

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

	)	File Nos.
In the Matter of	)	SAT-LOA-19970926-00151/52/53/54/56
	)	SAT-AMD-20001103-00154
Emergency Application for Review and	)	SAT-MOD-20020717-00116/17/18/19
Request for Stay of Globalstar, L.P.	)	SAT-MOD-20020722-00107/08/09/10/12
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 2, 2004**

**Released: June 24, 2004**

By the Commission: Commissioner Martin approving in part, concurring in part, and issuing a statement.

**I. INTRODUCTION**

1. In this Order, we deny the application for review filed by Globalstar, L.P. (Globalstar). Globalstar requests us to overturn the International Bureau (Bureau) Order declaring that its 2 GHz mobile satellite service (MSS) license had become null and void for failure to meet the first milestone deadline specified as a condition in that license.<sup>1</sup> By our action, we reaffirm our policies expediting provision of satellite service, by expediting our revocation of licenses held by applicants who have not constructed their satellites in a timely fashion.

**II. BACKGROUND**

**A. The Commission's Milestone Policy**

**1. Purpose**

2. It is longstanding Commission policy to impose milestones for satellite system implementation upon licensees.<sup>2</sup> Milestone schedules are designed to ensure that licensees are proceeding with

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<sup>1</sup> *Globalstar, L.P.*, Memorandum Opinion and Order, 18 FCC Rcd 1249 (Int'l Bur. 2003) (*Globalstar Milestone Order*).

<sup>2</sup> See, e.g., *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, Report and Order, 90 F.C.C.2d 676, 719 ¶ 114 (1982) (adopting rule requiring DBS licensees to "begin construction or complete contracting for construction" of satellites within one year after receiving construction permits), and *MCI Communications Corp.*, Memorandum Opinion and Order, 2 FCC Rcd 233, 233 ¶ 5 (Com. Car. Bur. 1987) (*MCI Order*) (noting that a milestone schedule is included in each domestic space station authorization issued by the Commission). See also *Norris Satellite Communications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 22299 (1997) (*Norris Review Order*); *Morning Star Satellite Company, L.L.C.*, Memorandum Opinion and Order, 15 FCC Rcd 11350 (Int'l Bur. 2000), *aff'd*, Memorandum Opinion and Order, 16 FCC Rcd 11550 (2001) (*Morning Star Reconsideration Order*).

construction and will launch their satellites in a timely manner, and that the orbit spectrum resource is not being held by licensees unable or unwilling to proceed with their plans.<sup>3</sup> Milestones ensure speedy delivery of service to the public and prevent warehousing of valuable orbit locations and spectrum, by requiring licensees to begin operation within a certain time.<sup>4</sup> 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.<sup>5</sup> Moreover, warehousing undercuts decisions by the Commission to allocate scarce spectrum resources to satellite services over other competing services. Consequently, to ensure that unused spectrum is reassigned as quickly as possible, the Commission has strictly enforced the construction commencement milestone.<sup>6</sup>

## 2. Milestone Framework

3. The Commission has required satellite licensees to adhere to milestone schedules for over two decades. For most of that time, the Commission has imposed three milestones for each space station or satellite system it has licensed. These milestones require that, within specified time periods, licensees must (1) begin construction – which the Commission has defined as entering into a non-contingent construction contract;<sup>7</sup> (2) complete construction; and (3) launch. As early as 1983, the Commission stated that including specified dates for each milestone as a condition of each license will "discourage warehousing" and noted that "delays in the commencement and completion of construction and launch activities beyond the specified dates will render the orbital assignment null and void."<sup>8</sup> The Commission noted, at that time, that the milestone dates it imposed were generally based upon the implementation schedule proposed in the license application for a particular satellite.<sup>9</sup> In 1985, the Commission stated,

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<sup>3</sup> See, e.g., *Advanced Communications Corporation*, Memorandum Opinion and Order, 10 FCC Rcd 13337, 13338 ¶ 4 (Int'l Bur. 1995) (*Advanced*), *aff'd*, Memorandum Opinion and Order, 11 FCC Rcd 3399 (1995) (*Advanced Review Order*), *aff'd*, *Advanced Communications Corporation v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996) (unpublished order available at 1996 WL 250460); *National Exchange Satellite, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 1990 (Com. Car. Bur. 1992) (*Nexsat Order*); *AMSC Subsidiary Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 4040, 4042 ¶ 13 (1993) (*AMSC Order*); *Motorola, Inc. and Teledesic LLC*, Memorandum Opinion and Order, 17 FCC Rcd 16543 (Int'l Bur. 2002) (*Motorola/Teledesic*).

<sup>4</sup> *2 GHz MSS Order*, 15 FCC Rcd at 16177 ¶ 106. See also *Columbia Communications Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 15566, 15571, ¶ 11 (Int'l Bur. 2000) (*First Columbia Milestone Order*).

<sup>5</sup> *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order, IB Docket No. 02-34, 18 FCC Rcd 10760, 10827 ¶ 173 (2003) (*First Space Station Reform Order*), citing *PanAmSat Ka-Band License Revocation Review Order*, 16 FCC Rcd at 11537-38 ¶ 12, citing *Nexsat Order*, 7 FCC Rcd at 1991 ¶ 8; *MCI Order*, 2 FCC Rcd at 233 ¶ 5; *First Columbia Milestone Order*, 15 FCC Rcd at 15571 ¶ 11.

<sup>6</sup> See *Columbia Communications Corporation, Application for Amendment to Pending Application to Extend Milestones*, Memorandum Opinion and Order, 15 FCC Rcd 16496, 16502 ¶ 16 (Int'l Bur., 2000) (*Second Columbia Milestone Order*); *AMSC Order*, 8 FCC Rcd at 4042 (para. 13); *Norris Review Order*, 12 FCC Rcd at 22306 (para. 17).

<sup>7</sup> See Section II.A.3., *infra*.

<sup>8</sup> *Licensing of Space Stations in the Domestic Fixed-Satellite Service*, Report and Order, CC Docket No. 81-704, 48 Fed. Reg. 40233 (1983) at para. 82.

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

however, that given the inherent uncertainty in long-term traffic projections and rapidly changing satellite technology, it would deny applications proposing to launch satellites more than five years after grant.<sup>10</sup>

4. In the last decade, the Commission has often imposed uniform schedules for each of the three milestones in each license granted in a processing round. For example, in granting the first licenses for constellations of non-geostationary satellite orbit (NGSO) satellites in 1991 for "Little LEO" systems, the Commission required all licensees to begin construction of the first two satellites in the constellation within one year of license grant, to begin construction of the remaining satellites within three years of grant, to complete construction of the first two satellites within four years of grant, and to have the entire system launched and in operation within six years of grant.<sup>11</sup> In other services, such as the Ka-band service, the Commission has based milestone dates on other considerations, such as the date by which the satellites must be "brought into use" under international Radio Regulations in order to protect their international filing priority status.<sup>12</sup>

5. In the *2 GHz Order* adopted in 2000, the Commission adopted two new milestones for 2 GHz mobile-satellite service systems.<sup>13</sup> It did so because of its concern that the often three-year gap between the commencing construction and completing construction milestones did not provide adequate assurance that licensees are taking sufficient steps toward system implementation.<sup>14</sup> Consequently, the Commission imposed two new milestones on 2 GHz licensees – Critical Design Review (CDR) and Commencement of Physical Construction – that would occur between the beginning construction and completing construction milestones.<sup>15</sup> For both 2 GHz geostationary-satellite orbit (GSO) and non-geostationary-satellite orbit (NGSO) licensees 2 GHz licensees, CDR must be completed within two years of grant.<sup>16</sup> Further, NGSO licensees must commence physical construction of the first two satellites in their systems within two-and-a-half years of licensing, while GSO licensees must commence physical construction within three years of licensing.<sup>17</sup>

6. In the *2003 First Space Station Reform Order*, the Commission extended the CDR and Commencement of Physical Construction milestones from 2 GHz licensees to all satellite licensees (except for Direct Broadcast Satellite systems and Digital Audio Radio Service systems) on a going-

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<sup>10</sup> *Licensing Space Stations in the Domestic Fixed-Satellite Service*, Report and Order, CC Docket No. 85-135, 50 Fed. Reg 36071 (1985) at para. 28 and n. 43.

