

FILED/ACCEPTED

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Federal Communications Commission  
Office of the Secretary

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

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In the Matter of )

STAR ONE S.A. )

Petition for Declaratory Ruling to be  
Added to the Permitted List )

) File No. SAT-PPL-20081205-00225  
) Call Sign S2784

) File No. SAT-PPL-20071113-00159  
) Call Sign S2742

To: The Commission

**APPLICATION FOR REVIEW**

Star One S.A. (“Star One”) hereby submits this Application for Review of the International Bureau’s Order, DA 10-1957 (rel. Oct. 13, 2010) (“*October 2010 C5 Order*”) which (1) denied Star One’s request to modify the Bureau’s declaratory judgment that placed the Star One C5 satellite (“C5”) on the Commission’s Permitted Space Station List (“Permitted List”) at 68°<sup>1</sup> by substituting the in-orbit Star One B1 satellite (“B1”), and instead (2) ordered null and void the C5 Permitted List entry and (3) declared the C5 performance bond due and payable to the U.S. Treasury.<sup>2</sup>

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<sup>1</sup> In this Application for Review, we refer to 68° to refer to both the 68° W.L. orbital slot and the 67° W.L. slot, since under the Commission’s 2° spacing rule, the slots are essentially the same. See *Licensing of Space Stations in the Domestic Fixed-Satellite Service and Related Revisions of Part 25 of the Rules and Regulations*, 54 Rad. Reg. 2d 577 (1983). Moreover, as a technical matter, it is not possible for two satellites to operate in the same frequency band a mere one degree apart. See Stamp Grant, File No. SAT-PPL-20071113-00159 (granted Feb. 7, 2008) (“*February 2008 C5 Order*”); Public Notice, DA 08-394 (rel. Feb. 15, 2008) (“*C5 Notice*”).

<sup>2</sup> *Petition for Modification to the Declaratory Ruling Adding Star One C5 to the Permitted List*, Order, File Nos. SAT-PPL-20081205-00225, SAT-PPL-20071113-00159 (rel. Oct. 13, 2010) (“*October 2010 C5 Order*”).

In the *October 2010 C5 Order*, the Bureau acted contrary to established Commission policy and precedent by declaring the performance bond for C5 due and payable in lieu of either granting Star One's request to substitute the B1 satellite and find all applicable milestones met or waiving the bond requirement for good cause shown. Actions taken by the Bureau and the Andean States Association ("ASA")<sup>3</sup> after Star One posted the bond preclude Star One from providing Ku-band service in the United States from 68°. The ASA entered into a new agreement with SES New Skies to relocate an aging satellite to 68° by the September 18, 2010 deadline for maintaining ITU priority ("*ASA-SES Relocation Agreement*"), and asked the Bureau to reconsider its *February 2008 C5 Order* to establish that this relocation maneuver would preclude Star One from offering Ku-band service in the United States. The Bureau obliged by first changing the *February 2008 C5 Order* to add two new conditions that prohibit Star One from providing Ku-band service at 68° if ASA has a Ku-band satellite at 68°,<sup>4</sup> and later granting first Special Temporary Authority and then permanent authority to SES to relocate and operate AMC-4 in the Ku- and extended Ku-bands at 68°.<sup>5</sup> These actions preclude Star One from offering service to the United States in the Ku-band from 68°.

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<sup>3</sup> The Andean States Association acts through the Administration of Columbia as its Notifying Administration before the International Telecommunications Union ("ITU"). See Letter from Maria Del Rosario Guerra, Minister for Communications, Republic of Colombia, to Mr. Kevin J. Martin, Chairman, FCC, File No. SAT-PPL-20071113-00159 (dated Mar. 13, 2008) ("*ASA Reconsideration Motion*").

<sup>4</sup> See Order on Reconsideration, Petition for Declaratory Ruling to Add the Star One C5 Satellite at 68° to the Permitted Space Station List, 23 FCC Rcd. 10896 (2008) ("*C5 Reconsideration Order*"); see also Star One S.A., Opposition to Request for Clarification or, in the Alternative, for Reconsideration, File No. SAT-PPL-20071113-00159 (filed Mar. 26, 2008) ("*Star One Opposition*").

<sup>5</sup> Stamp Grant, File No. SAT-STA-20100525-00108 (granted July 29, 2010) ("*SES-ASA Relocation Order*"); Stamp Grant, File No. SAT-MOD-20100623-00144 (granted Nov. 4, 2010).

The *October 2010 C5 Order* effectively fines Star One \$3 million for not constructing and deploying a system that, under the *C5 Reconsideration Order* and the Laws of Physics, Star One could not operate. There is no utility in attempting to force Star One to build a satellite that it cannot deploy. And it is manifestly inequitable to do so when circumstances beyond Star One's control, including the Bureau's own actions, preclude its use.

The *October 2010 C5 Order* was arbitrary and capricious because it conflicted with established Commission policy and precedent in at least three respects. First, it is settled Commission policy that the milestone and bond requirements will not be enforced when compliance is beyond the licensee's control. The new *ASA-SES Relocation Agreement* and the Bureau's new conditions in the *C5 Reconsideration Order* were manifestly outside of Star One's control.

Second, it is established Commission policy that a waiver of its rules will be granted when the waiver "would better serve the public interest than would strict adherence to the general rule."<sup>6</sup> The milestone and bond requirements are designed to discourage the warehousing of spectrum and to encourage parties to complete their planned systems. Enforcing the bond could not encourage Star One to complete its planned hybrid C/Ku-band satellite because Star One cannot operate in the Ku-band at 68° under the Bureau's orders. Indeed, it would be a technical impossibility.

