

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

FILED/ACCEPTED

AUG 13 2008

Federal Communications Commission
Office of the Secretary

In the Matter of)
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STAR ONE S.A.)

File No. SAT-PPL-20071113-00159

Call Sign S2742

Petition for Modification of)
Declaratory Ruling That Added the)
Star One C5 Satellite at 68° W.L. to)
the Permitted Space Station List)
_____)

To: The Commission

APPLICATION FOR REVIEW

Star One S.A. (“Star One”) hereby submits this Application for Review of the International Bureau’s Order on Reconsideration, DA 08-1645 (rel. July 14, 2008) (“*Reconsideration Order*”), which modified the Bureau’s earlier grant of a Declaratory Ruling adding the proposed Star One C5 satellite at 68° W.L. to the Commission’s Permitted Space Station List (the “*C5 Ruling*”).¹

In the *Reconsideration Order*, the Bureau erred in granting the “Request for Clarification or, in the Alternative, for Reconsideration” of the *C5 Ruling* filed by the Administration of Colombia on behalf of the Andean Satellites Association and the Andean Community (collectively, “ASA”).² The ASA Request should have been denied at the outset because it was procedurally defective. ASA had failed to participate in the proceeding prior to the grant of the

¹ See Stamp Grant, File No. SAT-PPL-20071113-00159 (granted Feb. 7, 2008) (“*C5 Ruling*”); Public Notice, *Policy Branch Information: Actions Taken*, DA 08-394, Rep. No. SAT-00502 (rel. Feb. 15, 2008) (“*C5 Grant Notice*”).

² See Letter from Maria Del Rosario Guerra, Minister for Communications, Republic of Colombia, to Mr. Kevin J. Martin, Chairman, FCC, *filed in* File No. SAT-PPL-20071113-00159 (dated Mar 13, 2008) (“Request”).

C5 Ruling and had failed to provide “good reason” for not having participated earlier, as required by the Commission’s rules.³ The Bureau’s decision to consider the ASA Request despite this procedural defect was therefore in conflict with the Commission’s established rules, precedent and policy.⁴ Further, this procedural error was highly prejudicial because Star One was required to, and did, post a \$3 million bond for the C5 satellite prior to ASA first appearing before the Commission to raise its concerns.⁵ As a result, the *Reconsideration Order* should be reversed and ASA’s Request should be denied.

I. QUESTIONS PRESENTED

The questions presented by this Application for Review are:

1. Was the Bureau’s grant of the ASA Request, despite ASA’s failure to show “good reason” why it did not participate earlier in the proceeding, in conflict with the Commission’s rules, case precedent and policy?⁶
2. Did the Bureau commit prejudicial procedural error⁷ by granting ASA’s Request for reconsideration?

³ See 47 C.F.R. § 1.106(b)(1). See also Star One S.A., Opposition to Request for Clarification or, in the Alternative, for Reconsideration at 2-3, filed in File No. SAT-PPL-20071113-00159 (filed Mar. 26, 2008) (“*Star One Opposition*”).

⁴ See 47 C.F.R. § 1.115(b)(2)(i).

⁵ See 47 C.F.R. § 1.115(b)(2)(v). See also *Star One Opposition* at 3.

⁶ See 47 C.F.R. § 1.115(b)(2)(i).

⁷ See 47 C.F.R. § 1.115(b)(2)(v).

II. THE BUREAU'S GRANT OF ASA'S REQUEST FOR RECONSIDERATION CONFLICTED WITH COMMISSION RULES, PRECEDENT AND POLICY

The Bureau should have denied ASA's Request for reconsideration because ASA failed to participate earlier in this proceeding and failed to provide "good reason" for why it did not participate. Section 1.106(b)(1) of the Commission's rules is clear:

If the petition [for reconsideration] is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, *and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.*

In this case, ASA made no attempt to file any comments or otherwise participate in this proceeding prior to the grant of the *C5 Ruling*, despite the fact that Star One's petition for declaratory ruling was on public notice for two months.⁸ The first time ASA made its interest known to the Commission was when it filed its Request for reconsideration on March 13, 2008, or 35 days after the grant of the *C5 Ruling*, and after Star One had posted a \$3 million bond with the Commission.⁹

