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

In the Matter of	)	File Nos.
	)	198/199-SAT-P/L-95
PanAmSat Licensee Corp.	)	202-SAT-AMEND-95
Application for Authority to Construct,	)	
Launch, and Operate a Ka-Band Communications	)	IBFS File Nos.
Satellite System in the Fixed-Satellite Service	)	SAT-LOA-19950929-00155/54
at Orbital Locations 58° W.L. and 125° W.L.	)	SAT-AMD-19950929-00109
	)	SAT-MOD-19980521-00070
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 2001 Released: May 25, 2001

By the Commission:

I. INTRODUCTION

1. By this Order, we deny PanAmSat Licensee Corporation's (PanAmSat's) application for review of an International Bureau (Bureau) Order cancelling PanAmSat's Ka-band license for their Ka-band satellites at the 58° W.L. and 125° W.L. orbital locations.[1] This action prevents "warehousing" of scarce orbit and spectrum resources.

II. BACKGROUND

2. In May 1997, the International Bureau (Bureau) authorized PanAmSat to construct, launch, and operate geostationary-orbit satellites at the 58° W.L. and 125° W.L. orbital locations to provide fixed-satellite service in the United States in the Ka-band.[2] This authorization was granted as part of the first "processing round" of Ka-band systems, in which the Bureau authorized a total of 13 Ka-band systems.[3] Satellite systems in this band have the potential to provide a wide variety of broadband interactive digital services in the United States and around the world, including voice, data, video, videoconferencing, facsimile, computer access and telemedicine.[4]

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[1] PanAmSat Licensee Corp., *Memorandum Opinion and Order*, 15 FCC Rcd 18720 (Int'l Bur. 2000) (*PanAmSat Cancellation Order*). For purposes of this Order, the "Ka-band" is the 19.7-20.2, 28.35-28.6, and 29.25-30.0 GHz frequency bands.

[2] PanAmSat Licensee Corp., *Memorandum Opinion and Order, Order and Authorization*, 13 FCC Rcd 1405 (Int'l Bur. 1997) (*PanAmSat Authorization Order*).

[3] Assignment of Orbital Locations to Space Stations in the Ka-band, *Order*, 13 FCC Rcd 13737 (1996).

[4] *See* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Third Report and Order*, CC Docket No. 92-297, 12 FCC Rcd 22310, 22311 (para. 1) (1997).

3. PanAmSat's license, like all satellite licenses, required PanAmSat to meet explicit deadlines, or "milestones." Milestones are necessary to ensure "that licensees are building their systems in a timely manner and that the orbit-spectrum is not being held by licensees unable or unwilling to proceed with their plans."[5] PanAmSat's authorization stated the authorization would be null and void unless PanAmSat commenced construction of its first satellite by May 1998.[6]

4. Prior to the date PanAmSat was issued Ka-band licenses, in April 1997, the Commission authorized PanAmSat to merge with another first round Ka-band licensee, Hughes Communications, Inc. (Hughes).[7] Hughes was originally authorized to launch and operate 15 Ka-band satellites concurrently with PanAmSat.[8] One week after the licenses were issued, on May 16, 1997, Hughes transferred seven of its Ka-band licenses to PanAmSat.[9] In its initial application, Hughes also requested authority to use inter-satellite links (ISLs) to provide connectivity between the coverage regions of satellites in different orbital locations. The Bureau explained that ISL frequencies had not been allocated at that time, but directed Hughes to apply for specific ISL operating frequencies once these frequencies were identified.[10] The Bureau recognized that Hughes would not be able to proceed beyond "the initial phases of construction" until ISL frequencies had been allocated, and so did not impose specific milestones at that time.[11] PanAmSat did not request ISL authority in its initial Ka-band license application.[12]

5. On May 21, 1998, more than one year after PanAmSat and Hughes were issued Ka-band licenses and Hughes had transferred seven Ka-band licenses to PanAmSat, and approximately 10 days before PanAmSat was required to meet its construction commencement milestones on its two originally requested satellites, PanAmSat filed a modification application to add ISLs to these two Ka-band satellites, and to suspend its milestone schedule.[13] PanAmSat

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[5] *PanAmSat Authorization Order*, 13 FCC Rcd at 1412 (para. 23). *See also* Columbia Communications Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd 15566, 15571 (para. 11) (Int'l Bur. 2000) (*First Columbia Milestone Order*).

[6] PanAmSat was required to start construction of its second satellite by May 1999. *See PanAmSat Authorization Order*, 13 FCC Rcd at 1414 (para. 28).

[7] Hughes Communications, Inc. and Affiliated Companies, *Order and Authorization*, 12 FCC Rcd 7534 (1997) (*Merger Order*).

[8] Hughes Communications Galaxy, Inc., *Order and Authorization*, 13 FCC Rcd 1351, 1363 (para. 35) (Int'l Bur. 1997) (*Hughes Authorization Order*).

[9] *See* PanAmSat Application at 2 n.2.

[10] *Hughes Authorization Order*, 13 FCC Rcd at 1361-62 (para. 29).

[11] *Hughes Authorization Order*, 13 FCC Rcd at 1361-62 (para. 29).

[12] *PanAmSat Authorization Order*, 13 FCC Rcd 1405.

