

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Morning Star Satellite	)	File No. 190-193-SAT-P/LA-95
Company, L.L.C.	)	New IBFS No. SAT-LOA-19950929-
	)	00120/00123
Application for Authority to Construct, Launch,	)	
and Operate a Ka-band Satellite System in the	)	
Fixed-Satellite Service at Orbital Locations 62°	)	
W.L., 30° E.L., 107.5° E.L., and 147° W.L.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 23, 2001**

**Released: May 25, 2001**

By the Commission:

**I. INTRODUCTION**

1. By this Order, we deny Morning Star Satellite Company, L.L.C.'s ("Morning Star's") application for review of an International Bureau ("Bureau") Order<sup>1</sup> cancelling Morning Star's Ka-band license.<sup>2</sup> This action prevents "warehousing" of scarce orbital and spectrum resources and makes four additional orbit locations available to qualified applicants participating in the second Ka-band processing round.

**II. BACKGROUND**

2. On May 9, 1997, the Bureau authorized Morning Star to construct, launch, and operate geostationary-orbit satellites at the 62° W.L., 30° E.L., 107.5° E.L., and 147° W.L. orbit locations to provide fixed-satellite service (FSS) in the United States in the Ka-band.<sup>3</sup> This authorization was granted

<sup>1</sup> See *Morning Star Satellite Company, L.L.C., Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service at Orbital Locations 62° W.L., 30° E.L., 107.5° E.L., and 147° W.L.*, Memorandum Opinion and Order, 15 FCC Rcd 11350, 11351, ¶ 4 (Int'l Bur. 2000) ("*Morning Star Cancellation Order*").

<sup>2</sup> 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.

<sup>3</sup> See *Morning Star Satellite Company, L.L.C., Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service at Orbital Locations 62° W.L., 30° E.L., 107.5°*

as part of the first “processing round” of Ka-band systems, in which the Bureau assigned over 70 orbit locations to 13 Ka-band satellite systems.<sup>4</sup> 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.<sup>5</sup>

3. Morning Star’s license, like all satellite licenses, requires Morning Star to meet explicit deadlines, or “milestones.” Milestones are designed to ensure that licensees are proceeding with construction and will launch their satellites in a timely manner and that orbit-spectrum is not being held by licensees unable or unwilling to proceed with their plans.<sup>6</sup> Morning Star’s authorization clearly states that the authorization would become null and void unless Morning Star commenced construction of its first satellite by May 1998.<sup>7</sup>

4. Morning Star’s license, while granting it authority to operate a satellite system in the Ka-band, deferred action on Morning Star’s request to operate in the 12.2-12.5 GHz Ku-band frequencies as part of its system.<sup>8</sup> The specific Ku-band spectrum that Morning Star requested to use is allocated domestically to the Broadcasting Satellite Service (BSS). The orbit locations that Morning Star requested were not designated by the International Table of Allocations to the United States for BSS use. Therefore, the Commission deferred consideration of Morning Star’s requested use of Ku-band frequencies until modifications to the BSS allocation plan could be effected. The Commission nevertheless did not predicate the grant of Morning Star’s Ka-band authorization on resolution of the Ku-band issue. Instead, it licensed Morning Star in the Ka-band, subject to the milestones described above.<sup>9</sup>

5. On November 3, 1999, Celsat America, Inc. (“Celsat”), filed a Petition for Declaratory Ruling asking the Commission to cancel Morning Star’s license for failure to meet its first construction milestone

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*E.L., and 147° W.L.*, Order and Authorization, 12 FCC Rcd 6039 (Int’l Bur. 1997) (“*Morning Star Authorization Order*”).

<sup>4</sup> *Assignment of Orbital Locations to Space Stations in the Ka-band*, Order, 11 FCC Rcd 13737 (Int’l Bur. 1996).

<sup>5</sup> *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 29.5-30.5 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, ¶ 1 (1997).

<sup>6</sup> *Morning Star Authorization Order*, 12 FCC Rcd at 6048, ¶ 46. *See also Columbia Communications Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 15566, 15571, ¶ 11 (Int’l Bur. 2000) (“*Columbia Milestone Order*”).

<sup>7</sup> *Morning Star Authorization Order*, 12 FCC Rcd at 6050, ¶ 31.

<sup>8</sup> *Id.* at 6045, ¶ 16.

