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

In the Matter of	)	
	)	
Comprehensive Review of Licensing and	)	IB Docket No. 12-267
Operating Rules for Satellite Services	)	

To: The Commission

PETITION FOR RECONSIDERATION OF THE BOEING COMPANY

The Boeing Company ("Boeing"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby seeks the Commission's reconsideration of a discrete aspect of its order in the above captioned proceeding ("*Part 25 Order*"), specifically the evidentiary showing that is required of a space station licensee to demonstrate compliance with its second due diligence milestone addressing the completion of the critical design review ("CDR") for a satellite.[1]

In raising this issue in its comments and in this petition, Boeing is not requesting that the Commission codify a specific criteria or process that satellite licensees should use to demonstrate compliance with the CDR milestone rules. Instead, Boeing supports the use of a flexible approach that permits the submission of different types of evidence to demonstrate compliance – just as the Commission described in its 2003 decision adopting its CDR milestone requirements.[2]

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[1] *See* Comprehensive Review of Licensing and Operating Rules for Satellite Services, FCC 13-111, *Report and Order*, ¶¶ 45-50 (Aug. 9, 2013) ("*Part 25 Order*").

[2] *See Amendment of the Commission's Space Station Licensing Rules and Policies*, IB Docket No. 02-34, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760 (2003) ("*Space Station Licensing Reform Order*").

Such evidentiary submissions can and should appropriately include the filing of an affidavit from an independent spacecraft manufacturer.[3] Further, given the highly sensitive and proprietary nature of spacecraft CDR documentation – which includes a detailed design of a spacecraft – the Commission staff should refrain from requiring the submission of actual CDR materials for review except where other evidentiary showings have been fully considered and have clearly proven inadequate to demonstrate a licensee's CDR milestone compliance.

I. THE COMMISSION AND ITS STAFF SHOULD EMPLOY GREATER FLEXIBILITY IN THE EVIDENTIARY SHOWINGS THAT SATELLITE LICENSEES CAN USE TO DEMONSTRATE CDR MILESTONE COMPLIANCE

In the Part 25 proceeding, several parties, including Boeing, urged the Commission to reaffirm its original flexible criteria for assessing a space station licensee's compliance with its CDR milestone.[4] As the Commission originally explained, evidence of such compliance could take different forms, potentially including:

1. evidence of a large payment of money, required by most construction contracts at the time of the spacecraft CDR;
2. affidavits from independent manufacturers; and
3. evidence that the licensee has ordered all the long lead items needed to begin physical construction of the spacecraft.[5]

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[3] *See id.*, ¶ 191.

[4] *See* Comments of The Boeing Company, IB Docket No. 12-267 (Jan. 14, 2012) ("*Boeing Comments*"); Comments of The Satellite Industry Association, IB Docket No. 12-267 at 14-15 (Jan. 14, 2012); Reply Comments of Inmarsat, IB Docket No. 12-267 at 5 (Feb. 13, 2012); Reply Comments of the Satellite Industry Association, IB Docket No. 12-267 at 10 (Feb. 13, 2012); Reply Comments of EchoStar, IB Docket No. 12-267 at 6 (Feb. 13, 2012).

[5] *See Space Station Licensing Reform Order*, ¶ 191.

In providing this criteria, the Commission cautioned that "on occasion" it may be necessary or appropriate to supplement the record by requiring licensees "to provide further information, or to conduct physical inspections."[6]

In practice, however, the Commission staff appears to be employing a very inflexible evidentiary requirement, directing most, if not all, space station licensees to disclose an entire copy of the CDR documentation to the Commission for its review. Thus, what the Commission originally described as an occasional necessity appears to have become the norm.

In asking the Commission to reaffirm its original criteria for assessing CDR milestone compliance, Boeing expressly *did not* ask the Commission to codify that criteria. Instead, Boeing explained in its comments that

> the Commission does not need to provide greater specificity in its rules concerning the evidence appropriate for demonstrating compliance with the CDR milestone. The Commission, however, should employ this opportunity to reaffirm that its goals for managing scarce spectrum and orbital resources are best served in the vast majority of cases by using the Commission's original evidentiary requirements for satellite licensees seeking to demonstrate compliance with their CDR milestone requirements.[7]

Boeing made this statement in direct response to a specific question posed by the *Part 25 NPRM*, *i.e.*, whether the Commission should provide "greater specificity in the rules concerning the evidence appropriate for demonstrating compliance with the CDR" milestone.[8]

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[6] *Id.*

[7] *Boeing Comments* at 12-13.

[8] Comprehensive Review of Licensing and Operating Rules for Satellite Services, IB Docket No. 12-267, *Notice of Proposed Rulemaking*, 27 FCC Rcd 11619, 11630, ¶ 30 (2012) ("*Part 25 NPRM*").