<sup>11</sup> *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile-Satellite Service*, Report and Order, CC Docket No. 92-76, 8 FCC Rcd 8450, 8455 ¶ 18 (1993) (*Little LEO Order*).

<sup>12</sup> See, e.g., *VisionStar, Inc.*, Order and Authorization, 13 FCC Rcd 1428 (Int'l Bur. 1997).

<sup>13</sup> For a detailed discussion of these new milestone requirements, see *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz band*, Report and Order, IB Docket No. 99-81, 15 FCC Rcd 16127, 16177-78 ¶ 106 (2000) (*2 GHz MSS Order*).

<sup>14</sup> *2 GHz MSS Order*, 15 FCC Rcd at 16178-79 ¶ 108.

<sup>15</sup> *2 GHz MSS Order*, 15 FCC Rcd at 16177-78 ¶ 106.

<sup>16</sup> *2 GHz MSS Order*, 15 FCC Rcd at 16177-78 ¶ 106.

<sup>17</sup> *2 GHz MSS Order*, 15 FCC Rcd at 16177-78 ¶ 106.

forward basis.<sup>18</sup> It also codified uniform milestone dates for these satellites, requiring all licensees to enter into a binding non-contingent contract for the satellite or satellite system within one year of grant and to complete CDR within two years of grant.<sup>19</sup> GSO operators must begin physical construction of the satellite within three years of grant and must launch and operate the satellite within five years of grant.<sup>20</sup> NGSO operators must begin physical construction of the first satellite in the system within two and one-half years of grant, launch and operate the first satellite within three and one-half years of grant, and bring all the satellites in the licensed system into operation within six years of grant.<sup>21</sup>

### 3. "Beginning Construction" Milestone

7. The Commission has viewed the first milestone condition – the "beginning construction" or "contract" milestone – as especially important because it provides an early objective indication of whether a licensee is committed to proceeding with implementation of its proposal.<sup>22</sup> The Commission established the criteria for meeting this first milestone requirement in the *Tempo Order*. First, licensees must enter into a binding, non-contingent contract with a spacecraft manufacturer to construct the licensed satellite system.<sup>23</sup> Second, satellite construction contracts must describe the licensee's payment terms and schedule sufficiently to demonstrate the parties' investment and commitment to completion of the system.<sup>24</sup> In other words, the Commission established two general principles for milestone review in the *Tempo Order*: (1) the contract must be binding and non-contingent, and (2) the contract must demonstrate that the licensee is committed to completing the construction of the satellite system within the time frame specified in the license.<sup>25</sup>

8. Since the *Tempo Order*, the Bureau has correctly clarified that the first prong of this analysis, the "binding, non-contingent contract" requirement, requires that the contract identify specific satellites and their design characteristics, and specify dates for the start and completion of construction.<sup>26</sup> The Bureau also correctly found that there must be neither significant delays between the execution of the construction contract and the actual commencement of construction nor conditions precedent to construction.<sup>27</sup>

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<sup>18</sup> See *First Space Station Reform Order*, 18 FCC Rcd at 10827-28 ¶ 174.

<sup>19</sup> 47 C.F.R. § 25.164.

<sup>20</sup> 47 C.F.R. § 25.164.

<sup>21</sup> 47 C.F.R. § 25.164.

<sup>22</sup> See, e.g., *Motorola/Teledesic*, 17 FCC Rcd at 16547 ¶ 11.

<sup>23</sup> *Tempo Enterprises, Inc., et al.*, Memorandum Opinion and Order, 1 FCC Rcd 20, 21 ¶ 7 (1986) (*Tempo Order*). See also *MCI Order*, 2 FCC Rcd at 234 ¶ 10, *Nexsat Order*, 7 FCC Rcd at 1990 ¶¶ 3-4. See also Letter from Chief, Domestic Facilities Division, Common Carrier Bureau to Counsel, Hughes Communications Galaxy, Inc. (June 7, 1990) stating that "[r]equiring a non-contingent construction contract provides a uniform standard for all licensees and tangible evidence that implementation is proceeding."

<sup>24</sup> *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

<sup>25</sup> *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

<sup>26</sup> *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

<sup>27</sup> *Norris Satellite Communications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 22299, 22303-04 ¶ 9 (1997) (*Norris Review Order*), *PanAmSat Licensee Corp.*, Memorandum Opinion and Order, 15 FCC Rcd (continued....)

9. In order to meet the second prong of this analysis, the construction contract must set forth a specific construction schedule that is consistent with the licensee's milestones.<sup>28</sup> In particular, the contract must require the licensee to make significant initial payments and the majority of payments well before the end of the construction period.<sup>29</sup>

10. Under the two prong analysis for the first milestone, there is substantial FCC precedent that provides guidance to the Commission and licensees in making a determination as to whether a licensee<sup>30</sup> has met its first milestone. Specifically, in determining whether a satellite system construction contract demonstrates the requisite investment and commitment to meet the standards of the two-prong analysis, the Commission has generally considered several factors, including but not limited to the following: 1) it sets forth a specific construction schedule that is consistent with the licensee's milestone schedule and that does not unduly postpone commencement of construction work; 2) the licensee is required to make significant initial payments; 3) most of the consideration to be paid by the licensee under the contract will be due well before the end of the construction period; 4) the contract identifies specific satellites and their design characteristics, consistent with the license, in appropriate detail; and 5) obligations under the contract are not contingent upon future performance of an elective action by the licensee. During the milestone review process, if the individual case analysis does not demonstrate that the licensee has met these or related factors, the Commission, in the absence of some countervailing factor,<sup>31</sup> will find that the licensee has not met its first milestone commitment.

11. Bureau decisions have correctly followed this two-prong analysis in determining whether a licensee has met the first milestone. For example, in nullifying a license held by Norris Satellite Communications, Inc. in 1994 for failure to meet the first milestone, the International Bureau noted that while Norris had, in fact, "signed a construction contract with Harris Corporation, it failed to make the \$3

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18720 (Int'l Bur. 2000), *PanAmSat Licensee Corp. Application for Authority to Construct, Launch, and Operate a Ka-Band Communications Satellite System in the Fixed-Satellite Service at Orbital Locations 58° W.L. and 125° W.L.*, Memorandum Opinion and Order, 16 FCC Rcd 11534, 11539 (para. 16) (2001); *Mobile Communications Holdings, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 11898 (Int'l Bur. 2002), *aff'd* 18 FCC Rcd 11650 (2003).

<sup>28</sup> See *Morning Star Satellite Company, LLC*, Memorandum Opinion and Order, 15 FCC Rcd 11350, 11352 ¶ 6 (Int'l Bur., 2000), *aff'd in Morning Star Satellite Company, LLC*, Memorandum Opinion and Order, 16 FCC Rcd 11550 (Int'l Bur., 2001).

<sup>29</sup> *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

<sup>30</sup> In this Order, the term "license" is used to refer both to licenses issued pursuant to Section 301 of the Communications Act, 47 USC § 301, and to a spectrum reservation adopted pursuant to the Commission's procedures for considering letter of intent filings. See 47 CFR § 25.137; *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and International Service in the United States*, Report and Order, IB Docket No. 96-111, 12 FCC Rcd 24094, 24173-74 ¶ 185 (1997) (*DISCO II*).

