ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 08-1046

GLOBALSTAR, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties appearing before the agency are listed in petitioner's brief, as are all parties appearing before the Court.

B. Ruling Under Review

Review Of The Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems In The 1.6/2.4 GHz Bands, Second Order On Reconsideration, 22 FCC Rcd 19733 (2007) (JA).

C. Related cases

The order on review has not been before this Court or any other court.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Administrative Decision

Statutes and Regulations

Page

Others

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

CDMA	Code Division Multiple Access.
LEO	Low Earth Orbit.
MSS	Mobile Satellite Service.
TDMA	Time Division Multiple Access.

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QUESTIONS PRESENTED

In 1994, the Commission allocated for use in providing mobile telephone and data service a band of satellite spectrum known as the "Big LEO" band. The agency split the Big LEO spectrum into two unequal parts, allotting exclusive use of the majority of the spectrum to satellite systems using "CDMA" technology and granting a smaller allotment of spectrum for exclusive use by a system using "TDMA" technology. That arrangement was premised on the Commission's expectation that multiple CDMA systems would be built and operated, whereas

only one TDMA system would be constructed. As it happened, only one of each system type ultimately was constructed. Globalstar operates the CDMA system, and Iridium operates the TDMA system.

Iridium subsequently filed a petition for rulemaking asking the Commission to allocate more of the Big LEO spectrum to exclusive TDMA use. In response, the Commission issued a notice of proposed rulemaking that sought comment on various ways to reconfigure the band, including spectrum reassignment.

After receiving public comment, the FCC adopted a new spectrum plan in which TDMA and CDMA operations were to share part of the spectrum previously reserved for exclusive CDMA usage. Globalstar sought reconsideration of that decision, in part on the ground that spectrum sharing to the degree ordered was not technically feasible. In the reconsideration order now on review, the Commission agreed with Globalstar that the spectrum sharing plan would not work and decided instead to reallocate part of the Big LEO spectrum to exclusive TDMA usage, one of the options originally set forth in the NPRM. The questions presented are:

1) Whether Globalstar has waived its claim that it lacked adequate notice and opportunity to comment on the possibility that the

Commission would allocate some of the Big LEO spectrum to exclusive TDMA usage, and if not, whether that claim has merit;

2) Whether the order on reconsideration is arbitrary and capricious because it (a) impermissibly departed from prior FCC rulings; (b) lacked record support; or (c) unlawfully failed to consider an alternative proposal.

JURISDICTION

The Court has jurisdiction to review final FCC rulemaking orders pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). For the reasons set forth at pages 24-27 below, the Court lacks jurisdiction over the claim that the Commission failed to provide an opportunity for notice and comment because Globalstar failed to preserve it before the agency. 47 U.S.C. § 405(a).

STATUTES AND REGULATIONS

Pertinent materials are attached hereto.

COUNTERSTATEMENT

This case involves the Commission's management of a portion of the electromagnetic spectrum commonly referred to as the "Big LEO" band, which consists of two sub-segments known as the "L band" and the "S

band" (see chart at page 6).[1] When it created the Big LEO band in 1994 and accepted applications for spectrum licenses, the Commission expected the available spectrum to support five providers of mobile satellite service (MSS), which is a satellite-based voice and data communications service. Four of the license applicants intended to use a technology known as "code division multiple access" (CDMA), and one intended to use "time division multiple access" (TDMA) technology. Both technologies are ways to allow multiple callers to use the same spectrum, increasing the efficiency of spectrum usage.

Because of the uneven split in the number of applicants proposing to use each technology, the Commission allocated most of the spectrum – somewhat more than four-fifths – to exclusive CDMA use, with the remainder allotted to exclusive TDMA use. Ultimately, however, only one CDMA and one TDMA provider constructed systems. In the order on review, the Commission re-balanced the spectrum assignments in the Big LEO band and allocated additional spectrum to the TDMA segment in order to reflect the reality of spectrum usage and needs.

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[1] "LEO" stands for "low earth orbit," which describes the satellites' location in outer space. "Big" refers to the high frequencies used for the service.

1. <u>Creation Of The Big LEO Band</u>.

In 1990, two companies applied for licenses to use the frequencies between 1610 MHz and 1626.5 MHz (the "L band" portion of the Big LEO spectrum) and between 2483.5 MHz and 2500 MHz (the "S band" portion) to provide MSS services. Eventually, more companies filed competing applications. After conducting both international and domestic proceedings,[2] the Commission created the Big LEO band. *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, Report and Order, 9 FCC Rcd 5936 (1994) (*Big LEO Order*). By that point, there were five applicants, four of which proposed CDMA systems and one of which proposed a TDMA system. CDMA technology allows multiple licensees to use the same spectrum at the same time, but TDMA does not.

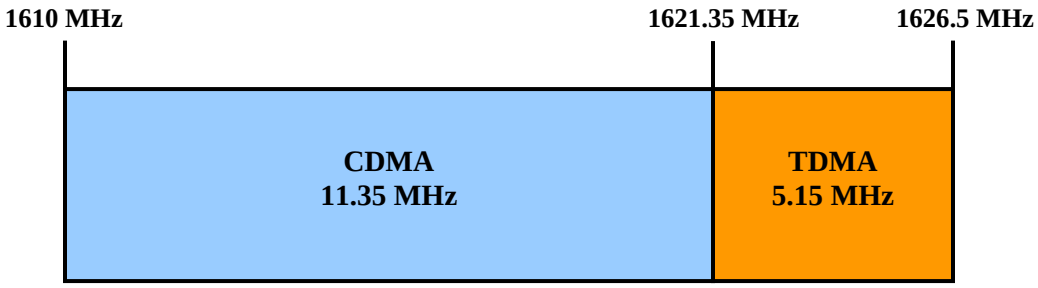
The *Big LEO Order* split the band into two unequal, but roughly proportionate, parts. Of the 33 megahertz of total Big LEO spectrum, the four CDMA licensees were accorded joint exclusive access to 27.85 megahertz of spectrum (11.35 megahertz in the L band and the entire 16.5 megahertz of the S band) – somewhat more than four-fifths of the total. The

[2] International proceedings were required because all countries share orbital locations in outer space along with the spectrum associated with those locations.

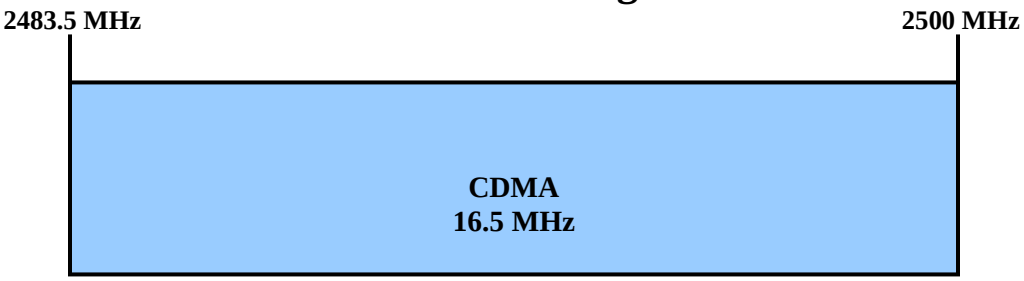
TDMA licensee was allotted exclusive use of the remainder – 5.15 megahertz of spectrum in the L band and none in the S band. The initial spectrum allocation thus looked like this:

BIG LEO ORDER SPECTRUM ALLOCATION

L Band – 16.5 Megahertz



S Band – 16.5 Megahertz



In CDMA systems, the L band spectrum is used only for earth-to-space "uplink" operations, and the S band spectrum is used for space-to-earth "downlink" operations. *Big LEO Order* ¶8 & n.13. Thus, when the user of a CDMA system makes a call, communications from the earth terminal (*i.e.*, a user's phone handset) to the satellite are carried on the L band and communications from the satellite to an earth terminal are carried

on the S band. With a TDMA call, both uplink and downlink between the phone and the satellite take place in the L band.