Finally, it is a bedrock principle of Commission policy and administrative law that similarly situated parties must be treated the same. At the time Star One posted its bond, the Commission's *Rainbow* decision was still good law.<sup>7</sup> Star One's inability to proceed with its

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<sup>6</sup> *TMI Commc'ns. & Co., L.P. and TerreStar Networks Inc.*, 19 FCC Rcd. 12603 ¶ 39 (2004).

<sup>7</sup> See *Rainbow DBS Co. LLC*, 22 FCC Rcd. 4272 (2007) ("*Rainbow*").

original plans for 68° because of the subsequent actions by the ASA and the Bureau is at least as good a cause as the financial challenges *Rainbow* experienced in its efforts to fulfill the terms of its license. There is no rational basis for treating Star One more harshly than *Rainbow*, and the Bureau's *October 2010 C5 Order* did not offer one.

The Bureau's actions to collect on the C5 bond were arbitrary and capricious. The Commission should therefore grant Star One's request to replace the Star One C5 Permitted List entry with the C-band B1, find that Star One has satisfied any applicable milestone requirements, and release the C5 performance bond. In the alternative, the Commission should find that the public interest is served by a waiver of its bond requirements, and should release the Star One C5 performance bond for good cause shown.

## **I. QUESTION PRESENTED**

The question presented by this *Application for Review* is: Was the Bureau's decision to declare C5's performance bond due and payable to the U.S. Treasury in conflict with the Commission's precedents or established Commission policy?<sup>8</sup>

## **II. BACKGROUND AND PROCEDURAL HISTORY**

### **A. The Operations of Star One**

Star One, a Brazilian company, is the leading South American satellite operator providing fixed and direct-to-home satellite services to the Americas. Star One currently operates a fleet of six satellites, three of which are authorized by the Commission to serve the United States.<sup>9</sup> Star

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<sup>8</sup> See 47 C.F.R. § 1.115(b)(2)(i).

<sup>9</sup> Pursuant to the *October 2010 C5 Order*, B1 is authorized to serve the United States in the C-band from 68°. In addition, the Star One C1 satellite is authorized to serve the United States in both the C- and Ku-bands from 65° W.L., and the Star One C2 satellite is authorized to serve the United States in the Ku-band from 70° W.L. See Stamp Grant, File No. SAT-MOD-

One's annual revenues exceed \$190 million, and customers include TV Globo, British Telecom, Intelsat and Embratel.

Once the *ASA-SES Relocation Agreement* and the Bureau's *C5 Reconsideration Order* made it clear that Star One would not be able to provide Ku-band service to the United States from 68°, Star One adjusted its plans and now intends to offer service to the United States from its next generation Star One C3 satellite to be located at 75° W.L. Star One C3 is a Brazilian-licensed, hybrid C/Ku-band satellite currently under construction and scheduled for launch in 2012. Star One is preparing a Petition for Declaratory Ruling to add the C3 satellite to the Permitted List for C/Ku-band service from 75° W.L.

**B. The ASA's Filings for Ku-Band Service at 68°**

The ASA first filed with the ITU for the Ku-band at 68° in July 1989.<sup>10</sup> In the 22 years since the original ITU filing, neither the ASA nor anyone else has ever provided any commercial Ku-band services from this slot. In 2005, 16 years after the initial ITU filing, the ASA was at risk of losing its priority at 68°. The ASA managed to extend ITU priority, however, by arranging to have Telesat relocate the 14-year old Anik E1 satellite to 68°.<sup>11</sup> Anik E1 operated at 68° for just over 3 months prior to its end of life in 2005 and never provided any actual

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20051014-00200 (granted Apr. 4, 2006) (C2); Stamp Grant, File No. SAT-PPL-20050706-00143 (granted Mar. 29, 2005) (C1).

<sup>10</sup> See ITU, *Satellite Network Listings*, [www.itu.int/ITU-R/snl](http://www.itu.int/ITU-R/snl) (accessed Oct. 19, 2010) (listing the Simon Bolivar 2 network as having first filed with the ITU in July 1989) ("*Simon Bolivar 2 Network Listing*"). The *October 2010 C5 Order* mistakenly states that the ASA first filed for this orbital location nine years later, in September 1998. *October 2010 C5 Order* ¶ 12 n.40.

<sup>11</sup> See *Simon Bolivar 2 Network Listing* (noting the submission of Resolution 49 materials in November 2004); see also Canadian Satellites – The Hardware Story, *Canadian Communications Foundation*, <http://www.broadcasting-history.ca> (noting that Anik E1 was leased to a Venezuelan company "in support of a bid to bring the 67° W orbital slot into service") (accessed Nov. 10, 2010).

commercial service. The ITU ultimately placed the ASA network on its list of “suspended satellite networks” as of September 2005.<sup>12</sup>

Under ITU rules, the ASA had two years from September 2005 to bring its frequencies back into use at 68° before it lost its priority at the slot.<sup>13</sup> However, the ASA managed to procure a three-year extension of this deadline at the World Radio Conference 2007 until September 18, 2010.<sup>14</sup> If the ASA failed to bring a satellite into use by that date, the ASA would lose its priority vis-à-vis later filed systems in the ITU Master International Frequency Register.

**C. Star One’s Efforts to Provide C- and Ku-band Services at 68°**

By late 2007, it was clear that the ASA was not going to be able to contract for, design, build, and launch a new satellite for Ku-band service before the September 2010 deadline, given the minimum three-year timeframe to construct and launch such a satellite. In light of the repeated failures of the ASA to provide commercial service from 68° and its apparent decision not to build and launch a new satellite, Star One decided to build and deploy an hybrid C/Ku-band satellite that would serve the United States. Accordingly, on November 13, 2007, Star One filed a petition with the Commission to have C5 placed on the Permitted List for operations in the C- and Ku-bands. No party opposed the Star One application. On February 7, 2008, the Bureau issued its *February 2008 C5 Order* granting Star One’s request.<sup>15</sup>

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<sup>12</sup> See ITU, List of Suspended Satellite Networks (Oct. 19, 2010), <http://www.itu.int/ITU-R/space/snl/list1149/index.asp> (“*Suspended Satellite Networks List*”).

