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

In the matter of)
)
Ka-band Satellite Application)
Processing Round of)
September 29, 1995)
)
Petition of PanAmSat Licensee Corp.)
to Reopen the Processing Round)

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

OCT 31 1995

Satellite Policy Branch
International Bureau

OPPOSITION TO PETITION TO REOPEN PROCESSING ROUND

Lockheed Martin Corporation ("Lockheed Martin"), by its attorneys, hereby submits its Opposition to the Petition to Reopen the Processing Round ("Petition") filed by PanAmSat Licensee Corp. ("PanAmSat") on October 11, 1995. Contrary to PanAmSat claims, the Commission should not deviate in the Ka-band licensing proceeding from its established policy of strictly enforcing application deadlines for satellite processing rounds. Further, an extension of the deadline for Ka-band satellite applications would seriously prejudice applicants who filed their applications in a timely manner consistent with established Commission procedures.

INTRODUCTION

Pursuant to a public notice dated July 28, 1995, the Commission established a cut-off date of September 29, 1995, for parties to file applications for authority to construct, launch and operate new Ka-band satellite systems.^{1/} In response to this notice, the Commission

^{1/} Ka-Band Satellite Applications Accepted for Filing; Cut-Off Established for Additional Applications, Public Notice (DA 95-1689, Released July 28, 1995).

received thirteen new Ka-band satellite applications, or amendments to previously-filed applications, including an application by PanAmSat for authority to construct, launch and operate two international Ka-band satellites.^{2/} PanAmSat now asks the Commission to abandon these cut-off procedures for licensing Ka-band satellite systems by reopening the processing round so that additional Ka-band satellite applications and amendments to pending applications can be accepted for filing.

I. PANAMSAT'S PETITION PROVIDES NO BASIS FOR REOPENING THE KA-BAND SATELLITE PROCESSING ROUND

PanAmSat has not demonstrated circumstances sufficient to overcome the Commission's historical presumption against reopening a processing round after the deadline for filing applications has expired. In the past, the Commission has waived its cut-off rules only in the most unusual and compelling circumstances, recognizing that the rules are necessary to assure that Commission proceedings are conducted in an orderly, efficient and fair manner.^{3/}

The Commission has consistently upheld cut-off dates involving new applications, holding that "waivers are granted only upon showings of compelling circumstances."^{4/} In the

^{2/} In addition, Teledesic Corporation had filed an application with the Commission on March 21, 1994, for authority to construct, launch and operate a global Ka-band satellite system in low-Earth orbit.

^{3/} Bronco Broadcasting Co., Inc., 50 FCC 2d. 529, 533 (1974); United Public Broadcasting Co., Inc., 57 R.R. 2d 1605, 1606 (1985); Prairie Broadcasting Company, 47 FCC 2d 373, 377 (1974).

^{4/} Green County Mobilephone, Inc., 98 FCC 2d. 593, 595 (1984). The Commission's caselaw sets out different legal standards, for purposes of waiving the cut-off rules, between new applications to initiate service and amendments to pending applications. Parties seeking to set aside cut-off procedures to file initial applications beyond an

Caldwell II opinion, the Commission stressed that it rarely deviates from its cut-off procedures, stating that "we wish to take this opportunity to reaffirm our intent to continue to enforce strictly the cut-off provisions of our rules and expect all applicants and their counsel to adhere thereto."^{5/} Indeed, as the Court of Appeals in Radio Athens, Inc. stated, "[t]here must be some point in time when the Commission can close the door to new parties"^{6/}

The Commission has recognized that "[t]he cut-off rules serve important public purposes, including fairness among applicants and expedition in the dispatch of the Commission's business," and that "[s]trict enforcement of the cut-off rules is necessary to administrative efficiency."^{7/} Moreover, the Commission has said that deviating from strict enforcement of its cut-off rules in the context of new applications --

would mean that the Commission would consistently have to expend resources on case-by-case waiver requests and never be certain that the processing of a defined group of applicants could begin without disruption. Such potential disruption does not further the public interest. See, e.g., Direct Satellite Broadcast Systems, 88 FCC 2d 100, 110 (1981), recon. denied, 89 FCC 2d 177 (1982).^{8/}

This policy of refusing to reopen a processing round after the deadline for filing applications has been strictly observed in the satellite context. For example, in its Tentative Decision in the domestic Mobile Satellite Service ("MSS") licensing proceeding, the Commission summarily denied requests to reopen that processing round, holding that its cut-

established cut-off date must show unusual and compelling circumstances. A more lenient standard for waiving a cut-off rule applies in the context of amendments to pending applications after establishment of an initial processing group. See e.g., Id. at 595-6.

