E960622 -- *Modification of Authority To Operate a Mobile Satellite System in the 1.6 GHz Frequency Band*, FCC 08-125 (rel. May 7, 2008) ("*Modification Order*"). The *Modification Order* was issued in order to give effect to the Commission's *Second Report and Order* revising the Big LEO spectrum sharing plan in the United States by reassigning certain spectrum previously reserved for CDMA carriers, such as Globalstar, for exclusive use by Iridium. *See* Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands, *Second Order on Reconsideration and Second Report and Order*, 22 FCC Rcd 19733 (2007) ("*November 9th Order*").

[3/] The *Modification Order* proposed to modify certain licenses held by Iridium Constellation LLC, Iridium Satellite LLC, and Iridium Carrier Services. For purposes of this Protest, these entities are referred to collectively as "Iridium."

[4/] *See* 5 U.S.C. §§ 553, 558.

A. The Commission Never Provided Notice or Opportunity for Comment on Whether To Modify Globalstar's International Operating Authority.

The Commission's proposed action in the *Modification Order* is not within the scope of any notice provided in the *Big LEO Spectrum Sharing Proceeding*.[5/] The only issue in that proceeding, as expressly defined by the *2004 Further Notice*, was the possible revision of the U.S. Big LEO MSS band plan to authorize Iridium to share an additional 2.25 MHz of Globalstar's spectrum in the United States. As the *2004 Further Notice* expressly stated, "[w]e issue this *Further Notice* in IB Docket No. 02-364 to explore whether and how such additional sharing [between Globalstar and Iridium] may be possible."[6/] Because the *2004 Further Notice* defined that as the sole issue in the proceeding, the parties' voluminous submissions in the proceeding never discussed a transfer of spectrum to Iridium for Iridium's exclusive use, and the record contains nothing to support such a transfer.[7/] As a result, the FCC's *November 9th Order* was itself taken without adequate notice, and Globalstar has appealed that action.[8/]

As Globalstar demonstrates below, the decision in the *Modification Order* to give extraterritorial effect to the U.S. band plan by restricting Globalstar's and expanding Iridium's satellite operations on a global (as opposed to national) basis was even more plainly outside the

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5/ *See* Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands, *Report and Order, Fourth Report and Order, and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 13386 (2004) ("*2004 Further Notice*"). The *2004 Further Notice* and the *November 9th Order* are referred to collectively as the "*Big LEO Spectrum Sharing Proceeding*".

6/ *See 2004 Further Notice* at ¶ 96.

7/ *See* Globalstar *Ex Parte* Filing in IB Docket No. 02-364 (filed Nov. 7, 2007). Neither does the record support sharing an additional 2.25 MHz of spectrum as proposed in the *2004 Further Notice*.

8/ *See Globalstar, Inc. v. FCC*, DC Cir. Case No. 08-1046 (Petition for Review filed Feb. 5, 2008).

narrow issue of further L-band sharing defined by the *2004 Further Notice*.[9/] The Commission gave no notice at any point in the *Big LEO Spectrum Sharing Proceeding* that it might do more than simply revise the US band plan for Big LEO MSS providers. The *2004 Further* Notice did not presage in any respect the Commission's restriction of Globalstar's and expansion of Iridium's authority to provide service worldwide, with the effect of preventing Globalstar from providing service in other countries on frequencies permitted by the band plans in effect in those countries. Iridium introduced the issue into the proceeding in an *ex parte* letter on March 7, 2008, in which it asserted that the *November 9th Order* should be given global effect.[10/] Iridium's letter cannot, of course, provide the notice that the FCC has never given.[11/] The action purportedly taken in the *Modification Order* thus would involve an independent and equally plain violation of the APA's notice and comment requirement.

9/ Any assertion by the Commission that the *Modification Order* does not give extraterritorial effect to the U.S. band plan but only restricts Globalstar's satellite authority as a U.S. licensee is belied by the fact that the order purports also to authorize Iridium to use spectrum in other countries regardless of their band plans, and that the only basis given for the Commission's action is the change in the band plan wrought by the *November 9th Order*. As the *Modification Order* expressly states, "the proposed modifications of [Globalstar's and Iridium's] space station authorizations would apply to the two systems' *global space station operations*." *See Modification Order* at ¶ 4 (*emphasis added*).

10/ *See* Iridium Satellite LLC *Ex Parte* Filing in IB Docket No. 02-364 (filed Mar. 7, 2008) ("*Iridium March 7th Letter*").

11/ *See, e.g., National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (D.C. Cir. 1985) ("[t]he comments of other interested parties do not satisfy an agency's obligation to provide notice."); *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (An agency "cannot bootstrap notice from a comment"); *Small Refinery Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 546 (D.C. Cir. 1983) ("As a general rule, [an agency] must *itself* provide notice of a regulatory proposal .... notice necessarily must come -- if at all -- from the agency.") (emphasis in original).

B. An After-The-Fact Opportunity To Protest Commission Action Under Section 316 Does Not Satisfy the APA's Notice and Comment Requirement.