Under the Commission's rules, ASA was required to demonstrate, in its Request for reconsideration, "good reason why it was not possible for [it] to participate in the earlier stages of the proceeding."¹⁰ But the only explanation given by ASA for its failure to participate earlier was that it mistakenly "expected" the Commission to impose additional conditions on the *C5*

⁸ Star One's petition was placed on public notice on December 7, 2007. Public Notice, *Policy Branch Information: Space Station Applications Accepted for Filing*, Rep. No. SAT-00487 (rel. Dec. 7, 2007). The *C5 Ruling* was granted on February 7, 2008. *See C5 Ruling.*

⁹ The *C5 Ruling* was granted on February 7, 2008, but the grant was not placed on public notice until February 15, 2008. *See C5 Grant Notice.*

¹⁰ 47 C.F.R. § 1.106(b)(1).

Ruling that would protect ASA's interests.¹¹ In other words, ASA was surprised that the Bureau granted Star One's petition without such conditions.

The Commission, however, has long held that "surprise" is "no basis for a new party to file a petition for reconsideration,"¹² and has consistently rejected petitions for reconsideration filed on this basis.¹³ As the Commission has explained, "[i]nterested parties must timely file a petition to deny any application they oppose and record their opposition, and the reasons for that opposition, however remote they perceive the chances that the application would be granted."¹⁴ In this regard, the D.C. Circuit has agreed with the Commission: "If we were to require the Commission to accept surprise as a sufficient justification for a new party to seek reconsideration, the Commission's – and indeed the public's – interest in finality of licensing decisions would be eviscerated."¹⁵ In other words: "a person who has a right to participate in a

¹¹ See *Reconsideration Order* at ¶ 4 ("The Andean Satellites Association indicates that it did not participate in the Star One C5 proceeding earlier because it expected, consistent with precedent, that such a condition would be adopted."); ASA Request at 2.

¹² *Press Broadcasting Co. and Silver King Broadcasting of Vineland, Inc.*, 3 FCC Rcd 6640, at ¶ 5 (1988). See also *GTE Telenet Communications Corp. v. AT&T*, 1 FCC Rcd 367, at ¶ 6 (1986) (rejecting "surprise[] at the result" as "good cause" for a new party to file a petition for reconsideration); *GTE Mobilenet of Houston L.P.*, 8 FCC Rcd 2728, at ¶¶ 4-5 (rejecting a mistaken assumption about how the Commission would rule as good cause for not participating earlier); *AT&T Corp. v. BellSouth Telecommunications, Inc.*, 20 FCC Rcd 8578, at ¶ 6 (2005) ("'surprise' at the outcome of a Commission proceeding does not ordinarily excuse a failure to attempt to participate earlier in the proceeding.").

¹³ See *supra* note 12.

¹⁴ *Press Broadcasting Co.*, 3 FCC Rcd at ¶ 5.

¹⁵ *Committee for Community Access v. FCC*, 737 F.2d 74, 84 (D.C. Cir. 1984). Indeed, the impact of the Bureau's decision on the finality of Commission licensing decisions cannot be underestimated. Other non-participating parties have already begun to cite the *Reconsideration Order* in support of post-grant requests for action. See Letter from Todd M. Stansbury, Counsel for Spectrum Five, LLC, to Marlene H. Dortch, Secretary, FCC, filed in File No. SAT-LOA-20070622-00085 (Aug. 8, 2008) (Emergency Request for Clarification of Conditions on the Operation of the EchoStar 11 DBS Satellite at 110° W.L.).

proceeding before the Commission cannot delay exercising that right until after the Commission has acted and then expect to be allowed to participate by filing post-grant pleadings.”¹⁶

In the *Reconsideration Order*, the Bureau simply noted that ASA did not participate earlier because it “expected” the Bureau to impose certain conditions, before summarily granting ASA’s Request.¹⁷ The Bureau did not even address the question of whether ASA’s surprise constituted “good reason” for not participating earlier in the proceeding, even though the issue had been raised squarely by Star One in its opposition to the ASA Request.¹⁸ The Bureau did not try to reconcile ASA’s excuse for failing to participate in the earlier proceedings with the Commission’s past precedent on what constitutes “good reason.” Had it consulted those precedents, it would have found that ASA’s “surprise” at the Bureau’s decision is not “good reason” for ASA’s failure to participate earlier in the proceeding.¹⁹ The Bureau therefore acted in clear conflict with established Commission rules, precedent and policy when it decided to consider ASA’s Request.