[13] *PanAmSat Cancellation Order*, 15 FCC Rcd at 18721 (para. 5), *citing* application of PanAmSat Licensee Corporation, File No. SAT-MOD-19980521-00070 (PanAmSat 1998 Modification Application).

claimed that ISL frequencies were necessary to integrate its Ka-band satellites with Hughes's satellites.[14]

6. On July 23, 1998, the Bureau's Satellite and Radiocommunication Division (Division) sent a letter to PanAmSat, as well as all other Ka-band licensees requesting ISL spectrum. In the Division's letter to PanAmSat, it pointed out that Hughes was not authorized to operate on any ISL frequency, and that the Commission and the National Telecommunications and Information Administration (NTIA) were still working jointly on obtaining an ISL frequency allocation.[15] The Division also informed PanAmSat that it could not consider its ISL request unless PanAmSat identified the specific ISL frequency bands that it sought to use. The Division requested PanAmSat to provide additional ISL information on October 9, 1998 and December 22, 1999.[16]

7. On December 9, 1999, the Division sent PanAmSat another letter noting that its record did not indicate that PanAmSat had entered into a noncontingent construction contract.[17] The Division further requested that PanAmSat submit a copy of any contract that it had executed. In response, PanAmSat informed the Division that it had not entered into a non-contingent construction contract because, at that time, ISL frequencies had not been assigned.[18]

8. In June 2000, the Bureau adopted the *PanAmSat Cancellation Order* cancelling the authorizations for two of PanAmSat's nine Ka-band satellites. The Bureau concluded that, because PanAmSat's pending ISL modification application was not a circumstance beyond the licensee's control, PanAmSat did not provide adequate justification for extending its construction commencement milestone.[19] Accordingly, the Bureau concluded that PanAmSat's Ka-band license for the two satellites was null and void, and that the orbital assignment granted to PanAmSat was available for reassignment.[20]

9. On July 25, 2000, PanAmSat filed an application for review of the *PanAmSat Cancellation Order*, claiming that the Bureau did not place adequate weight on its ISL argument, and that the Bureau "signaled" that it would extend PanAmSat's milestones by requesting additional ISL information. Pacific Century Group (PCG) and Pegasus Development Corporation (Pegasus) filed oppositions on August 10, 2000, and PanAmSat filed a reply on August 23, 2000.

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[14] *PanAmSat Cancellation Order*, 15 FCC Rcd at 18721 (para. 5). *See also* PanAmSat 1998 Modification Application.

[15] Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, FCC, to Joseph A. Godles, counsel to PanAmSat (dated July 23, 1998) (*July 1998 Letter*).

[16] Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, FCC, to Joseph A. Godles, counsel to PanAmSat (dated October 9, 1998) (*October 1998 Letter*); Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, FCC, to Joseph A. Godles, counsel to PanAmSat (dated December 22, 1999) (*December 1999 ISL Letter*).

[17] Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, FCC, to Joseph A. Godles, counsel to PanAmSat (dated December 9, 1999) (*December 1999 Contract Letter*).

[18] *See PanAmSat Cancellation Order*, 15 FCC Rcd at 18722 (para. 7).

[19] *PanAmSat Cancellation Order*, 15 FCC Rcd at 18723 (para. 10).

[20] *PanAmSat Cancellation Order*, 15 FCC Rcd at 18723 (para. 11).

III. DISCUSSION

A. Procedural Issue

10. In its opposition, PCG emphasizes that PanAmSat's license became null and void under its own terms when it missed its construction commencement milestone in May 1998, not as a result of the Bureau's action in the *PanAmSat Cancellation Order*. Therefore, according to PCG, PanAmSat's application for review should be denied as a late-filed application for review of the 1997 *PanAmSat Authorization Order*, in which the May 1998 construction commencement requirement was placed in PanAmSat's license.[21] PanAmSat maintains that it filed a request for extension of its construction commencement milestone before that milestone expired.[22] PanAmSat also notes that, under Section 25.161(a) of the Commission's rules, an authorization is terminated automatically when a milestone passes and the licensee fails to certify that it has met that milestone, unless the licensee has requested an extension of the milestone and the Commission has not acted on that request.[23] PanAmSat asserts therefore that its licensed was not cancelled until the Bureau took action in June 2000, and that its application for review of the June 2000 Order was filed timely.[24]

11. PanAmSat is correct that, by filing a construction commencement milestone extension request before June 1, 1998, its license did not become null and void until the Bureau acted on its extension request.[25] Accordingly, we conclude that PanAmSat's milestone extension request was "timely filed" for purposes of Section 25.161(a), and we therefore consider the merits of its application for review. Nevertheless, for the reasons discussed below, we find that PanAmSat has not justified an extension of its construction commencement milestone.

B. Standard for Milestone Extensions

12. The standard that licensees must meet to justify a milestone extension request is well-established. Extensions of the milestone schedule are granted only when delay in implementation is due to circumstances beyond the control of the licensee.[26] Requiring licensees

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[21] PCG Opposition at 4-6.

[22] PanAmSat Reply at 3.

[23] PanAmSat Reply at 3-4.

[24] PanAmSat Reply at 4.

[25] *See* 47 C.F.R. § 25.161(a) (an authorization is terminated automatically when a milestone passes and the licensee fails to certify that it has met that milestone, unless the licensee has requested an extension of the milestone and the Commission has not acted on that request). The *PanAmSat Authorization Order* established a construction commencement milestone of the end of May 1998. *PanAmSat Authorization Order*, 13 FCC Rcd at 1414 (para. 28). Because May 31, 1998 fell on a Sunday, PanAmSat's deadline became June 1, 1998. *See* 47 C.F.R. § 1.4(j).