A proceeding under section 316 of the Act, in which the Commission has already determined and adopted its planned course of action, subject only to a limited, after-the-fact opportunity for Globalstar to protest, is no substitute for APA notice. It is fundamental that the APA requires that all interested persons be given an opportunity to comment on the Commission's proposal *before* the Commission has made an initial determination. For example, in *Kennecott Corp. v. EPA*,[12/] the D.C. Circuit rejected an argument by the EPA that the agency's failure to give adequate notice before adopting new rules was remedied by its consideration of interested parties' views in petitions for reconsideration: "That EPA allowed petitions for reconsideration is not an adequate substitute for an opportunity for notice and comment prior to promulgation."[13/]

Similarly, in *Sharon Steel Corp. v. EPA*, the court rejected the EPA's attempt to bypass the APA's notice and comment requirements by providing parties the opportunity to comment after promulgating the rule and promising to modify the rule if necessary after reviewing the comments.[14/] As the court held, a period for comments "after promulgation cannot substitute for

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12/ *Kennecott Corp. v. EPA*, 684 F.2d 1007 (D. C. Cir. 1982).

13/ *Id.* (citing *New Jersey v. EPA*, 626 F.2d 1038 (D.C. Cir. 1980). *See also New Jersey v.* EPA, 626 F.2d 1038, 1049 (D.C. Cir. 1980) ("Were we to allow the EPA to prevail on this point we would make the provisions of § 553 virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act.") (quoting *United States Steel Corp. v.* EPA, 595 F.2d 207, 381 (5th Cir. 1979)); *Montana Power Co. v. EPA*, 429 F. Supp. 683 (D. Mont. 1977).

14/ *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3d Cir. 1979).

the prior notice and comment required by the APA."[15/] The court explained that only by providing the opportunity for prior notice and comment can an agency allow "effective participation in the rulemaking process while the decisionmaker is still receptive to information and argument." Providing only limited opportunity for comment "[a]fter the final rule is issued," as is the case here, requires the petitioner to "come hat-in-hand and run the risk that the decisionmaker is likely to resist change."[16/] In the five-and-one-half year history of this proceeding, the Commission has *never* fully and fairly reviewed and evaluated the evidence of record that Globalstar has submitted. It would be naïve to expect the Commission to consider changing its decision in response to the instant, perfunctory protest opportunity.

The texts of section 316 and of the *Modification Order* make clear that the Commission has made a decision subject to protest, rather than giving advance notice of a possible future decision. Section 316 states in part:

> "No such order of modification [of a license] *shall become final* until the holder of the license . . . shall have been notified [and] given reasonable opportunity . . . *to protest* such proposed order of modification . . . ." 47 U.S.C. § 316 (a)(1) (*emphasis added*).

Accordingly, the *Modification Order* does not merely seek comment on possible agency action; it "reject[s]" Globalstar's *ex parte* contention that giving extraterritorial effect to the U.S. band plan would be "contrary to law and Commission policy."[17/] The Commission plainly has made a determination subject only to subsequent "protest" – a course the APA forbids it to take without prior notice and comment.

15/ *Id.*, 597 F.2d at 381.

16/ *Sharon Steel Corp. v. EPA*, 597 F.2d 377 at 381 (citing *Maryland v. EPA*, 530 F.2d 215, 222 (4th Cir. 1975)).

17/ *Modification Order* at ¶ 3.

A section 316 protest falls short of APA requirements in another key respect: Section 316 and its implementing regulation, 47 C.F.R. § 1.87, allow only an entity whose license will be modified by a proposed order to file a protest. Many other entities may have an interest in commenting on the Commission's asserted power to act extraterritorially – including other Commission licensees, carriers licensed in other countries, other regulatory administrations, the ITU, Globalstar's independent gateway operators who are responsible for providing the ground segment of Globalstar service outside of the U.S., and users of MSS services, among others. APA notice would allow them to submit their views; section 316 shuts them out. For example, in response to the *2004 Further Notice*, two interested parties (QUALCOMM and Sagem Avionics)[18/] and four Congressional offices[19/] submitted comments and letters, respectively, questioning whether the Commission's proposal to order further sharing was in the public interest. Not one party other than Iridium – not one customer and not one distributor – filed in support of expansion of Iridium's spectrum authority, much less in support of an extraterritorial application of the proposal.

In sum, only by rescinding the *Modification Order* and initiating a rulemaking proceeding to consider whether that order's departure from longstanding Commission MSS licensing policies would serve the public interest can the Commission cure this APA violation.

18/ *See* Reply Comments of Qualcomm Incorporated in IB Docket No. 02-364 (filed Sept. 23, 2004); Sagem Avionics, Inc., Comments in IB Docket No. 02-364 (filed Sept. 7, 2004).