<sup>9</sup> *Id.*

by failing to enter into a non-contingent construction contract by May 1998.<sup>10</sup> Morning Star denied Celsat's allegation.<sup>11</sup> By letter dated December 9, 1999, the Chief, Satellite and Radiocommunication Division, International Bureau, asked Morning Star to substantiate its compliance with its first milestone. Morning Star responded by providing a redacted copy of a construction contract that was executed on June 29, 1998. The contract Morning Star submitted contained no terms relating to the contractor's construction schedule, no terms regarding Morning Star's payment schedule, and no terms that indicated a binding commitment for satellite construction. Thus, this contract failed to meet the Commission's minimum requirements for a non-contingent construction contract.<sup>12</sup> For these reasons, the Bureau found that Morning Star failed to meet its first commencement of construction milestone by the express terms of its license. This failure rendered the license null and void and the Bureau took action cancelling it on June 26, 2000.<sup>13</sup>

6. Morning Star now seeks review of the Morning Star Cancellation Order, asserting that the Commission's action "is arbitrary and capricious, does not reflect the Commission's failure to act on Morning Star's complete application and is discriminatory."<sup>14</sup> Morning Star argues that because the Bureau deferred consideration of its Ku-band requests, the Bureau should not have imposed milestones for construction of the Ka-band portion of its system. Morning Star states it has suffered discriminatory treatment as milestones were not imposed on other Ka-band applicants who proposed inter-satellite links (ISLs). It further argues that it is arbitrary and capricious for the Commission to hold it to a timetable without resolving all outstanding technical issues.<sup>15</sup> Pegasus Development Group (Pegasus), Pacific Century Group (PCG), and TRW, Inc. (TRW) filed oppositions.

### III. DISCUSSION

#### A. Application of Licensing Policies and Rules

7. It is longstanding Commission policy to impose mandatory construction commencement milestones upon licensees in the FSS.<sup>16</sup> To demonstrate compliance with this milestone, the Commission has consistently required licensees to execute non-contingent satellite construction contracts within the time frame specified in their authorizations.<sup>17</sup> The milestones are designed to ensure that licensees are building

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<sup>10</sup> *Morning Star Cancellation Order* at 11351, ¶ 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 11351-52, ¶¶ 5-6.

<sup>13</sup> *Id.* at 11353, ¶¶ 10-11.

<sup>14</sup> Morning Star Application at 1.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *See, e.g., Norris Satellite Communications, Inc.*, 12 FCC Rcd 22, 299 (1997).

<sup>17</sup> *Id.*

their systems in a timely manner. They also enable the Commission to determine early on if a license is being held by a licensee that is unable or unwilling to proceed with its plans. The Commission strictly enforces its milestone schedules to ensure that unused spectrum can be reassigned to an entity that is ready, willing and able to construct a system and commence service to the public.<sup>18</sup> In our order establishing Ka-band service rules, we stated that we would not impose a strict financial qualification test for first round applicants. Instead, we noted that we would be vigilant in enforcing those construction milestones contained in individual authorizations. Thus, we would rely on milestones, rather than financial qualifications, to prevent warehousing of scarce spectrum and orbital resources.<sup>19</sup>

8. In its Application for Review, Morning Star appears to challenge the Commission's well established policy of imposing mandatory construction milestones in the FSS to prevent orbital locations from being warehoused.<sup>20</sup> According to Morning Star, in so doing, the Commission is holding it to an arbitrary implementation schedule that was imposed without benefit of a record in a rulemaking proceeding.<sup>21</sup> We disagree. To the extent that Morning Star believes that it was inappropriate for the Bureau to impose milestones based on a long established policy, rather than a formal rule, it had two clear procedural avenues for addressing its concern. First, to the extent that Morning Star questions the overall Commission policy of imposing milestones, it had ample opportunity to raise this issue in the context of the 1997 Ka-band Service Rules Proceeding. Second, to the extent that Morning Star questions the imposition of this particular milestone to its authorization, Morning Star was afforded 30 days from the date of release of its order to accept its authorization as conditioned.<sup>22</sup> Failure to challenge the conditions imposed is tantamount to accepting its license as conditioned. Thus, Morning Star cannot now complain, after failing to meet its commencement of construction milestone, that its imposition was arbitrary and capricious.

9. We also disagree with Morning Star's contention that the Bureau erred in the application of the commencement of construction milestone. Morning Star seems to be arguing that the necessity of entering into a construction contract, or the demonstration that must be made in the contract itself, was not clear.<sup>23</sup> To the contrary, we agree with TRW's assertion that "the Commission's requirements concerning

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<sup>18</sup> See, e.g., *National Exchange Satellite, Inc.*, 8 FCC Rcd 636 (1993); *Advanced Communications Corporation*, 10 FCC Rcd 13,337 (Int'l Bur. 1995).

<sup>19</sup> *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5 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, 12 FCC Rcd 22310, paras. 18, 61 (1997).

<sup>20</sup> Morning Star Application at 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Morning Star Authorization Order*, 12 FCC Rcd at 6051, ¶ 38.