[26] National Exchange Satellite, Inc., *Memorandum Opinion and Order*, 7 FCC Rcd 1990, 1991 (para. 8) (Com. Car. Bur. 1992) (*Nexsat Order*); MCI Communications Corporation, *Memorandum Opinion and Order*, 2 FCC Rcd 233 (1987) (*MCI Order*); Hughes Communications Galaxy, *Order and Authorization*, 5 FCC Rcd 3423, 3424 (paras. 10-11) (Com. Car. Bur. 1990) (*Hughes Milestone Order*); *PanAmSat Authorization Order*, 13 FCC Rcd at 1412 (para. 23); Columbia Communications Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd 15566, 15571 (para. 11) (Int'l Bur. 2000) (*First Columbia Milestone Order*).

to make and fulfill realistic construction and launch commitments prevents increasingly scarce orbital resources from being warehoused by licensees. Such warehousing could hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately with the construction and launch of their satellite systems.[27]

13. In summary, PanAmSat asserts that the Bureau should have granted its construction commencement milestone extension request because it entered into a merger with Hughes,[28] the merger led to PanAmSat's modification application to add ISL capability to its two satellites,[29] and adding ISLs to its satellites assigned to the 58° W.L. and 125° W.L. orbital locations would make them more efficient.[30] The Commission has determined on more than one occasion that mergers,[31] modification applications,[32] and decisions to incorporate additional technological capabilities into a satellite[33] are business decisions within the control of the licensee, and therefore cannot justify a milestone extension. Although PanAmSat asserts for several reasons that we should not follow our milestone precedents in its case, we find none of those reasons persuasive. We discuss our determinations in more detail below.

C. Construction Contracts and ISL Frequency Assignments

14. In the first Ka-band processing round, seven applicants requested authority to include ISL frequencies in their satellites. In those licenses, the Bureau noted that the licensee "will not be able to proceed beyond the initial phases of construction" until ISL frequencies were assigned,

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[27] *Nexsat Order*, 7 FCC Rcd at 1991 (para. 8); *MCI Order*, 2 FCC Rcd at 233 (para. 5); *First Columbia Milestone Order*, 15 FCC Rcd at 15571 (para. 11).

[28] PanAmSat Application at 2-3.

[29] PanAmSat Application at 2-3.

[30] PanAmSat Application at 12.

[31] *MCI Order*, 2 FCC Rcd at 234 (para. 7); *First Columbia Milestone Order*, 15 FCC Rcd at 15571 n.35; Columbia Communications Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd 16496, 16500-01 (para. 12) (Int'l Bur. 2000) (*Second Columbia Milestone Order*). *See also* Pegasus Opposition at 6-7; PCG Opposition at 12-14.

[32] Advanced Communications Corporation, *Memorandum Opinion and Order*, 10 FCC Rcd 13337, 13341 (para. 14) (Int'l Bur., 1995) (*Advanced Order*); Tempo Enterprises, Inc., *Memorandum Opinion and Order*, 1 FCC Rcd 20 (1986); *First Columbia Milestone Order*, 15 FCC Rcd at 15571-72 (para. 12); *PanAmSat Cancellation Order*, 15 FCC Rcd at 18723 (para. 10). *See also* Pegasus Opposition at 6-7; PCG Opposition at 12-14.

[33] *See* American Telephone and Telegraph Company, *Memorandum Opinion and Order*, 2 FCC Rcd 4431, 4435 (paras. 30-31) (1987) (*AT&T Order*) (incorporating new hybrid capabilities into satellite design does not justify construction commencement milestone extension); Advanced Communications, Application for Extension of Time to Construct, Launch and Operate a Direct Broadcast Satellite System, *Memorandum Opinion and Order*, 11 FCC Rcd 3399, 3412 (paras. 30-32) (1995) (*Advanced Review Order*) (promoting technological development cannot substitute for concrete progress towards construction and operation of system).

and did not assign a specific milestone schedule for those satellites.[34] The Bureau stated that it would assign a milestone schedule once ISL frequencies were assigned, and noted that those licensees were free to begin construction at their own risk.[35] The remaining six licensees, including PanAmSat, did not request ISL capability in their original license applications, and were assigned a May 1998 construction commencement milestone.[36] PanAmSat did not request ISL authority until May 21, 1998, the same day it filed its milestone extension request.

15. PanAmSat maintains that it could not enter into a construction contract before it was assigned ISL frequencies.[37] PanAmSat asserts that the fact that the Commission had not assigned ISL frequencies before its construction commencement deadline is a circumstance beyond its control.[38]

16. As an initial matter, PanAmSat is mistaken in asserting that it could not enter into a "non-contingent" construction contract before it was assigned ISL frequencies. By "non-contingent contract," we have always meant that there will be neither significant delays between the execution of the contract and the actual commencement of construction, nor conditions precedent to construction.[39] The Commission has also distinguished between accounting for contingencies in a contract and a "contingent contract" that does not create a contractual financial obligation for the licensee to proceed with the construction of its satellite.[40] PanAmSat provides no explanation as to why it could not execute a construction contract in time to comply with its construction commencement milestone that allowed for the possibility that its ISL request would be granted subsequently.

17. Furthermore, when the Bureau issued Ka-band licenses in 1997, it determined that licensees can begin constructing their satellites prior to ISL frequency assignments, although the Bureau recognized that licensees would not be able to progress beyond the initial phases of construction.[41] Indeed, we note that another licensee that did not request ISL frequencies in its

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[34] *See, e.g., Hughes Authorization Order*, 13 FCC Rcd at 1361-62 (para. 29).

[35] *See, e.g., Hughes Authorization Order*, 13 FCC Rcd at 1362 (para. 29).

[36] *See, e.g., PanAmSat Authorization Order*, 13 FCC Rcd at 1414 (para. 28).

[37] PanAmSat Application at 6.

[38] PanAmSat Reply at 7.

[39] Norris Satellite Communications, Inc., Memorandum Opinion and Order, 12 FCC Rcd 22299, 22303-04 (para. 9) (1997) (*Norris Review Order*), *cited in December 1999 Contract Letter* at 1.

[40] *See Second Columbia Milestone Order*, 15 FCC Rcd at 16500-01 (para. 12) (licensee could have executed construction contract that accounted for possibility of future Commission approval of pending transfer of control application), *citing* Volunteers in Technical Assistance, *Order*, 12 FCC Rcd 3094, 3108 (para. 43) (1997) (accounting for contingencies in construction and launch contracts is "not extraordinary.")