19/ *See* Letter from United States Senator Lisa Murkoswki to Kevin J. Martin (dated Dec. 7, 2006) filed in IB Docket No. 02-364; Letter from United States Congressman Don Young to Kevin J. Martin (dated Oct. 16, 2006) filed in IB Docket No. 02-364; Letter from United States Congressman Michael Honda to Michael Powell (dated June 9, 2004) filed in IB Docket No. 02-364; Letter from United States Congresswoman Anna G. Eshoo to Michael Powell (dated June 8, 2004) filed in IB Docket No. 02-364.

As we show below and would demonstrate more fully in such a proceeding, the action taken in the *Modification Order* also is substantively unlawful.

II. IN PURPORTING TO GIVE EXTRATERRITORIAL EFFECT TO THE U.S. BAND PLAN, THE *MODIFICATION ORDER* DEPARTS FROM LONGSTANDING POLICY WITHOUT ACKNOWLEDGMENT OR JUSTIFICATION.

A. The Commission Consistently Has Recognized That It Has The Authority To Designate Big LEO Band Plans Only for Application In The United States.

Until Iridium filed its *March 7th Letter*, more than five years into this proceeding, Globalstar had no reason to suspect that the Commission might modify its and Iridium's authority outside the United States. Globalstar responded to Iridium's letter by pointing out that acceptance of Iridium's position would be an abrupt departure from the Commission's longstanding prior policies implementing Title III of the Communications Act.[20/] The Commission previously has made clear that the MSS band plans it adopts apply only within the United States and has recognized the rights of other countries to determine the appropriate MSS band plans within their borders. Departure from such a longstanding policy requires acknowledgement and adequate justification, neither of which is found in the conclusory *Modification Order*. Whenever an agency changes a policy by departing from precedent, it is "obligated to supply a reasoned analysis for the change."[21/] The Commission here failed even to acknowledge the departure, let alone to "supply a reasoned analysis" for it.[22/]

20/ *See* Globalstar *Ex Parte* Filing in IB Docket No. 02-364 (filed Mar. 24, 2008) ("*Globalstar March 24, 2008 Letter*"); Globalstar *Ex Parte* Filing in IB Docket No. 02-364 (filed April 24, 2008) ("*Globalstar April 24, 2008 Letter*").

21/ *Global Crossing Telecomms., Inc. v. FCC*, 259 F.3d 740, 746 (D.C. Cir. 2001) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 42 (1983)); *see Bush-Quayle '92 Primary Comm., Inc. v. FEC*, 104 F.3d 448, 453-55 (D.C. Cir. 1997) ("An agency interpretation that would otherwise be permissible is, nevertheless, prohibited when the agency has failed to explain

Globalstar has shown that the Commission has long recognized that under the ITU regime each country has the authority to regulate the use of radiofrequencies within its borders. The Commission repeatedly has acknowledged that, when it establishes a band plan for the provision of Big LEO MSS services in the United States, that plan does not "purport to have any extraterritorial application."[23/] To the contrary, as the Commission made clear, each country has the right to determine its own band plan for the provision of such services within its borders.[24/] Recognizing this principle of international comity, the Commission has declared that "we will continue to require our [Big LEO MSS] licensees to meet both their international obligations and

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its departure from prior precedent."). *See also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

22/ The fact that the *Modification Order* was issued by the Commission, and not by the International Bureau pursuant to its delegated authority (as customarily is the case with such orders) suggests that the Commission itself was aware that the action contemplated in the *Modification Order* is far from routine, but instead represents a dramatic departure from longstanding policy. *See* 47 C.F.R. § 0.261.

23/ Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Band, *Memorandum Opinion and Order*, 11 FCC Rcd 12861 (1996) ("*Big LEO Memorandum Opinion and Order*") at ¶ 53, quoted in *Globalstar March 24, 2008 Letter* at 2. *See also* Application of Orbital Communications Corporation for Authority to Construct, Launch and Operate a Non-Voice, Non-Geostationary Mobile-Satellite System, *Order and Authorization*, 9 FCC Rcd 6476 (1994) at ¶ 15 ("[W]e do not believe it is appropriate for the United States to impose global band sharing restrictions, which will directly impact the ability of other countries to access these LEO systems, absent indications from these countries regarding their planned use of these frequency bands.").

24/ *Id. See also* Maritime Telecommunications Network, Inc., Application for Special Temporary Authority, *Order on Reconsideration and Memorandum Opinion and Order*, 16 FCC Rcd 11615 (Int'l Bureau, 2001) ("*Maritime Telecommunications Network*") at ¶ 18 ("Nothing in the jurisdiction provisions of the Communications Act explicitly gives the Commission authority to issue licenses for radio operations on foreign territory and on foreign ships...."). As the Bureau recognized in *Maritime Telecommunications Network*, unless Congress has granted the Commission specific statutory authority to act extraterritorially (which it has not done here), the Commission's authority is construed to apply only within the United States. *Maritime Telecommunications Network* at ¶ 18, citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *Foley Brothers v. Filardo*, 336 U.S. 281, 285 (1949).

