

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)
)
The Establishment of Policies and) IB Docket No. 02-19
Service Rules for the Non-Geostationary)
Satellite Orbit, Fixed Satellite Service in the)
Ka-Band)

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Northrop Grumman Space and Mission Systems Corporation (formerly TRW Inc.), through its Northrop Grumman Space Technology sector (“NGST”), by counsel and pursuant to Section 1.429 of the Commission’s Rules (47 C.F.R. § 1.429), hereby seeks reconsideration of a portion of the Commission’s *Report and Order* in the above-captioned proceeding (“*Ka-Band Round II R&O*”).¹ Specifically, NGST believes that the Commission erred in determining to apply the Commission’s recently adopted performance bond requirement to the applicants in the second processing round for Ka-band non-geostationary satellite orbit (“NGSO”) systems in the fixed-satellite service (“FSS”).² The Commission does not explain adequately its reasons for imposing this requirement retrospectively to applicants in a processing round that has been closed since December 1997. Because there are no discernible benefits to applying the bond-posting requirement to the current Ka-band processing group, and because the

¹ See *Establishment of Policies and Service Rules for Non-Geostationary Satellite Orbit, Fixed-Satellite Service in the Ka-band*, 18 FCC Rcd 14708 (2003) (“*Ka-Band Round II R&O*”). Public Notice of this action was published in the *Federal Register* thirty days ago, on October 14, 2003. See 68 Fed. Reg. 59128 (Oct. 14, 2003). Accordingly, this Petition is timely filed pursuant to Section 1.429(d) of the Commission’s Rules. See 47 C.F.R. § 1.429(d).

² *Ka-Band Round II R&O*, 18 FCC Rcd at 14709 & 14723 (¶¶ 3 & 47).

application of the requirement would otherwise be unjust and inequitable, the Commission should reconsider and rescind this portion of its decision.

The decision to impose the bond-posting requirement on the current Ka-band NGSO applicants suffers from two principal defects. First, it dramatically upsets the long-settled expectations of these applicants, all of which filed their applications many years ago. Second, the approach arbitrarily discriminates against the Ka-band NGSO applicants by treating dissimilarly other similarly situated applicants (i.e., the applicants for NGSO systems in the Ku-band), even though both the Ka-band NGSO and comparable Ku-band NGSO satellite services are new, and systems in both services will be direct competitors with one another in the marketplace for broadband telecommunications services.

If the Commission does not alter its course, this decision will have a substantial negative impact on NGST.³ The Commission would be arbitrarily imposing upon NGST and others additional, unanticipated start-up costs based solely on the fact that the Commission has taken a longer period of time to process the applications filed by these companies. In NGST's view, the Commission should not apply the bond-posting requirement to any licensees with initial applications that were filed prior to the effective date of the new rules.⁴ At the very least, especially considering the current difficulties being experienced in the satellite industry, the Commission should correct actions that have the effect of singling out some applicants for additional, inconsistently imposed cost burdens.

³ See, e.g., Applications of TRW Inc., FCC File Nos. SAT-LOA-19970904-00080 thru -00084 (filed Sept. 4, 1997) and SAT-AMD-19971222-00219 (filed Dec. 22, 1997). TRW Inc. is Northrop Grumman's predecessor in interest in the prosecution of these applications.

⁴ NGST expressed its view regarding the retroactive application of the bond-posting requirement to any pending application in its Petition for Partial Recon of the Commission's *Space Station Licensing Reform Order* (18 FCC Rcd 10760 (2003)). See Petition for Partial Reconsideration, IB Docket No. 02-34, filed September 26, 2003.

Argument

I. The Commission’s Decision To Impose The New Bond-Posting Requirement Upon Future Ka-band Licenses Granted To Pending Applicants, While Declining To Impose it on Other Applicants That Filed Their Applications Contemporaneously or Later in Time, Is Arbitrary and Unreasonable.