<sup>13</sup> See ITU, *Radio Regulations* Rule 11.44.

<sup>14</sup> See *Suspended Satellite Networks List*.

<sup>15</sup> See *February 2008 C5 Order*.

Star One then relied on the silence of potentially interested parties, including the ASA, and timely posted a performance bond for C5 on March 10, 2008.<sup>16</sup> Because the *February 2008 C5 Order* was issued on February 7, 2008, Star One had 30 days from that date to submit a timely performance bond.<sup>17</sup> Since the *February 2008 C5 Order* was not released until February 15, 2008, however, parties had 30 days from the February 15 date to file petitions for reconsideration.<sup>18</sup> Star One was therefore required to post its bond on March 10, 2008, before knowing whether any party would file such a petition.

Just three days after Star One posted the C5 bond, however, the ASA appeared in the proceeding for the first time and asked the Bureau to reconsider its decision to add C5 to the Permitted List.<sup>19</sup> Specifically, the ASA sought to protect its old network priority by asking the Commission to add a new condition to C5's authorization that would preclude Star One from operating in the Ku-band were the ASA to place a satellite at 68°.<sup>20</sup> The ASA failed to "show good reason why it was not possible for [it] to participate in the earlier stages of the proceeding" as required by the Commission's Rules.<sup>21</sup>

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<sup>16</sup> See Letter from Daniel C.H. Mah, Counsel for Star One S.A., to Marlene H. Dortch, Secretary, FCC, File No. SAT-PPL-20071113-00159 (filed Mar. 10, 2008).

<sup>17</sup> See 47 C.F.R. § 25.165(a).

<sup>18</sup> See *C5 Notice*; see also 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.").

<sup>19</sup> See *ASA Reconsideration Motion*. Although the *ASA Reconsideration Motion* is dated March 13, 2008, the IBFS copy is stamped "Filed/Accepted" as of April 1, 2008, which is the date referenced in the *October 2010 C5 Order*. See *October 2010 C5 Order* ¶ 5 & n.13. Star One had practical notice well in advance of the April 1 date, as it filed its Opposition on March 26, 2008.

<sup>20</sup> See *ASA Reconsideration Motion*.

<sup>21</sup> See 47 C.F.R. § 1.106(b)(1).

Shortly after filing the *ASA Reconsideration Motion*, the ASA concluded and announced the *ASA-SES Relocation Agreement* to relocate a satellite to 68° by the September 18, 2010 deadline. The ASA promptly notified the Commission of the agreement with an *ex parte* filing in support of its *ASA Reconsideration Motion* in May 2008.<sup>22</sup>

The Bureau endorsed the ASA plan to maintain ITU priority by relocating an aging satellite when it issued the *C5 Reconsideration Order*, which added two new conditions to C5 service in the United States more than four months after Star One posted the C5 bond.<sup>23</sup> Under the Bureau's new conditions, Star One was effectively precluded from operating in the Ku-band at 68° as long as the parties fulfilled the *ASA-SES Relocation Agreement*.

The Bureau considered the substance of the *ASA Reconsideration Motion*, despite the ASA's failure to even offer, much less demonstrate, "good reason" for its late showing, and despite the obvious prejudice to Star One, which had already posted the bond before the ASA entered the proceeding. The *C5 Reconsideration Order* did not even mention the "good reason" standard, much less find that ASA had met it. Star One filed an Application for Review of the *C5 Reconsideration Order* on August 13, 2008, which is still pending.<sup>24</sup>

Bowing to the new reality, on December 5, 2008, Star One filed an application with the Bureau seeking to modify its C5 authorization.<sup>25</sup> Since Ku-band service would be precluded by

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<sup>22</sup> See Letter from Joaquin Restrepo, Ministry of Communications, Republic of Columbia, to Kevin J. Martin, Chairman, FCC, File No. SAT-PPL-20071113-00159 (filed May 15, 2008).

<sup>23</sup> See generally *C5 Reconsideration Order* (failing to require the ASA to show good reason for its late appearance in the C5 proceeding).

<sup>24</sup> See Star One S.A., Application for Review, File No. SAT-PPL-20071113-00159 (filed Aug. 13, 2008).

<sup>25</sup> See Star One S.A., Request to Modify the Declaratory Ruling Adding C5 to the Permitted List, File No. SAT-PPL-20081205-00225 (filed Dec. 5, 2008).



the *ASA-SES Relocation Agreement* and the *C5 Reconsideration Order*, Star One proposed to provide service to the United States using only the C-band frequencies. Star One would implement the C-band-only service immediately by re-deploying the existing B1 satellite because the market has not supported construction of a C-band-only satellite in many years. Pursuant to Brazilian authority, Star One moved the B1 satellite to 68° in August 2008, where it stood ready to provide service to the United States as soon as it was added to the Permitted List. To the extent that any milestones still applied after substituting B1 for C5, Star One asked that the Bureau confirm that the in-orbit satellite had met all applicable milestones, thereby allowing it to cancel the performance bond. There was no opposition to Star One's request to substitute the B1 satellite or to cancel the performance bond.

Earlier this year, and pursuant to the *ASA-SES Relocation Agreement*, SES asked the Commission for authority to move the aging AMC-4 to 68° and to operate at that location in the Ku-band under the ASA's ITU priority. AMC-4 was available for the move because SES was shifting AMC-4's customers to the new SES-1 satellite at 101° W.L., a shift necessitated by AMC-4's capacity-limiting problems with its solar arrays and historical difficulties with its amplifiers.<sup>26</sup> Star One did not oppose SES' application, but asked that the Bureau simultaneously grant Star One's request to modify its C5 Permitted List entry by substituting B1, since a grant of SES' request would conclusively preclude Star One Ku-band operations at 68°.<sup>27</sup> The Bureau granted SES Special Temporary Authority to operate on July 29, 2010, and made

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<sup>26</sup> See Michael A. Taverna, *2 SES-Operated Sats Hindered*, *Aviation Week* Aug. 9, 2008, <http://www.aviationweek.com/> (reporting the solar array problems); Rocco Fanucci, *Another Proton Launch Relief*, *Real Rocket Science* Apr. 26, 2010, <http://www.reallyrocketscience.com/node/1403> (reporting 10 years of TWTA problems).