any national requirements imposed by other licensing administrations regarding operations within their territories....We continue to believe that decisions relating to the implementation of Big LEO service within a country's territory will remain within that country's jurisdiction and control."[25/]

Accordingly, the Commission has emphasized that, while "adoption by other administrations of our domestic inter-system sharing plan could, in many instances, provide a simple means of assuring a complementary licensing system in other countries, ... any decision on the issue of what, if any, method of inter-system sharing best serves its national interests rests with the particular administration."[26/] In later proceedings, the Commission has again expressly confirmed that its Big LEO MSS rules do not establish a global band plan. In establishing the fixed satellite service rules, for example, the Commission specifically recognized that "[i]n the Big LEO proceeding ... we did not require non-Government licensees to operate in accordance with the domestic band plan outside the United States."[27/] As these precedents make clear, while the Commission clearly has the authority to revise the Big LEO band plan in the United States, its actions may only inform, not bind, other jurisdictions that choose to adopt different spectrum assignments within their borders.

25/ *See* Amendment of the Commission's Rules To Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, *Report and Order*, 9 FCC Rcd 5936 (1994) ("*Big LEO Report and Order*") at ¶¶ 211-213.

26/ *See Big LEO Memorandum Opinion and Order* at ¶ 53.

27/ *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 (1997) ("*LMDS Third Report and Order*") at ¶ 68 (citing *Big LEO Report and Order* at ¶ 213).

This bedrock principle has found expression in the Commission's MSS satellite authorizations. Those authorizations explicitly distinguish between the scope of a carrier's authorization to construct and launch a global MSS satellite system and the scope of its authority to provide MSS services in the United States. Only the latter is confined by the U.S. band plan. For example, the Commission allocated spectrum in 1995[28/] and subsequently authorized Globalstar in 1999 to launch a global MSS system capable of operating in the entire 1610-1626.5 MHz band, consistent with the global allocation adopted at the 1992 World Administrative Radio Conference.[29/] The Commission simultaneously authorized Globalstar to provide MSS services in the United States only within the 1610-1621.35 MHz band – the frequencies then reserved for use by CDMA carriers under the Big LEO band plan in the United States.[30/] Iridium's authorization similarly differentiates between the spectrum on which its satellite system may operate globally (to the extent permitted by other administrations) and the spectrum on which it may provide service in the United States.[31/] Thus, both Globalstar's and Iridium's satellite authorizations reflect the Commission's heretofore proper recognition that, while the host administration's constellation authorization for a global system should reflect the global allocation in the ITU's Radio Regulations, the Commission separately assigns frequencies on which MSS providers may provide service *only in the United States*. Globalstar has put these

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28/ *See Big LEO Report and Order.*

29/ *See id.* at ¶ 8; Loral/Qualcomm Partnership, L.P. Application for Authority to Construct, Launch and Operate Globalstar, a Low Earth Orbit Satellite System to Provide Mobile Satellite Services in the 1610-1626.5 MHz/2483.5-2500 MHz Bands, File Nos. 19-DSS-P-91(48), CSS-91-014 and 21-SAT-MISC-95, *Order and Authorization*, 10 FCC Rcd 2333 (1999) at ¶ 25, Erratum, 10 FCC Rcd 3926 (1999) ("*Globalstar Authorization*").

30/ *Globalstar Authorization* at ¶ 26; *see Globalstar March 24, 2008 Letter* at 4.

31/ *See Globalstar March 24th Letter* at 4-5.

authorities before the Commission on several occasions, but the *Modification Order* fails to acknowledge them or to give a reasoned analysis for departing from them.

B. Iridium's Own Actions Contradict the Position That It Advocates Here and That The *Modification Order* Adopts.

Iridium's assertion that the US band plan as revised in the *November 9th Order* has effect globally – made for the first time four months after that order was released[32/] – contradicts its own consistent prior actions and statements. By consistently advocating expansion of its operating authority abroad, Iridium has made clear its recognition that each country determines the MSS band plan within the country's borders. Soon after the Commission adopted the original MSS Big LEO band plan, Iridium's founder, Motorola, advocated adoption of a band plan by other administrations that was different from the U.S. band plan.[33/] In October 1996, after months of negotiation, Iridium, Globalstar, and Odyssey (the other US CDMA MSS licensee at the time) reached an agreement to work together to secure spectrum assignments in other countries that would be harmonized with the MSS band plan adopted in the United States.[34/] Immediately prior to the *November 9th Order*, Iridium sought to convince European regulators to adopt a band plan that would allow it to *share* 3.1 MHz of Globalstar's spectrum, consistent with the Commission's *Big LEO Spectrum Sharing Order*.[35/] And finally, following

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32/ *See Iridium March 7th Letter.*

33/ *See* Document SE28(96)41 (also known as SE40(05)(15)) submitted by Motorola, "Sharing Analysis Between CDMA and TDMA Systems" (July 1, 1996).