In the *Ka-Band Round II R&O*, the Commission states that “[a]ll applicants for NGSO FSS Ka-band licenses will be required to execute a \$7.5 million bond payable to the U.S. Treasury within 30 days of grant of their license,” as provided for by the recently adopted changes to Part 25 of the Commission’s Rules.⁵ The Commission provides scant explanation, however, of the policy rationale prompting it to apply this new requirement to the pending Ka-band NGSO applicants, when many other applications that were filed contemporaneously with or later than the Ka-band NGSO filings, including Ka-band GSO applications submitted on the same day, were not subject to such a requirement. Instead, the Commission simply asserts, “[t]his bond requirement will provide assurance that the Ka-band licensees are fully committed to constructing their satellite facilities.”⁶

The Commission itself has emphasized that the new bonding and milestone requirements will not apply on a retrospective basis “to licenses *granted* before [the *SSLR Order*] was adopted.”⁷ Regardless of the absence of additional anti-speculation safeguards for these licensees, however, the Commission has determined to eliminate the former anti-trafficking rules for these authorizations even without imposing the new bonding and revised milestone conditions. Thus, all pre-2003 applicants for satellite operating authority would share in the new

⁵ *Ka-Band Round II R&O*, 18 FCC Rcd at 14723 (¶ 47), citing *Amendment of the Commission’s Space Station Licensing Rules and Policies*, 18 FCC Rcd 10760, 10825 (¶ 168) (2003) (“*Space Station Licensing Reform Order*” or “*SSLR Order*”).

⁶ *Ka-Band Round II R&O*, 18 FCC Rcd at 14723 (¶ 47).

⁷ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10866 (¶ 283) (emphasis in original).

benefits of greater ability to transfer unbuilt satellite systems, but within this group the second round Ka-band NGSO applicants, and a few others, would be inequitably saddled with the additional cost burdens of the bonding requirement.

Because the applications pending in the second Ka-band NGSO processing round were actually filed *before*, or at least contemporaneously with, significant numbers of other applications for which the Commission has not imposed a bond because these other applicants had their licenses granted prior to the adoption of the new rules,⁸ the Commission's decision in the *Ka-Band Round II R&O* arbitrarily disadvantages the applicants whose licenses will be granted later in time. Indeed, among the Ka-band GSO applications granted in 2001 was NGST's request, which was part of the very same application amendment on which the Commission now proposes to impose a performance bond with respect to the NGSO portion of the application. **The Commission is thus arbitrarily imposing additional costs upon some prospective operators based solely on the fact that the Commission has taken a longer period of time to process their applications.** To some extent, these disparities in processing time have already disadvantaged applicants by delaying their ability to implement service. Imposing additional economic obligations upon these potential competitors would only exacerbate this disadvantage, and potentially inhibit system implementation, without any evident countervailing benefit.

⁸ These licenses include not only the co-frequency Ka-band GSO authorizations, but also the 2 GHz NGSO authorizations, complex networks similar to the proposed Ka-band systems. See, e.g., *EchoStar Satellite Corp.*, 15 FCC Rcd 14300 (IB 2001); *GE American Communications, Inc.*, 15 FCC Rcd 14306 (IB 2001); *KaStarCom World Satellite, LLC*, 15 FCC Rcd 14322 (IB 2001); *Loral CyberStar, Inc.*, 15 FCC Rcd 14346 (IB 2001); *Pegasus Development Corp.*, 15 FCC Rcd 14378 (IB 2001). See also *The Boeing Company*, 16 FCC Rcd 13691 (IB 2001); *Celsat America, Inc.*, 16 FCC Rcd 13712 (IB 2001); *Constellation Communications Holdings, Inc.*, (IB/OET 2001); *Globalstar, L.P.*, 16 FCC Rcd 13739 (IB/OET 2001); *Iridium LLC*, 16 FCC Rcd 13778 (IB 2001); and *Mobile Communications Holdings, Inc.*, 16 FCC Rcd 13794 (Int'l Bur./OET 2001) (*MCHI 2 GHz MSS Order*). See also *Intelsat LLC*, 15 FCC Rcd 15460, 15521-22 (Appendix A) (2000) (authorizing Intelsat, *inter alia*, to occupy four additional orbital locations with new or in-orbit spacecraft).