Despite the clarity of Boeing's request, the *Part 25 Order* repeatedly asserts that Boeing asked the Commission to "codify" its CDR milestone compliance criteria.[9] The *Part 25 Order* then declines to implement this strawman proposal, explaining "[c]odifying specific criteria could result in a loss of flexibility to licensees in making their CDR showings, as well as to Commission staff in determining whether a licensee has, in fact, met the CDR milestone."[10]

Ironically, rather than seeking reduced flexibility for the Commission staff, Boeing and other commenters were urging the Commission and its staff to employ greater flexibility in assessing the CDR milestone compliance of space station licensees. Specifically, Boeing argued that the Commission was correct in originally concluding that multiple means exist for space station licensees to reliably verify their compliance with the CDR milestone deadline, including through the use of evidence of a large payment of money to the spacecraft manufacturer, affidavits from independent manufacturers, or evidence that the long lead components of the spacecraft had been ordered. Each of these items can be very probative to the critical question of whether the space station licensee is proceeding forward with the design, construction and launch of its satellite. Therefore, the Commission should encourage its staff to welcome and consider such evidence as sufficient in most cases to demonstrate that the CDR milestone has been satisfied.

Unfortunately, rather than provide such confirmation, the *Part 25 Order* moves in the opposite direction, inadvertently suggesting that one of the specific factors that the Commission originally identified as appropriate to demonstrate CDR milestone compliance – affidavits from independent manufacturers – may no longer be considered probative. As explained in the

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[9] *See Part 25 Order*, ¶¶ 46, 48 and 49.

[10] *Id.*, ¶ 47.

following section of this petition, the Commission has no basis for such a suggestion and Boeing therefore urges the Commission to withdraw or clarify this statement.

II. THE COMMISSION SHOULD CONFIRM THAT AFFIDAVITS FROM INDEPENDENT MANUFACTURERS PROVIDE HIGHLY PROBATIVE EVIDENCE THAT A SATELLITE LICENSEE'S CDR HAS BEEN COMPLETED

As noted in the previous section, in establishing its CDR milestone rule, the Commission originally identified affidavits from independent manufacturers as one form of evidence that could be used to demonstrate compliance with CDR requirements.[11] Boeing and others urged the Commission to reaffirm this position in its Part 25 proceeding. Far from reaffirming the Commission's original position, however, the *Part 25 Order* appears to undermine it in two respects.

First, the *Part 25 Order* states that the Commission "will not replace evidentiary showings with certifications or affidavits, which we did not propose or request comment on in the *Notice*."[12] No party in the proceeding, however, asked the Commission to replace evidentiary showings with certifications or affidavits (*i.e.*, to accept only certificates or affidavits as sufficient evidentiary showings). Instead, several parties asked the Commission to reaffirm that affidavits from independent manufacturers could still be used as one type of evidentiary showing that would be sufficient in most cases to demonstrate compliance with a CDR milestone.

Second, the *Part 25 Order* asserts that "allowing licensees to file certifications or affidavits in lieu of concrete evidence could allow a licensee not making sufficient progress to

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[11] *See Space Station Licensing Reform Order*, ¶ 191.

[12] *Part 25 Order*, ¶ 47.

continue to hold spectrum to the exclusion of others willing and able to proceed."[13] In making this statement, the *Part 25 Order* seems to imply that certificates and affidavits do not under any circumstances provide "concrete evidence" of CDR compliance. The only expressed justification for this position in the *Part 25 Order* is its statement that, "[i]n several cases, the International Bureau has found that despite a licensee's assertion that it had met particular milestones, it had not, in fact, met the milestones."[14] The referenced cases, however, suggest only that certifications executed by the licensees themselves may not always be sufficiently probative of whether the CDR milestone has been satisfied. The cases do not, however, suggest that affidavits from independent manufactures lack sufficient reliability to constitute "concrete evidence" of CDR completion.

In reality, affidavits from independent satellite manufacturers are very reliable in determining whether the manufacturer has completed the spacecraft CDR for a satellite licensee. The completion of a spacecraft CDR is usually coupled with contractual requirements for significant payments by the licensee to the manufacturer. An independent manufacturer would therefore have no incentive to assert in an affidavit that a spacecraft CDR had been completed unless this was actually the case.

The Commission also uses independent affidavits in other circumstances to verify the factual circumstances of complex situations. For example, pursuant to Section 73.3555 of the Commission's rules, in order to demonstration that a television station qualifies for a "failing" station waiver, the Commission will accept an affidavit from an independent broker affirming

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[13] *Id.*

[14] *Id.* (*citing Commission cases*).

that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received.[15]

The Commission has provided no reason in its *Part 25 Order* why affidavits from independent manufacturers should not be acceptable in most cases to demonstrate compliance with the CDR milestone requirement. Therefore, the Commission should reaffirm its original position that affidavits from independent manufacturers should be acceptable in most cases to resolve a CDR compliance inquiry.