<sup>27</sup> See Comments of Star One S.A., File No. SAT-MOD-20100623-00144 (filed Aug. 2, 2010).

such authority permanent on November 4, 2010.<sup>28</sup> To the best of Star One’s knowledge, AMC-4 has yet to provide commercial service in the Ku-band from 68°.<sup>29</sup> Under the reasoning of the *C5 Reconsideration Order*, AMC-4’s Ku-band operations preclude operation of *any other* satellite in the Ku-band at 68° for service to the United States.<sup>30</sup>

**D. The October 2010 C5 Order**

On October 13, 2010, fully 22 months after Star One submitted its request for modification, more than 2 years after Star One placed B1 in orbit at 68° and made it available for service to the U.S. market, and several months after the Bureau issued the *SES-ASA Relocation Order*, the Bureau rejected Star One’s request to substitute B1 for the C5 Permitted List entry. Instead, the Bureau placed B1 on the Permitted List on a conditional basis but declared C5’s authorization “null and void” for missing planned milestones.

In reaching its decision, the Bureau emphasized that the original C5 application was for a “new space station that . . . would provide C- and Ku-band service to the United States” and that the proposed modification would substitute a satellite that “has been in orbit for more than 15

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<sup>28</sup> The Bureau initially granted Special Temporary Authority only for TT&C operations, *see* Stamp Grant, File No. SAT-STA-20100525-00108 (granted in part, deferred in part July 12, 2010), but then granted temporary authority for general operations in the Ku-band, *see SES-ASA Relocation Order*, extended such authority through November 8, 2010, *see* Stamp Grant, File No. SAT-STA-20100824-00182 (granted Sept. 10, 2010), and made such authority permanent on November 4, 2010, *see* Stamp Grant, File No. SAT-MOD-20100623-00144 (granted Nov. 4, 2010). SES’ original application for regular operations of AMC-4 at 68° was dismissed without prejudice for failing to submit a two-degree spacing interference analysis for its proposed C-band TTC&M operations. *See* Letter from Robert G. Nelson, Chief, Satellite Division, FCC, to Joslyn Read, Vice President, Regulatory Affairs for SES Americom, Inc., and Karis A. Hastings, Counsel for SES Americom, Inc. (June 21, 2010) (referencing File No. SAT-MOD-20100421-00081 (filed Apr. 21, 2010)). On June 23, 2010, SES filed the present application providing the missing interference analysis.

<sup>29</sup> *See* AMC-4, *Wikipedia*, [www.wikipedia.com](http://www.wikipedia.com) (reporting no activity on AMC-4 at 67 W.L) (last visited Nov. 7, 2010).

<sup>30</sup> *See C5 Reconsideration Order* ¶ 6.

years.”<sup>31</sup> The Bureau asserted that such modification “would not serve the public interest”<sup>32</sup> and that B1 would not “provide the functional equivalent of Star One C5.”<sup>33</sup>

The Bureau characterized Star One’s rationale for the modification as “difficulties arising from international coordination,”<sup>34</sup> and stated that the conditions added to C5’s authorization by the *C5 Reconsideration Order* “merely restated the Commission’s existing policies regarding the ITU coordination process between two non-U.S. licensed space station operators.”<sup>35</sup> The Bureau noted that the ASA’s priority had existed “long before” Star One filed to add C5 to the Permitted List, asserting that “[o]perators often make the business decision to implement satellites at orbital locations where another Administration [has priority] but where the other Administration does not have an operational satellite.”<sup>36</sup>

The *October 2010 C5 Order* did not discuss the *ASA-SES Relocation Agreement* or the Bureau’s own actions approving the operations of AMC-4 at 68° in the *SES Relocation Order*. The *October 2010 C5 Order* also did not address the fact that AMC-4’s operations definitively preclude Star One’s Ku-band operations at 68° under the *C5 Reconsideration Order*.

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<sup>31</sup> *October 2010 C5 Order* ¶ 8.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* ¶ 14.

<sup>34</sup> *Id.* ¶ 11.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* ¶ 13.

### III. THE BUREAU'S DECISION TO DECLARE THE C5 BOND DUE AND PAYABLE WAS CONTRARY TO ESTABLISHED COMMISSION PRECEDENTS AND POLICY

The *October 2010 C5 Order* effectively fines Star One \$3 million for not constructing, launching, and operating a satellite that the Bureau had already prohibited Star One from operating. This *Alice in Wonderland* result conflicts with established Commission precedents and policy in at least three respects: (1) it is express Commission policy to forego enforcement of its bond and milestone requirements when circumstances beyond a licensee's control preclude compliance; (2) the public interest is better served in the instant case by a waiver of the bond and milestone requirements; and (3) the Commission's sole precedent at the time that Star One committed the C5 performance bond clearly required waiver of the bond.

#### A. Circumstances Beyond Star One's Control Preclude Ku-band Service from 68°

The Commission's 2003 *Space Station Licensing Reform Order* adopting the bond requirement established that the purpose of the bond was to replace the financial qualification requirement and "strengthen [the Commission's] protections against speculation and warehousing."<sup>37</sup> Accordingly, the Commission made the bond "payable upon failure to meet any milestone based on circumstances within the licensee's control."<sup>38</sup> The Commission emphasized that "[t]he bond **would not be payable** if the licensee missed a milestone **because of circumstances beyond its control.**"<sup>39</sup>

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<sup>37</sup> *Amendment of the Commission's Space Station Licensing Rules & Policies*, 18 FCC Rcd. 10760 ¶ 170 (2003) ("*Space Station Licensing Reform Order*").