[41] *See* Teledesic Corporation, *Order and Authorization*, 12 FCC Rcd 3154, 3163-64 (para. 21) (Int'l Bur., 1997) (*Teledesic Authorization Order*); Comm, Inc., *Order and Authorization*, 12 FCC Rcd 23001, 23010 (para. 28) (Int'l Bur., 1997) (*Motorola Authorization Order*); Lockheed Martin Corporation, *Order and Authorization*, 12 FCC Rcd 23014, 23023 (para. 27) (Int'l Bur., 1997) (*Astrolink Authorization Order*); *Hughes Authorization Order*, 13 FCC Rcd at 1361-62 (para. 29); KaStar Satellite Communications Corp., *Order and Authorization*, 13 FCC Rcd 1366, 1374 (para. 24) (Int'l Bur., 1997) (*KaStar*

original Ka-band license, GE Americom, entered into a construction contract within its May 1998 construction commencement deadline, even though it was not assigned ISL frequencies until January 2001.[42] PanAmSat, on the other hand, did not even attempt to enter into a construction contract, or provide any explanation as to why it was unable to do so. Rather, PanAmSat stated, 10 days before its construction commencement deadline, that it could not be done.

18. PanAmSat contends further that it would be unreasonable to require it to launch its satellites assigned to the 58° W.L. and 125° W.L. orbital locations before ISL frequencies were assigned.[43] PanAmSat seems to be confusing its construction commencement milestone with its launch milestone. The Bureau did not require PanAmSat to launch any Ka-band satellite before it was assigned ISL frequencies. Rather, the Bureau required PanAmSat to enter into a satellite construction contract by May 1998, or demonstrate that it faces circumstances outside its control that would warrant an extension of time. Given that it has not even started construction of its satellites, PanAmSat's concern regarding its launch is at best speculative, and cannot justify overturning the Bureau's Order.

D. Consistency with Precedent

1. Business Transactions

19. PanAmSat asserts that the Commission should apply its rules flexibly when changes are made that are incidental to a *bona fide* business transaction.[44] This would require a substantial departure from precedent. We have determined on several occasions that business transactions are within the control of the licensee, and so cannot justify a milestone extension.[45] Furthermore, the Bureau has considered and rejected a proposal to interpret milestone requirements flexibly,[46]

Authorization Order); Loral Space & Communications, Ltd., *Order and Authorization*, 13 FCC Rcd 1379, 1387-88 (para. 27) (Int'l Bur., 1997) (*CyberStar Authorization Order*); EchoStar Satellite Corporation, *Order and Authorization*, 13 FCC Rcd 5664, 5672 (para. 25) (Int'l Bur., 1997) (*EchoStar Authorization Order*).

[42] GE American Communications, Inc., Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service, *Order and Authorization*, DA 01-225 (Int'l Bur., released Jan. 31, 2001).

[43] PanAmSat Application at 6.

[44] PanAmSat Application at 8, *citing* Request for Declaratory Ruling Filed by Satellite CD Radio, *Declaratory Ruling*, 9 FCC Rcd 2569 (Com. Car. Bur. 1994); Starsys Global Positioning, Inc., Request for a Declaratory Ruling Concerning Section 25.116 of the Commission's Rules, *Declaratory Order*, 8 FCC Rcd 1662 (1993); Airsignal International, *Memorandum Opinion and Order*, 81 FCC 2d 472 (1980); Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Sprint Communications Company, L.P., Petition for Waiver, *Order*, 15 FCC Rcd 16487 (Com. Car. Bur., 2000).

[45] We observed above that mergers cannot justify a milestone extension request. *MCI Order*, 2 FCC Rcd at 234 (para. 7); *First Columbia Milestone Order*, 15 FCC Rcd at 15571 n.35; *Second Columbia Milestone Order*, 15 FCC Rcd at 16500-01 (para. 12). We have also determined that construction contract negotiations cannot justify a milestone extension request. *Advanced Review Order*, 11 FCC Rcd at 3417 (para. 45); *First Columbia Milestone Order*, 15 FCC Rcd at 15571 n.35.

[46] *See Second Columbia Milestone Order*, 15 FCC Rcd at 16502-03 (para. 17).

and PanAmSat provides no reason to revisit that issue here. Finally, none of the Orders cited by PanAmSat address milestone extension requests, and so are not relevant to this issue.[47]

2. Incorporation of Technology

20. PanAmSat also claims that the Commission applies its procedural rules flexibly to encourage development of efficient and innovative systems, and therefore should extend PanAmSat's construction commencement milestone to allow it to incorporate ISL frequencies into its satellite design.[48] Pegasus asserts that there is no reason to assume that an "all ISL" FSS system is more efficient, and notes that Hughes is no longer planning to incorporate ISLs into two of its satellites.[49] PCG questions why it took PanAmSat a year to realize that its two original satellites authorized for the 58° W.L. and 125° W.L. orbital locations were incompatible with the satellites it acquired from Hughes, and to request ISL frequencies for those two satellites. PCG suspects that PanAmSat's ISL request was merely an attempt to justify a milestone extension.[50] PanAmSat responds that the Commission should not "second-guess" satellite operators' decisions regarding whether to incorporate ISLs into their satellites.[51]

21. We do not need to determine whether a satellite with ISLs is more technologically advanced than a satellite that does not utilize ISLs. We do not extend milestones merely to allow a licensee to incorporate a new technology into its satellite design.[52] Otherwise, we would create a loophole in our milestone policy, allowing licensees to extend their milestones indefinitely by filing modification applications.[53] Furthermore, as explained above,[54] PanAmSat could have entered into a construction contract within the deadline specified in its license that allowed for the possibility of incorporating ISL capability at a later date. Thus, PanAmSat did not have to forgo ISLs to meet its milestone requirement.