III. POTENTIAL UNCERTAINTY REGARDING THE DEFINITION OF A COMPLETE CDR SHOULD NOT IMPAIR THE USE OF AFFIDAVITS FROM INDEPENDENT MANUFACTURERS

The *Part 25 Order* provides no explanation for its apparent assertion that affidavits from independent manufacturers cannot be used as concrete evidence of compliance with the Commission's CDR milestone requirement. Boeing understands, however, that concern may exist within the Commission staff regarding whether, in executing such affidavits, some satellite manufacturers may be employing different definitions of a 'complete CDR.'

Boeing questions the basis for this apparent concern. The Commission has repeatedly elaborated on its definition of a complete CDR, explaining that CDR is defined as "the stage in the spacecraft implementation process at which the design and development phase ends and the manufacturing phase starts."[16] The Commission's definition mirrors what has historically been

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[15] *See* 47 C.F.R. § 73.3555, Note 7; Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 FCC Rcd 12903, 12941, ¶ 86 (1999).

[16] *Part 25 Order*, ¶ 191; *see also* Star One S.A. Petition for Declaratory Ruling to Add The Star One C1 Satellite at 65º W.L. To the Permitted Space Station List, 19 FCC Rcd 16334, ¶ 15 (Aug. 24, 2004); *Space Station Licensing Reform Order*, ¶ 103.

employed by satellite manufacturers in the U.S. and other countries. As noted above, the completion of the CDR is usually a critical step in most satellite contracts, marking the due date for a significant payment from the satellite licensee to the manufacturer. Therefore, the term is well defined and understood within the industry.

In any event, it does not seem appropriate for the Commission to require the filing of a manufacturer's CDR package for a spacecraft solely because of lingering uncertainty regarding the definition of a CDR. Any rule that can only be enforced through actual inspection by the Commission staff would result in a highly subjective "we know it when we see it" enforcement posture that is incompatible with the "fair notice" requirement of objective regulation.[17]

Perhaps a better and more objective approach would be to instruct satellite licensees that, if they choose to submit an affidavit from an independent manufacturer, the affidavit should both confirm that the spacecraft CDR has been complete and should additionally acknowledge that, in certifying this fact, the manufacturer is employing the Commission's definition of CDR with respect to its completion. The Commission might also instruct satellite licensees that plan to use affidavits from independent manufacturers to reflect the Commission's definition of CDR, or something comparable, in the non-contingent satellite manufacturing contract that is filed with the Commission in fulfillment of the licensee's first milestone requirement. Such approaches would ensure that all manufacturers are employing the same definition of CDR for purposes of compliance with the Commission's CDR milestone requirements. Further, such approaches would be far more streamlined than the current *de facto* approach of requiring all or nearly all

[17] *See, e.g.*, FCC v. Fox TV Stations, Inc., 132 S. Ct. 2307 (2012) (explaining that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required . . . a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved").

satellite licensees to file a complete copy of the spacecraft CDR with the Commission on a confidential basis.

As Boeing and others explained in their comments in this proceeding, a spacecraft CDR is an extremely confidential document containing highly sensitive trade secrets regarding the latest developments in satellite engineering. Boeing acknowledges that the Commission has in place "a well-established and effective process for dealing with confidential information."[18] Nevertheless, Boeing believes that, however limited, the potential risk of accidental disclosure of any portion of a CDR necessitates significant discretion by the Commission staff in requiring the filing of a CDR package only in limited circumstances and only when other forms of evidence have been considered by the Commission and have proven insufficient to demonstrate that the CDR has been completed.

In this regard, the *Part 25 Order* explains that the "Commission staff asks a licensee to submit a CDR package when the licensee has provided insufficient evidence to demonstrate it has met the CDR milestone."[19] Given this fact, Boeing seeks only for the Commission and its staff to reconsider whether sufficient weight is being given in day-to-day practice to other forms of evidence that were originally deemed sufficient to potentially demonstrate that a spacecraft CDR has been completed. Most specifically, the Commission should reaffirm that, in the vast majority of cases, a licensee should be able to demonstrate that its CDR has been completed through the filing of an affidavit from its independent manufacturer certifying that the CDR has been finalized using the definition of CDR that has repeatedly been identified in Commission decisions.

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[18] *Part 25 Order*, ¶ 49.

[19] *Id.*

IV. CONCLUSION

For the reasons discussed herein, the Commission should reconsider its *Part 25 Order* and reaffirm its original statement that multiple approaches can be employed in most cases to demonstrate compliance with the Commission's CDR milestone requirements. In making this request, Boeing is not asking the Commission to codify its original criteria regarding the types of evidence that can be used to demonstrate CDR milestone completion. Instead, Boeing is solely requesting that the Commission reaffirm that sufficient and probative evidence of CDR completion can take a variety of forms, such as the submission of an affidavit from an independent manufacturer, and therefore the filing of an entire CDR package for Commission review should be unnecessary in the vast majority of cases.

Respectfully submitted,

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