The Commission recognized from the outset of the Big LEO proceeding that the disproportionate spectrum division would remain fair and efficient only if multiple CDMA systems were constructed. Thus, in the NPRM that preceded the *Big LEO Order*, the Commission proposed a future modification to the band plan "in the event only one CDMA licensee goes forward." *See Big LEO Order* ¶54. Specifically, the Commission proposed that if only one CDMA system were to be constructed (an outcome the Commission then viewed as an "unlikely scenario"), the entire 11.35 megahertz L band allocation would not be necessary to operate a single system, but 8.25 megahertz would be sufficient. The Commission accordingly proposed that, in such circumstances, 3.1 megahertz of the L band spectrum – between 1618.25 and 1621.35 MHz – "would be made available to an operational [TDMA] system upon a showing of need or, if this demonstration could not be made, to a new entrant." Ibid.

Despite that proposed course of action, in the *Big LEO Order* the Commission declined to adopt that approach, including the "showing of need" test. Instead, the Commission decided to "defer any decision with respect to the 3.1 MHz between 1618.25 and 1621.35 MHz" and to "make

the decision with respect to the 3.1 MHz, if necessary, in the context of a rulemaking, based upon the circumstances that have developed at that time." *Id*. ¶55 (emphasis added).

2. The *2003 NPRM*.

The FCC granted five licenses in 1995, but in the ensuing years only two licensees constructed systems: one CDMA system, now operated by petitioner Globalstar, and one TDMA system, now operated by intervenor Iridium. In July 2002, Iridium petitioned the FCC to undertake the re-allocation rulemaking the agency had contemplated in the *Big LEO Order* in the event only one CDMA system became operational. Iridium informed the Commission that, in light of the modest 5.15 MHz TDMA spectrum allotment, Iridium "faces significant spectrum constraints," and that in order to "meet current critical customer needs and near-term future demand, it is essential that Iridium be permitted to expand its operations into the 1615.5-1621.35 MHz frequency band." Iridium Petition for Rulemaking at 4 (filed July 26, 2002) (JA). Iridium thus asked for a re-allocation of 5.85 megahertz of spectrum from the CDMA allotment to the TDMA allotment. *Id*. at 5 (JA).

In response to the Iridium petition, the Commission issued the *2003 NPRM* seeking comment on "proposals for reassigning or reallocating a

portion of spectrum in the Big LEO MSS frequency bands." *Review Of The Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems In The 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 1962, 2087 (2003) (*2003 NPRM*) (JA). In the *2003 NPRM*, the Commission asked for comment on "the original spectrum-sharing plan, Iridium's proposal, and other possible uses of the spectrum," *ibid.*, including "comment on both the possible reassignment and possible reallocation of any returned spectrum for possible use by other services," *id*. at 2089 (JA). Moreover, because "only one CDMA Big LEO system has deployed, it is now appropriate to consider making at least 3.1 megahertz of additional spectrum available to Iridium. We will base our final judgment on the record established in this proceeding." *Ibid*. The Commission asked for a host of specific data about both Iridium's and Globalstar's use of and need for spectrum resources, *id*. at 2090 (JA), and also sought comment on whether to allocate Big LEO spectrum to a new entrant or to other services, *id*. at 2091 (JA).

The parties submitted extensive comments in response to the *2003 NPRM*. Iridium provided 40 pages (plus many more pages of appendices) of detailed information about its technical operations, its spectrum needs, and the policy implications of re-allocating the spectrum band. The gist of its

position was that it "is experiencing a spectrum shortage" and "requires access to more than its current assignment of 5.15 MHz of spectrum." Comments of Iridium Satellite LLC (filed July 11, 2003) at 3 (JA). Iridium had also previously submitted an extensive technical report that, it contended, showed the extent of its system's spectrum shortages. *Id*. at 10-12 (JA -); *see* Iridium Satellite LLC Spectrum Report, Jan. 13, 2003 (JA). In its comments, Iridium proposed a "spectrum parity" plan under which the entire 33 megahertz of Big LEO spectrum, including the L band and the S band spectrum, would be split into three roughly equal blocks, with Iridium getting one-third (an increase in its spectrum allotment of 6 MHz), Globalstar getting one-third, and one-third reclaimed for other uses. Iridium Comments at 30-32 (JA).

Globalstar also submitted extensive comments in response to the *2003 NPRM*, as did its creditors' committee (the company was in bankruptcy proceedings at the time). The gist of its comments was that it "is using its entire spectrum assignment," and that "[c]hanging the bandwidth available to Globalstar would impair its capacity and ability to provide the variety of services desired by the MSS marketplace." Joint Comments of L/Q Licensee, Inc., Globalstar, L.P. and Globalstar USA, L.L.C. (filed July 11, 2003) at i (Globalstar Comments) (JA). Globalstar's comments argued

expressly against the band plan amendment put forth by Iridium, *id*. at 21-30 (JA -); argued that Iridium needed no additional spectrum, *id*. at 12-17 (JA -); and argued that the Commission should not reallocate any of the Big LEO spectrum to other users, *id*. at 17-21 (JA). It also submitted a detailed technical appendix. JA . The creditors' committee made similar arguments. Comments of the Official Creditors' Committee of Globalstar, L.P. (filed July 11, 2003) (JA). All parties also submitted lengthy reply comments. JA , , .

Globalstar's reply comments ended with a plea that the Commission give Globalstar and Iridium the opportunity to work out a spectrum sharing plan. Joint Reply Comments of L/Q Licensee, Inc., Globalstar, L.P. and Globalstar USA, L.L.C. (filed July 25, 2003) at 35-37 (JA -). Globalstar contended that the two companies had effectively shared spectrum as a result of FCC grants of special temporary authority for Iridium to use some of the CDMA spectrum in connection with communication services provided to the military, and through that process the companies had "learned more about how the systems operate." *Id*. at 37 (JA). A sharing plan, Globalstar argued, "would serve the public interest substantially better than the destructive band split proposed by Iridium." *Id*. at 36 (JA).

3. The *Sharing Order*.

After considering the record, the Commission decided to allow Globalstar and Iridium to share 3.1 megahertz of spectrum in the L band, between 1618.25 MHz and 1621.35 MHz (see chart on page 6). *Review Of The Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems In The 1.6/2.4 GHz Bands*, Report and Order, 19 FCC Rcd 13356 (2004) (JA) (*Sharing Order*).

The Commission began by "affirm[ing] our conclusion that conditions have been met to justify a reassessment of the existing band plan." *Sharing Order* ¶30 (JA). In the *Big LEO Order*, the Commission had stated its intention to reassess the plan in the event that only one CDMA system became operational, and that contingency had come to pass. Thus, "reassessing the current band plan at this time is appropriate." *Sharing Order* ¶33 (JA).

The Commission then decided to allow Globalstar and Iridium to share the 3.1 megahertz of spectrum between 1618.25 and 1621.35 MHz. Spectrum sharing "should be implemented, and improved, wherever possible," and the plan to share the 3.1 megahertz "should promote more market-driven, as opposed to regulatory-driven, uses of the spectrum." *Sharing Order* ¶45, 46 (JA). That approach was called for in the Big LEO

band, the Commission found, because "both the CDMA and the TDMA MSS operator set forth compelling arguments for utilizing the spectrum, so we believe that sharing the spectrum would be the most equitable solution at this time." *Id*. ¶47 (JA). The Commission determined that Iridium had need for additional spectrum, but on a "sporadic and geographic-specific" basis, which did not justify "tak[ing] spectrum from a competitor on a worldwide basis" given that additional spectrum could instead be provided on a shared basis. *Ibid*.

The Commission rejected Iridium's "spectrum parity" plan. The Commission found that the lack of proportionality between the CDMA and TDMA spectrum allocations did not by itself "prevent Iridium from providing competitive services" or "justif[y] allocating the same amount of spectrum to TDMA and CDMA." *Sharing Order* ¶49 (JA). Moreover, "if the Commission implemented 'spectrum parity' on a pure megahertz-per-party basis, it would ignore the significant encumbrances that exist in the lower portion of the L-band." *Ibid*. Radioastronomy and other operations that share part of the L band restrict the use of that band and make it more difficult to provide certain aviation services. *Id*. ¶48 (JA).