22. PanAmSat notes that we extended construction completion and launch milestones for Hughes in 1990 to enable it to launch a hybrid satellite rather than two satellites, each with only single band capacity.[55] PanAmSat misplaces its reliance on this Order, because Hughes had

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[47] The first three Orders PanAmSat cites considered petitions for waiver of the "cut-off" rule. The last Order considered a petition for waiver of the "presubscription" rules, governing procedures for long distance customers seeking to switch their long distance telephone service provider.

[48] PanAmSat Application at 13-14.

[49] Pegasus Opposition at 7, *citing* Letter from Arthur S. Landerholm, Counsel to Hughes, to Magalie Roman Salas, Secretary, FCC (dated Jan. 19, 2000). *See also* PCG Opposition at 9-10.

[50] PCG Opposition at 10.

[51] PanAmSat Reply at 8.

[52] *AT&T Order*, 2 FCC Rcd at 4435 (paras. 30-31). *See also* EarthWatch Incorporated, *Order and Authorization*, 15 FCC Rcd 18725, 18728 (para. 9) (*EarthWatch Order*).

[53] *See Advanced Order*, 10 FCC Rcd at 13341 (para. 14); Tempo Enterprises, Inc., *Memorandum Opinion and Order*, 1 FCC Rcd 20 (1986) (*Tempo Order*); *First Columbia Milestone Order*, 15 FCC Rcd at 15571-72 (para. 12).

[54] *See* Section III.C.

[55] PanAmSat Application at 12-13.

probably already begun construction of the hybrid satellite at its own risk. Specifically, Hughes was directed to begin construction of its satellite "if it had not already done so."[56] Commencement of construction is evidence of a licensee's commitment to proceed with its business plans. PanAmSat, on the other hand, has not even entered into a contract to commence construction of its satellites. Except when a licensee faces circumstances beyond its control,[57] or for some other reason has demonstrated good cause for a milestone waiver,[58] we have always strictly construed construction commencement milestones to ensure that unused spectrum is reassigned as quickly as possible to another qualified entity that seeks to implement a system.[59] Therefore, Orders extending construction completion or launch milestones have no bearing on PanAmSat's construction commencement milestone request.

3. Other Ka-Band Licensees

23. PanAmSat asserts that the Bureau "suspended" the milestones of other Ka-band licensees that requested ISL frequency assignments.[60] PCG replies that the Bureau is not *required* to grant PanAmSat's modification request simply because it filed the request. PCG states further that PanAmSat is not in the same position as a licensee with ISL authority simply because it has applied for a license modification to add ISL capability.[61] Pegasus argues that, to

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[56] *Hughes Milestone Order*, 5 FCC Rcd at 3424 (para. 11). Hughes was granted a waiver under Section 319(d) of the Commission's rules to begin construction at its own risk.

[57] *See* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, GE American Communications, Inc. Request for Extension of Construction and Launch Milestones for GE-3, *Memorandum Opinion and Order*, 13 FCC Rcd 13863, 13865-66 (paras. 5-7) (1998) (*1998 GE Americom Order*) (granting GE Americom a 60-day extension of its construction commencement milestone in conjunction with reassigning its satellite to another orbit location, to help resolve complicated international coordination issues with other countries); *MCI Order*, 2 FCC Rcd at 234 (paras. 7-9) (extending the milestones for one of MCI's two licenses because a series of launch failures that disrupted the industry at that time, including the *Challenger* disaster, may have played a part in MCI's failure to begin construction of that satellite). In addition, we have employed a different standard, a "totality of the circumstances" test, to determine whether to extend Direct Broadcast Satellite (DBS) milestones. *See, e.g.*, Petition of R/L DBS Company, L.L.C. for Extension of its Direct Broadcast Satellite Construction Permit, *Memorandum Opinion and Order*, 16 FCC Rcd 9 (Int'l. Bur., 2000).

[58] *See* NetSat 28 Company, LLC, For Authority to Construct, Launch and Operate a Ka-Band Communications Satellite in the Fixed-Satellite Service in Orbital Location 95° W.L., *Memorandum Opinion and Order*, File No. SAT-WAV-20001215-00164, DA 01-1284 (rel. May 25, 2001).

[59] AMSC Subsidiary Corporation, Applications to Modify Space Station Authorizations in the Mobile Satellite Service, *Memorandum Opinion and Order*, 8 FCC Rcd 4040, 4042-43 (paras. 13-14) (1993) (*AMSC Order*); Application of GE American Communications, Inc., for Orbital Reassignment and for Modification of Authorization to Construct and Launch the Satcom H-1 Domestic Fixed-Satellite, *Memorandum Opinion and Order*, 7 FCC Rcd 5169, 5169 (para. 3) (Com. Car. Bur. 1992) (*1992 GE Americom Order*); *Norris Review Order*, 12 FCC Rcd at 22306 (para. 17); *Second Columbia Milestone Order*, 15 FCC Rcd at 16503 (para. 16); *EarthWatch Order*, 15 FCC Rcd at 18728 (para. 9).

[60] PanAmSat Application at 9-10.

[61] PCG Opposition at 8.

the extent that PanAmSat's concern with efficiency focuses on its ongoing operating costs, this is an economic concern and cannot justify a milestone extension.[62]

24. Although the Bureau delayed assigning specific milestone deadlines to Ka-band licensees that requested ISL capabilities in their original applications, it noted that they were capable of proceeding with at least the initial phases of construction.[63] Again, PanAmSat provides no explanation as to why it could not proceed with at least the initial phases of construction, especially since it was required to do so under the terms of its license.