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (emphasis added).

The Commission’s milestone policies in the *Space Station Licensing Reform Order* were extensions and modifications of prior Commission policy and practice of extending milestones for licensees when factors outside the licensees’ control affected satellite construction and launch schedules.<sup>40</sup> The Bureau has implemented the milestone policy by routinely granting milestone extensions for manufacturing delays and even self-imposed, cautionary testing delays.<sup>41</sup>

In the *October 2010 C5 Order*, however, the Bureau adds a new hurdle to the Commission’s “circumstances beyond its control” standard, reformulating the test as “an **unforeseeable** circumstance beyond its control.”<sup>42</sup> The Bureau does not cite any Commission (or other) decision in support of adding an “unforeseeable” element to the *Space Station Licensing Reform Order* test.<sup>43</sup> Of course, the Bureau is not authorized to change Commission

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<sup>40</sup> See, e.g., *Panamsat Licensee Corp.*, FCC 01-178 ¶ 12 (rel. May 25, 2001) (noting that milestone extensions are granted “when delay in implementation is due to circumstances beyond the control of the licensee”); *Am. Tel. & Tel. Co.*, 2 FCC Rcd. 4431 ¶ 19 (1987) (explaining that “circumstances beyond [the licensee’s] control” could justify a milestone extension); see also *Intelsat LLC*, 17 FCC Rcd. 2391 ¶ 1 (2002) (granting an extension because of technical problems with a satellite under construction); *EarthWatch Inc.*, 15 FCC Rcd. 13594 ¶ 8 (2000) (granting a sixth-month extension to complete construction so that the licensee could “conduct additional tests on several components of the satellite to ensure proper in-orbit operations”); *AMSC Subsidiary Corp.*, 10 FCC Rcd. 3791 ¶¶ 3-4 (1995) (granting an extension because of technical problems).

<sup>41</sup> See Stamp Grant, *TerreStar Networks, Inc.*, File No. SAT-MOD-20080718-00143 (granted Nov. 12, 2008) (granting extension of launch milestone for licensee to conduct additional, cautionary tests of the satellite before launch); *TerreStar Networks, Inc.*, 22 FCC Rcd. 17698 ¶ 7 (2007) (granting a milestone extension, despite evidence that manufacturing difficulties arose as a result of last-minute design changes); *New ICO Satellite Services G.P.*, 22 FCC Rcd. 2229 ¶¶ 6-7, 14 (2007) (granting multiple milestone extensions for testing purposes).

<sup>42</sup> *Id.* ¶ 12 (emphasis added).

<sup>43</sup> In almost 30 years of oversight of satellite milestone requirements the Bureau has characterized the test as “unforeseeable circumstances” only sporadically, and even then, application of this variant has been inconsistent. Compare *TerreStar Networks, Inc.* 22 FCC Rcd. 17698 ¶ 7 (Sat. Div., Int’l Bur. 2007) (purporting to apply the “unforeseeable circumstances” test, but stating that the licensee’s late stage of satellite construction made it “not necessary to determine whether the manufacturing difficulties that have occurred were an

policy by adding a new element to an established test, much less to apply the new test retroactively.<sup>44</sup> By adding this element, the Bureau impermissibly held Star One to a higher standard than required under Commission policy.

The events that followed the posting of the C5 bond were at least as “beyond [Star One’s] control” as manufacturing and testing delays.<sup>45</sup> After not opposing Star One’s application and after Star One posted its bond, the ASA filed its *ASA Reconsideration Motion* and entered into the *ASA-SES Relocation Agreement*. The Bureau granted the *ASA Reconsideration Motion*, despite the absence of “good reason” for the ASA’s late appearance, and added conditions to C5’s authorization that preclude Star One Ku-band operations at 68° if the parties merely implemented the *ASA-SES Relocation Agreement*.

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unforeseeable outcome of TerreStar’s decision to alter its satellite design” and then granting the requested extension), *with Loral SpaceCom Corp.*, 20 FCC Rcd 12045 ¶ 8 (Int’l Bur. 2005) (stating the test without the “unforeseeable” element); *WB Hldgs. 1 LLC*, 20 FCC Rcd 10846 ¶ 6 (Sat. Div., Int’l Bur. 2005) (stating that “we will grant [milestone] extensions when the delay is due to circumstances beyond the control of the licensee”); *EarthWatch, Inc.*, 15 FCC Rcd 18725 ¶ 8 (Sat. Div., Int’l Bur. 2000) (same). The Commission, too, has on at least one occasion characterized the milestone test as including an unforeseeability element. *See Constellation Commc’ns Hldgs., Inc.*, 18 FCC Rcd. 18822 ¶ 23 (FCC 2003) (noting that the licensee’s failure to attract financing was not an “unforeseeable circumstance beyond [its] control”). *But see Constellation Commc’ns Hldgs., Inc.*, 19 FCC Rcd. 11631 ¶ 26 (FCC 2004) (finding that the licensees’ failure to meet milestones was not “caused by circumstances beyond their control”); *Panamsat Licensee Corp.*, 16 FCC Rcd. 11534 ¶ 12 (FCC 2001) (characterizing the test as when “delay in implementation is due to circumstances beyond the control of the licensee”); *Am Tel. & Tel. Co.*, 2 FCC Rcd. 4431 ¶ 18 (FCC 1987) (“[E]xtensions of the milestone schedule are granted only when delay . . . is due to circumstances beyond the control of the licensee.”). In any event, all these cases addressed systems licensed before the Commission issued the *Space Station Licensing Reform Order*, and the Commission did not adopt the “unforeseeable” variant of the milestone test when defining when a bond would be due and payable. *See Space Station Licensing Reform Order* ¶ 170 (“The bond [will] not be payable if the licensee misse[s] a milestone because of circumstances beyond its control.”)