The *Sharing Order* also included a *Further Notice* in which the Commission sought comment on potential further sharing of an additional

2.25 megahertz of spectrum between 1616 and 1618.25 MHz. *Id*. ¶¶96-99 (JA -).[3]

4. The *Reconsideration Order*.

Globalstar sought agency reconsideration of the *Sharing Order*. Petition for Reconsideration of Globalstar LLC, filed Sept. 8, 2004 (JA). In part, Globalstar argued to the Commission that the sharing plan "is based on a misperception of the manner in which Globalstar and Iridium would use the 'shared' spectrum. While Globalstar and Iridium can *coordinate usage* of spectrum, the two systems cannot *share* the spectrum co-frequency, co-coverage in the same way that, for example, two systems using Code Division Multiple Access technology can share frequencies. At some point, access by one system to the 'jointly used' spectrum requires the other to cede access." Globalstar Petition at 5-6 (JA). In support of that claim, Globalstar provided a detailed technical appendix demonstrating that sharing between TDMA and CDMA systems is not feasible. JA - .

Globalstar thus asked the Commission to "reverse its ill-advised decision" to order spectrum sharing. Globalstar Petition at 6 (JA). In the

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[3] In a separate action not at issue here, the Commission also implemented a sharing requirement between MSS and other services in 5 megahertz of spectrum in the S band (2495-2500 MHz). *Sharing Order* ¶¶66-67 (JA -).

alternative, Globalstar asked the Commission to establish various rules governing the spectrum sharing process. *Id*. at 6-8 (JA -). Globalstar also asked in the alternative that the Commission move the boundary between shared and unshared spectrum from 1618.25 MHz to 1618.725 MHz in order to protect one of Globalstar's channels. *Id*. 8-10 (JA -).

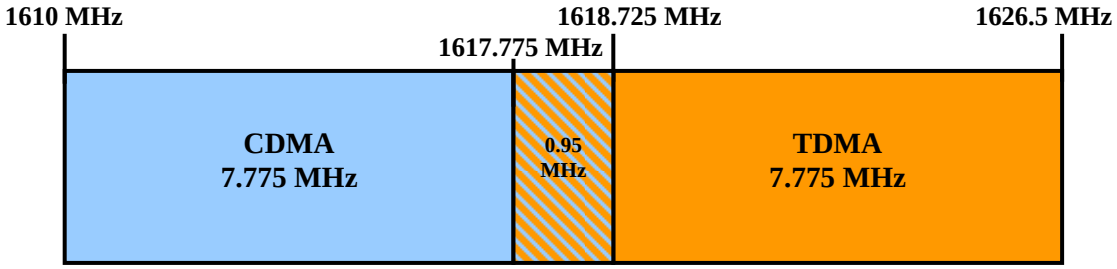
On reconsideration, the Commission found that it mistakenly had concluded in the *Sharing Order* that sharing 3.1 megahertz of L band spectrum was feasible on a long term basis. *Review Of The Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems In The 1.6/2.4 GHz Bands*, Second Order On Reconsideration, 22 FCC Rcd 19733 (2007) (JA) (*Reconsideration Order*). Globalstar, in its petition for reconsideration and in an ex parte letter, had submitted technical analyses of spectrum sharing and the risk of interference. *Reconsideration Order* ¶14 & n.52 (JA). On review of that material, the agency credited the conclusions that "in shared spectrum, when both Iridium and Globalstar are fully loaded, an Iridium satellite would suffer harmful interference from Globalstar earth terminals 45% of the time, a Globalstar satellite would suffer interference from Iridium earth terminals … 100% of the time, and Globalstar satellites would receive unacceptable interference from Iridium satellites." *Id*. ¶16 (JA).

Although at present neither system is typically fully loaded, the Commission looked toward the future and decided to adopt a band plan that would accommodate expected growth of both Globalstar's and Iridium's systems without risk of interference. "[B]oth Iridium and Globalstar state that their business has grown, and confidently predict that their business will continue to grow." *Reconsideration Order* ¶16 (JA). The record also showed that "Globalstar has experienced steady, significant increases in subscribership … and Iridium has shown that the communications traffic it is handling has increased substantially." *Ibid*. Thus, "in order to provide long-term certainty and stability in the Big LEO market and to avoid harmful interference between CDMA and TDMA Big LEO MSS systems, we will divide the Big LEO L-band spectrum equally to CDMA and TDMA systems." *Id*. ¶17 (JA).

On that record, the Commission adopted an "equitable" band plan that assigned equal amounts of exclusive L band spectrum – 7.775 megahertz apiece – to CDMA and TDMA usage. *Reconsideration Order* ¶19 (JA). In order to accommodate Globalstar's request that the Commission protect one of Globalstar's channels, the Commission retained a small amount of shared spectrum – 0.95 megahertz between the two exclusive portions. The agency found that this small sliver of spectrum could be shared safely "while

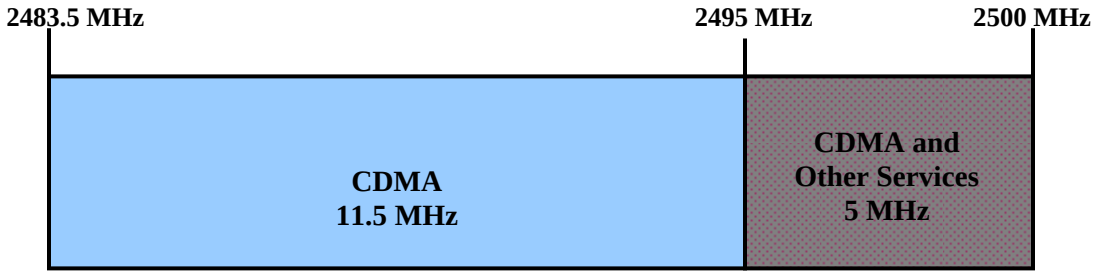
both systems are relatively lightly loaded." *Ibid*. The revised L band plan looks like this:

RECONSIDERATION ORDER L Band ALLOCATION



The net effect of the new plan is to give Iridium an additional 2.625 megahertz of exclusive spectrum and 0.95 megahertz of shared spectrum. The entire S band remains allocated to CDMA usage (5 megahertz of which is shared with other services):

RECONSIDERATION ORDER S Band ALLOCATION



In sum, the Commission found, "Iridium has made a case demonstrating its need for more spectrum," *Reconsideration Order* ¶17 (JA), and "the public interest would be better served by reassigning spectrum in the L-band so that CDMA and TDMA MSS systems have equal assignments

of spectrum for their exclusive MSS use in order to account for the growth of current CDMA and TDMA MSS systems," *id*. ¶14 (JA -).

In the same document as the *Reconsideration Order,* the Commission included a Second Report and Order in which it disposed of the *Further Notice* that had been issued along with the *Sharing Order*. *Reconsideration Order* ¶26 (JA). As discussed above, the *Further NPRM* had sought comment on the sharing of an additional 2.25 MHz of CDMA spectrum. The Commission held that "[b]ecause we are altering the bandplan … to reduce the amount of spectrum shared by CDMA and TDMA Big LEO systems, the proposal for expanded spectrum sharing … is moot." *Ibid*.

Globalstar now seeks review of the *Reconsideration Order*.

SUMMARY OF ARGUMENT

The FCC granted the majority of the Big LEO spectrum to CDMA providers on the premise that four licensees would use the assigned spectrum. Ultimately, however, only one licensee commenced operations. In that circumstance, the Commission properly re-balanced the Big LEO spectrum assignments to accord more spectrum to the TDMA licensee, which had demonstrated a need for additional spectrum. Globalstar has identified no error in the Commission's actions.

1a. Globalstar has waived its principal argument – that it had no notice of or opportunity to comment on the possibility that the FCC would reassign spectrum from CDMA to TDMA. Globalstar attempted to raise that claim in an *ex parte* letter filed on the very day the Commission adopted the order on review. Such a last-minute filing did not give the agency a fair opportunity to consider the matter. The Court therefore must proceed as if Globalstar had not raised its claim at all. It is established law in this Circuit that such a failure, particularly with respect to procedural matters such as an alleged lack of notice, deprives the Court of jurisdiction over the claim. It makes no difference that Globalstar may not have realized that it had such a claim until after the Commission issued its order. The cases are clear that in such circumstances a would-be litigant must preserve its claim by raising it in a petition for agency reconsideration.

