

LAW OFFICES
GOLDBERG, GODLES, WIENER & WRIGHT LLP
1025 Connecticut Avenue, N.W., Suite 1000
WASHINGTON, D.C. 20036-5417

HENRY GOLDBERG
JOSEPH A. GODLES
JONATHAN L. WIENER

W. KENNETH FERREE*
HENRIETTA WRIGHT
THOMAS G. GHERARDI, P.C.
COUNSEL

THOMAS S. TYCZ**
SENIOR POLICY ADVISOR

*NOT ADMITTED IN DC

**NOT AN ATTORNEY

(202) 429-4900
FAX:
(202) 327-5499
e-mail:
general@g2w2.com
website: www.g2w2.com

August 15, 2019

FILED ELECTRONICALLY VIA IBFS

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

Re: *Ex Parte* Communication
Space Exploration Holdings, LLC, File Nos. SAT-LOA-20161115-00118 and SAT-MOD-20181108-00083
WorldVu Satellites Limited, File No. SAT-LOI-20160428-00041
Kepler Communications Inc., File No. SAT-PDR-20161115-00114

Dear Ms. Dortch:

On behalf of Telesat Canada (“Telesat”), this letter responds to the filing of Space Exploration Holdings, LLC (“SpaceX”), dated July 19, 2019, in the above-captioned proceedings.¹ In that filing, SpaceX responds to the analyses submitted by Telesat, WorldVu Satellites Limited (“OneWeb”), and Kepler Communications, each demonstrating that SpaceX has misread the Commission’s rules concerning which satellite operator is entitled to first choice of “home base” frequencies.

SpaceX’s argument essentially comes down to its contention that the words of the Commission’s first to launch rule, Section 25.261(c),² do not mean what they say. While citing what SpaceX describes as long-standing principles of statutory

¹ Letter dated July 19, 2019 from William M. Wiltshire, Counsel for SpaceX to Marlene H. Dortch, Secretary, Federal Communications Commission, re Space Exploration Holdings, LLC, File Nos. SAT-LOA-20161115-00118 and SAT-MOD-20181108-00083 (“SpaceX Letter”).

² 47 CFR §25.261(c).

construction,³ it ignores what the Supreme Court has called the “cardinal canon before all others,” which is that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”⁴

These fundamental principles of construction refute SpaceX’s argument. As Telesat has shown, SpaceX’s proposed interpretation conflicts with what the Commission has said, and must be presumed to have meant, in Section 25.261(c).⁵ Although SpaceX asserts Section 25.261(c) makes having a U.S. earth station a precondition to getting in line for home spectrum, no such words appear in the text of the rule. The only precondition Section 25.261(c) identifies is launching a first space station that is capable of operating in the frequency band under consideration.

SpaceX cites an 1850 case for the proposition that one must go beyond the words of a single sentence to interpret its meaning in a statute.⁶ Even if that proposition were applicable here, notwithstanding the unambiguous language of Section 25.261(c), nothing in the remainder of Section 25.261 suggests the Commission intended Section 25.261(c) to mean anything other than what it plainly states.

SpaceX’s 1850 case, moreover, involved a convoluted set of overlapping statutes where the reading of one sentence in isolation would have rendered “nugatory” other parts of the statute - a nonsensical result that would have granted jurisdiction to the court in one part of a statute only to deny it in another.⁷ Here, by contrast, there is nothing nonsensical about the words of the rule in question which, despite SpaceX’s desire that they should mean something different from the words as written, are entirely consistent with other “home spectrum” policies and rules the Commission has promulgated.⁸

SpaceX’s reliance on the 1850 case to suggest some similarly fatal flaw in the words of the rule in question must fail. Here, SpaceX argues, the flaw is that the Commission might be forced to determine which company is entitled to choose spectrum first without knowing whether that company would have any earth stations

³ SpaceX Letter at 2-3.

⁴ *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992). See, e.g., *Carcieri v. Salazar*, 555 U.S. 379, 393 (2009) (one of many cases following this principle).

⁵ [cite]

⁶ SpaceX Letter at 3.

⁷ *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1850).

⁸ See, *In the Matter of The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, 15 FCC Rcd 16127 (2000), at ¶¶ 16 and 28; see also 47 C.F.R. § 25.157(f)(1).

falling under the rule. SpaceX's argument is beyond fanciful because, among other reasons, (1) the Commission need not make a determination under Section 25.261(c), as SpaceX recognizes, unless and until coordination between the parties has been attempted and failed; and (2) that coordination of necessity will have taken into account earth stations that fall within the jurisdictional ambit of Section 25.261(a).⁹

SpaceX claims its position is supported by there being a reference to earth stations in Section 25.261(a), which sets forth the jurisdictional scope of the rule, but not in 25.261(c), which identifies the precondition to securing home spectrum priority.¹⁰ However, a principle of construction that SpaceX itself cites shows exactly the opposite, *i.e.*: "When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing."¹¹

Accordingly, principles of construction, as well as an ordinary reading of the terms of Section 25.261(c), require that meaning be given to the differences in language between Section 25.261(a) and Section 25.261(c). Section 25.261(a) makes having earth stations part of the jurisdictional scope of the rule because until there are operating earth stations, there can be no in-line interference events that necessitate coordination or, if coordination fails, division of frequencies. Section 25.261(c) does not make having operating earth stations a prerequisite to getting priority for home spectrum because, as with other home spectrum policies and rules, the Commission did not want it to be a prerequisite.