<sup>44</sup> Cf. 47 C.F.R. § 1.115(b)(2).

<sup>45</sup> *See Space Station Licensing Reform Order* ¶ 170.

Even if the Bureau properly added a “foreseeability” component to the Commission’s “circumstance beyond its control” test, the *ASA-SES Relocation Agreement* and the Commission’s *C5 Reconsideration Order* were no less foreseeable than the manufacturing delays and self-imposed testing delays for which the Bureau routinely grants exceptions to the milestone requirements under the Commission’s “circumstances beyond the operator’s control” test.<sup>46</sup>

It was not preordained that the Bureau would endorse and then authorize the ASA-SES plan to move an aging satellite to preserve ITU priority and thereby preclude Star One’s Ku-band service. The Bureau might have concluded that, after two decades without commercial Ku-band service from 68°, it was not in the public interest to support the ASA plan to preserve ITU priority by relocating an incapacitated satellite that is not intended to provide commercial service. Yet the *C5 Reconsideration Order* made it clear that the Bureau would support the *ASA-SES Relocation Agreement* to reserve the Ku-band at 68° for the ASA and preclude the commercial service proposed by Star One. Of course, the Bureau’s *SES-ASA Relocation Order* did just that.

The Bureau mischaracterizes Star One’s rationale for its modification request as “difficulties arising from international coordination.” This assertion misses the point. When Star One posted its bond for C5, less than three years remained until the September 2010 deadline for the ASA to exploit the Ku-band at 68°. The ASA could not have built and launched a satellite by the ITU deadline. Only after Star One posted its bond did the ASA seek to modify Star One’s authorization and then enter into the *ASA-SES Relocation Agreement* meant to preclude Star One’s Ku-band operations at 68°. A satellite operating over the same frequencies

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<sup>46</sup> See *supra* notes 40, 41.

in the same orbital location makes it physically impossible to provide service in the same band just one degree apart. It is not a matter of power levels or polarization. No amount of “international coordination” would enable C5 to operate in the Ku-band at 68° while AMC-4 operates in the same band at 67°.

The Bureau also relies on questionable authority when it asserts that coordination difficulties cannot serve as a basis for a milestone extension request. The Bureau cites to its own 2005 refusal of a Loral request for multiple milestone extensions over 6 years premised, in part, on delays in international frequency coordination.<sup>47</sup> But the facts in *Loral* were quite different than this case. Loral’s Telstar 9 satellite was originally authorized to serve the United States. After *DISCO I*, Loral sought to expand the scope of its authorization to include South America. The Commission never authorized Telstar 9 to serve international points. Nevertheless, Loral relied on international coordination issues to claim that it could not finalize the technical specifications for its satellite.<sup>48</sup> Loral’s own actions, seeking to increase the satellite coverage, created the asserted cause of its delay and noncompliance. Nothing prevented Loral from constructing and operating the satellite licensed by the Commission, and only Loral’s own actions created any uncertainty over the satellite coverage. In contrast, it is the actions by the ASA and the Bureau – not Star One – that have decreased the effective scope of Star One’s authorization to cover only C-band service. Significantly, Star One was prevented from constructing and operating C5 as originally authorized by the actions of third parties. Rather than sit still as Loral did for 6 years, Star One immediately relocated a C-band satellite to 68° to provide the most service it could legally and physically provide.

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<sup>47</sup> See *October 2010 C5 Order* ¶ 12 n.41 (citing *Loral SpaceCom Corp.*, 20 FCC Rcd. ¶ 12).

<sup>48</sup> *Loral SpaceCom Corp.*, 20 FCC Rcd. ¶¶ 3-4.



## **B. The Public Interest Is Best Served by Waiving the Bond Requirement**

Having decided to bifurcate Star One's modification request into separate actions placing B1 on the Permitted List and declaring C5's authorization null and void, the Bureau should have found that good cause existed for a waiver of its bond requirement in the case of the C5 performance bond. The Commission will grant a waiver "if the petitioner demonstrates good cause for such action."<sup>49</sup> Good cause, in turn, exists "where particular facts would make strict compliance inconsistent with the public interest."<sup>50</sup> "Waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule."<sup>51</sup> Considerations for a waiver include "equity" and the "more effective implementation of overall policy."<sup>52</sup>

Waiving the bond requirement would more effectively implement the Commission policies on which the bond and milestone requirements are premised than would requiring Star One to pay \$3 million for not building a satellite it could not use. In creating the bond and milestone requirements, the Commission asserted that the bond would "help deter speculative satellite applications, and help expedite provision of service to the public."<sup>53</sup> The underlying milestones, against which the bond is enforced, are "intended to ensure that licensees provide service to the public in a timely manner, to prevent warehousing of scarce orbit and spectrum

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<sup>49</sup> See *TMI Commc'ns. & Co.*, 19 FCC Rcd. ¶ 41; see also 47 C.F.R. § 1.3.

<sup>50</sup> *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>51</sup> *TMI Commc'ns. & Co.*, 19 FCC Rcd. ¶ 39.