1b. Even if the Court concludes that it has jurisdiction over the lack of notice claim, however, Globalstar's argument lacks merit. The 2003 NPRM explicitly sought comment on spectrum reassignment, and Globalstar took ample advantage of that opportunity. The *Reconsideration Order* rested on the complete record that was developed in response to the *2003 NPRM*. In light of that notice and Globalstar's subsequent extensive

comments on the very action the Commission took, Globalstar's lack of notice claim is baseless.

2a. Globalstar is wrong that in the *Reconsideration Order* the Commission changed its prior assessment of the public interest without acknowledging or explaining the change. The *Sharing Order* found spectrum sharing to be in the public interest on the premise that sharing of spectrum between Iridium and Globalstar was technically possible. Globalstar's own petition for reconsideration showed the error in that premise and demonstrated that sharing was not feasible. The Commission agreed. In the absence of spectrum sharing, the Commission was forced to strike a different public interest balance – this time favoring reassignment rather than sharing. Far from an unexplained departure, the Commission engaged in a thoroughly reasonable process of reconsideration.

2b. Globalstar is also wrong that in the *Sharing Order* the Commission rejected "spectrum parity," but that in the *Reconsideration Order* the agency adopted spectrum parity without acknowledging the change in policy. In the *Sharing Order*, the Commission rejected a spectrum parity proposal that would have split the Big LEO spectrum into three equal parts. By contrast, the band plan the Commission adopted in the *Reconsideration Order* is not a "parity" plan at all because Globalstar

continues to have exclusive access to far more spectrum than Iridium. Globalstar's argument fails because it rests on an apples-to-oranges comparison.

2c. Globalstar incorrectly claims that the Commission failed to apply to Iridium a showing of need test that the agency allegedly adopted in the *Big LEO Order*. In fact, the Commission declined to adopt such a test, so Globalstar's contention fails at the starting gate. Even if the Commission had adopted a showing of need test, however, it expressly found that Iridium had shown a need for additional spectrum.

3. Globalstar is wrong that the record fails to support the Commission's action. The argument is largely a rehash of the notice claim: Globalstar contends that there is no record at all because the Commission did not ask for comment on spectrum reassignment. That reasoning ignores the full record compiled in response to the *2003 NPRM*. That record supports the Commission's decision and establishes that Iridium needs additional spectrum, both at present and in the future. The Commission's prediction of future spectrum needs is entitled to deference and rests on a solid footing.

4. Globalstar is wrong that the Commission erroneously failed to consider further spectrum sharing as an alternative to spectrum

reassignment. It is a strange argument coming from Globalstar, because Globalstar itself successfully convinced the Commission that spectrum sharing was not technically feasible. At that point, any question of further spectrum sharing was moot.

ARGUMENT

I. STANDARD OF REVIEW.

With respect to the question of whether the Commission complied with the notice-and-comment requirements of the Administrative Procedure Act, we agree with Globalstar that the Court does not simply defer to the Commission's characterization of its action. Here, there is no such characterization to which to defer, however, because Globalstar failed to raise the matter properly before the agency, which deprives the Court of jurisdiction over the argument.

The other issues raised in Globalstar's brief are reviewed under the customarily deferential standards of the APA. The Court may reverse the agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In applying that standard, the Court "presume[s] the validity of the Commission's action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Consumer*

Electronics Ass'n v. FCC, 347 F.3d 291, 300 (D.C. Cir. 2003). In a case like this one, which involves the agency's management of the electromagnetic spectrum, the Court is especially deferential. On "a highly technical question ... courts necessarily must show considerable deference to an agency's expertise." *MCI Cellular Telephone Company v. FCC*, 738 F.2d 1322, 1333 (D.C. Cir. 1984). Indeed, the Court will "uphold the Commission if it makes a 'technical judgment' that is supported 'with even a modicum of reasoned analysis,' 'absent highly persuasive evidence to the contrary.'" *Mobile Relay Associates v. FCC*, 457 F.3d 1, 8 (D.C. Cir. 2006), *quoting Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289, 1297-1298 (D.C. Cir. 1989).

II. GLOBALSTAR FAILED TO PRESERVE ITS NOTICE-AND-COMMENT CLAIM, WHICH IS WRONG IN ANY EVENT.

Globalstar's principal claim is that the Commission violated the APA's notice-and-comment provisions by re-allocating spectrum without first providing notice of an intent to do so and an opportunity for comment. Br. 22-27. That claim lacks merit, but the Court should not reach the merits because Globalstar failed to preserve the claim and this Court thus lacks jurisdiction over the matter.

A. The Court Lacks Jurisdiction Over The Issue.

Congress has mandated that the filing of a petition for agency reconsideration is "a condition precedent to judicial review" whenever a litigant "relies on questions of fact or law upon which the Commission … has been afforded no opportunity to pass." 47 U.S.C. § 405(a). *See, e.g.*, *Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 256-257 (D.C. Cir. 2008). This Court "has strictly construed that section, holding that [it] 'generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission.'" *In Re Core Communications, Inc.*, 455 F.3d 267, 276 (D.C. Cir. 2006), *quoting BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003). Moreover, section 405(a) requires not just that an issue be raised in a literal manner, but also that the Commission have a "fair opportunity" to address it. *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-280 (D.C. Cir. 1997). Thus, "even where an issue has been 'raised' before the Commission, if it is done in a less than complete way, … the Commission has not been afforded a fair opportunity." *Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998). Section 405(a) applies fully to claims of alleged lack of notice. *See Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1169 (D.C. Cir. 1994); *see also AT&T Corp. v. FCC*,

113 F.3d 225, 229 (D.C. Cir. 1997) ("The exhaustion requirement under § 405 applies to procedural as well as substantive arguments.").

Globalstar attempted to raise its notice claim before the Commission in an ex parte letter that it filed *the very same day* that the Commission adopted the *Reconsideration Order*. *See* Globalstar *Ex Parte* Letter of November 7, 2007 (JA); Br. 15-16 & n.39. That last-second *ex parte* letter, however, did not give the agency a fair opportunity to address the matter. A few hours' time (at most) is not adequate for an agency to consider an issue. *See Time Warner*, 144 F.3d at 79 (Court asks "whether a question was *adequately presented* to the Commission") (emphasis added). Indeed, chances are high that individual commissioners did not even see the letter until after they voted to adopt the *Reconsideration Order*, which means that they did not have any opportunity at all to consider the letter, let alone a fair or adequate one. *See AT&T Wireless Services, Inc. v. FCC*, 270 F.3d 959, 966 (D.C. Cir. 2001) (matter raised in ex parte letter on April 4 was "untimely" with respect to order adopted May 24). It is in part for such reasons that this Court has recently warned that "future litigants should note that relying on [*ex parte*] notices to satisfy § 405 is a risky strategy." *Sprint Nextel*, 524 F.3d at 257. The Court therefore must review this matter as though the notice issue had not been raised at all.

The Court applies the exhaustion requirement of section 405(a) especially strictly with respect to claims of a "technical defect or procedural oversight," such as alleged failures of notice. *Time Warner*, 144 F.3d at 80-81 (internal quotation marks omitted). Globalstar's argument that allocating additional spectrum to exclusive TDMA usage would violate the notice-and-comment provisions of the APA is unquestionably one concerning a "technical defect or procedural oversight." *Ibid*. The argument is now barred under a straightforward application of section 405(a) as that statute has been consistently construed by this Court.

It is no answer for Globalstar to argue that it could not have known that the Commission would re-allocate the spectrum until after issuance of the *Reconsideration Order*. "[E]ven when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file a 'petition for reconsideration' with the Commission before it may seek judicial review." *Core*, 455 F.3d at 276-277, *citing AT&T Corp. v. FCC*, 86 F.3d 242, 246 (D.C. Cir. 1996); *accord Qwest Corp. v. FCC*, 482 F.3d 471, 473-476 (D.C. Cir. 2007) ("failure to [raise an issue before the FCC] isn't excused merely because the issue arose unequivocally only at the moment the Commission took action"). Globalstar should have raised its lack of notice claim before the Commission in a

petition for reconsideration, which would have given the Commission a chance either to correct an error or to explain why there was no error. Because Globalstar failed to preserve its claim, this Court now lacks jurisdiction to hear it.