^{5/} Caldwell Television Associates, Ltd., 53 R.R. 2d, 1686, 1687 (1983).

^{6/} Radio Athens, Inc. (WATH) v. FCC, 401 F.2d 398, 400-401 (D.C. Cir. 1968).

^{7/} Green Country Mobilephone, Inc., *supra* note 4, at 600.

^{8/} Id.

off procedures ensure "orderliness, expedition and finality" in the licensing process and that "these procedures have been upheld by the courts."^{9/} The Commission found that reopening the MSS processing round would be inconsistent with an expeditious resolution of MSS licensing. The Commission also noted in the Tentative Decision that delay from reopening the MSS cut-off could hinder international coordination efforts required for implementing domestic MSS services. Moreover, the Commission has recognized that reopening a satellite processing round might be unfair to applicants who expended substantial sums of money in preparing applications in reliance upon previously-established cut-off dates.^{10/} These public interest factors apply equally to the present Ka-band processing round, and PanAmSat provides no compelling reason for the Commission to abandon strict enforcement of the cut-off rules to reopen this processing round.

PanAmSat maintains that the Commission should reopen the processing round for additional filings because parties lacked adequate notice of the filing fee for Ka-band satellite applications and that applicants might have applied for additional satellites had the Commission previously clarified its fee structure. PanAmSat's argument, however, fails to consider that the establishment of an interim fee arrangement has not yet altered the statutorily-established application fee for geostationary satellites, nor has the Commission to date concluded that a waiver of its scheduled filing fee is justified. Indeed, the notice

^{9/} Tentative Decision, Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Mobile Satellite Service for the Provision of Various Common Carrier Services, 6 FCC Rcd. 4900, 4914, citing, Radio Athens, Inc. (WATH) v. FCC, 401 F.2d 398, 400-01 (D.C. Cir. 1968); Green Country Mobilephone, Inc., 98 FCC 2d 593, 600 (1984); John W. Talbott, 60 FCC 2d 511, 513 (1976).

^{10/} See Notice of Proposed Rulemaking, In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band (FCC 95-229, Released June, 15, 1995), at ¶34.

establishing the interim payment confirms that the filing fee has not yet conclusively changed, for it states that the interim policy will "afford the Commission an opportunity to determine whether to seek congressional amendment of the statutory filing fee schedule, as it now applies to geostationary space stations" ^{11/} In fact, the Commission expressly required that any Ka-band applicant filing an interim payment declare that it will submit any further fee payment required by the Commission on 30 days' notice. Consequently, while it is possible, perhaps even probable, that a downward adjustment to the filing fee will ultimately be adopted based on locating multiple space stations in a given orbit, that issue has yet to be resolved by either the Commission or Congress. While the interim fee arrangement may have provided relief (although possibly only temporary relief) from a literal application of the geostationary satellite fee schedule, the adoption of an interim fee cannot serve as a basis to reopen the Ka-band satellite processing round.

Importantly, PanAmSat's Petition ignores that at least two procedural routes were available to Ka-band applicants, including PanAmSat, who desired to take issue with the Commission's existing fee structure. First, had PanAmSat actually considered locating multiple satellites in the same orbit, it could have filed a request for declaratory ruling ahead of time concerning the fee applicable to such a Ka-band system configuration. Hughes pursued precisely this course, which led to adoption of the interim fee arrangement. Alternatively, PanAmSat could have requested a declaratory ruling and fee refund at the time it filed its application. Lockheed Martin pursued this path by paying the full amount listed in the fee schedule and filing a Request for Fee Determination, Partial Waiver and Refund of Fees. Since PanAmSat could have addressed any concern regarding filing fees for its Ka-

^{11/} Interim Filing Fee Payment Established for Ka Band Satellite Applications, Public Notice, Released September 28, 1995.

band satellite system prior to, or at the same time as, the application filing deadline, its failure to pursue established procedures for resolving fee issues should preclude reopening the processing round at this time. To hold otherwise would unfairly provide PanAmSat with a "second bite at the apple," thereby prejudicing other applicants, contrary to all established precedent.