<sup>31</sup> One example of a countervailing factor is a case in which the licensee committed to build its own satellite system rather than hiring an outside satellite manufacturer. In that case, the licensee submitted an "Inter-organizational Work Order" committing a subsidiary to build the satellite system, and allocating \$3 million to the project. The licensee also demonstrated that it had sufficient facilities to build a satellite system. See *The Boeing Company*, Order and Authorization, 18 FCC Rcd 12317, 12328-29 ¶¶ 30-31 (Int'l Bur. and OET, 2003) (listing factors that the Commission may consider in reviewing "in-house" satellite manufacturing arrangements).

million down payment necessary to render that contract non-contingent."<sup>32</sup> Thus, Norris's contract was not binding and non-contingent. Similarly, on several occasions, the Commission has found that satellite construction contracts that do not provide for completion of the satellite system within the milestone schedule in the license are not sufficient to meet the second prong of the standard set forth in the *Tempo Order*, that the licensee is committed to completing the construction of the satellite system within the time frame specified in the license.<sup>33</sup> Also, the Bureau has stated that contracts that unduly delay the commencement of satellite construction do not show that the licensee has sufficient commitment to proceed with construction of the satellite.<sup>34</sup> Moreover, the Commission has determined that a contract to use capacity on another satellite does not show that the licensee is committed to construct and operate a licensee's own satellite, and so cannot meet the *Tempo Order* standard.<sup>35</sup> Last, the Bureau held that a licensee had met its first milestone when its commonly-controlled sister corporation had entered into a non-contingent construction contract with a spacecraft manufacturer, where the contract provided for construction of a satellite with design characteristics fully consistent with those specified in the license.<sup>36</sup>

12. The Commission is not required to prescribe all-inclusive, specific, and detailed terms for contractual arrangements that meet the requirements of the contract execution milestone.<sup>37</sup> Such an intrusion into a licensee's business decisions is not necessary to determine whether it is sufficiently committed to constructing and launching a satellite system. In addition, we have never found it to be desirable or possible to try to anticipate and articulate every possible scenario that we might be asked to rule on in deciding compliance with our milestone requirements. Instead of adopting such detailed rules requiring or prohibiting certain contract provisions or types of arrangements, the Commission has adopted general standards. Under those standards, (1) the contract must be binding and non-contingent, and (2) the contract must demonstrate that the licensee is committed to completing the construction of the satellite system.<sup>38</sup> As a result, licensees have more flexibility to consider different construction and related financing arrangements, as long as they meet the general standards developed in the Commission's

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<sup>32</sup> *Norris Satellite Communications, Inc.*, Order, 11 FCC Rcd 5402, 5402 ¶ 4 (Int. Bur. 1996), *aff'd* 12 FCC Rcd 22299 (1997).

<sup>33</sup> See *Direct Broadcasting Satellite Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 7959, 7960 ¶6 (Mass Media Bur., Video Services Div. 1993) (a non-contingent contract must specify a construction timetable with "regular, specific" progress deadlines), quoting *United States Satellite Broadcasting Co., Inc. and Dominion Video Satellite, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 6858, 6861 ¶ 20 (1988) (*USSB/Dominion Order*); *Morning Star Satellite Co., LLC*, Memorandum Opinion and Order, 15 FCC Rcd 11350, 11352 ¶ 8 (Int'l Bur. 2001), *aff'd*. 16 FCC Rcd 11550 (2001) (contract found contingent in part because it did not specify a construction schedule), *EchoStar Satellite Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 12780, 12783 ¶7 (Int'l Bur. 2002).

<sup>34</sup> *EchoStar Satellite Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 12780, 12783 ¶ 7 (Int'l Bur., 2002).

<sup>35</sup> *Advanced Review Order*, 11 FCC Rcd at 3414 ¶ 39.

<sup>36</sup> *KaStarCom World Satellite, LLC*, Order and Authorization, 18 FCC Rcd 22337, 22339 n.16 (Int'l. Bur. 2003) (*KaStarCom Order*).

<sup>37</sup> *Lakeshore Broadcasting, Inc., v. FCC*, 199 F.3d 468 (D.C. Cir., 1999) (*Lakeshore*), *Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618 (D.C. Cir. 2000) (*Trinity*).

<sup>38</sup> *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

precedents.<sup>39</sup>

## B. 2 GHz Proceedings

13. In 2000, the Commission adopted the *2 GHz MSS Order*, establishing service rules for satellite licensees planning to operate in the 2 GHz band.<sup>40</sup> Following that Order, the Bureau and the Office of Engineering and Technology (OET) issued eight 2 GHz MSS authorizations, including Globalstar's license.<sup>41</sup> In the *Globalstar 2 GHz MSS Order*, Globalstar was authorized to construct, launch and operate a 2 GHz MSS system comprised of four geostationary satellite orbit (GSO) satellites and 64 non-geostationary satellite orbit (NGSO) satellites.<sup>42</sup> In addition, Globalstar's license, like all satellite licenses, required Globalstar to meet explicit deadlines, or "milestones." As the Commission explained in the *2 GHz MSS Order*, milestones are designed to ensure speedy delivery of service to the public and to prevent warehousing of valuable orbit locations and spectrum, by requiring licensees to begin operation within a certain time.<sup>43</sup> Globalstar's authorization clearly stated that the authorization would become null and void unless it entered into a non-contingent satellite manufacturing contract for its satellite system, as specified in the *2 GHz MSS Order*, by July 17, 2002.<sup>44</sup>

14. At the time of its first milestone, Globalstar submitted (1) a modification request, seeking authority to reduce the number of NGSO satellites in its system from 64 to 48,<sup>45</sup> and (2) a request to extend or waiver the later milestones for those 48 NGSO satellites, and three of its four licensed GSO satellites.<sup>46</sup> Specifically, Globalstar requested an extension of the milestone to launch its first two NGSO satellites from January 17, 2005 to April 17, 2007. It requested extension of the milestone to launch three of its GSO satellites from July 17, 2006 to January 17, 2009. Finally, it requested extension of the deadline to bring its entire system into operation from July 17, 2006 to July 17, 2009.<sup>47</sup> In other words, Globalstar stated that it intended to construct only one satellite in its system within its milestone deadlines. Globalstar also submitted a contract that it had entered into with Loral for construction of its 2 GHz MSS system, the terms of which conformed to the system architecture and build-out schedule in its

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<sup>39</sup> It is well established that administrative agencies may develop policy in either rulemaking or adjudicatory proceedings. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), *cited in* *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 351 n.4 (D.C. Cir. 1989); *SBC Communications, Inc. v. FCC*, 138 F.2d 410, 421 (D.C. Cir. 1998) (Commission is allowed to proceed in adjudications so that it can develop policy in small steps).

<sup>40</sup> *2 GHz Order*, 15 FCC Rcd at 16127.

<sup>41</sup> *Globalstar, L.P.*, Order and Authorization, 16 FCC Rcd 13739 (Int'l Bur. and OET, 2001) (*Globalstar 2 GHz MSS Order*).

<sup>42</sup> *See Globalstar 2 GHz MSS Order*, 16 FCC Rcd 13739.

<sup>43</sup> *2 GHz MSS Order*, 15 FCC Rcd at 16177 ¶ 106. *See also First Columbia Milestone Order*, 15 FCC Rcd at 15571 ¶ 11.

<sup>44</sup> *Globalstar 2 GHz MSS Order*, 16 FCC Rcd at 13753 ¶ 36, *citing 2 GHz MSS Order*, 15 FCC Rcd at 16177 ¶ 106.

<sup>45</sup> Application for Modification of License of Globalstar, L.P., File Nos. SAT-MOD-20020722-00107/08/09/10/12 (July 17, 2002) (*Globalstar 2 GHz MSS Modification Application*).

<sup>46</sup> File Nos. SAT-MOD-20020717-00116/17/18/19 (July 17, 2002). *See also* Public Notice, Report No. SAT-00115 (August 1, 2002).