<sup>23</sup> Morning Star Application for Review at 2.

commencement of construction are neither ambiguous nor overly stringent.”<sup>24</sup> The Commission has consistently held that, at a minimum, an FSS licensee must execute a non-contingent satellite construction contract to satisfy the commencement of construction milestone.<sup>25</sup> The Bureau was correct in its finding that the contract that Morning Star submitted to demonstrate compliance with the milestone was inadequate.<sup>26</sup> Not only was the contract, by its terms, not non-contingent, but it was also not executed within the time frame specified in its Authorization. Because there is clear precedent for the application of this minimum threshold, we reject Morning Star’s arguments to the contrary.

10. Finally, other procedural approaches were available to Morning Star that it chose not to pursue. At no point did Morning Star request a clarification, extension or waiver of its construction commencement milestone. At the same time, it made no progress towards satellite implementation. As stated above, satellite milestones are imposed to ensure efficient and timely use of spectrum and commencement of service to the public. Indeed, when satellites are not implemented in spectrum allocated for the fixed-satellite service, as is the case here, the orbit location may revert back to the ITU for possible assignment to another country. In general, when satellite licensees do not pursue procedural avenues available to them to address concerns surrounding their authorizations, but rather wait until their authorizations are null and void due to their failure to act, their inaction ensures the result that the milestone concept is designed to prevent. In other words, it needlessly adds to the time in which the spectrum is unused.

## B. Technical Issues

11. Morning Star also argues that technical uncertainties needing resolution by the Commission, coupled with the imposition of milestones, placed it in an impossible situation. According to Morning Star, the Commission’s failure to act on the Ku-band portion of its application prevented it from moving forward. Moreover, Morning Star claims its efforts were also impeded by unspecified technical issues affecting Morning Star’s competitor applications that somehow impacted Morning Star’s system’s compatibility with those systems. According to Morning Star, these technical uncertainties make it impossible for it to complete construction of an efficient satellite service until all technical parameters are resolved.<sup>27</sup> Morning Star claims that to hold it to a timetable while outstanding technical issues remain is arbitrary and capricious.

12. We agree with TRW that there is no basis for Morning Star to claim that technical uncertainties precluded it from entering into a non-contingent contract.<sup>28</sup> On several occasions we have

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<sup>24</sup> TRW Opposition at 5.

<sup>25</sup> See, e.g., *Norris Satellite Communications, Inc.*, 12 FCC Rcd 22299, 22303 (para. 9) (1997); *AMSC Subsidiary Corp.*, 8 FCC Rcd 404, 4042 (para. 14) n. 27 (1993); *National Exchange Satellite, Inc.*, 7 FCC Rcd 1990, 1991 (para. 5) n.13 (CCB 1992), *aff’d*, 8 FCC Rcd 636 (1993).

<sup>26</sup> See para. 5 above.

<sup>27</sup> Morning Star Application for Review at 2.

<sup>28</sup> TRW Opposition at 7.

made clear the difference between contingencies with respect to final satellite configuration and contingencies in the effectiveness of a satellite construction contract. Technical contingencies clearly do not undermine the validity of an otherwise binding agreement. TRW is correct in its assertion that leaving technical matters open is possible when executing a non-contingent satellite construction contract to satisfy the construction commencement milestone.<sup>29</sup> Thus, technical or regulatory uncertainty is no excuse for not meeting the first milestone and operators cannot defer contracting due to alleged regulatory uncertainty.<sup>30</sup> In fact, an example of a licensee's ability to enter into a non-contingent contract despite technical uncertainty can be found in this very proceeding. GE Americom, which did not originally request ISL frequencies before receiving its license in the first Ka-band processing round, later decided it wanted ISL frequencies and requested a modification of its license. Despite its request for modification, however, GE Americom entered into a non-contingent construction contract by May 1998 as required by its construction commencement milestone, even though it was not assigned ISL frequencies until January 2001.<sup>31</sup>

### C. Taking of Property

13. Morning Star argues that by declaring its licenses null and void, the Commission is denying it the opportunity to recover its investments.<sup>32</sup> According to Morning Star, this amounts to a taking of property without just compensation.<sup>33</sup> No Commission licensee, however, receives any property rights to any spectrum or any orbit location.<sup>34</sup> Thus we reject Morning Star's argument.

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<sup>29</sup> TRW Opposition at 7.

<sup>30</sup> See *Volunteers in Technical Assistance*, 12 FCC Rcd 3094, 3108 (para.43) (Int'l Bur., rel. April 5, 2000); *TEMPO Enterprises, Inc.*, 1 FCC Rcd, 20, 20-21 (para. 6) (1986) (contingencies involving the final configuration of a spacecraft need not prevent the satisfaction of a due diligence milestone).