B. The Commission Provided Ample Notice And Opportunity For Comment.

Even if Globalstar had properly preserved the notice claim, it would fail on the merits. Globalstar would have the Court believe that the administrative proceeding before the Court began with the 2004 *Further Notice*, which addressed only further spectrum sharing and did not involve any issue of spectrum reassignment. The *Further Notice*, Globalstar contends, did not indicate that the Commission was contemplating spectrum reassignment, as opposed to additional sharing. That claim fails because it completely overlooks proceedings that were ongoing prior to the *Further Notice* and that remained unresolved until the *Reconsideration Order*. Those proceedings were not yet final due to Globalstar's own petition for reconsideration.

Specifically, on February 10, 2003, the Commission issued the *2003 NPRM*, 18 FCC Rcd at 2087 (JA), with the express purpose of "seek[ing] comment on proposals for reassigning or reallocating a portion of spectrum in the Big LEO MSS frequency bands." *Id*. ¶261 (JA). The Commission

reviewed the history of the Big LEO proceeding, including the Commission's 1994 decision that the agency would "consider reducing the 11.35 megahertz of spectrum allocated for … CDMA systems [in the L band] to 8.25 megahertz if only one CDMA system were implemented." *Id*. ¶263 (JA). It noted Iridium's request for additional spectrum, *id*. ¶265 (JA), and expressly sought "comment on both the possible reassignment and possible reallocation of any returned spectrum for possible use by other services," *ibid*. (JA). The Commission also asked for information regarding Globalstar's and Iridium's actual spectrum usage. *Id*. ¶¶267-269 (JA -).

In response to the *2003 NPRM*, Globalstar submitted extensive comments and reply comments addressing all of the matters raised by the Commission. Among other things, it argued that "the 'circumstances' at this time do not warrant modifying the Big LEO band plan," Globalstar Comments at 3 (JA), that Globalstar requires all of the CDMA spectrum, *id*. at 6-12 (JA -), and that Iridium does not need additional spectrum, *id*. at 12-19 (JA -). On reply, Globalstar argued that "the record does not support changes to the Big LEO band plan," Globalstar Reply Comments at 8 (JA), that Iridium had failed to provide evidence of a need for additional

spectrum, *id*. at 10-17 (JA -), and that "the public interest does not support Iridium's proposed Big LEO band plan," *id*. at 22 (JA).

On that record, Globalstar cannot seriously contend that the decision to reassign spectrum from CDMA to TDMA usage "came out of the blue," Br. 22, that the FCC "failed to give notice that it was considering reassigning spectrum," Br. 23, and that "a starker contravention of the APA's notice-and-comment requirement is hard to imagine," Br. 22. Such colorful rhetoric notwithstanding, Globalstar not only had ample opportunity to comment on the very type of spectrum reassignment the Commission ultimately adopted – a matter that itself had been on the table since 1994 – but it took full advantage of that opportunity.

Globalstar attempts to evade the dispositive significance of the *2003 NPRM* and the complete record developed in response to that notice by arguing that the *Spectrum Sharing Order* that followed from the *2003 NPRM* "expressly put … out of consideration" the possibility of reallocating spectrum from CDMA to TDMA usage. "Spectrum reassignment was off the table," Globalstar asserts; the only open issue was whether the Commission should order additional spectrum *sharing*, a matter addressed in the 2004 *Further Notice*. Br. 25; *see also* Br. 2.

Globalstar is wrong. It filed a petition for reconsideration of the *Sharing Order* arguing that sharing was not technically feasible and asking the Commission (among other things) to reverse the sharing decision. Globalstar Petition for Reconsideration (JA). "[I]nsofar as such petitions are timely filed, the rulemaking is not final pending their resolution." *AT&T Corp. v. FCC*, 113 F.3d 225, 229 (D.C. Cir. 1997). The *Reconsideration Order* "is thus properly viewed as a further step in the ongoing [*2003 NPRM*] rulemaking, rather than a commencement of a new rulemaking proceeding." *Ibid*. "[B]ecause there was a continuing rulemaking, the FCC was free to modify its rule on a petition for reconsideration as long as the modification was a 'logical outgrowth' of" the proposals in the *2003 NPRM*. *Ibid*. The *2003 NPRM* placed squarely at issue (and indeed generated substantial comment on) the very course of action the Commission ultimately adopted on reconsideration. Globalstar would like to pretend that this proceeding began with the 2004 *Further Notice* and expunge from the record all materials prior to that time, but this Court's precedents do not permit such a constricted view of agency proceedings.[4]

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[4] *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003), is not to the contrary. There, unlike here, the Commission relied on its authority to reconsider an order *sua sponte* under 47 C.F.R. § 1.108, which the Court found limits the agency's authority to setting aside, as opposed to modifying a rule. 315 F.3d at 374-375. Section 405 of the Communications Act contains no such

In that sense, this case is directly analogous to *Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Comm'n*, 650 F.2d 1235 (D.C. Cir. 1980), where the agency also reversed its initial course after receiving petitions for reconsideration. Taking a "commonsense approach" to the notice-and-comment requirement, the Court found it "hard to conceive how petitioners may claim that they were not provided sufficient notice and opportunity to comment" in light of the original NPRM, which directly raised the very issue ultimately decided. *Id*. at 1259. The Court squarely rejected the notion that once the Commission had adopted the initial approach "it was precluded from thereafter changing its position" in response to a petition for reconsideration. *Ibid*.

Far from having violated any procedural requirement, the agency acted precisely as it is supposed to in a reconsideration proceeding. Congress granted the FCC express statutory authority to reconsider its decisions upon petition. 47 U.S.C. § 405(a). "Reconsider" means "[t]o consider again; to consider *with a view to changing*, as a plan." Webster's New International Dictionary of the English Language at 1748 (1933) (emphasis added); *see* American Heritage Dictionary of the English

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limitation. Moreover, in *Sprint*, the Commission had not published any notice in the Federal Register, 315 F.3d at 375-376, whereas here the Commission properly followed all rulemaking requirements.

Language at 1510 (3rd ed. 1992) ("To consider again, especially with intent to alter or modify a previous decision."); *cf. Freeman Eng'g Assocs. v. FCC*, 103 F.3d 169, 182 (D.C. Cir. 1997) (the purpose of reconsideration is for the agency to be "afforded an opportunity to cure any defect" in the original order). Congress thus granted the FCC discretionary authority to modify or change a decision upon a timely request that it reconsider that ruling, and the Commission is free to adopt any modification within the scope of the original notice. *See AT&T Corp.*, 113 F.3d at 229. Under that authority, once Globalstar invoked the reconsideration process and requested reversal of the *Sharing Order*, that request necessarily opened the door to a reassessment of spectrum assignments in the absence of sharing.

Globalstar's claim rests on the implicit, but unelaborated, notion that when the Commission addresses a petition for reconsideration, the Commission's discretion to act is limited to the precise course of action presented in the petition. Br. 25 ("Spectrum reassignment was off the table *unless some party sought reconsideration of that determination*.") (emphasis added). Globalstar cites no authority for such a radical notion, which conflicts with this Court's decisions in *AT&T* and *Trans-Pacific Freight* and would be an extremely unwise administrative law practice. Globalstar's approach could require a new notice any time an agency realizes on

reconsideration that its original decision was erroneous and that a different policy course would be best, even if the agency had already provided notice and compiled (as it did here) a complete record. The result would be needless proceedings and the gathering of duplicative and wasteful comments. Globalstar's approach would transform the reconsideration process from an efficient way for agencies to correct mistakes into an administrative straightjacket.

Globalstar had ample notice of the possibility of spectrum reassignment, it took full advantage of that notice, and the administrative process worked precisely as it is supposed to. Even if it had preserved its claim, Globalstar has failed entirely to come to grips with the effect of its own petition for reconsideration, which caused the proceeding to remain open and allowed the Commission to modify its initial approach. The FCC adhered in all respects to the procedural requirements of the APA.

III. THE COMMISSION REASONABLY DECIDED TO RE-ALLOCATE THE BIG LEO SPECTRUM.

Globalstar contends that the Commission acted arbitrarily in three respects: first, that the *Reconsideration Order* departed without explanation from prior Commission rulings; second, that the *Reconsideration Order* is not supported by the record; and third, that the Commission unlawfully

failed to consider a reasonable alternative to reassignment of spectrum. None of those contentions has merit.