25. To the extent that PanAmSat is criticizing the Bureau for imposing different milestone requirements on it than were imposed on other Ka-band licensees, this criticism is equivalent to the PanAmSat argument we rejected above. Filing a modification application is a circumstance within the licensee's control that cannot justify a milestone extension, even if the licensee seeks authority to incorporate a new technology into its satellite design.[64] Otherwise, we would create a loophole in our milestone policy, allowing licensees to extend their milestones indefinitely by filing modification applications.[65] Such indefinite milestone extensions could hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately with the construction and launch of their satellite systems.[66] Thus, to avoid creating such a loophole, we find that it is reasonable to require Ka-band licensees filing ISL modification applications and seeking construction commencement milestone extensions to meet the same standard as any other licensee requesting a construction commencement milestone extension.

26. PanAmSat further observes that GE American Communications, Inc. (GE Americom) filed a modification application to add ISLs to its satellites.[67] PanAmSat observes that GE Americom admitted to the Bureau that it had "suspended construction" of its satellite, and asserts for this reason that GE Americom did not meet its construction commencement milestone.[68] PCG observes that GE Americom's case is distinguishable because GE Americom

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[62] Pegasus Opposition at 7, *citing Second Columbia Milestone Order*, 15 FCC Rcd at 16500 (para. 11).

[63] *See Teledesic Authorization Order*, 12 FCC Rcd at 3163-64 (para. 21); *Motorola Ka-band Authorization Order*, 12 FCC Rcd 23001, 23010 (para. 28); *Astrolink Ka-band Authorization Order*, 12 FCC Rcd at 23023 (para. 27); *Hughes Ka-band Authorization Order*, 13 FCC Rcd at 1361-62 (para. 29); *KaStar Ka-band Authorization Order*, 13 FCC Rcd at 1374 (para. 24); *CyberStar Ka-band Authorization Order*, 13 FCC Rcd at 1387-88 (para. 27); *EchoStar Ka-band Authorization Order*, 13 FCC Rcd at 5672 (para. 25).

[64] Section III.D.2., *supra*, *citing AT&T Order*, 2 FCC Rcd at 4435 (paras. 30-31).

[65] Section III.D.2., *supra*, *citing Advanced Order*, 10 FCC Rcd at 13341 (para. 14); *Tempo Order*, 1 FCC Rcd at 20; *First Columbia Milestone Order*, 15 FCC Rcd at 15571-72 (para. 12).

[66] *First Columbia Milestone Order*, 15 FCC Rcd at 15571 (para. 11); *citing Nexsat Order*, 7 FCC Rcd at 1991 (para. 8); *MCI Order*, 2 FCC Rcd 233.

[67] PanAmSat Application at 11.

[68] PanAmSat Application at 11-12, *citing* Letter from Peter A. Rohrbach to Thomas S. Tycz (dated Dec. 23, 1999).

met its construction commencement milestone.[69] Pegasus asserts that we should rescind GE Americom's license rather than reinstate PanAmSat's license.[70]

27. PanAmSat is mistaken in asserting that GE Americom failed to meet its construction commencement milestone.[71] It entered into a noncontingent construction contract by May 1998, thus demonstrating an intent to proceed with its business plan.[72] Furthermore, by entering into a construction contract and making at least some progress before suspending construction to await the ISL frequency allocation, GE Americom disproves the PanAmSat assertion underlying most of its contentions, that it could not enter into a contract before ISL frequencies were assigned. Thus, GE Americom's case is distinguishable from PanAmSat's case. In other words, GE Americom, which filed its modification application in a much more timely fashion than PanAmSat, met its milestone and progressed as far as it could before "suspending" construction of its satellites to await the Commission's ISL assignments.

E. Applicability of Precedents

28. PanAmSat points out a number of factors which, it maintains, weigh against following our milestone policies and precedents in its case. For the reasons discussed below, we conclude that PanAmSat does not provide sufficient justification for departing from our precedents.

1. Motivation

29. PanAmSat claims that there is no basis for assuming that either its merger or its modification applications were motivated by an intent to avoid compliance with its milestones.[73] PanAmSat overstates its case. If a licensee does not even enter into a contract before the milestone to begin construction of its satellite specified in its license, it raises substantial doubts as to whether the licensee intends to or is able to proceed with its business plan.[74] Furthermore, PanAmSat merged with Hughes over a year before its construction commencement milestone was scheduled, and must have known that Hughes was granted ISL authority for its satellites long before that time. Yet, PanAmSat did not file its ISL modification until 10 days before its construction commencement deadline. While the timing of PanAmSat's modification request

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[69] PCG Opposition at 11.

[70] Pegasus Opposition at 8-9.

[71] PanAmSat Application at 11-12.

[72] *AMSC Order*, 8 FCC Rcd at 4042 (para. 13) (failing to begin construction raises questions regarding the licensee's intention to proceed); *Norris Review Order*, 12 FCC Rcd at 22306 (para. 17) (by failing to commence construction or request extension within the milestone deadline, licensee in that Order did not demonstrate a commitment to proceed with its proposed system); *Second Columbia Milestone Order*, 15 FCC Rcd at 16502 (para. 16).

[73] PanAmSat Application at 5-6, 9; PanAmSat Reply at 6.

[74] *AMSC Order*, 8 FCC Rcd at 4042 (para. 13) (failing to begin construction raises questions regarding the licensee's intention to proceed); *Norris Review Order*, 12 FCC Rcd at 22306 (para. 17) (by failing to commence construction or request extension within the milestone deadline, licensee in that Order did not demonstrate a commitment to proceed with its proposed system); *Second Columbia Milestone Order*, 15 FCC Rcd at 16502 (para. 16).

does not show conclusively that there was no legitimate business purpose for its ISL request, the timing of the request does raise a legitimate question about whether it filed its modification application at least in part to delay compliance with its construction commencement deadline.