SpaceX's attempt to explain away the 2017 changes in the pertinent portion of Section 25.261(c) is equally unavailing. The Commission's 2017 rewrite modified the requirement for selecting frequencies from "the date that the first space station in each satellite network is launched and operating" to the current "the date that the first space station in each satellite system is launched and capable of operating."¹² To be capable of operating, a satellite needs only a transmitter and a receiver; there is no requirement for an earth station to exist with which to communicate, much less a requirement that such earth station exist in the United States.

Similar language can be found in Section 25.146(b) of the Commission's rules, which states: "an NGSO FSS applicant proposing to operate in the 10.7-12.7 GHz, 12.75-

⁹ 47 C.F.R. §25.261(a) and (b).

¹⁰ SpaceX Letter at 3-4.

¹¹ SpaceX Letter, note 10, quoting *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (DC Cir, 1984).

¹² See SpaceX Letter at 3.

13.25 GHz, 13.75-14.5 GHz, 18.8-19.3 GHz, or 28.6-29.1 GHz bands must provide a demonstration that the proposed system is *capable of providing* FSS on a continuous basis throughout the fifty states, Puerto Rico, and the U.S. Virgin Islands.”¹³ It is hard to imagine anyone suggesting that the demonstration of such capability would require that there exist earth station facilities in all fifty U.S. states and in all U.S. territories that are also capable of such communication. Indeed, SpaceX made no such demonstration in its own showing of compliance with and request for partial waiver of this rule.¹⁴ And the Commission’s acceptance of SpaceX’s showing and grant of its partial waiver request make no suggestion of such a requirement.¹⁵

Canons of construction are helpful here, too. There is a construction principle that the same or similar words used in different parts of the same statute should be interpreted to mean the same thing.¹⁶ Under this principle, the use of the word “capable” in the rule addressing satellite coverage requirements should have the same meaning when used in the rule providing for satellite home frequency selection. In either case, the capability of a satellite system to operate or provide service is not defined or dependent on having operating earth stations.

Moreover, nothing in the Commission’s rulemaking decision or other administrative history suggests that the earth station language in Section 25.261(a) was intended to apply to the first to launch language in Section 25.261(c). If that had been the Commission’s intention, surely it would have said so. Instead, the Commission stated it was modifying 25.261(a) to clarify that its sharing rule only applies to earth stations with directional antennas¹⁷ and to clarify the geographic scope of the rule as

¹³ 47 C.F.R. § 25.146(b) (emphasis added).

¹⁴ *Space Exploration Holdings, LLC, Application for Approval of Orbital Deployment and Operating Authority for the SpaceX NGSO Satellite System*, IBFS File No. SAT-LOA-20161115-00118 (filed Nov 15, 2016), Attachment A Technical Information to Supplement Schedule S at pp 17-19, and Waiver Requests at pp. 13-14.

¹⁵ *In re Space Exploration Holdings, LLC, Application For Approval for Orbital Deployment and Operating Authority for the SpaceX NGSO Satellite System and Supplement*, IBFS File No. SAT-LOA-20161115-00118, Call Sign S2983, and SAT-LOA-20170726-00110, Call Sign S3018, Memorandum Opinion, Order & Authorization, FCC 18-38 (rel Mar 29, 2018) at ¶ 33.

¹⁶ See e.g., *Sullivan v. Stroop*, 496 U.S. 471, 484 (1990).

¹⁷ *Update to Parts 2 and 25 Concerning Non-Geostationary, Fixed-Satellite Service Systems and Related Matters*, Notice of Proposed Rulemaking, IB Docket No. 16-408, FCC 16-170 (rel. Dec. 15, 2016) (“NGSO NPRM”) at ¶ 23

applied to non-U.S.-licensed systems.¹⁸ While SpaceX is dismissive of these stated reasons, they perfectly explain why the Commission's rule is written as it is.

Finally, SpaceX's parade of horrors as to how foreign-licensed satellite operators supposedly could game the system under a plain reading of the words in Section 25.261(c) makes no sense because:

- It is fanciful to suggest that the operators would make an effort to gain U.S. market access and then use it not to serve the U.S., but only to get a leg up on coordination that would in any event only apply to their operations in the U.S.;
- If this really were a plausible strategy, U.S. licensed systems could do the same thing by operating for years just with earth stations outside the U.S.;
- SpaceX's argument that its interpretation of the rule would prevent operators from claiming priority based on just a few "dummy satellites" goes even farther afield. Having an earth station in the U.S. or somewhere else in the world is not indicative of the scope or quality of the service that an operator's first satellites might be able to provide, nor is there anything in the Commission's rules that would require such a demonstration.

In sum, the plain meaning of the Commission's language, principles of construction, the lack of any expression of contrary intent, Commission policy, and the public interest all dictate that the Commission's words in Section 25.261(c) should be interpreted to say what they mean and mean what they say.

¹⁸ *Update to Parts 2 and 25 Concerning Non-Geostationary, Fixed-Satellite Service Systems and Related Matters, Report & Order and Further Notice of Proposed Rulemaking*, IB Docket 16-408, FCC 17-122, 32 FCC Rcd 7809 (rel. Sep 27, 2017) ("NGSO R&O") at ¶ 53.

Ms. Marlene H. Dortch
August 15, 2019
Page 6

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

A handwritten signature in black ink that reads "Henry Goldberg". The signature is written in a cursive style with a large, prominent "H" and "G".

Henry Goldberg
Joseph A. Godles
Attorneys for Telesat Canada

cc: Karl Kensinger, FCC
William M. Wiltshire, counsel for SpaceX
Brian Weimer, counsel for OneWeb
Nicholas Spina, Kepler Communications