34/ *See* Iridium LLC News Release, "Globalstar, Iridium, Odyssey Global Mobile Satellite Phone System Operators Sign Spectrum Agreement" (Oct. 16, 1996) ("Our Agreement conforms with the International telecommunication Union's frequency authorizations for global mobile systems. We think it provides a workable framework for countries around the world to adopt.").

35/ *Big LEO Spectrum Sharing Order* at ¶¶ 44-50. *See, e.g.*, CEPT, Electronic Communications Committee, Submission of Iridium to the Working Group FM44, 12 March 2007, Doc. No. FM44(07)09 (attached to *Globalstar March 24, 2008 Letter*).

the *November 9th Order* redrawing the boundary line between CDMA and TDMA MSS operations in the United States, Iridium has advocated (to date unsuccessfully) a similar change in MSS band plans around in the world.[36/]

Iridium's assertion here that the Commission's *November 9th Order* is effective worldwide without further action by sovereign regulatory administrations also contradicts its own submissions in the *Big LEO Spectrum Sharing Proceeding*. Indeed, Iridium addressed this very issue in a written submission responding to questions raised by Commission staff (who, prior to the *Modification Order*, also quite clearly understood the national scope of the Commission's licensing authority). The staff asked Iridium to explain "how, from a technical, system-engineering perspective, access to additional spectrum *in the United States* supports an increase in Iridium system capacity for services provided in other geographic areas."[37/] In response, Iridium said:

> The Iridium system operates using a single, defined range of spectrum over the entire earth due to the design and implementation of the satellite software. *The system and spectrum-related telephony software were designed to operate with 10.5 MHz of spectrum over the band 1616-1626.5 MHz, which resulted in, among other things, the current telephony algorithms that attempt to provide complete coverage beneath a given satellite and prevent self- interference between elements of the Iridium system. However, the Iridium system was licensed in the U.S. to operate with service links at 1621.35-1626.5 MHz.*
>
> The Iridium system could, from a technical perspective, commence operations in the U.S. and other geographic areas with additional L-band frequencies as soon as it receives FCC approval. Practically, however, Iridium *would wait until it receives similar authorizations and approvals from other countries before commencing operations with the additional frequencies.*

36/ *See, e.g.*, CEPT, Electronic Communications Committee, Submission of Iridium to the Working Group FM44, 4 December 2007, Doc. No. FM44(07)38.

37/ *See* Iridium *Ex Parte* Filing in IB Docket No. 02-364 (filed Dec. 18, 2003) at Question 1 (*emphasis added*).

> The FCC is the Administration that licensed and coordinated Iridium's space segment, so other countries are not likely to change the frequency assignments unless and until the FCC acts. Indeed, *when licensing the Big LEOs, countries were asked initially to follow the FCC's Big LEO band plan; and most of them did, so it is to be expected that they would consider the FCC ruling on this issue prior to taking any action. This was furthered by the 1997 Big LEO Agreement, pursuant to which the three Big LEO operators (Iridium, Globalstar, and Odyssey) agreed to seek in other countries what the FCC had done in its Big LEO Band Plan.*[38/]

There accordingly can be no doubt that, until very recently, Iridium (as well as the Commission) recognized the simple proposition that the Commission sets the band plan for the United States, and other administrations set the band plans for their countries.

C. *DISCO I*, the Only Precedent Cited by the Commission To Support the *Modification Order*, By Its Own Terms Does Not Apply.

The *Modification Order* suggests that all of this was changed by the *DISCO I* order.[39/] That is palpably untrue. In the first place, the Commission continued to declare without qualification *after DISCO I* that the US band plan does not "purport to have any extraterritorial application"[40/] and that "[i]n the Big LEO proceeding ... we did not require non-Government licensees to operate in accordance with the domestic band plan outside the United States."[41/] No world-changing effect of *DISCO I* was perceived before this proceeding.

And rightly not. *DISCO I* was expressly limited to *geostationary* systems. The Commission acted there to abolish its prior distinction between two types of geostationary MSS

38/ *Id.*

39/ *See Modification Order* ¶ 3, citing Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, *Report and Order*, 11 FCC Rcd 2429 (1996) ("*DISCO I*").

40/ *See Big LEO Memorandum Opinion and Order* at ¶ 53.

41/ *See LMDS Third Report and Order* at ¶ 68. This policy also has been reaffirmed in other contexts since adoption of the *DISCO I* decision. *See, e.g., Maritime Telecommunications Network*, cited *supra*, note 24.

systems – U.S. domestic fixed satellites ("domsats") and U.S. "separate systems" – with the effect that all such systems may now offer both domestic and international services. In the very passage relied on in the *Modification Order*, *DISCO I* recognized that "LEO systems, by virtue of their *non-geostationary* satellite orbits, are inherently capable of providing global service" and are in fact "required . . . to be capable of providing global coverage."[42/] The issue in *DISCO I* was only "whether [the Commission] should permit U.S.-licensed *geostationary* MSS systems to provide both domestic and international service, *as well*."[43/] The Commission decided "to permit geostationary MSS systems, *as their counterpart LEO MSS systems* and geostationary FSS and DBS systems, to provide international as well as domestic service."[44/]

Thus, it is simply not true, as the *Modification Order* declares, that "the Commission automatically modified the licenses of *all U.S. MSS operators* to allow them to offer both domestic and international services."[45/] *DISCO I* changed the licenses of *geostationary* MSS operators. It made no change at all with respect to LEO systems, which were already permitted – indeed, required – to provide global coverage. Since the action taken in *DISCO I* affected only geostationary MSS systems, it cannot possibly provide the basis for the *Modification Order* here.[46/] Yet it is the only authority cited for the radical change of policy in the order.