Finally, Lockheed Martin seriously questions PanAmSat's claim that the filing fee is a "critical factor" for applicants in configuring Ka-band satellite proposals. For example, the Ka-band application filed by PanAmSat on September 29 proposes two international Ka-band satellites costing \$204.5 million each. The filing fee paid by PanAmSat for each of these applications, \$82,690, amounts to only 0.04% of the total cost for each satellite. Given PanAmSat's resources and established role in the industry, it is difficult to imagine that application fees were a "critical factor" in designing its Ka-band satellite system. Moreover, it is inconceivable that FCC filing fees could ever be a "critical factor," given the enormous financial resources otherwise required to construct, launch, and operate a Ka-band satellite system. But even if fees were a factor, PanAmSat, or any other party, could have pursued established procedures for seeking adjustment of the filing fee, a course followed by other Ka-band applicants. PanAmSat's failure to do so cannot now justify setting aside the cut-off rules.

II. A DECISION TO REOPEN THE KA-BAND PROCESSING ROUND WOULD SERIOUSLY PREJUDICE APPLICANTS WHO COMPLIED WITH THE COMMISSION'S PROCEDURES

Grant of the PanAmSat Petition would be fundamentally unfair to current Ka-band applicants for a number of reasons. First, a decision to reopen the processing round would delay licensing of the Ka-band systems that have already been proposed. Reopening the

process would necessitate setting a new application deadline, and the Commission's consideration of applications currently on file would need to be deferred. New applications, including more ambitious proposals by existing applicants, would complicate the proceeding, virtually ensuring that mutual-exclusivity could not be resolved within any reasonable timeframe. An increased number of applicants or space station proposals at this stage would increase the level of pleadings and bickering among applicants, creating an unmanageable and costly administrative process that would delay the FCC's licensing of Ka-band systems.

Second, reopening the process would enable existing applicants to upgrade their proposals, and permit others to file proposals for the first time, and thereby gain an unwarranted advantage vis-a-vis applicants who filed consistent with the Commission's cut-off rules. It would be grossly unfair to permit applicants to propose upgraded or new systems based on a review of previously-filed applications that have been made publicly available. Indeed, this would violate elemental rules of fairness and would compromise the integrity of the Commission's processes in a most serious way.

Third, reopening the Ka-band processing round would encourage the filing of speculative satellite proposals by parties seeking to "warehouse" spectrum or gain concessions from serious applicants who filed in accordance with the established cut-off procedures.

Finally, reopening the processing group would not only delay FCC licensing of Ka-band systems, but would hinder international coordination efforts that must begin immediately in order to protect U.S. satellite interests. Indeed, the Commission's International Bureau has scheduled a status conference for October 26, 1995 "to explore options for resolving the conflicting requirements for orbital locations so that we can begin submissions of Appendix 4 to the ITU before the end of WRC-95." Permitting new

applicants and space station proposals now will thwart this effort and jeopardize the interests of the U.S. satellite industry in the international coordination process.

For these reasons, reopening the Ka-band processing round would seriously prejudice parties who filed their applications on or before the September 29 cut-off date, and the Commission should decline to do so.

CONCLUSION

Lockheed Martin respectfully submits that the FCC's policy of strictly enforcing cut-off procedures for initial applications is based on sound public interest considerations, including fairness among applicants and the efficient dispatch of the Commission's business. PanAmSat's Petition does not provide a sufficient reason, much less compelling circumstances, that would justify a reopening of the Ka-band processing round. Contrary to PanAmSat's assertions, the interim filing fee for geostationary satellites cannot be viewed as a critical factor in the context of the limited relief afforded by the public notice announcing the interim arrangement, *i.e.*, permitting parties proposing multiple space stations in a given orbit to calculate an interim fee based on the number of orbit locations rather than the number of space stations. Nor can FCC filing fees be deemed material in the context of the enormous financial resources otherwise required to construct, launch and operate satellite

systems. But even assuming, arguendo, that fees were a factor, PanAmSat, or any other party, could have pursued established procedural routes to address their fee concerns. The failure to do so should preclude a reopening of the established Ka-band processing round.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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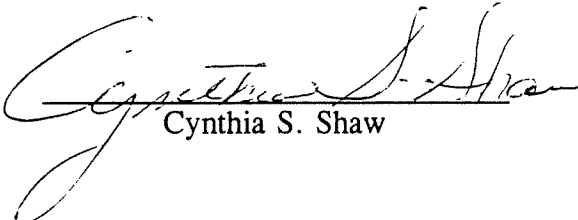
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