

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

In the Matter of)
)
Amendment of the Commission's Space) IB Docket No. 02-34
Station Licensing Rules and Policies)

To: The Commission

**PETITION FOR RECONSIDERATION AND CLARIFICATION
AND COMMENTS OF THE SATELLITE INDUSTRY ASSOCIATION**

September 26, 2003

SUMMARY

The Satellite Industry Association (“SIA”) hereby seeks reconsideration and clarification of certain actions taken by the Commission in the *First Report and Order* in this proceeding. Although SIA supports a number of the space station licensing reforms adopted by the Commission, SIA believes that certain issues require reconsideration or clarification to better achieve the pro-competitive, deregulatory objectives of the Commission.

Specifically, with respect to issues related to space station applications (including transfer of control and assignment applications), SIA believes that the Commission should reconsider or clarify that: (i) application limits do not apply in the context of assignment of license and transfer of control applications; (ii) it will not consider the motivations of a seller in connection with assignment of license and transfer of control applications; (iii) the notice requirement and Commission review of transfers of foreign-licensed satellites take place after such transfers are consummated; and (iv) transfers of control of space station applicants and assignment of pending applications will be permitted in the context of legitimate business transactions.

SIA also believes that the Commission should reconsider issues associated with its new performance bonds and milestones requirements, including: (i) the period for critical design review should be extended by six months; (ii) milestone extensions should be available to a space station licensee when in the public interest, even in circumstances not strictly “beyond its control;” (iii) new Section 25.149 should be revised to reflect that replacement satellites are exempt from bond requirements; (iv) replacement satellites that add extended bands or additional spectrum in the same band should not be subject to a bond requirement; and (v) non-U.S.-licensed operators of GSO-like satellites should not be subject to milestone and bond requirements.

SIA also urges the Commission to reconsider the *First Report and Order* to the extent it purports to modify existing procedures with respect to treatment of requests for confidential treatment of satellite contracts. SIA believes that broad disclosure of satellite construction contracts will harm both satellite operators and manufacturers, and that the Commission should retain its existing procedures for handling satellite contract confidentiality requests.

SIA also comments on the *Further Notice of Proposed Rulemaking* in the proceeding. To the extent the Commission retains bond requirements, SIA supports the Commission's proposal to allow the establishment of an escrow account as an alternative to posting a bond for U.S. space station licenses and non-U.S.-licensed NGSO-like systems that participate in a processing round. In addition, although SIA opposes the application of any bond requirements to foreign operators of GSO-like satellites, to the extent the Commission retains such bond requirements, the rules for non-U.S. licensees must not be more onerous than the requirements for U.S.-licensed operators.

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The Satellite Industry Association (“SIA”), pursuant to Section 1.429 of the Commission’s rules,¹ hereby seeks reconsideration and clarification of the *First Report and Order* in the above-captioned proceeding.² SIA also hereby files comments in response to the *Further Notice of Proposed Rulemaking* in the proceeding.³

SIA is a U.S.-based trade association representing the leading U.S. and international satellite manufacturers, service providers, and launch service companies. SIA serves as an advocate for the commercial satellite industry on regulatory and policy issues common to its members. With its member companies providing a broad range of manufactured products and services, SIA represents the unified voice of the commercial satellite industry.⁴

¹ 47 C.F.R. §1.429.

² See In the Matter of Amendment of the Commission's Space Station Licensing Rules and Policies and Mitigation of Orbital Debris, *First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-34, FCC 03-102 (rel. May 19, 2003) (“*Order*”).

³ See *id.* at ¶¶ 333-336 (“*Further NPRM*”).

⁴ SIA’s membership includes Executive Members The Boeing Company; Globalstar, L.P.; Hughes Network Systems, Inc.; ICO Global Communications; Intelsat; Iridium Satellite LLC; Lockheed Martin Corp.; Loral Space & Communications Ltd.; Mobile Satellite Ventures; Northrop Grumman Corporation; PanAmSat Corporation and SES Americom, Inc. Associate

Although SIA supports a number of the space station licensing reforms adopted in the *Order*, as discussed below, SIA believes that certain issues require reconsideration or clarification to better achieve the pro-competitive, deregulatory objectives of the Commission.