<sup>47</sup> *Globalstar Milestone Order*, 18 FCC Rcd at 1250-51 ¶ 5.

license modification and milestone extension requests. In addition, Globalstar asked that, in the event the Commission did not grant the requested extension, Globalstar be given at least 90 days to negotiate a reformation of its executed satellite manufacturing contract with Loral.<sup>48</sup>

15. The Bureau declared Globalstar's 2 GHz MSS license null and void in its entirety in the *Globalstar Milestone Order*.<sup>49</sup> Significantly, the Bureau noted that Globalstar's contract with Loral provided for construction consistent with the revised implementation schedule proposed in Globalstar's request to extend its milestones, and concluded "the contract is inadequate to satisfy Globalstar's milestone for entering into a satellite manufacturing contract."<sup>50</sup> The Bureau also addressed Globalstar's milestone extension request and decided that each of the reasons Globalstar provided to support its request concerned business decisions Globalstar had made based on economic considerations that were in Globalstar's control, which under our precedent do not warrant an extension of milestones.<sup>51</sup> Accordingly, the Bureau denied Globalstar's waiver request, as well as Globalstar's alternate request for 90 days to reform its contract.<sup>52</sup>

16. In its Application for Review, Globalstar asserts that the Bureau applied a previously unannounced standard of milestone review, *i.e.*, whether the contract provides that future milestones will be met.<sup>53</sup> Globalstar argues that the Bureau should have found it in milestone compliance at least with respect to the single GSO satellite for which a milestone extension request was not pending and for which the construction contract indicated milestones would be met.<sup>54</sup> Globalstar also claims its status as debtor-in-possession under Chapter 11 of the U.S. Bankruptcy Code required the Bureau to give special consideration to its requests, and protects Globalstar's license from cancellation.<sup>55</sup> Finally, Globalstar argues that it should have been afforded an opportunity to cure the defects in its approach, *i.e.*, that it should have been allowed to modify its contract to conform system implementation to the milestones in the authorization, if that would have preserved its license.<sup>56</sup> The Wireless Carriers opposed Globalstar's Emergency Application for Review, and the Creditors supported it.<sup>57</sup> Globalstar and the Wireless

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<sup>48</sup> *Globalstar Milestone Order*, 18 FCC Rcd at 1250-51 ¶¶ 5-6.

<sup>49</sup> *Globalstar Milestone Order*, 18 FCC Rcd 1249.

<sup>50</sup> *Globalstar Milestone Order*, 18 FCC Rcd at 1255 ¶ 13.

<sup>51</sup> *Globalstar Milestone Order*, 18 FCC Rcd at 1252 ¶ 8, *citing Columbia Communications Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 16496, 16499 ¶ 10 (Int'l Bur. 2000) (desire to avoid increased costs in a business decision within the licensee's control does not justify a milestone extension); *American Telephone and Telegraph Company and Ford Aerospace Satellite Services Corporation*, Memorandum Opinion and Order, 2 FCC Rcd 4431, 4434 ¶ 26 (1987) (*AT&T/Ford Order*) (AT&T could not justify a milestone extension by asserting that delay might clarify certain launch and insurance issues and lower satellite construction costs). *See also MCI Order*, 2 FCC Rcd at 234 ¶ 7, *citing Rock City Broadcasting, Inc.*, 52 F.C.C.2d 1246, 1250 (1975); *Community Broadcasters of Cleveland, Inc.*, 58 F.C.C.2d 1296, 1300 (1976)).

<sup>52</sup> *Globalstar Milestone Order*, 18 FCC Rcd at 1254-55 ¶¶ 11-12.

<sup>53</sup> Globalstar Application for Review at 18-19.

<sup>54</sup> Globalstar Application for Review at 3-4.

<sup>55</sup> Globalstar Application for Review at 7-8, 11-12, 19-22.

<sup>56</sup> Globalstar Application for Review at 5.

<sup>57</sup> Opposition to Globalstar's Emergency Application for Review of AT&T Wireless Services, Inc., Verizon Wireless and Cingular Wireless LLC (March 18, 2003) (Wireless Carriers Comments); Comments in Support of Globalstar's Emergency Application for Review of the Official Creditors Committee of Globalstar, L.P. (March 18, 2003) (Creditors Comments).



Operators replied.<sup>58</sup> Globalstar also filed a request to stay the effect of the Bureau's decision.<sup>59</sup>

17. For the reasons discussed below, we find that Globalstar has not met the *Tempo Order* standards for determining whether a licensee's satellite construction contract is adequate. In particular, Globalstar did not show that it was committed to completing construction of its satellite system within the time frame specified in its license. Accordingly, we deny Globalstar's application for review.

### III. DISCUSSION

#### A. License Modification Request

18. *Background.* Globalstar asserts that there is nothing in the Commission's precedent that requires it to enter into a binding non-contingent contract to construct its licensed satellite system within its milestone deadlines.<sup>60</sup> Globalstar observes that it filed a binding, non-contingent satellite construction contract for all of its satellites within the first milestone deadline, and that it did not request extension of the first milestone. Rather, it requested extension of later milestones.<sup>61</sup> Globalstar also interprets the *Globalstar Milestone Order* as canceling its license because it requested a modification, and because its construction contract assumed that the modification would be granted. Globalstar further claims that this is inconsistent with the Bureau's treatment of other licensees.<sup>62</sup> Globalstar and the Creditors claim that requiring a contract that provides for constructing the entire satellite system in a timely manner is a new requirement without adequate notice.<sup>63</sup> Alternatively, Globalstar and the Creditors maintain that the Bureau provided adequate guidance on this issue only after Globalstar's license was canceled.<sup>64</sup>

19. *Discussion.* As an initial matter, Globalstar is mistaken in assuming that the Bureau cancelled its license because it filed a modification request.<sup>65</sup> The Bureau cancelled Globalstar's license because its construction contract did not show adequate intention to proceed with construction, and to

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<sup>58</sup> See Reply of Globalstar (March 28, 2003) (Globalstar Reply). Reply to Comments of AT&T Wireless Services, Inc., Verizon Wireless and Cingular Wireless LLC (March 28, 2003) (Wireless Carriers Reply). Also on file are several *ex parte* letters cited in this Order below.

<sup>59</sup> Request for Stay of Globalstar, L.P., File Nos. SAT-MOD-20020717-00116/17/18/19, SAT-MOD-20020722-00107/08/09/10/12 (Mar. 3, 2003).

<sup>60</sup> Globalstar Application for Review at 5, citing *Teledesic LLC*, Memorandum Opinion and Order, 17 FCC Rcd 11263 (Sat. Div., Int'l Bur. 2002) (*Teledesic*). See also Letter from William D. Wallace, counsel to Globalstar to Marlene H. Dortch, Secretary, FCC (Dec. 19, 2003) (Globalstar December 19 *ex parte* letter), Att. at 5.

<sup>61</sup> Globalstar Application for Review at 5-6.

<sup>62</sup> Globalstar Application for Review at 4.

<sup>63</sup> Globalstar Application for Review at 3-4; Creditors Comments at 5-11.

<sup>64</sup> See also Letter from William D. Wallace, counsel to Globalstar to Marlene H. Dortch, Secretary, FCC (Dec. 12, 2003) (Globalstar December 12 *ex parte* letter); Globalstar December 19 *ex parte* letter, Att. at 7.

<sup>65</sup> While Globalstar's modification request was not the reason its license was cancelled, we note that filing a modification request cannot *justify* a modification request. *AT&T/Ford Order*, 2 FCC Rcd at 4433-4 ¶ 21.

bring its satellite system into service within the milestone deadlines specified in the license.<sup>66</sup> Globalstar is also mistaken in claiming that *Teledesic* is inconsistent with the *Globalstar Milestone Order*, because Teledesic did not request milestone extensions together with its modification request that would result in delaying bringing any part of its satellite system into use.<sup>67</sup> Alternatively, Globalstar's contract was *not* in keeping with the milestones in its license, and *would* delay bringing part of its system into use.