42/ *See DISCO I* at ¶¶ 71, 73 (*emphasis added*).

43/ *Id.* (*emphasis added*).

44/ *Id.* at ¶ 73.

45/ *See Modification Order* at ¶ 3 and n. 2, citing *DISCO I*, at ¶ 73.

46/ The other portion of *DISCO I* cited in the *Modification Order*, paragraph 9, is even more clearly inapplicable, as it dealt only with fixed satellite systems, not MSS. *See DISCO I* at ¶ 9, cited), cited in *Modification Order* at ¶ 3. As that paragraph stated, "the public interest would be best served by modifying our policy to reflect the global nature of the communications needs by eliminating the distinction between domsats and separate systems and permitting U.S.-

Moreover, far from asserting that the Commission may set spectrum assignments outside U.S. borders, *DISCO I* fully acknowledges that other national administrations have the authority to determine whether U.S.-licensed systems may offer services within their borders and under what conditions.[47/] *DISCO I* reaffirmed that, "[b]efore an MSS licensee can actually provide service in a foreign territory, of course it must complete its international frequency coordination obligations and obtain any required approvals from the countries it wishes to serve."[48/] It explicitly recognized that each country has the right to "grant[] permission for another country's satellite to provide service or 'land' in its country."[49/] Thus, even as to the geostationary MSS services that were affected by *DISCO I*, that order did not purport to change the international allocation of responsibility to each national regulator to determine which carriers may provide service in its country and on what frequencies.

Since the only authority relied on in the *Modification Order* is at war with the order's conclusions, the order stands as a nakedly unjustified departure from prior Commission practice.

D. The *Modification Order* Conflicts with the Commission's Well-Established Policy of Fostering the Provision of Global Service by US-Licensed MSS Carriers.

The action contemplated in the *Modification Order* is wholly at odds with the Commission's sound goal of encouraging U.S.-licensed Big LEO MSS carriers to provide service around the world.[50/] As noted, the Commission has *required* Big LEO systems to be

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licensed *fixed-satellite systems* to provide both domestic and international service under a modified Separate Systems Policy." *Id.* (*emphasis added*).

47/ *DISCO I*, 11 FCC Rcd 2429 at ¶¶ 19, 68, 70, 73 & n.14.

48/ *Id.* at ¶ 73.

49/ *Id.* at ¶ 12 n.14.

50/ *See, e.g., Big LEO Report and Order* at ¶ 216 ("Delaying [the licensing of Big LEO MSS systems] would delay the improved communications and economic growth that Big LEO

designed to provide global coverage, noting the significant benefits in "furthering the creation of the global information infrastructure."[51/] The decision in the *Modification Order* to restrict Globalstar's ability to provide MSS services in other countries on frequencies permitted by the MSS band plans in those countries cannot be squared with that policy. As we have shown, such a restriction would seriously hinder and potentially eliminate Globalstar's ability to provide MSS services in many countries and regions.[52/] Globalstar's customers could lose the international coverage that is a key benefit of MSS services.

These harms would be inflicted on Globalstar and its customers with no countervailing benefit to Iridium. Like any other carrier, Iridium may provide service only where a national administration authorizes it to do so.[53/] Where a national administration has prescribed the respective frequencies on which Iridium and Globalstar may provide service within its borders, any attempt to disable Globalstar from providing service cannot expand the scope of Iridium's service authority. Similarly, if an administration permits Iridium to provide service, its action will be effective without any need for the Commission to try to limit Globalstar's ability to serve customers in that jurisdiction.

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services will create. These benefits would be developed both for citizens of the United States and all other countries that may choose to participate in rendering these services. Such a delay would also harm developing countries by limiting their opportunity to improve their communications infrastructure.").

51/ *Id.*; *see Globalstar March 24, 2008 Letter* at 5 & n.16; *Globalstar April 24, 2008 Letter* at 5.

52/ *See Globalstar April 24, 2008 Letter* at 5; part III *infra.*

53/ As Globalstar has shown, other countries have complained about Iridium's operations in the spectrum the FCC required Globalstar to share with Iridium in 2004, because the band plans in effect in those countries prohibit TDMA operations in that spectrum in order to prevent interference to other services. *See, e.g.*, German Report of Harmful Interference, March 30, 2006 (referenced in Globalstar's *Ex Parte* Filing in IB Docket 02-364 (filed Feb. 6, 2007) at 3-4.