30. We do not intend to begin to examine licensees' motivations as part of our milestone review standard. Even if PanAmSat were correct that there is no basis for assuming that it was motivated by an intent to avoid compliance with its milestones, we would still affirm the Bureau's Order. The standard for reviewing milestone extension requests is a relatively clear test. It is much easier to determine whether a licensee faces circumstances beyond its control than it is to divine the licensee's motivations, intent, or state of mind at the time it filed its modification application. Maintaining a clear milestone extension test is important because we want to be able to reassign the license as quickly as possible when a licensee demonstrates an unwillingness or inability to proceed with construction.[75]

2. Public Interest

31. PanAmSat asserts that there is no public interest benefit in revoking its license.[76] Pegasus counters that there is a public interest benefit in making orbital locations available for assignment in the second Ka-band processing round.[77] PCG argues that reinstating PanAmSat's license would cause uncertainty in the marketplace, and therefore would be inconsistent with the public interest.[78] PanAmSat asserts that revoking its license to make orbital locations available for reassignment would be tantamount to adopting a different standard for milestone extension requests when a processing round is pending.[79]

32. The Bureau explained in the *PanAmSat Cancellation Order* that the public interest benefit of our milestone policy, and of the application of that policy to PanAmSat, is to ensure that licensees proceed with construction and will launch their satellites into the limited orbit and spectrum resource in a timely manner.[80] This is an adequate public interest justification for cancelling PanAmSat's license. Furthermore, as explained above, the Bureau's action was completely consistent with Commission precedents governing milestone extensions. PanAmSat has no grounds to assert that the Bureau has established a different standard for proceedings in which a second processing round is pending.

3. Information Requests Regarding ISL Modification Application

33. As discussed briefly above, the Division requested PanAmSat in July 1998 to identify the specific ISL frequencies that it proposes to use for the seven satellites it acquired

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75 *See First Columbia Milestone Order*, 15 FCC Rcd at 15571 (para. 11) (anti-warehousing policy helps make services available to the public "at the earliest possible date"), *citing Nexsat Order*, 7 FCC Rcd at 1991 (para. 8); *MCI Order*, 2 FCC Rcd 233.

76 PanAmSat Application at 6.

77 Pegasus Opposition at 9.

78 PCG Opposition at 14-15.

79 PanAmSat Reply at 8-9.

80 *PanAmSat Cancellation Order*, 15 FCC Rcd at 18722 (para. 8).

from Hughes.[81] The Division requested additional ISL information in October and December 1999,[82] and PanAmSat provided that information.

34. PanAmSat notes that, in its *July 1998 Letter*, the Division informed PanAmSat that this information was necessary to "allow [the Bureau] to issue an amended and complete space station license."[83] PanAmSat claims that this language, and similar language in the Division's two later information requests, constituted a Division commitment to grant PanAmSat's ISL modification application in its entirety, including its request to extend the milestones for the satellites initially authorized for the 58° W.L. and 125° W.L. orbital locations.[84] PanAmSat asserts that the Bureau did not properly consider this alleged commitment when it cancelled PanAmSat's licenses.[85] PanAmSat claims that it took "significant steps" towards developing its Ka-band system, based in part on its belief that the Bureau had indicated that it would grant its ISL modification request by requesting additional information.[86] PanAmSat also contends that it spent millions of dollars on market studies and satellite design testing, with a "special emphasis" on the 58° W.L. orbital location.[87]

35. PCG notes that PanAmSat was required to enter into a contract to construct two satellites for the 58° W.L. and 125° W.L. orbital locations by May 1998, and subsequent statements by the Bureau requesting additional information about PanAmSat's plans for ISLs could not create any expectations that PanAmSat's deadline for satellite construction would be extended.[88] Similarly, Pegasus argues that the *PanAmSat Authorization Order* clearly put PanAmSat on notice that it was required to enter into a non-contingent construction contract for those two satellites by May 1998, and that PanAmSat does not dispute that it missed its construction commencement milestone in its application for review.[89] Pegasus argues further that the Bureau did not act unreasonably in requesting ISL information from PanAmSat, because the Bureau was clearly still considering PanAmSat's ISL and milestone extension requests.[90]

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[81] Section II, *supra*, *citing July 1998 Letter*.

[82] Section II, *supra*, *citing October 1998 Letter*; *December 1999 ISL Letter*.

[83] PanAmSat Application at 3-4, *quoting July 1998 Letter*. PanAmSat quotes similar language in the *October 1998 Letter* and *December 1999 ISL Letter*.

[84] PanAmSat Application at 4.

[85] PanAmSat Application at 5-6, 8-11, *citing, e.g.*, Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir., 1994) (Commission must take into account particular circumstances of each case). *But see* PCG Opposition at 6-8 (*Petroleum Communications* is not relevant. In that case, the Commission invited comment in a rulemaking proceeding and then did not consider those comments).

[86] PanAmSat Reply at 5.

[87] PanAmSat Application at 3.

[88] PCG Opposition at 10-11.

[89] Pegasus Opposition at 5-6.

[90] Pegasus Opposition at 8.

36. The Bureau's *July 1998 Letter* was intended to request from PanAmSat ISL information regarding the seven satellites it acquired from Hughes. "PanAmSat specifically requests that the Commission incorporate by reference the inter-satellite link proposal for the satellites that were originally part of the Hughes Spaceway Ka-band system."[91] It is not reasonable for PanAmSat to interpret the *July 1998 Letter* as a commitment to extend the milestones of two satellites that were not "originally part of the Hughes Spaceway Ka-band system." The Commission staff has the right to seek the necessary information to develop an adequate record in each proceeding in order to make informed decisions.[92] Accordingly, PanAmSat is incorrect in asserting that the Division's information requests provide any basis for overturning the *PanAmSat Cancellation Order*.