I. APPLICATION, TRANSFER OF CONTROL AND ASSIGNMENT ISSUES

A. Limits On Pending Space Station Applications

In the *Order*, the Commission established limits on the number of GSO and NGSO space stations applications that any one applicant may have in a particular frequency band. In the case of GSO space stations, the limit is five orbital locations. In the case of NGSO space stations, the limit is one NGSO system. Authorized but unlaunched satellites also count toward these limits.⁵

There is an ambiguity in the *Order* concerning how the Commission will apply these limits in the context of assignment of license and transfer of control applications. In one passage, the Commission stated that the limits do not apply to “applications for ... transfers of control,”⁶ suggesting that an applicant will not be required to dismiss any applications even if the applications it has pending, when combined with applications it is acquiring from a third party in a *bona fide* transaction, will place it over the limit. If, for example, a company with applications for three GSO orbital locations in a frequency band were to acquire a second company having applications for an additional three GSO orbital locations in the same frequency band, the language suggests that the acquiring company could prosecute all six applications, but could not file any new GSO applications in the band until it dropped below the limit of five orbital locations.

Members of SIA include Inmarsat, New Skies Satellites and Verestar. Iridium did not participate in this pleading.

⁵ *Order* at ¶¶ 230-231.

⁶ *Id.* at ¶ 232.

In another passage, however, the Commission stated that “a license purchaser will be required to comply with all the rules applicable to the original licensee, including ... the limits on pending applications and unbuilt satellites.”⁷ This language suggests that, in the scenario described above, the acquiring applicant would be required to dismiss one of its GSO applications.

SIA respectfully requests that the Commission resolve this ambiguity on reconsideration by holding that the application limits do not apply to assignment of license and transfer of control applications. Applying the limits in this context could discourage mergers and acquisitions that are in the public interest. There is no incentive, moreover, to acquire an application from a third party unless one intends to launch and operate the space station proposed in the application. The anti-speculation measures that the Commission adopted in the *Order*, including the strict milestones, and penalties for failure to satisfy milestones, make sure of that. Accordingly, the application limits should not apply to assignment of license and transfer of control applications.

B. The Commission Should No Longer Consider A Seller’s Motivations For Obtaining A Space Station License.

In the *Order*, the Commission eliminated the anti-trafficking rule, which prohibited the sale of a bare satellite license for profit. It found that eliminating the rule would expedite service to the public by facilitating the transfer of space station licenses to those with “the greatest incentive and ability to construct a satellite system within the required time frame.”⁸ On the other side of the ledger, although the Commission recognized that eliminating the sale-for-profit

⁷ *Id.* at ¶ 222.

⁸ *Id.* at ¶ 217.

restriction might “increase the incentives for speculation,”⁹ it determined that the benefits of expediting service outweighed this risk.¹⁰ The Commission found, moreover, that the licensing procedures and safeguards that it adopted in the *Order* made speculation so unlikely as to render the anti-trafficking rule for satellites “superfluous.”¹¹

Despite eliminating the anti-trafficking rule, the Commission stated that it would continue to consider, “if appropriate,” whether a seller “obtained ... [its] license in good faith or for the primary purpose of selling it for a profit,” and whether it had made “serious efforts to develop a satellite or constellation.”¹² The Commission indicated that it was leaving open the possibility of examining a seller’s motivations because “[a]llowing those with no intention of building a satellite system to profit from the Commission’s regulatory process would be contrary to the public interest.”¹³ SIA urges the Commission to reconsider this statement, which is inconsistent with the Commission’s rationale for eliminating the anti-trafficking rule, and will undercut the benefits of eliminating the rule.