Imagine what would happen if other regulators exercised the authority asserted here. A number of MSS carriers are licensed in jurisdictions other than the United States. For example, ICO's 2 GHz system is licensed in the UK, and TerreStar's is licensed in Canada. If the UK changed the frequencies it designates for ICO to provide services in the UK, it might, on the theory of the *Modification Order*, decree that ICO must provide services on those same frequencies in all other countries, regardless of the band plans adopted by local regulators in those countries. If those frequencies differed from the frequencies the FCC has designated for ICO's operations in the United States, would the FCC recognize that the UK regulator can trump the FCC's band plan, merely because the UK is ICO's licensing jurisdiction? Not likely. Add a few more regulators doing the same thing, and the orderly system of frequency regulation under the ITU would be a shambles.

The proper answer is that the Commission's *November 9th Order* revising the U.S. band plan for Big LEO MSS services has no effect on the frequencies on which Globalstar or Iridium may provide service in other countries. Each national administration retains the authority to establish the band plan for provision of MSS services within its borders – as Iridium has recognized most recently in urging European administrations to revise their band plans to mirror the revised U.S. band plan adopted in the *November 9th Order*.[54/] It would be appropriate (although premature in light of Globalstar's appeal) for the Commission to implement the *November 9th Order* by revising Globalstar's and Iridium's authorizations to reflect the revised frequencies on which the two carriers may *provide service in the United States*. But the Commission's attempt in the *Modification Order* to dictate the frequencies on which Globalstar

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54/ *See Globalstar March 24, 2008 Letter* at 3-4 & n.11 & Exh. 3. Iridium has repeatedly rejected Globalstar's offers to negotiate a band sharing coordination plan outside of the United States.

and Iridium may provide service in other countries contravenes consistent FCC and international practice.

III. THE COMMISSION'S PROPOSED RESTRICTION ON GLOBALSTAR'S PROVISION OF SERVICE ON FREQUENCIES PERMITTED BY THE BAND PLANS IN EFFECT IN OTHER COUNTRIES RAISES FACTUAL ISSUES THAT CAN BE RESOLVED ONLY IN A HEARING CONDUCTED PURSUANT TO SECTION 316.

If the Commission does not rescind the *Modification Order* for the reasons advocated above, Globalstar respectfully requests a hearing on the order as required by section 316 of the Act and section 1.87 of the Commission's rules.[55/] Globalstar notes in this connection that the Commission twice has denied its prior requests for a hearing in connection with the *Big LEO Spectrum Sharing Proceeding* on a basis that necessitates granting a hearing here. In 2004, when the Commission first required Globalstar to share some of its spectrum with Iridium, the Commission denied Globalstar's request for a hearing under section 316 on the ground that the Big LEO "spectrum sharing plan does not fall under section 316 because the spectrum sharing plan has been adopted pursuant to a rulemaking proceeding that generally affects all MSS providers operating in that band."[56/] The Commission later reaffirmed that conclusion in the *November 9th Order*.[57/]

While Globalstar continues to disagree with the Commission's conclusion that a hearing was not warranted in that instance, the reason given for the denial makes clear that a hearing is required here. The Commission has, to date, rejected Globalstar's request that it proceed by APA rulemaking in attempting to give global effect to its band plan. And there can be no doubt

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55/ *See* 47 U.S.C. § 316; 47 C.F.R. § 1.87(e).

56/ *See Big LEO Spectrum Sharing Order and Further Notice* at ¶ 85.

57/ *See November 9th Order* at ¶¶ 23-25.

that the Commission has proposed to modify Globalstar's licenses, since by its very terms the *Modification Order* proposes to take that very action. To deny a hearing under these circumstances would effectively strip Globalstar of the protections afforded by *both* the APA and section 316 – a clearly unlawful and *ultra vires* outcome.

Critical issues of fact require resolution in the hearing. To warrant an evidentiary hearing under section 316, a licensee "'must . . . set forth a substantial and material question of fact," *i.e.*, specific allegations of fact sufficient to show that the action would be *prima facie* inconsistent with the public interest, convenience and necessity.'[58/] Once this *prima facie* case is made, the Commission then "proceed[s] to the second level of inquiry and determine[s] whether the totality of the evidence arouses sufficient doubt that further inquiry to determine the facts is necessary."[59/] Each of these levels of inquiry is satisfied here, and a hearing pursuant to section 316 is warranted.