<sup>31</sup> *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., rel. Jan. 31, 2001).

<sup>32</sup> Morning Star Application for Review at 3. According to Morning Star, its investments include a substantial filing fee and unspecified continuing "substantial financial burdens."

<sup>33</sup> *Id.*

<sup>34</sup> See Section 301 of the Communications Act of 1934, 47 U.S.C. § 301 (the Communications Act does not confer ownership rights over any spectrum to any person).

#### D. Discriminatory Treatment

14. Morning Star asserts that it was discriminatory for the Bureau to impose a milestone schedule on its authorization because similar time tables were not imposed on applicants requesting ISLs.<sup>35</sup> The Bureau imposed this milestone schedule on Morning Star in its Authorization Order in 1997.<sup>36</sup> Thus, if Morning Star believed it was being unfairly treated, then the time to take issue with the Commission over this perceived inequity was within the 30-day period after release of its authorization. Morning Star's argument is in effect a late-filed Petition for Reconsideration of the Morning Star Authorization Order and, accordingly, we deny reinstatement of its license based on this argument.

15. Furthermore, Morning Star fails to show that there was any discrimination. Morning Star never requested ISL authority.<sup>37</sup> Accordingly, Morning Star was assigned the same milestone schedule as other licensees that did not request ISL authority in their original license applications.<sup>38</sup> Ka-band licensees that requested ISL capabilities in their original applications were unable to proceed beyond the initial phases of construction until frequencies for ISLs were identified.<sup>39</sup> Morning Star provides no reason to assign the same milestone schedules to these two different groups of Ka-band licensees.

#### E. Ku-band Request

16. As noted above, in Morning Star's authorization, we deferred action on the Ku-band portion of its application. In the United States, the two locations that Morning Star requests are located one degree, or less, from licensed BSS satellites. Moreover, this spectrum is not allocated for FSS use. Thus, they are not available to Morning Star. The other two locations it requests will require a modification to the existing BSS plan for Region 1 and initiation of the coordination process for Region 3. To the extent that Morning Star wants to pursue these locations, we direct the Bureau to consider their request and take any action necessary consistent with the disposition of this request.<sup>40</sup> Therefore, Morning Star may continue to

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<sup>35</sup> See, e.g., *In the Matter of Hughes Communications Galaxy Inc. Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed Satellite Service and a Ku-band Broadcast Communications Satellite System*, 13 FCC Rcd 1351, 1361-62, ¶ 29 (1997).

<sup>36</sup> *Morning Star Authorization Order*, 12 FCC Rcd at 6048,50, ¶¶ 26,31.

<sup>37</sup> See generally *Morning Star Authorization Order*.

<sup>38</sup> See *GE American Communications, Inc., Order and Authorization*, 12 FC Rcd 6475, 6485 ¶ 32 (Int'l Bur. 1997).

<sup>39</sup> 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).

<sup>40</sup> At a minimum, pursuing these frequencies for FSS would require modifying the Region 1 BSS List contained in Appendices S 30 and S 30A of the International Telecommunication Union (ITU) Radio Regulations

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prosecute this portion of their application, separate from the Ka-band locations and frequencies that it has relinquished by failing to meet the milestones in its Ka-band authorization.

#### IV. CONCLUSION

17. Morning Star presents no sound arguments regarding the Bureau's cancellation of its Ka-band license. Because its arguments are without merit, its Application for Review is denied. We therefore affirm the Bureau's Order of June 26, 2000 canceling Morning Star's Ka-band authorization.

#### V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, 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, Morning Star Satellite Company, L.L.C.'s July 26, 2000 Application for Review of the International Bureau's Order of June 26, 2000 that canceled Morning Star Satellite Company, L.L.C.'s Ka-band authorization, *Memorandum Opinion and Order*, DA 00-1265, 15 FCC Rcd 11350 (Int'l Bur. 2000), IS DENIED.

19. IT IS FURTHER ORDERED that the International Bureau is directed to consider Morning Star Satellite Company L.L.C.'s proposal for use of Ku-band frequencies and take any action consistent with the proper disposition of that proposal.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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and subject to availability in Region 3. In order to initiate this process, Morning Star must submit to the Bureau the information required in Appendix S4 of the Radio Regulations to modify the Region 1 List for the 30° E.L. location and the information to initiate the coordination process for the 107.5° E.L. location in Region 3. This, of course, is no guarantee that the modification will be possible or the location available. If Morning Star does not submit the information in 90 days, the Bureau may take appropriate action to dispose of the underlying application without prejudice.