20. More importantly, Globalstar incorrectly assumes that Commission precedent allows a licensee to meet its contract execution milestone with a contract in which the licensee does not commit to launching the satellite system within the launch deadlines. Since the *Tempo Order*, the second prong of the Commission's two-prong test has required licensees to demonstrate adequate commitment and investment intent to complete construction of its satellite system within the time frame specified in the license. In that Order, the Commission clarified that "such submissions will not be considered adequate unless they include regular[,] specific construction progress milestones in the construction timetable," and "[t]his will provide greater accuracy in any early Commission assessment of whether a DBS permittee . . . will be able to construct and operate *within the period specified in its construction permit*."<sup>68</sup> As early as 1986, the Commission indicated that the satellite manufacturing contract must identify "specific satellites and their design characteristics" and specify the "dates for the start and completion of construction."<sup>69</sup> In addition, the Commission has explained that, given the rapid growth of technology, it will not authorize satellites that will not be constructed or launched until more than five years after grant.<sup>70</sup> It would severely undercut the policies underlying milestones if the Commission allowed licensees to meet their first milestone with a contract for a satellite system that will be launched more than five years after grant. We recently reiterated this long-standing doctrine in the *MCHI Big LEO Review Order*: "To hold that a licensee can satisfy a construction-commencement requirement by entering into an agreement that does not obligate the contractor to finish building its satellites before the milestone deadline for placing them into operation would, as the Bureau rightly observed, disserve the purposes of the milestone policy."<sup>71</sup>

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<sup>66</sup> See *Tempo Order*, 1 FCC Rcd at 21 ¶ 7 (describing sufficient construction contract as one that provides "the major milestones in the construction schedule, and with the payment schedules, establish the certainty of the plan *and the reasonableness of its projection for timely completion*") (*emphasis added*). Thus, the Commission in the *Tempo Order* found that a satellite construction contract that does not provide for bringing the system into use within the milestone is not sufficient to meet the first milestone.

<sup>67</sup> In the *Teledesic Order*, the Bureau approved of a contract that was not for the authorized system, but otherwise was "in keeping with the Commission's milestones." *Teledesic*, 17 FCC Rcd at 11266 ¶ 11.

<sup>68</sup> *United States Satellite Broadcasting Company, Inc. and Dominion Video Satellite, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 6858, 6861 ¶ 20 (1988) (*USSB/Dominion Order*) (*emphasis added*), *overruled in part on other grounds*, Constellation Communications Holdings, Inc., Memorandum Opinion and Order, 18 FCC Rcd 18822, 18828 ¶ 16 (2003) (*Constellation Big LEO Reconsideration Order*). Specifically, the *Constellation Big LEO Reconsideration Order* overruled the *USSB/Dominion Order* only to the extent that it could be read to stand for the proposition that rapid changes in technology or disappointing financial results could justify a milestone waiver. <sup>69</sup> *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

<sup>70</sup> *AT&T/Ford Order*, 2 FCC Rcd at 4432 ¶ 12. The Commission adopted this policy for GSO satellites. For NGSO satellites, the Commission now requires licensees to launch their first two satellites within 3.5 years of grant, and to bring the entire system into operation within 6 years of grant. *2 GHz MSS Order*, 15 FCC Rcd at 16177-78 ¶ 106.

<sup>71</sup> *MCHI Big LEO Review Order*, 18 FCC Rcd at 11656 ¶ 19 (footnotes omitted).

21. We disagree with Globalstar that the Commission's precedents do not provide adequate notice that licensees must enter into a satellite construction contract that will enable the licensee to start providing service within the schedule set forth in the license. The Court set forth the standard for determining whether regulated parties have adequate notice of the requirements placed on them in the *Lakeshore* and *Trinity* cases.<sup>72</sup> In *Lakeshore*, the Court found that, while parties need "full and explicit notice of all prerequisites,"<sup>73</sup> the Commission need not have "made the clearest possible articulation." "[I]t is enough if, based on a 'fair reading' of the rule, applicants knew or should have known what the Commission expected of them."<sup>74</sup> Similarly, in *Trinity*, the Court explained that "[w]e thus ask whether 'by reviewing the regulations and other public statements by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform...'"<sup>75</sup> The Orders cited above explain the requirement in sufficient detail to satisfy *Lakeshore* and *Trinity*. Specifically, Globalstar knew or should have known that a satellite construction contract would not meet the *Tempo Order* standards if it did not provide for completing construction of Globalstar's entire satellite system within the milestones set forth in Globalstar's license.<sup>76</sup>

22. Finally, Globalstar is mistaken in claiming that the Bureau first concluded that a contract that does not provide for completion of the licensed satellite system within the milestone schedule does not satisfy the contract milestone in the *Boeing Modification Order*, after the Bureau cancelled Globalstar's license.<sup>77</sup> In fact, the Bureau's *MCHI Big LEO Reconsideration Order*, released a few weeks prior to the milestone deadline, indicated, "the execution of a contract that does not provide for complete construction of the satellites in question by a specified date consistent with the licensee's milestone deadline for making its system fully operational cannot satisfy a construction-commencement requirement."<sup>78</sup> The Bureau cited to the *MCHI Big LEO Reconsideration Order* in the *Globalstar Milestone Order*.<sup>79</sup> None of Globalstar's pleadings in this application for review proceeding discuss the Bureau's holding in the *MCHI Big LEO Reconsideration Order*. Again, this Order, in addition to the Orders cited above, gave Globalstar sufficient notice of this requirement.

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<sup>72</sup> *Lakeshore*, 199 F.3d 468; *Trinity*, 211 F.3d 618.

<sup>73</sup> *Lakeshore*, 199 F.3d at 475, citing *Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985); *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993) (*McElroy*).

<sup>74</sup> *Lakeshore*, 199 F.3d at 475, citing *McElroy*, 990 F.2d at 1358.

<sup>75</sup> *Trinity*, 211 F.3d at 628, quoting *GE v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (*emphasis added*).

<sup>76</sup> *Direct Broadcasting Satellite Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 7959, 7960 ¶6 (Mass Media Bur., Video Services Div. 1993) (a non-contingent contract must specify a construction timetable with "regular, specific" progress deadlines), quoting *United States Satellite Broadcasting Co., Inc. and Dominion Video Satellite, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 6858, 6861 ¶ 20 (1988) (*USSB/Dominion Order*); *Morning Star Satellite Co., LLC*, Memorandum Opinion and Order, 15 FCC Rcd 11350, 11352 ¶ 8 (Int'l Bur. 2001), *aff'd*, 16 FCC Rcd 11550 (2001) (contract found contingent in part because it did not specify a construction schedule), *EchoStar Satellite Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 12780, 12783 ¶7 (Int'l Bur. 2002).

<sup>77</sup> Letter from William D. Wallace, counsel to Globalstar to Marlene H. Dortch, Secretary, FCC (July 14, 2003) (Globalstar July 14 *ex parte* letter).

<sup>78</sup> *MCHI Big LEO Reconsideration Order*, 17 FCC Rcd at 11901 ¶ 11.

<sup>79</sup> *Globalstar Milestone Order*, 18 FCC Rcd at 1251 n.13.

## B. Meeting Milestone Requirements with Respect to Partial Satellite Systems

23. *Background.* Globalstar maintains that the Bureau erred in canceling its license with respect to the one satellite for which it did not seek a milestone extension.<sup>80</sup> Globalstar notes that it paid separate license application fees for each of the four GSO satellites and the NGSO satellite system.<sup>81</sup> Globalstar also notes that other 2 GHz MSS licensees were authorized to operate one GSO-satellite systems, and asserts that it was penalized for proposing a more complex system.<sup>82</sup>

24. *Discussion.* Globalstar has never before claimed that the parts of its hybrid system were severable. Rather, in its Modification Application, Globalstar maintained that the system was an integrated set of NGSO and GSO satellites designed "to provide worldwide voice and data communications for mobile, portable and fixed user terminals."<sup>83</sup> Our reading of Globalstar's construction contract with Loral matches this description, as the GSO spacecraft in the contract does not appear to be a stand-alone satellite network, and there is no indication that the NGSO and GSO spacecraft are being handled separately.<sup>84</sup> Furthermore, the record before us shows that Globalstar "did not ask and is not asking to downsize its system" to one GSO.<sup>85</sup> In light of Globalstar's representations, we affirm the Bureau's decision to treat Globalstar's satellite system as an integrated system, rather than five stand-alone systems. Accordingly, we also affirm the Bureau's conclusion that Globalstar's contract was not sufficient to meet the first milestone, because Globalstar did not make a binding, non-contingent commitment to build its integrated satellite system within the time period specified in its license.