¹⁶ *Concord Telephone Exchange, Inc.*, 56 Rad. Reg. 2d (P & F) 653, at ¶ 9 (1984).

¹⁷ *Reconsideration Order* at ¶¶ 3-5. In any event, as Star One has previously argued, ASA should not have been surprised by the Bureau’s omission of the additional conditions it has requested on reconsideration. See *Star One Opposition* at 2-3 n.5. In the vast majority of its satellite licensing decisions, the Bureau will do no more than make its grant subject to the international coordination process, regardless of the ITU priority of the U.S. network. It is only in those proceedings in which a party claiming superior ITU priority has filed comments that the Commission has imposed the additional conditions sought in this proceeding. See, e.g., *Loral SpaceCom Corp.*, 18 FCC Red 16374 (2003) (cited in ASA Request at 3 n.4); *PanAmSat Corp.*, 15 FCC Red 21802 (1999) (where Andean participation in the proceeding resulted in conditions to protect a higher priority ITU network).

¹⁸ See *Star One Opposition* at 2-3.

¹⁹ See *supra* note 10.

III. THE BUREAU COMMITTED PREJUDICIAL PROCEDURAL ERROR

As discussed above, the Bureau's decision to grant the ASA Request, despite ASA's failure to show "good reason" why it did not participate earlier in the proceeding, was clearly procedural error. This error was also extremely prejudicial to Star One.²⁰

Pursuant to the Commission's rules and the *C5 Ruling* itself,²¹ Star One was required to submit a \$3 million performance bond for the Star One C5 satellite "within 30 days of the grant" of its petition for declaratory ruling. Star One duly submitted such a bond on March 10, 2008, on the assumption that the Bureau's decision would be final because no party had opposed or commented on Star One's petition.²² ASA's Request for consideration, however, was not filed until March 13, 2008, several days *after* Star One submitted the performance bond.²³

The Bureau's erroneous grant of the ASA Request in this case, therefore, involved not only the usual prejudice associated with late participation and lack of finality. It also involved the prejudice that flows from modifying the *C5 Ruling* after Star One had already made a \$3-million decision to post a bond for the Star One C5 satellite in accordance with the *C5 Ruling* and the Commission's rules. In effect, Star One was deprived of the opportunity to consider whether the additional conditions requested by ASA, and subsequently imposed by the Bureau,

²⁰ See *Star One Opposition* at 3.

²¹ See 47 C.F.R. §§ 25.137(d), 25.165(a); *C5 Ruling* at condition 5(e).

²² See Letter from Daniel C.H. Mah, Counsel for Star One S.A., to Marlene H. Dortch, Secretary, FCC, filed in File No. SAT-PPL-20071113-00159 (filed Mar. 10, 2008).

²³ Because the February 7, 2008 *C5 Ruling* was not placed on public notice by the Bureau until February 15, 2008, see *C5 Grant Notice*, petitions for reconsideration of the *C5 Ruling* were not due until 30 days after that notice, or March 16, 2008. See 47 C.F.R. § 1.106(f) ("The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules . . ."). However, Star One's 30 days to submit a performance bond ran from the February 7, 2008 grant date. See 47 C.F.R. § 25.165(a).

would have affected Star One's investment decisions regarding this project. Such prejudicial error should not be countenanced by the Commission.

IV. CONCLUSION

For all of the reasons set forth herein, the Commission should reverse the *Reconsideration Order* and reject ASA's Request for reconsideration.

Respectfully submitted,



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August 13, 2008.

CERTIFICATE OF SERVICE

I, Chung Hsiang Mah, hereby certify that on Wednesday, August 13, 2008, caused true and correct copies of the attached "Application for Review" to be served on the following parties by the method indicated:

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