A. The Commission Explained Any Departure From Prior Orders.

Globalstar claims that the FCC departed in three ways from earlier orders without any explanation. All of those claims are wrong.

1. *The Commission Properly Assessed The Public Interest.*

First, Globalstar argues that in the Sharing Order the Commission found that sharing of spectrum, not reassignment, best served the public interest, Br. 28, but in the *Reconsideration Order* the Commission made "a 180-degree U-turn" and found that reassignment would serve the public interest without "acknowledging or justifying" the change in assessment. Br. 27.

That argument is wrong because the Commission properly re-assessed the public interest in the wake of Globalstar's petition for reconsideration, and Globalstar has again failed to grapple with the consequences of that petition. Although the Commission found in the *Sharing Order* that sharing of spectrum would best serve the public interest, Globalstar itself specifically asked the Commission to reverse that decision, pointing out that spectrum sharing is not an effective or technically feasible long-term

solution. On further reflection, the Commission agreed, and thus could not retain the policy that it had originally believed would serve the public interest best. Globalstar does not contest that position and indeed supports it. Br. 32-33 ("The infeasibility of [spectrum] sharing has been recognized by everyone involved … since the Big LEO proceeding began in 1994."). On reconsideration, the Commission therefore was left to determine which alternative to sharing would be the best approach.

In the *2003 NPRM*, the Commission had identified three possibilities: first, leave the spectrum plan as it had been since 1994; second, reassign spectrum from exclusive CDMA use to exclusive TDMA use; or third, reassign spectrum from CDMA to another service entirely. 18 FCC Rcd at 2089 (JA). In the *Sharing Order*, the Commission rejected the first option, finding that "conditions have been met to justify a reassessment of the existing band plan," *id*. ¶30 (JA), and that Iridium had set forth a "compelling argument" for additional spectrum, *id*. ¶47 (JA); *see Reconsideration Order* ¶17 ("Iridium has made a case demonstrating its need for more spectrum.") (JA). It therefore would not have served the public interest to leave the 1994 band plan intact. Nor would it have served the public interest to re-assign spectrum to a third party, as "no third party …

expressed an interest" in L band spectrum. *Reconsideration Order* ¶17 (JA).

That left re-assignment of spectrum from Globalstar's CDMA system to Iridium's TDMA system. The Commission found in the *Sharing Order* that Iridium had established a need for additional spectrum. *Sharing Order* ¶47 (JA). The Commission reaffirmed that determination in the *Reconsideration Order*. *Id*. ¶17 ("Iridium has made a case demonstrating its need for more spectrum.") (JA). In that circumstance, the Commission found that "the public interest would be better served by reassigning spectrum in the L-band so that CDMA and TDMA MSS systems have equal assignments of [L band] spectrum," than by retaining the original plan. *Id*. ¶14 (JA -). Such an "equitable distribution," *id*. ¶1 (JA), of spectrum would "account for the growth of current CDMA and TDMA MSS systems," *id*. ¶14 (JA), and "provide long-term certainty and stability in the Big LEO market," *id*. ¶17 (JA).

Thus, far from having ignored the public interest determination set forth in the *Sharing Order*, the Commission in the *Reconsideration Order* confronted that determination directly – and reassessed it, as is proper on reconsideration of an order. Indeed, it was Globalstar's own petition for

reconsideration that caused the Commission to revisit and ultimately change its prior approach.

2. *The Commission Did Not Adopt Spectrum Parity.*

Globalstar next claims (Br. 29-30) that in the *Sharing Order* the Commission rejected "spectrum parity," but that in the *Reconsideration Order* the agency adopted spectrum parity without acknowledging the change in policy. That claim rests on a misreading of both the Sharing Order and the *Reconsideration Order*. In fact, the specific spectrum parity proposal rejected in the *Sharing Order* was fundamentally different from the spectrum plan adopted in the *Reconsideration Order*, which is not a "spectrum parity" plan at all.

In its comments filed pursuant to the *2003 NPRM*, Iridium had proposed a spectrum "parity" plan in which the total available 33 megahertz of Big LEO spectrum would be split into three roughly equal parts, with Iridium getting just over 11 megahertz (all of it in the L band – an increase of 6 megahertz over its original allocation and 67 percent of the total L band spectrum), Globalstar getting just over 11 megahertz (about half in the L band and the rest in the S band), and the remaining 10 megahertz (all in the S band) being assigned to a third party. *See* Iridium Comments at 31-34 (JA -); *Sharing Order* ¶49 (JA -). The Commission rejected that proposal

for "'spectrum parity' on a pure megahertz-per-party basis," in part on the ground that Iridium's plan to give Globalstar only 5.5 megahertz of L band spectrum would "ignore the significant encumbrances that exist in the lower portion of the L-band" used by Globalstar. *Sharing Order* ¶49 (JA).

The FCC thus did not, as Globalstar wrongly claims, reject "a 50/50 spectrum split," Br. 29, because of encumbrances on Globalstar's L band spectrum. Quite to the contrary, it rejected a three-way split, which would have split the L band by a ratio of 67-to-33 – a ratio that would have made the encumbrances on Globalstar's small remaining slice of L band spectrum especially severe. Globalstar's reading of the *Sharing Order* thus is simply wrong.

So is its reading of the *Reconsideration Order*. The Commission did not in that order "mandat[e] precisely the 'spectrum parity on a pure megahertz-per-party basis'" that it rejected in the *Sharing Order*. Br. 30. Rather, under the *Reconsideration Order*, Globalstar is assigned more than 24 megahertz of spectrum (in both the L and S bands) and Iridium is assigned less than 8 megahertz. To be sure, the Commission split the L band spectrum in half, but Iridium conducts both its uplink and downlink operations in that spectrum, whereas Globalstar uses L band spectrum only for uplink and has large amounts of S band spectrum for downlinks.

Globalstar's apples-to-oranges comparison between the spectrum sharing plan the Commission rejected in the *Sharing Order* and the plan it adopted in the *Reconsideration Order* is wholly invalid. There has been no change in policy at all with respect to the Commission's view of "spectrum parity," let alone an unexplained one.

3. *The Commission Did Not Adopt A "Showing Of Need" Test, But Even If It Did, It Reasonably Found That Iridium Needed More Spectrum.*

Third, Globalstar asserts that the *Reconsideration Order* must be reversed because it "fails to mention the 'showing of need' test" allegedly established in 1994 for reconfiguring the L band spectrum. Br. 30, 28. The Commission adopted no such test in 1994. In the notice of proposed rulemaking that preceded the *Big LEO Order*, the Commission *proposed* to adopt such a test, *see Big LEO Order* ¶54, but in the end, the Commission expressly declined to adopt that proposal.[5] Instead, it "defer[red] *any* decision" with respect to reconfiguring the band and pledged to "make the decision with respect to [reconfiguration], if necessary, in the context of a

[5] Indeed, in that NPRM, the Commission proposed to reduce the CDMA spectrum automatically by 3.1 megahertz if only one system were built, whether or not that spectrum was then granted to the TDMA operator. *See Big LEO Order* ¶54.

rulemaking, based upon the circumstances that have developed at that time." *Id*. ¶55 (emphasis added).

In any event, even if the Commission had adopted a showing of need test, Globalstar is simply wrong that the agency's analysis would not have satisfied it. The Commission found in the *Sharing Order* that Iridium "set forth compelling arguments" for additional spectrum, *id*. ¶47 (JA), and it found again in the *Reconsideration Order* that "Iridium has made a case demonstrating its need for more spectrum," *id*. ¶17 (JA). As discussed below, that finding is grounded solidly in the record. *See infra* at 42-44. Once again, Globalstar is wrong that the Commission departed from prior orders without explanation.

B. The *Reconsideration Order* Is Supported By The Record.

Globalstar argues that the *Reconsideration Order* has "no record support at all," because no party to the proceeding "submitted any proposal … to reassign spectrum, or evidentiary support for such an action." Br. 31, 32. The argument boils down to a rehash of Globalstar's notice argument, and it fails for the same reasons. As we showed in part II above, the *2003 NPRM* expressly sought comment on the very type of spectrum reassignment adopted in the *Reconsideration Order*, and the Commission had before it a complete record, including full comment by Globalstar on all

pertinent matters. See Globalstar Comments (JA), Globalstar Reply Comments (JA), Globalstar Creditors' Committee Comments (JA), Globalstar Creditors' Committee Reply Comments (JA); Iridium Comments (JA), Iridium Reply Comments (JA). The parties also engaged in numerous permissible *ex parte* contacts with Commission staff on the same issues, the summaries of which also became part of the record.