25. Globalstar's comparisons to Celsat's and Boeing's GSO-only contracts are unpersuasive. The Bureau did not declare that Globalstar's license had become null and void because Globalstar asked to reduce its system to one GSO satellite, nor did the Bureau interpret Globalstar's modification application as seeking to reduce its satellite system to one GSO satellite. Nor is Globalstar being "penalized for contracting to construct a more complex system."<sup>86</sup> Rather, as explained above, the Bureau simply applied our precedent and determined that, by not contracting to construct its integrated satellite system within the timeframe required by its license, Globalstar did not comply with the first milestone.

26. For almost 20 years, the Commission has enforced system implementation milestones because it is in the public interest to ensure that licensees proceed expeditiously to complete construction

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<sup>80</sup> Globalstar Application for Review at 3-4.

<sup>81</sup> Globalstar Application for Review at 3.

<sup>82</sup> Globalstar Application for Review at 4, *citing Celsat*, Order and Authorization, 16 FCC Rcd 13712 (Int'l Bur. 2001); *Boeing*, Order and Authorization, 16 FCC Rcd at 13961 (Int'l Bur. 2001). *See also* Creditors Comments at 16-18.

<sup>83</sup> Globalstar 2 GHz MSS Modification Application at 1 (referring to the 2 GHz MSS system as one system comprised of NGSO and GSO satellites). Indeed, Globalstar refers to one "authorized system" throughout the document.

<sup>84</sup> Contract between Globalstar L.P. and Space Systems/Loral for the Globalstar 2nd Generation Satellite Program (July 17, 2002), subject in part to a request for confidential treatment.

<sup>85</sup> Globalstar Reply at 4.

<sup>86</sup> Globalstar Application for Review at 4.

of their *full systems*.<sup>87</sup> Since that time, the Commission has explained more than once that allowing licensees to delay implementation of service is warehousing, and is contrary to the public interest because it could block other applicants willing and able to provide service from doing so.<sup>88</sup> In essence, Globalstar argues that, if it brings its service into use in the United States in a timely manner, it should be allowed to delay service in other parts of the world.<sup>89</sup> This is not persuasive.

### C. Request for Milestone Extension or Waiver

27. *Background.* Globalstar claims that the Bureau was mistaken in considering its voluntary bankruptcy under Chapter 11 as a business decision within the control of the licensee.<sup>90</sup> Globalstar further asserts that, because of the "business decisions" standard for milestone extensions, the Bureau did not place adequate weight on Globalstar's claims of "special circumstances" that warrant a waiver of the milestone requirements.<sup>91</sup> Globalstar contends that granting a waiver based on its bankruptcy would not undermine the purposes of milestone requirements.<sup>92</sup> Globalstar maintains that the Bureau did not consider its claim that a waiver would further the public interest by allowing Globalstar to provide service to the public.<sup>93</sup> According to Globalstar, the Bureau did not place adequate weight on Globalstar's showing of its intent to proceed.<sup>94</sup> The Creditors assert that a waiver is warranted because Globalstar does not plan to warehouse spectrum in North America.<sup>95</sup>

28. *Discussion.* As an initial matter, we considered and rejected an argument that entering into voluntary bankruptcy warrants a milestone extension, in the *Geostar Order*.<sup>96</sup> In that Order, Geostar requested extension of its construction completion and launch milestones for two of the three satellites in its radiodetermination satellite service (RDSS) network. The Common Carrier Bureau placed no weight

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<sup>87</sup> *Policies and Procedures for the Licensing of Space and Earth Stations in the Radiodetermination Satellite Service*, Second Report and Order, 104 F.C.C.2d 650, 665 ¶ 25 (1986) (*Radiodetermination Satellite Service Rules Order*) (*emphasis added*). See also *Advanced Communications Corporation*, Memorandum Opinion and Order, 10 FCC Rcd 13337, 13338 ¶ 5 (Int'l Bur. 1995).

<sup>88</sup> *Geostar Order*, 6 FCC Rcd at 2279 ¶¶ 25-26.

<sup>89</sup> Globalstar Application for Review at 3-4.

<sup>90</sup> Globalstar Application for Review at 11-12. Globalstar December 19 *ex parte* letter, Att. at 8.

<sup>91</sup> Globalstar Application for Review at 8-10. See also Creditors Comments at 13-14; Globalstar December 19 *ex parte* letter, Att. at 9.

<sup>92</sup> Globalstar Application for Review at 12-14.

<sup>93</sup> Globalstar Application for Review at 14-15. See also Creditors Comments at 15-16; Globalstar December 19 *ex parte* letter, Att. at 11.

<sup>94</sup> Globalstar Application for Review at 15-16.

<sup>95</sup> Creditors Comments at 14-15.

<sup>96</sup> *Geostar Positioning Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 2276 (Com. Car. Bur., 1991) (*Geostar Order*).

on Geostar's voluntary bankruptcy, and rejected Geostar's request.<sup>97</sup> We see no reason to depart from that precedent here.

29. We also reject Globalstar's contentions that it faced special circumstances that warrant waiver of its milestone requirements. First, Globalstar claims that "[i]t was not predictable that its financial restructuring and Chapter 11 bankruptcy would be so prolonged a process."<sup>98</sup> Although Globalstar may or may not have predicted the length of the bankruptcy process, the decision to go into voluntary bankruptcy is by definition within the control of the licensee, and waiving a milestone on this basis could create an incentive for licensees to declare Chapter 11 bankruptcy merely to delay implementation of its satellite system.<sup>99</sup>

30. Globalstar also asserts that a milestone waiver is warranted because it could not have predicted that the business for MSS would have been so depressed for so long a period.<sup>100</sup> Milestone compliance, like any licensee responsibility, is not excused merely because of poor market conditions. In industries characterized by uncertain market conditions, such as satellite communications, this reason justify delays in the implementation of virtually all licensed systems, and acceptance of such reasons by themselves would undermine the objective for our milestone policy.<sup>101</sup>

31. Finally, we are not convinced by Globalstar's claims that a milestone waiver was warranted to enable it to provide service to public, or by its statements of its intent to proceed. Given that Globalstar has entered into bankruptcy, we have questions regarding whether Globalstar has the financial ability to proceed with its business plan. Moreover, based on Globalstar's stated difficulties in constructing its entire system,<sup>102</sup> and its lack of any statement that it was willing to proceed with a system modified to a

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<sup>97</sup> *Geostar Order*, 6 FCC Rcd at 2279 ¶ 24. See also *Final Analysis Communications Services, Inc.*, Memorandum Opinion and Order, DA 04-727 (Int'l Bur., released Mar. 17, 2004) (*Final Analysis Order*) (rejecting *involuntary* bankruptcy as a justification for a milestone extension). In the *Final Analysis Order*, the International Bureau (Bureau) cited the *Globalstar Milestone Order* as a proceeding in which a licensee's bankruptcy proceeding was not relevant to the Bureau's milestone review. *Final Analysis Order* at para. 21. Afterwards, Globalstar asserted that the *Final Analysis Order* misinterpreted the *Globalstar Milestone Order* as stating that Globalstar relied on its bankruptcy proceeding as a justification for a milestone extension request. Letter from William D. Wallace, Counsel for Globalstar, to Marlene H. Dortch, Secretary, FCC (dated Mar. 30, 2004). Globalstar is correct that the Bureau did not discuss Globalstar's bankruptcy proceeding in any way in the *Globalstar Milestone Order*, but that observation does not affect any of the conclusion we reach in this Order.

<sup>98</sup> Globalstar Application for Review at 7-8.

<sup>99</sup> See *Geostar Order*, 6 FCC Rcd at 2279 ¶ 25 (waiving milestones for licensees that have trouble obtaining adequate financing may result in warehousing); *First Columbia Milestone Order*, 15 FCC Rcd at 15571-72 (para. 12) (denying milestone waiver request based on factors within the licensee's control).

<sup>100</sup> Globalstar Application for Review at 7-8. See also *id.* at 11 ("the Commission's rules clearly must consider the impact of the application of a general rule to a licensee operating as a debtor-in-possession and attempting to reorganize its business.").