<sup>52</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

<sup>53</sup> See *Space Station Licensing Reform Order* ¶ 175.

resources.”<sup>54</sup> The Commission has further explained that warehousing is discouraged because it can “hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately with the construction and launch of their satellite systems.”<sup>55</sup> This concern is the same in the context of foreign-licensed satellite granted permission to serve the United States.<sup>56</sup>

Star One’s petition to place C5 on the Permitted List and subsequent request to modify that ruling by substituting B1 for C5 did not “hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately.”<sup>57</sup> As an initial matter, Star One’s hybrid system would have put a valuable orbital resource to use. However, it is the Bureau’s *C5 Reconsideration Order* and *SES-ASA Relocation Order* that will allow the ASA to continue to “warehouse” this slot for Ku-service and will “hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately.”<sup>58</sup> Under the Bureau’s rulings, no satellite operator (other than ASA or its designee) would be permitted to provide Ku-band service from 68°. Star One’s actions did not, therefore, result in any “warehousing” of spectrum.<sup>59</sup> To the contrary, Star One sought to maximize the utility of the 68° slot by moving the B1 satellite to that location for immediate service. Accordingly, waiving the bond – not

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<sup>54</sup> *Id.* ¶ 173.

<sup>55</sup> *Id.*

<sup>56</sup> *Cf. TMI Commc’ns. & Co.*, 19 FCC Rcd. ¶ 38.

<sup>57</sup> *Space Station Licensing Reform Order* ¶ 173.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

fining Star One \$3 million – would be most consistent with the Commission’s bond and milestone policies.

The Bureau’s arguments that the public interest is not served by waiving the bond requirement are misguided. In the *October 2010 C5 Order*, the Bureau concluded that the public interest did not favor waiving the bond requirements because Star One was licensed to build a new hybrid C/Ku-band satellite and offered only an old satellite limited to C-band service.<sup>60</sup> Under the *C5 Reconsideration Order* and the *ASA-SES Relocation Agreement*, however, Star One could not operate a Ku-band satellite at 68°. And building a new satellite dedicated exclusively to C-band service is commercially impractical for Star One or for anyone else. The C5 business case was premised on having two-thirds of C5’s capacity devoted to Ku-band service and only about one-third allocated to C-band service.<sup>61</sup> It has been more than 8 years since the Commission last licensed a satellite dedicated to C-band service that has provided commercial service, and more than 20 years since the Commission last licensed a satellite dedicated to C-band services that was not a replacement satellite serving long-established “cable neighborhoods.”<sup>62</sup> The business case simply cannot be made today for a new satellite dedicated to C-band service.

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<sup>60</sup> *Id.* ¶ 8.

<sup>61</sup> See Star One S.A., Petition for Declaratory Ruling to Add the Star One C5 Satellite at 68° W.L. to the Permitted Space Station List, File No. SAT-PPL-20071113-00159 at Attachment A, p.1 (filed Nov. 13, 2007) (proposing 48 Ku-band transponders and 28 C-band transponders).

<sup>62</sup> A search of IBFS revealed only 8 applications over the last two decades for C-band-only satellites that eventually offered commercial service, and all were for replacement satellites. See Stamp Grant, File No. SAT-LOA-20020104-00002 (granted Dec. 29, 2003); Stamp Grant, File No. SAT-LOA-20020104-00001 (granted Dec. 29, 2003); Stamp Grant, File No. SAT-LOA-20000929-00136 (granted Mar. 27, 2003), Stamp Grant, File No. SAT-LOA-20000407-00080 (granted Nov. 13, 2001); Stamp Grant, File No. SAT-LOA-19991207-00117 (granted Feb. 19, 2004); *GE Americom, Inc.*, 15 FCC Rcd. 23583 (2000) (File No. SAT-LOA-19990601-00061);

The Bureau has never previously suggested that only new satellites could be added to the Permitted List or substituted for existing satellites on the List. Indeed, the Bureau has approved deletions of entire frequency bands from Permitted List authorizations with little discussion.<sup>63</sup>

In considering requests for foreign-licensed satellites to be placed on the Permitted List, the Commission evaluates the “effect on competition in the United States, spectrum availability, eligibility and operating (e.g., technical) requirements, and national security, law enforcement, foreign policy, and trade concerns.”<sup>64</sup> Any new “requirement” that would bar older or “inferior” satellites from the Permitted List would not fulfill the U.S. open-entry obligations under the WTO Basic Telecom Agreement.<sup>65</sup> Accordingly, there is no rational basis for refusing to substitute B1 for C5 on the Permitted List. Indeed, the *October 2010 C5 Order* effectively did substitute B1 for C5 but required a forfeiture of the bond nonetheless. Such actions serve neither

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Stamp Grant, File No. SAT-LOA-19941027-00058 (granted May 7, 1996); Stamp Grant, File No. SAT-LOA-19930107-00001 (granted July 19, 1993).

<sup>63</sup> See Stamp Grant, File No. SAT-MOD-20051014-00200 (granted Apr. 20, 2006). The Bureau allowed Star One to modify its Permitted List entry for its C2 satellite by dropping the C-band service from its authorized C/Ku-band service. *Id.* In that case, Star One had made a business decision to modify the C2 spacecraft to direct C-band coverage south of U.S. territory, and so had no need for the U.S. C-band authorization. The Bureau attempts to distinguish its C2 decision by asserting that the change in the B2 case was merely “regulatory” since Star One was still launching a new C/Ku-band satellite. See *October 2010 C5 Order* ¶ 10. Of course, the effect on U.S. consumers and the public interest is the same.

<sup>64</sup> *Satelites Mexicanos, S.A. de C.V.*, Order, File No. SAT-PDR-19991214-00131 (rel. Oct. 3, 2000) ¶ 4 (citing to *Amendment of the Commission’s Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and Int’l Serv. in the United States*, 12 FCC Rcd. 24094 (1997)).

<sup>65</sup> The Bureau routinely adds in-orbit satellites to the Permitted List, including satellites at or near their design end-of-life. This past June, for example, the Commission approved New Skies’ request to add the thirteen-year-old NSS-5 to the List. See Public Notice, List of Actions Taken, 25 FCC Rcd. 7425 (2010).

the purposes behind the Permitted List, nor the Commission's bond and milestone policies more generally, as discussed above.