That record renders irrelevant Globalstar's argument that materials demonstrating the infeasibility of sharing spectrum submitted pursuant to Globalstar's petition for reconsideration of the *Sharing Order* do not support the decisions made in the *Reconsideration Order*. Br. 32-34. The FCC relied on the reconsideration petition and ensuing comments for its determination that sharing was not feasible (an outcome suggested by and still supported by Globalstar), but, once it reached the conclusion that sharing was not feasible, the Commission properly revisited the portion of the record compiled in response to the *2003 NPRM* in order to determine whether the public interest required the Commission instead to rebalance the spectrum assignments. Quite literally, the FCC "reconsidered" the evidence that had been submitted previously regarding Iridium's need for additional spectrum in light of the technical difficulties with sharing. Globalstar has ignored entirely those key parts of the record, which fully support the

Commission's conclusions.[6] Globalstar may not properly ask the Court to overlook the portions of the record that undermine Globalstar's legal theory.

Globalstar is also wrong that the Commission found in the *Sharing Order* that "Iridium failed … to make a showing of need." In fact, the Commission found that Iridium had "set forth compelling arguments for utilizing the spectrum." *Sharing Order* ¶47 (JA). The Commission likewise found in the *Reconsideration Order* that "Iridium has made a case demonstrating its need for more spectrum." *Reconsideration Order* ¶17 (JA).

Such conclusions were based on solid record evidence. Iridium demonstrated that its original spectrum assignment was "insufficient to meet current and projected demand" and that "Iridium urgently needs additional spectrum to relieve traffic congestion that is currently causing service disruptions on the Iridium network." Iridium Comments at 8 (JA). In

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[6] The Commission's decision to retain a small sliver of shared spectrum does not demonstrate, as Globalstar wrongly contends, that the agency's decision was unreasonable in its totality. Br. 34-35. There is no dispute here that the plan put forth in the *Sharing Order* was unworkable; thus, for the reasons expressed, the Commission properly chose a different approach. Moreover, Globalstar does not challenge the Commission's retention of the small amount of shared spectrum – a decision it made in order to avoid rendering unusable one of the Globalstar's channels and that it found to be feasible when both systems are lightly loaded. *See Reconsideration Order* ¶¶18-19 (JA -).

particular, "Iridium was forced to cut voice and data rates in half throughout its network because of its spectrum limitations. This reduction in voice and data rates has degraded the voice quality for subscribers and slowed the data rates at which a customer can send and access data." *Id*. 7-8 (JA -). *See also id*. 22-24 (discussing dropped calls during peak load periods). Iridium also documented its need for spectrum in numerous *ex parte* documents. *E.g.*, Letter of March 17, 2004 from Peter D. Shields to Marlene H. Dortch (JA); Letter of May 26, 2004 from Peter D. Shields to Marlene H. Dortch (JA). Indeed, even outside of the comments the Commission was well aware of Iridium's need for additional spectrum. Between 2003 and 2005, the Commission had granted Iridium numerous temporary licenses, called STAs, to use spectrum in the CDMA portion of the band in order to relieve spectrum shortages Iridium was experiencing. *See Reconsideration Order* ¶6 (JA). We have attached to this brief a list of STA grants given to Iridium.

To be sure, in the *Sharing Order*, the Commission characterized Iridium's need for additional spectrum as "sporadic and geographic-specific." *Sharing Order* ¶47 (JA). The Commission made that determination, however, in the context of deciding between assigning additional spectrum to Iridium on a shared or exclusive basis. The balancing

of public interest considerations was different once sharing was not an option.

Moreover, although the *Sharing Order* described Iridium's *past* spectrum needs, in the *Reconsideration Order*, the Commission also reached predictive judgments about Iridium's *future* needs. Looking forward, the Commission found that Iridium would need more spectrum "in order to account for the growth" of its system, *id*. ¶14 (JA), and "in order to provide long-term certainty and stability in the Big LEO market," *id*. ¶17 (JA). Such "predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable." *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006). On the record here, with Iridium's documented need for additional spectrum, such a prediction was entirely reasonable.

C. The Commission Was Not Required To Address Globalstar's Proposed Alternative.

Finally, Globalstar contends that the FCC committed reversible error by "fail[ing] to consider a reasonable alternative." Br. 37. The alternative Globalstar has in mind called for *additional* sharing of spectrum between it and Iridium of the very same sort as the sharing adopted in the *Sharing Order*. The *Reconsideration Order*, Globalstar complains, did not adopt

such a plan yet "does not mention, much less justify, the FCC's rejection of the proposed coordination approach," Br. 39, in violation of a "duty to 'consider an obvious and less drastic alternative.'" *Id*., quoting *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 (D.C. Cir. 1986).

That claim fails because it does not acknowledge that the Commission rejected spectrum sharing (with a minor exception of less than 1 megahertz) *on Globalstar's own urging* in its petition for reconsideration of the *Sharing Order*. It was Globalstar that informed the Commission that sharing would not work, and Globalstar that asked the Commission to "reverse its ill-advised decision" to order spectrum sharing. Globalstar Petition at 6 (JA). Globalstar thus should not be heard to complain at this point that the Commission erred by failing to consider *additional* sharing of the very sort that Globalstar itself vigorously claimed would not work. Indeed, the Commission found that its own proposal, set forth in the 2004 *Further Notice*, to authorize sharing of an additional 2.25 megahertz of CDMA spectrum, was moot in light of the "comprehensive band plan" adopted in the *Reconsideration Order*. *Reconsideration Order* ¶26 (JA). The same reasoning applies to Globalstar's sharing proposal.

In those circumstances, the rule requiring administrative agencies to consider alternatives does not come into play. That "obligation extends only

to 'significant and viable' alternatives," *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008), and not to those that are "frivolous" or "out of bounds," *Chamber of Commerce v. SEC*, 412 F.3d 133, 145 (D.C. Cir. 2005). The governing principle here is that the FCC "need not address every comment, but it must respond in a reasoned manner to those that raise significant problems." *Reytblatt v. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997). Thus, "[t]he doctrine obliging agencies to address significant comments leaves them free to ignore insignificant ones." *National Ass'n of Regulatory Utility Comm'rs v. FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007). In the context of Globalstar's petition for reconsideration and the *Reconsideration Order* itself, Globalstar's proposal for increased spectrum sharing was an insignificant matter properly left unaddressed.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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October 17, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GLOBALSTAR, INC.,	)	
	)	
PETITIONER,	)	
	)	
V.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA	)	NO. 08-1046
	)	
	)	
RESPONDENTS.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee" in the captioned case contains 9564 words.

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October 17, 2008

STATUTORY APPENDIX

47 U.S.C. § 405(a)

47 U.S.C. § 405(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order.

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

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ATTACHMENT

LIST OF STA GRANTS TO IRIDIUM

File Number:	SAT-STA-20030414-00066	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	4/11/03
Last Action:	Grant of Authority	**Last Action Date:**	4/14/03

Applicant:	**Contact:**
Iridium Constellation LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request to operate over an additional 5.35 MHz of spectrum for 30 days. Iridium states that it requires the additional operating spectrum to serve U.S. and U.K. government operations in the Middle East, and has filed this request in response to concerns raised by the U.S. Department of Defense regarding recent system overloads and outages. Iridium currently holds authority to operate over the 1621.35-1626.5 MHz band, and is requesting additional spectrum from 1616-1621.35 MHz. Iridium states that grant of the additional spectrum authority will not interfere with Globalstar, which operates over the 1616-1621.5 MHz band, and Iridium has already notified Globalstar's CEO of this request.