Since the Commission gave no notice prior to the *Modification Order* of an intent to give global effect to its revised band plan, the record in the *Big LEO Spectrum Sharing Proceeding* and the *Modification Order* itself indicate, if anything, that the Commission's action is not sustainable. The purely domestic scope of the proceeding is exemplified by the request from Commission staff that Globalstar supplement the record in the *Big LEO Proceeding* with information concerning its North American aviation services, which operate in the United States

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58/ *See* National Science and Technology Network, Inc., Licensee of Private Land Mobile Radio Station WPMJ456, Glendale, California; Fisher Wireless Services, Inc., Licensee of Private Land Mobile Radio Station WPNQ697, Running Springs, California, FCC File Nos. D108068 and C007248, *Memorandum Opinion and Order*, 23 FCC Rcd 3214 (2008) at ¶ 12 (citing Modification of FM or Television Licenses Pursuant to Section 316 of the Communications Act, *Order*, 2 FCC Rcd 3327 at ¶ 1 (1987) ("*Section 316 Order*")). *See also, Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394-95 (D.C. Cir. 1985)

59/ *Id.* (citing *Section 316 Order* at ¶ 5).

on its L-band channels 6-9. Globalstar complied with that request in November 2005 and April 2006.[60/] Globalstar was never asked for any information about its channel use outside North America. Similarly, the Commission never sought comment on or considered the impact that Iridium's operations in the spectrum between 1617.775 – 1621.35 MHz would have on licensed services in countries in which TDMA MSS services are not authorized below 1621.35 MHz.

Extraterritorial application of the US band plan would have a negative impact on Globalstar, its independent gateway operators, and its customers, and an assessment of that impact would involve a number of complex factual issues that have not been placed in the record or considered. These include, among others:

- The number of foreign countries in which Globalstar and its independent gateway operators rely on the frequencies between 1618.725 and 1621.35 MHz to provide MSS service;
- The number of customers that Globalstar serves in these countries and the percentage of Globalstar's customer base that number represents;
- The extent to which the affected customers include U.S. military and special operations forces, local first responders, and other government and public safety organizations;
- How the restrictions placed on Globalstar's spectrum assignments in other parts of the world in order to protect other services operating in the same or adjacent frequencies (such as the Russian GLONASS system and the Radio Astronomy Service) would exacerbate the harm caused by the extraterritorial application of the revised Big LEO band plan;
- How the need for Globalstar to avoid self-interference in operating the Globalstar satellite and earth station network impacts its ability to provide service around the world without using the frequencies between 1618.725 and 1621.35 MHz;
- How the restrictions contained in the authorizations that have been issued by foreign countries to Globalstar's affiliated and independent gateway operators affect their ability to communicate with the Globalstar satellite constellation without using the frequencies between 1618.725 and 1621.35 MHz;

60/ *See* Globalstar, LLC *Ex Parte* Filing in IB Docket No. 02-364 (filed Nov. 4, 2005); Globalstar, Inc. *Ex Parte* Filing in IB Docket No. 02-364 (filed April 17, 2006).

- The impact that extraterritorial application of the US band plan would have on Globalstar's ability to provide simplex data services – the fastest growing segment of Globalstar's business both in the United States and abroad – outside of the United States.

The Commission's cavalier suggestion in the *Modification Order*[61/] that it "will entertain a waiver or modification of the limitation of space frequencies below 1618.725 MHz" does not obviate consideration of these factual issues before the proposed license modification can take effect. The impact on Globalstar's operations described above is not limited to isolated circumstances for which individual waivers might be appropriate. The impact would be so extensive as to render it arbitrary and capricious for the Commission to finalize the order without considering the factual issues involved. The courts have made clear that the existence of a waiver process does not salvage an unlawful order.[62/] A waiver process likewise cannot excuse a failure to consider the factual issues that bear on the impact of a proposed order. A requirement to file applications for waivers for potentially dozens of countries would impose an unwarranted and unacceptable burden on Globalstar. Where the destructive consequences of an order could be addressed only through multiple complex and expensive waiver requests – which are not presumptively to be granted – the Commission's offhand suggestion of such a "solution" cannot justify a failure to ascertain the relevant facts *before* the order can be placed into effect.

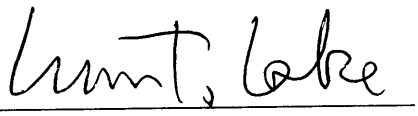
61/ *See Modification Order* at ¶ 5.

62/ *See, e.g., United States Telecom Ass'n v. FCC*, 359 F.3d 554, 571 (D.C. Cir. 2004) ("While a rational rule...may be saved by "safety-valve" waiver or exception procedures, the mere existence of a safety-valve does not cure an irrational rule."); *ALLTEL Corp. v. FCC,* 838 F.2d 551, 561-62 (D.C. Cir. 1988) (*citing WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969)) ("The FCC cannot save an irrational rule by tacking on a waiver procedure ... the deference that we accord administrative action on waiver applications depends upon this assumption.").

Conclusion

For these reasons, Globalstar protests the Commission's *Modification Order* and requests that the Commission designate this matter for hearing.

Respectfully submitted,



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June 6, 2008

CERTIFICATE OF SERVICE

I, Josh L. Roland, do hereby certify that a copy of the foregoing Protest of Globalstar Licensee LLC and GUSA Licensee LLC was served by hand this 6th day of June, 2008, on the following parties, unless otherwise noted:

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