<sup>101</sup> *Constellation Big LEO Reconsideration Order*, 18 FCC Rcd at 18828 ¶ 16. See also *Advanced Review Order*, 11 FCC Rcd at 3409 ¶ 22 (observing that uncertainties in or miscalculations of the business climate are risks that each licensee must bear alone); *USSB/Dominion Order*, 3 FCC Rcd at 6859 ¶ 11 (An unfavorable business climate in general [has] never been [an] adequate excuse for failure to meet a satellite construction timetable), citing *MCI Order*, 2 FCC Rcd 233; *AT&T/Ford Order*, 2 FCC Rcd 4431.

<sup>102</sup> In recounting the reasons it gave to the Bureau to justify modification on the milestone schedule, Globalstar states: (1) "[Globalstar] does not anticipate a need for substantial additional MSS capacity by the full (continued....)

single satellite, we also question whether Globalstar in fact intended to construct the entire 2 GHz MSS system it proposed in its original license application or its 2002 modification application. These questions preclude us from basing a milestone waiver on Globalstar's assertions of its intent to proceed with its satellite system and to provide service.

#### D. Bankruptcy Considerations

32. *Background.* Globalstar argues that the Bureau's cancellation of its 2 GHz MSS authorization is precluded by the automatic stay provision in Section 362(a) of the Bankruptcy Code.<sup>103</sup> Citing the Supreme Court's decision in *FCC v. NextWave*,<sup>104</sup> Globalstar broadly claims that "the Bankruptcy Code, where its provisions are applicable, trumps the Commission's policies and decisions when those policies and decisions would deny a debtor-in-possession rights provided to it by the plain terms of the Bankruptcy Code."<sup>105</sup>

33. *Discussion.* Globalstar's argument is misplaced. *FCC v. NextWave* involved Section 525 of the Bankruptcy Code,<sup>106</sup> in which Congress trumped a government agency's regulatory licensing powers in specific narrow conditions (such as where the license is revoked for non-payment of a debt that is dischargeable in the bankruptcy case). *FCC v. NextWave* does not support a wholesale bankruptcy exception to otherwise enforceable regulatory requirements, apart from the specific congressionally-mandated exception.<sup>107</sup> Here, there is no debt at issue, only the even-handed enforcement of the Commission's construction milestones to all similarly-situated licensees. Despite Globalstar's arguments to the contrary,<sup>108</sup> nullifying a license for having missed construction milestones falls within the Section 362(b)(4) regulatory exception to the automatic stay,<sup>109</sup> because the Commission is acting in a regulatory

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system operational date established in the Order."; (2) "Globalstar's original business plan relied on the first generation satellite system to generate the bulk of the revenues to fund the second-generation system. Due to the depressed MSS business, however, those revenues will not be available in the near future."; and (3) "[Globalstar] filed for Chapter 11 reorganization . . . . [Globalstar]'s spending profile for the 2 GHz system had to balance the financial requirements of the system with [Globalstar]'s fiduciary obligations as a debtor-in-possession to preserve its assets for the benefit of its creditors."). Globalstar Application for Review at 2.

<sup>103</sup> Globalstar Application for Review at 20-21, *citing* 11 U.S.C. § 362(a)(1) (bankruptcy petition operates as a stay of the "commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title"). *See also* Globalstar December 19 *ex parte* letter, Att. at 10.

<sup>104</sup> *F.C.C. v. NextWave Personal Communications Inc.*, 537 U.S. 293, 123 S. Ct. 832 (2003) (*FCC v. NextWave*).

<sup>105</sup> Globalstar Application for Review at 19-22.

<sup>106</sup> 11 U.S.C. § 525(a).

<sup>107</sup> Indeed, the *FCC v. NextWave* decision took pains to point out that: "[t]he government *may* take action that is otherwise forbidden [under 11 U.S.C. § 525] when the debt in question is one of the disfavored class that is non-dischargeable." 123 S. Ct. at 841 (emphasis in original).

<sup>108</sup> Globalstar Application for Review at 20-21.

<sup>109</sup> 11 U.S.C. § 362(b)(4) (bankruptcy petition does not operate as a stay of the "commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's ... regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's ... regulatory power").

capacity.<sup>110</sup> The Commission has not taken action that discriminates against a licensee simply because it is in bankruptcy or associated with a firm in bankruptcy, and nothing in the Bankruptcy Code prevented Globalstar from complying with the regulatory construction milestones other than its sole business discretion. The Bureau's consistent application of its construction milestone policy is thus not barred by the Bankruptcy Code or the Supreme Court's *FCC v. NextWave* holding.

### E. Opportunity to "Cure" Contract

34. Globalstar alleges that the Bureau was obligated to give Globalstar 90 days to conform its contract to the requirements of the Commission's milestone policy.<sup>111</sup> Globalstar's alternative argument is unavailing. Although Globalstar submitted a contract on time for meeting the milestone, the terms of the contract were insufficient to meet the milestone – clearly not a reason to grant an opportunity to cure. Globalstar does not cite any precedent where we gave extra time for contract reformation before enforcing a milestone. Furthermore, adopting Globalstar's theory could enable a licensee to warehouse spectrum indefinitely simply by filing inadequate satellite construction contracts every 90 days. The Bureau has previously explained why warehousing is contrary to the public interest.<sup>112</sup>

35. Globalstar's reliance on *NetSat 28* and the *EchoStar Due Diligence Order* is misplaced.<sup>113</sup> Those cases arose out of regulatory uncertainty or lack of clarity, where contracts were not signed on time, and so out of fairness, the Commission gave licensees more time to enter into a contract.<sup>114</sup> That is not the case here. The Commission made it abundantly clear in the *2 GHz MSS Notice*, *2 GHz MSS Report and Order*, the *Globalstar 2 GHz MSS Order*, and in the *AWS Further Notice* what the milestones were, and that these milestones would be strictly enforced.<sup>115</sup> Indeed, the Commission adopted the

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<sup>110</sup> See *In re F.C.C.*, 217 F.3d 125, 138 n.8 (2d Cir.), cert. denied sub nom., *NextWave Personal Communications, Inc. v. FCC*, 531 U.S. 1029 (2000) ("we hold that the FCC's regulatory decisions fall within § 362(b)(4)"). Cf. *Bell Atlantic-Delaware, Inc. et al. v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 15918, n.3 (2002) (Commission acts in a regulatory capacity when it is interpreting the statutory duties and obligations of a regulated entity).

<sup>111</sup> Globalstar Application for Review at 18-19. See also Globalstar December 19 *ex parte* letter, Att. at 6.

<sup>112</sup> *First Columbia Milestone Order*, 15 FCC Rcd at 15571-72 ¶ 12.

<sup>113</sup> Globalstar Application for Review at 6, citing *NetSat 28 Company L.L.C.*, Memorandum Opinion and Order, 16 FCC Rcd 11025 (Int'l Bur. 2001), recon. pending.; *EchoStar Satellite Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1765 (1992) (*EchoStar Due Diligence Order*).

<sup>114</sup> In *NetSat 28*, 16 FCC Rcd at 11028-29 ¶¶ 8-9, the Bureau held that a waiver of the licensee's construction timetable was equitably justified because the licensee had been materially hindered from meeting its milestone requirements by an erroneously-imposed license condition. In the *EchoStar Due Diligence Order*, 7 FCC Rcd at 1771 ¶¶ 27-29, the Commission granted EchoStar three months to enter into a contract for the western orbital position because EchoStar had demonstrated due diligence for its eastern satellite within the specified one-year period, and had submitted within the specified one-year period its argument that perceived regulatory uncertainty arising from a pending rulemaking prevented completing contracting for the western position.