37. Furthermore, assuming for the sake of argument that the Division had requested additional information for the two PanAmSat satellites originally authorized for the 58° W.L. and 125 W.L.° orbital locations, PanAmSat still fails to demonstrate that such information requests could provide any basis for overturning the *PanAmSat Cancellation Order*. We explain our milestone policy in detail in this Order. We note that, to obtain a milestone extension, a licensee must demonstrate that the delay in implementation is due to circumstances beyond the control of the licensee.[93] We note further that neither PanAmSat's 1997 merger nor its 1998 modification application were circumstances outside its control.[94] We find that PanAmSat is incorrect in asserting that it was unable to enter into a noncontingent construction contract that would have met our construction commencement milestone before ISL frequencies were assigned.[95]

38. PanAmSat argues that a Division request that PanAmSat provide additional information regarding its planned ISL usage could compel us to reverse all these conclusions. PanAmSat appears to argue that the Bureau implicitly relieved PanAmSat of any requirement to comply with a condition in its underlying license merely by stating that its could not consider a modification to that license without additional information. Alternatively, PanAmSat seems to contend that the Bureau attained authority to depart from the Commission's milestone extension precedents simply by informing PanAmSat that it could not consider its ISL request without information regarding the specific frequency bands PanAmSat proposes to use. Neither of PanAmSat's arguments bears close analysis. If we wanted to depart from our milestone policy, we would need to supply a reasoned analysis showing that our prior policies and standards are being deliberately changed, not casually ignored.[96] Clearly, asking PanAmSat to identify the specific ISL frequency bands it proposes to use does not constitute a "reasoned analysis" for departing from our milestone policies, and does not eliminate the need for providing such a reasoned analysis.

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91 *July 1998 Letter* at 1.

92 *See* Section 25.111(a).

93 Section III.B.

94 Section III.B.

95 Section III.C.

96 *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *AT&T v. FCC*, 236 F.3d 729, 726-37 (D.C. Cir. 2001).

39. PanAmSat also asserts that it invested time and money in reliance on a commitment it read into the Bureau's information requests.[97] This is not relevant because, as explained above, PanAmSat's reliance was not reasonable. Moreover, it is not clear how much reliance PanAmSat placed on this alleged commitment. PanAmSat asserts without elaboration that it spent millions of dollars on "market studies" and "satellite design testing," with a "special emphasis" on the 58° W.L. orbital location.[98] It is impossible to determine whether most or all of this investment was for any particular satellite PanAmSat acquired from Hughes. Given that PanAmSat has not entered into a Ka-band construction contract, thereby raising substantial doubts as to whether PanAmSat intends to proceed with its business plan, it would not be surprising to find that the market tests and satellite design testing could be applied to any satellite. In any case, even if PanAmSat's expenditures of time and money were related to the specific satellites at issue here, there is no basis to conclude that those expenditures represented progress towards implementing PanAmSat's business plan in the absence of a non-contingent construction contract. In other words, PanAmSat's expenditures are not circumstances beyond the licensee's control that can justify a milestone extension.

40. The Bureau could have been more explicit that it was requesting ISL information for the seven Ka-band satellite licenses that PanAmSat acquired from Hughes. To the extent that PanAmSat misunderstood the scope of the Bureau's information requests, PanAmSat provided support information for two satellites whose modification application was ultimately mooted by the Bureau's denial of PanAmSat's milestone extension request. However, allowing PanAmSat to keep its authorization based on its misunderstanding would not be reasonable or equitable to the several other first round Ka-band licensees who met their construction commencement milestones and now are proceeding with their business plans.

F. Negotiation of Contract Without ISLs

41. In the alternative, PanAmSat requests an opportunity to negotiate a contract for two Ka-band satellites for the 58° W.L. and 125° W.L. orbital locations without ISL frequencies.[99] PanAmSat asserts that it was "led to believe" that its ISL request would be granted, and was not given an opportunity to negotiate contracts without ISLs.[100] PanAmSat was free, however, to negotiate a construction contract that accounted for the possibility that it would not be granted ISL authority before its May 1998 construction commencement deadline.

42. PanAmSat asserts further that the Bureau granted a 60-day milestone extension to GE Americom in another context to enter into a construction contract in the face of uncertainty.[101] In the Order cited by PanAmSat, the Bureau granted GE Americom a 60-day extension of its construction commencement milestone in conjunction with reassigning its satellite to another

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97 PanAmSat Reply at 5.

98 PanAmSat Application at 3.

99 PanAmSat Application at 7; PanAmSat Reply at 7-8.

100 PanAmSat Application at 11.

101 PanAmSat Reply at 7, *citing* Assignment of Orbital Locations in the Domestic Fixed-Satellite Service, GE American Communications, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 13863 (1998) (*1998 GE Americom Order*).

orbital location, to help resolve complicated international coordination issues with other countries.[102] PanAmSat's situation is not analogous to GE Americom's situation.

43. The "uncertainty" in PanAmSat's case was whether the Bureau would grant its ISL modification application. We see nothing to distinguish this "uncertainty" from the *Second Columbia Milestone Order*. In that proceeding, Columbia claimed that uncertainty over whether the Bureau would grant a pending Columbia transfer-of-control application warranted a milestone extension. The Bureau rejected Columbia's claim.[103]

IV. ORDERING CLAUSE

44. Accordingly, IT IS ORDERED, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the application for review filed by PanAmSat Licensee Corp. on July 26, 2000, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[102] *1998 GE Americom Order*, 13 FCC Rcd at 13865 (para. 5). *See also Second Columbia Milestone Order*, 15 FCC Rcd at 16503 n.46.

[103] *Second Columbia Milestone Order*, 15 FCC Rcd at 16499-16500 (para. 10).