Moreover, it is far from clear as a legal matter that the Commission may impose a new financial obligation upon current applicants on only an *ad hoc* basis, allowing some to proceed based on prior expectations, while significantly altering the regulatory terrain for others. Upsetting the settled expectations of one subset of existing applicants by increasing significantly the pre-construction costs that they initially anticipated, while not retroactive rulemaking *per se*, does produce a “secondary retroactive effect” by inequitably changing the future impact of past conduct – the costs to be incurred in successfully prosecuting a previously filed satellite application to license grant. If a secondary retroactive effect of an agency rule is unreasonable, then the rule, like any other, may be struck down as arbitrary or capricious.⁹

By limiting the bond requirement only to licenses granted as a result of applications filed after the recent satellite application freeze, the Commission would avoid arbitrary distinctions among processing groups and appropriately limit the impact of the newly-imposed costs to those operators that had the opportunity to take into consideration all of these costs prior to seeking a license. Moreover, limiting the license bond to prospective application would allow all companies that originally sought authorizations during the 1990s to proceed with their programs subject to similar license requirements and burdens, ensuring that similarly situated applicants are treated in an appropriately similar fashion.¹⁰

Finally, the Commission also does not say why its conclusion that the bond requirement will assure “that the Ka-band licensees are fully committed to constructing their

⁹ See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring). See also *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997), citing *Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996).

¹⁰ See, e.g., *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (similarly-situated applicants must be treated in similar fashion).

satellite facilities”¹¹ applies uniquely to this processing group, as distinct from the other pending application groups where the Commission has indicated that it would not apply the requirement. Specifically, consistent with the language in the *Space Station Licensing Reform Order* singling out both Ka-band NGSO and V-band applications for treatment under the new rules, including the bonding requirement,¹² the FCC’s International Bureau Staff has stated on several occasions that pending Ku-band NGSO applications will not be subject to the new licensing rules, including the bond-posting requirement.¹³ The Commission has done nothing to justify this apparent disparity in treatment between the Ka-band NGSO and other processing rounds on one hand, and the Ku-band NGSO processing round on the other.

Indeed, there is no meaningful distinction between the Ka-band and Ku-band NGSO groups, and both sets of applicants should be spared the imposition of the bond requirement. Both of these services are brand new, both are subject to newly-minted service rules that allow for the licensing of all pending applications, and the systems in each service are expected to compete directly with both the other systems within the round and with the systems in the other service.¹⁴ Moreover, it is difficult to discern how there is any distinction to be drawn

¹¹ *Ka-Band Round II R&O*, 18 FCC Rcd at 14723 (¶ 47).

¹² *Space Station Licensing Reform Order*, 18 FCC Rcd at 10866 (¶ 281).

¹³ See, FCC Handout, “Frequently Asked Questions On the *First Space Station Reform Order*,” July 8, 2003 (Question 30) (“the new procedures will be applied to V-band applications, but not to Ku-band NGSO applications”); Tom Tycz, Chief, Satellite Division, SSPI Luncheon: Satellite Regulatory Update, June 3, 2003 (response to panelist question).

¹⁴ To the extent that there is a distinction to be made between the two groups, it does not provide a basis for imposing new rules upon the Ka-band group alone, as the Ka-band applications were actually filed more than a year before the Ku-band applications, and were pending before the FCC under the old rules for a longer period of time. See FCC Public Notice, “Cut-off Established for Additional Applications and Letters of Intent in the 12.75-13.25 GHz, 13.75-14.5 GHz, 17.3-17.8 GHz and 10.7-12.7 GHz Frequency Bands,” Report No. SPB-141 (released November 2, 1998) (establishing January 8, 1999 cut-off date for Ku-band NGSO applications to be considered contemporaneously with the application of SkyBridge LLC). Compare FCC Public Notice, “Satellite Application Accepted for Filing in the 18.8-19.3/28.6-29.1 and 19.7-20.2/29.5-30 GHz Bands; Cut-Off Established for Additional Applications in the 18.8-19.3 and 28.6-29.1 GHz Bands,” Report No. SPB-105 (released October 15,

between these groups of pending applications with respect either to the need for, or the efficacy of, efforts to discourage speculation and warehousing, *i.e.*, the bond-posting requirement.