The equities also strongly favor a waiver of the bond requirement in the instant case. The Bureau added the conditions that now preclude Star One Ku-band operations at 68° on the basis of a Petition for Reconsideration filed after Star One posted its bond by a party without good reason for its late appearance. The *C5 Reconsideration Order* also clearly signaled that the Bureau would support the ASA's efforts to move an aging satellite to 68° in order to preserve the ASA's priority. Finally, the Bureau's *SES Relocation Order* – an order that the Bureau clearly had the discretion to deny – foreclosed any Ku-band operations at 68°. Under these circumstances, a waiver of the bond is more appropriate than a \$3 million fine.

### **C. Star One Reasonably Relied on *Rainbow* When Posting the Bond**

When Star One posted the bond in March 2008 it justifiably relied on the Commission's February 2007 *Rainbow* decision – the only decision on the issue of when a bond would be returned. It is a bedrock principle of Commission policy and administrative law that similarly situated parties must be treated the same. Indeed, “[a] fundamental norm of administrative procedure requires an agency to treat like cases alike. If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases.”<sup>66</sup>

In *Rainbow*, the Commission returned four satellite bonds to the licensee after the licensee determined that its business prospects for the proposed system were insufficient to

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<sup>66</sup> *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007); see also *Colo. Interstate Gas Co. v. FERC*, 850 F.2d 769, 774 (D.C. Cir. 1988) (“[T]he Commission's dissimilar treatment of evidently identical cases . . . seems the quintessence of arbitrariness and caprice.”).

justify continued investment.<sup>67</sup> The Commission emphasized Rainbow's diligence in pursuing the system up until its surrender of the license and the fact that Rainbow's actions had not resulted in warehousing of orbital and spectrum resources because there were additional Ka-band locations available for other parties.<sup>68</sup>

Star One petitioned to place C5 on the Permitted List in November 2007, 8 months after the *Rainbow* decision, while *Rainbow* was unquestionably controlling law, because it was the only Commission decision on return or waiver of a bond. Like Rainbow, Star One's filings for 68° have not warehoused any spectrum. Indeed, the ASA and SES, with the Bureau's permission, have relocated a satellite to the very orbital slot Star One intended to use. In addition, Star One worked diligently to realize its system at 68° until it became clear that circumstances beyond its control would preclude operations in the Ku-band. Star One then took all possible steps to exploit the remaining utility of 68° by moving B1 to that location and making it available for service to the United States as soon as it was authorized to do so. Star One's inability to proceed with its original plans for 68° because of actions on the part of the Bureau and the ASA are at least as good cause as the changed business conditions *Rainbow* offered to justify its waiver. In addition, Star One's C-band service from 68° provides the only satellite service Star One is authorized to provide under the Bureau's *C5 Reconsideration Order*. Accordingly, there is no rational basis for treating Star One more harshly than Rainbow.

While the Bureau made no effort to distinguish *Rainbow* in the *October 2010 C5 Order*, the full Commission did distinguish *Rainbow* in its recent *AtContact* decision. In *AtContact*, the

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<sup>67</sup> See *Rainbow*, 22 FCC Rcd. ¶ 10.

<sup>68</sup> See *id.* ¶ 11.

Commission changed direction and overruled *Rainbow*.<sup>69</sup> The Commission reasoned that it could apply a stricter milestone policy and require a forfeiture because AtContact could not have relied on *Rainbow* in posting its bond in 2006 since the *Rainbow* decision was issued in 2007.<sup>70</sup> Here, however, Star One posted its bond more than a year **after** the *Rainbow* decision, and two years **before** the *AtContact* decision. As the full Commission indicated in *AtContact*, it was reasonable for licensees, such as Star One, to rely on *Rainbow* when that decision was controlling.<sup>71</sup> Accordingly, it is arbitrary and capricious to require a forfeiture when Star One reasonably relied on the Commission's controlling *Rainbow* decision when it posted the bond.

#### IV. CONCLUSION

Star One's request to modify its authorization and to have the C5 performance bond returned is very different than other requests that the Commission has recently decided or currently has pending to waive all or a portion of its bond rules.<sup>72</sup> Star One has not proposed a satellite system and failed to deliver because of business or financial reasons. With AMC-4 operating at 68° under the ITU priority enjoyed by the ASA, Star One is *not permitted*, under the terms of the Bureau's own order, to serve the United States in the Ku-band frequencies from that slot. Despite this, Star One has taken decisive action to provide C-band service to the United States from 68°, which is the most it can do under the *C5 Reconsideration Order*. It is

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<sup>69</sup> See *AtContact Commc'ns, LLC*, 25 FCC Rcd. 7567 ¶ 55 (2010) ("*AtContact*").

<sup>70</sup> See *id.* ¶ 56.

<sup>71</sup> Of course, licensees posting bonds either before *Rainbow* was issued or after the *AtContact* decision cannot justifiably rely on *Rainbow*. *Id.*

<sup>72</sup> See *AtContact*, 25 FCC Rcd. ¶ 50 n.123 (refusing to waive the bond rules when the petitioner had failed to move forward with its plans because of financial constraints and noting the additional bond waiver requests associated with surrenders of authorizations on the docket).

manifestly inequitable to collect on the C5 performance bond when the Commission's own actions make it impossible for Star One to provide the service for which it was originally authorized.

For all of the reasons set forth herein, the Commission should reverse the *October 2010 C5 Order* and modify the *February 2008 C5 Order* to substitute B1 for the C5 Permitted List entry, find any applicable milestones met, and release the performance bond. In the alternative, the Commission should find that good cause exists for a waiver of its bond requirements and order the bond released accordingly.

Respectfully submitted,



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November 12, 2010



## CERTIFICATE OF SERVICE

I, Stephanie A. Roy, hereby certify that on Friday, November 12, 2010, I caused true and correct copies of the enclosed "Application for Review" to be served on the following parties by the method indicated:

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