<sup>115</sup> *The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Notice of Proposed Rulemaking, IB Docket No. 99-81, 14 FCC Rcd 4843 (1999) (*2 GHz MSS Notice*); *2 GHz MSS Order*, 15 FCC Rcd at 16177 ¶ 106; *Globalstar 2 GHz MSS Order*, 16 FCC Rcd at 13753 ¶ 36; *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00- (continued....)



milestones along the lines Globalstar suggested in its comments.<sup>116</sup> As the Bureau correctly indicated, granting this request would be tantamount to granting any licensee that seeks a milestone extension an interim extension until 90 days after the Commission acts on its extension request.<sup>117</sup> Such a result is not consistent with the milestone scheme contemplated by our rules.<sup>118</sup>

## F. Hearing Requirement

36. Globalstar argues that the Bureau violated Section 312(c) of the Communications Act by depriving it of an opportunity for a hearing prior to finding its authorization null and void.<sup>119</sup> Section 312(c) provides that "[b]efore revoking a [station] license or [construction] permit pursuant to subsection (a), ... the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation . . . should not be issued."<sup>120</sup> Failure to timely construct facilities is not one of the enumerated reasons for which the Commission may revoke a license or permit pursuant to Section 312(a).<sup>121</sup> Thus, Section 312(c) is not triggered by the Bureau's actions. Moreover, Globalstar

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258, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 16043, 16056 ¶ 28 (2001) (*AWS Further Notice*).

<sup>116</sup> *2 GHz MSS Report and Order*, 15 FCC Rcd at 16178-79 ¶¶ 108-109. In its Comments and Reply Comments to the *2 GHz MSS Notice*, Globalstar supported strict enforcement of 2 GHz MSS milestones no less than nine times: "the Commission should adopt and enforce stringent implementation milestones for [2 GHz MSS] systems to guard against spectrum warehousing and 'paper' systems." Comments of Globalstar, L.P., IB Docket No. 99-81, at i-ii (June 24, 1999). "Stringent implementation milestones should be adopted for 2 GHz MSS systems. . . . Only by monitoring progress closely can the Commission be assured that licensees move forward with implementing a system to use spectrum to serve the public." *Id.* at iii-iv. "If the Commission's goal is to identify systems that ultimately will provide service to the public, the Commission should enforce stringent implementation milestones that require systems to build without delay . . . ." *Id.* at 8. "The Commission should adopt and strictly enforce detailed milestone requirements." *Id.* at 35. "If the Commission is serious about compelling satellite licensees to move forward with construction and launch, then it must establish milestones that will force operators to demonstrate real progress. Otherwise, the Commission does not have the means to identify failing systems until their lack of progress threatens to disrupt the licensing scheme and coordination requirements for the service." *Id.* at 39. "Milestones serve the public interest by helping to conserve spectrum resources and to promote the rapid deployment of licensed 2 GHz MSS systems. However, these milestones will achieve none of their purpose unless they are strictly enforced." *Id.* at 39. "There are many reasons why an operator cannot meet milestones, and the Commission should certainly consider those reasons in deciding whether a requested extension is warranted. But . . . [s]ignificant delay should still result in loss of license so that the spectrum can be fully utilized for the benefit of the public by other systems." *Id.* at 39-40. "[T]he Commission can avoid the adverse effects from not adopting a financial standard by imposing and enforcing stringent milestones." Reply Comments of Globalstar, L.P., IB Docket No. 99-81, at 19 (July 26, 1999). "Like Globalstar, most applicants supported the adoption of strict implementation milestones for 2 GHz MSS licensees." *Id.* at 22.

<sup>117</sup> *Globalstar Milestone Order*, 18 FCC Rcd at 1254 ¶ 12.

<sup>118</sup> *See, e.g.*, 47 C.F.R. § 25.161(a) (which provides, *inter alia*, that an authorization remains valid if an extension of time to meet a milestone has been filed with the Commission but has not been acted on).

<sup>119</sup> Globalstar Application for Review at 4 n.2, 5 n.10.

<sup>120</sup> 47 U.S.C. § 312(c).

<sup>121</sup> *Compare* 47 U.S.C. § 312(a) (listing seven bases for license or permit revocation) *with* 47 U.S.C. § 319(b) ("permits for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified"). For more on the Commission's policy incorporating space station construction permit authority into the launch and operation authority, see *Streamlining the* (continued....)

accepted its license as conditioned,<sup>122</sup> and was therefore on notice that failure to meet those conditions would result in nullification of the license.<sup>123</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

37. Based on the foregoing, we affirm the Bureau's decisions. We therefore deny Globalstar's Emergency Application for Review. Consequently, we dismiss as moot Globalstar's Emergency Request for Stay.

38. Accordingly, IT IS ORDERED that the Emergency Application for Review filed on March 3, 2003 by Globalstar, L.P., File Nos. SAT-LOA-19970926-00151/52/53/54/56, SAT-AMD-20001103-00154, SAT-MOD-20020717-00116/17/18/19, SAT-MOD-20020722-00107/08/09/10/12 IS DENIED.

39. IT IS FURTHER ORDERED that the Request for Stay filed on March 3, 2003 by Globalstar, L.P., File Nos. SAT-LOA-19970926-00151/52/53/54/56, SAT-AMD-20001103-00154, SAT-MOD-20020717-00116/17/18/19, SAT-MOD-20020722-00107/08/09/10/12 IS DISMISSED AS MOOT.

40. This *Memorandum Opinion and Order* is issued pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5) and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

(Continued from previous page) \_\_\_\_\_

*Commission's Rules and Regulations for Satellite Application and Licensing Procedures*, IB Docket No. 95-117, Report and Order, 11 FCC Rcd 21581, 21584-85 ¶ 8 (1996) (waiving construction permit requirement for space stations will accelerate the provision of satellite-delivered services, and eliminate administrative burdens and potential delays). *See also 2 GHz MSS Report and Order*, 15 FCC Rcd at 16179-80 ¶ 111 (applying this policy to 2 GHz MSS).

<sup>122</sup> The authorizations included an ordering clause stating the licensee "may decline this authorization as conditioned within 30 days of the date of the release of this *Order and Authorization*. Failure to respond within this period will constitute formal acceptance of the authorization as conditioned." *See Globalstar 2 GHz MSS Order*, 16 FCC Rcd at 13760 ¶ 63.

<sup>123</sup> *See, e.g., P&R Temmer v. FCC*, 743 F.2d at 928 ("An FCC licensee takes its license subject to the conditions imposed on its use. . . . Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations."); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 740 (D.C.Cir.1974) ("When an applicant accepts a government permit which is subject to certain conditions, he cannot later assert alleged rights which the permit required him to surrender in order to receive it.").

**CONSOLIDATED SEPARATE STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN, CONCURRING IN PART**

*Re: Joint Application for Review of Constellation Communications Holdings, Inc., Mobile Communications, Inc. and ICO Global Communications (Holdings) Limited, Memorandum Opinion and Order, File Nos. SAT-T/C-20020718-00114 et al.;*  
*Emergency Application for Stay of Globalstar, L.P., Memorandum Opinion and Order, File Nos. SAT-LOA-19970926-00151/52/53/54/56 et al.;*

While I do not take issue with these Orders' interpretation of the "non-contingent satellite manufacturing contract" milestone, I question the usefulness of our approach. With respect to Globalstar, we take away its license because Globalstar's manufacturing contract would not have provided for completion of construction of Globalstar's originally proposed system within Globalstar's original construction milestones. But Globalstar sought modification of its system and extension of the construction milestones. Globalstar specifically sought an opportunity to cure its satellite manufacturing contract to conform to the original requirements should its modification and extension requests be denied. In light of these facts, I think Globalstar could rather easily have entered into the requisite contract in order to meet the first milestone and preserve its license. Whether Globalstar could have ultimately lived with such a contract is a harder question, but Globalstar would have bought itself time to try. It thus seems to me that Globalstar is here being penalized for taking a more honest approach.

With respect to Constellation and MCHI, we take away their licenses because we conclude that their agreements to share satellite infrastructure with ICO do not constitute satellite manufacturing contracts. As with Globalstar, we rely in large part on the fact that these agreements do not commit Constellation and MCHI to implement the systems they were originally licensed to operate. While it is unclear whether Constellation and MCHI could have entered into the kind of contracts we deem are required in order to preserve their licenses, it does seem clear that they could have provided a viable service through their sharing agreements. I am not sure that the penalty of taking away their licenses is a fair match to the perceived transgressions.

In the end, I think the strict enforcement of the "non-contingent satellite manufacturing contract" milestone may be too blunt an instrument to address these questions. Going forward, I would prefer a more nuanced approach.