II. There Is No Sound Basis For Imposing A Bond-Posting Requirement Upon Satellite Licenses Ultimately Granted To Applicants That Have Already Spent Many Years Seeking Such Authority.

Finally, there does not appear to be any significant benefit to be gained from applying the bond requirement to applications that were already on file prior to the adoption of the new rules. The bond requirement poses no disincentive to speculative application filers because the applications have already been submitted, at not inconsiderable cost to the applicants both in terms of initial application fees and subsequent legal and engineering expenditures.

Especially given the current condition of the satellite industry,¹⁵ there is certainly nothing to be gained by imposing higher start-up costs on companies that have persevered for more than a half-decade in prosecuting their applications. The demand for new satellite authorizations has abated significantly since the late 1990s, when the Commission first began to consider reforming its licensing process.¹⁶ While these market changes rightly did not deter the Commission from proceeding with necessary reforms, they should cause the Commission to rethink its initial determination to apply the bonding requirement to some applications pre-dating

1997 (establishing December 22, 1997 cut-off date for Ka-band NGSO applications to be considered contemporaneously with the Celestri application filed by Motorola Global Communications, Inc.).

¹⁵ See, *e.g.*, Barnaby J. Feder, "Long Slump in Satellites Hurts Boeing and Loral," *International Herald Tribune*, at 11 (July 16, 2003).

¹⁶ For example, many previously granted Ka-band satellite authorizations have been returned to the FCC for cancellation. See, *e.g.*, Letter from Gerald Musarra, Vice President, Trade and Regulatory Affairs, Lockheed Martin, to Marlene H. Dortch, Secretary, FCC (dated August 2, 2002) (relinquishing licenses for Call Signs S2332, S2333, S2334, S2335 and S2336); Letter from John P. Janka, Counsel to Hughes, to Marlene H. Dortch, Secretary, FCC (dated December 20, 2002) (relinquishing licenses for Call Signs S2186 and S2189); and Letter from Henry Goldberg, Counsel to PanAmSat, to Thomas S. Tycz, International Bureau (dated January 14, 2003) (relinquishing licenses for Call Signs S2192, S2220, S2221, S2223, S2224, S2225, S2226, S2425, S2426, S2427, S2428, and 2429).

the new rules. While improving market conditions may someday revive the interest of speculators in seeking satellite licenses, the current difficulties being experienced by the industry as a whole have left the potential for such conduct at an historical low point. Those applicants that have continued to seek FCC authority during this significant downturn cannot reasonably be viewed as mere speculators, and should not have their perseverance and patience “rewarded” with additional costs of doing business. Such costs could include “copycat” fees imposed by other administrations, which might seek to impose retroactively additional obligations upon licensees to guarantee future landing rights in their countries.

The most appropriate approach to application of the new bonding requirement is to impose this new regulation on none of the pending applicants. This approach will allow the relatively small number of companies still pursuing new authority in the V-, Ka- and Ku-bands to proceed in a manner consistent with their original expectations without selectively imposing new cost burdens on some of them. This will further one of the Commission’s most important regulatory goals – the promotion of vigorous competition among a variety of service providers.

Conclusion

For all of the foregoing reasons, NGST urges the Commission to reconsider its initial decision to impose the new license bond requirement selectively upon pending applicants, and to determine that the requirement will not apply to the Ka-band NGSO applications that were filed before the new satellite licensing rules became effective. Reconsideration of the application of the bond-posting requirement would ensure fair treatment with respect to the

similarly-situated Ku-band NGSO applicants, from whom the Commission has stated no bond will be required.

Respectfully submitted,

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