File Number:	SAT-STA-20030425-00074	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	4/25/03
Last Action:	Grant of Authority	**Last Action Date:**	4/25/03

Applicant:	**Contact:**
Iridium Constellation LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request to operate over an additional 1.25 MHz of spectrum from 1618.85-1620.10 MHz until 5/13/03. Iridium states that it requires the additional operating spectrum to serve continuing immediate needs of "Government operations" in the Middle East, although the spectrum requested would be utilized globally. Iridium currently holds authority to operate over the 1621.35-1626.5 MHz band, and was granted special temporary authority on 4/14/03 to operate on an additional 1.25 MHz (1620.10-1620.35) until 5/13/03. Iridium states that the grant of additional spectrum on 4/14/03 decreased the call drop rate from 36 percent to 26 percent. Iridium further states that Globalstar is "amenable" to sharing 1618.85-1620.10 for one week, but Iridium requests permission to share the spectrum until 5/13/03, when its current STA expires.

File Number:	SAT-STA-20030502-00077	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed

Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	5/2/03
Last Action:	Grant of Authority	**Last Action Date:**	5/13/03

Applicant:	**Contact:**
Iridium Constellation LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 429-7000

Description:

Iridium filed this request to extend its authority for a second 1.25 MHz channel. Iridium Constellation LLC ('Iridium') seeks extension of its special temporary authority ('STA') to provide global mobile satellite service ('MSS') in an additional 1.25 MHz of spectrum from 1618.85-1620.10 MHz. Extension of Iridium's STA will permit the second channel STA to run concurrently with Iridium's first channel STA (1620.10-1621.35 MHz).

File Number:	SAT-STA-20030509-00088	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	5/9/03
Last Action:	Dismissed by Delegated Authority	**Last Action Date:**	6/11/03

Applicant:	**Contact:**
Iridium Constellation LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request to extend its authority to provide MSS service over the 1618.85-1621.35 MHz frequency band through 6/12/03. Iridium states that continued "extraordinarily high levels of demand" from U.S. Government and Coalition Forces in the Middle East justify granting this request. Iridium further states that continued use of this spectrum will not cause harmful interference to Globalstar, the licensee for the spectrum in question.

File Number:	SAT-STA-20030609-00100	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	6/9/03
Last Action:	Grant of Authority	**Last Action Date:**	6/12/03

Applicant:	**Contact:**
Iridium Constellation LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request to continue operating on the 1620.10-1621.35 MHz frequency band through 7/12/03. Iridium states that it does not need the 1618.85-1620.10 MHz frequency band that it had been authorized to use on a temporary basis, and it will cease operating in that spectrum on 6/12/03. Iridium states that demand for its services by coalition forces in the Middle East has decreased, but still remains at elevated levels compared to demand experienced before 4/11/03, when additional spectrum was first made available to Iridium. Iridium states that it has notified all parties to this proceeding of this request.

File Number:	SAT-STA-20030709-00129	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	7/9/03
Last Action:	Dismissed at Applicant's Request	**Last Action Date:**	10/7/03

Applicant:	**Contact:**
Iridium Constellation LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request to continue operating on the 1620.10-1621.35 MHz frequency band through 8/11/03. Iridium states that demand for its services by coalition forces in the Middle East has remained relatively unchanged since its last request (SAT-STA-20030609-00100).

File Number:	SAT-STA-20031010-00313	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	10/10/03
Last Action:	Grant of Authority	**Last Action Date:**	12/11/03

Applicant:	**Contact:**
Iridium Constellation LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request to extend its authority to operate on the 1620.1-1621.35 MHz band (Channel 9) through 5/12/04. Iridium states that "continued access to Channel 9 spectrum on a temporary basis will allow it to provide critical communications services to U.S. Government and Coalition Forces in the Middle East region, thereby serving the public interest." Iridium states that it has been given no indication that demand for its services will significantly decrease over the next six months, and therefore the company requests an extension of authority to utilize these frequencies.

File Number:	SAT-STA-20031113-00327	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium

Orbital Location:		**Date Filed:**	11/13/03
Last Action:	Grant of Authority	**Last Action Date:**	11/14/03

Applicant:	**Contact:**
Iridium Constellation LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request to continue operating in the 1620.10-1621.35 MHz frequency band until the FCC acts on Iridium's pending STA request to extend its authority to May 2004 (SAT-STA-20031010-00313). Iridium has been operating on these frequencies since April 2003 to accommodate increased demand for service in the Middle East from U.S. Government and Coalition Forces. Iridium states that it "has received no indication from the U.S. Government that Coalition Forces' use of Iridium's service in the Middle East region will decrease substantially within the next six months."

File Number:	SAT-STA-20040319-00056	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	3/19/04
Last Action:	Grant of Authority	**Last Action Date:**	6/9/04

Applicant:	**Contact:**
Iridium Constellation LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request to extend for an additional six months, through 11/8/04, its authority to operate on Channel 9 spectrum in the Middle East. Channel 9 is the designation for the 1620.10-1621.35 MHz frequency band that is licensed to Globalstar. Iridium has been operating on this band pursuant to grants of special temporary authority since April 2003 to serve increased demand by U.S. Government and Coalition Forces in the Middle East. Iridium states that it continues to experience high levels of system demand and "has received no indication from the U.S. Government that Coalition Forces' use of Iridium's service in the Middle East region will decrease substantially within the next six months." The company states that it will inform the FCC if demand levels decrease to levels where use of Channel 9 is no longer necessary.

File Number:	SAT-STA-20040506-00091	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	5/6/04
Last Action:	Grant of Authority	**Last Action Date:**	5/10/04

Applicant:	**Contact:**
Iridium Constellation LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request to extend its temporary operating authority for Channel 9 in the Middle East until the FCC acts on its pending STA to extend its authority through 11/8/04. Iridium states that continued access to Channel 9 frequencies will allow it to meet the demand of U.S. Government and Coalition Forces in the Middle East.

File Number:	SAT-STA-20050901-00171	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	9/1/05
Last Action:	Grant of Authority	**Last Action Date:**	9/2/05

Applicant:	**Contact:**
Iridium Satellite LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request for 30-day special temporary authority to test and then commence service in the 1616-1618.25 MHz band. The company states that grant of this request "will serve the public interest in accommodating the dramatic increase in demand for telephone service in the wake of Hurricane Katrina." Iridium's current MSS allocation is for the 1618.25-1626.5 MHz band, which the company states is insufficient to handle the 3000% increase in traffic over its system over the last week. In addition, Iridium states, a "sudden spike" in the number of its phones distributed in the U.S. Gulf region adds to the system overload problem.

File Number:	SAT-STA-20050923-00181	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	9/23/05
Last Action:	Grant of Authority	**Last Action Date:**	9/23/05

Applicant:	**Contact:**
Iridium Satellite LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request for special temporary authority to provide MSS in the 1616-1618.25 MHz band for an additional 30 days to meet existing demand caused by Hurricane Katrina and expected demand that will result from Hurricane Rita. Iridium states that this request is not likely to cause harmful interference to the Globalstar system and is willing to cease operations if it does. Iridium further states that grant of this request will serve the public interest "given the extraordinary circumstances of these two hurricanes." [Note: This application is identical to SAT-STA-20050923-00180. To avoid confusion, the FCC created two separate filings and granted two separate authorities based on this same request: one related to Hurricane Katrina; the other for Hurricane Rita.]

File Number:	SAT-STA-20050923-00180	**Old File Number:**	
Application Type:	Special Temporary Authority	**Filing Status:**	Closed
Call Sign:	S2110	**Satellite Name:**	Iridium
Orbital Location:		**Date Filed:**	9/23/05
Last Action:	Grant of Authority	**Last Action Date:**	9/23/05

Applicant:	Contact:
Iridium Satellite LLC	Wiley, Rein & Fielding 1776 K Street NW, Washington, DC 20006, (202) 719-7000

Description:

Iridium filed this request for special temporary authority to provide MSS in the 1616-1618.25 MHz band for an additional 30 days to meet existing demand caused by Hurricane Katrina and expected demand that will result from Hurricane Rita. Iridium states that this request is not likely to cause harmful interference to the Globalstar system and is willing to cease operations if it does. Iridium further states that grant of this request will serve the public interest "given the extraordinary circumstances of these two hurricanes." [Note: This application is identical to SAT-STA-20050923-00181. To avoid confusion, the FCC created two separate filings and granted two separate authorities based on this same request: one related to Hurricane Katrina; the other for Hurricane Rita.]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Globalstar, Inc., Petitioner,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing "Brief For Respondents" was served this 17th day of October, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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