In eliminating the anti-trafficking rule, the Commission found that the advantages of expediting service to the public outweighed the risks of encouraging or rewarding speculators. Continuing to consider a seller’s motivations turns that calculus on its head: It attaches greater weight to the risks of speculation than it does to the benefits of putting a license into the hands of a buyer that is ready, willing, and able to construct and operate.

⁹ *Id.* at ¶ 215.

¹⁰ *Id.* at ¶ 215.

¹¹ *Id.* at ¶ 216.

¹² *Id.* at ¶ 221.

¹³ *Id.* at ¶ 222.

Although the Commission states that it “do[es] not expect this situation to arise very often,”¹⁴ what matters is not how often the situation arises, but where the public interest lies when it does arise. The situation, moreover, may arise more frequently than the Commission believes. If the motivations of a seller remain a legitimate area of inquiry, then opponents of a transaction will have every incentive to raise a sale-for-profit issue whenever a bare license is sold. The Commission’s consideration of these objections will delay the prompt initiation of service, and could, *de facto*, lead to reinstatement of the anti-trafficking rule.

Accordingly, and to ensure that the benefits of eliminating the anti-trafficking rule are realized, on reconsideration the Commission should state that it will no longer, in connection with assignment of license and transfer of control applications, consider the purpose for which a seller has obtained its license, or whether the seller had made serious efforts to develop a satellite or constellation.

C. Changes in Ownership of Non-U.S.-Licensed Satellites

In the *Notice of Proposed Rulemaking* in this proceeding, the Commission proposed a relatively straightforward procedure for considering changes in ownership of non-U.S.-licensed satellites on the Permitted List.¹⁵ Specifically, the Commission proposed to issue a public notice announcing that a transaction involving a non-U.S.-licensed satellite has taken place, and inviting comment on whether the transaction affects any of the considerations made when the original satellite operator was allowed to enter the U.S. market.¹⁶ The Commission then would

¹⁴ *Id.*

¹⁵ Amendment of the Commission’s Space Station Licensing Rules and Policies, *Notice of Proposed Rulemaking*, 17 FCC Rcd 3847 at ¶ 136 (2002) (“*NPRM*”).

¹⁶ *See id.*

review any comments filed and determine whether any commenter raised any concern that would warrant precluding the new operator from entering the U.S. market.¹⁷

In the *NPRM*, the Commission made clear that its consideration of changes in ownership of non-U.S.-licensed satellites on the Permitted List would take place subsequent to the transfer of control.¹⁸ The Commission decided to adopt its proposed procedure, “which provides a reasonable framework for considering any issues that might be raised by such a transfer,” and stated that it “will revise Section 25.137 accordingly.”¹⁹ Furthermore, consistent with its subsequent review procedure, the Commission specifically decided that “Permitted List satellites that have been transferred to new owners may continue to provide service in the United States unless and until the Commission determines otherwise.”²⁰

However, revised Section 25.137 of the Rules does not reflect the subsequent review procedure proposed by the Commission in the *Space Station Licensing Reform NPRM*.

Specifically, new Section 25.137(g) provides:

A non-U.S.-licensed satellite operator that has been permitted to serve the United States pursuant to a Petition for Declaratory Ruling *must notify the Commission if*

¹⁷ *See id.* When reviewing requests for U.S. market access, the Commission considers factors such as the effect on competition in the United States, spectrum availability, eligibility and operating (*e.g.*, technical) parameters, and national security, law enforcement, foreign policy and trade concerns. Amendment of the Commission’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Services in the United States, *Report and Order*, 12 FCC Rcd 24094 at ¶¶ 30-182 (1997) (“*DISCO II*”). In addition, the Commission proposed to require the transferee to meet the ECO-Sat test if control of the satellite were transferred to a non-WTO-country-based operator. *NPRM* at ¶ 136.

¹⁸ *See NPRM* at ¶ 136; *see also Order* at ¶ 326 (“We proposed issuing a public notice announcing that the transaction *has taken place*, and inviting comment on whether the transaction affects any of the considerations made when the original satellite operator was allowed to enter the U.S. market”) (emphasis added).

¹⁹ *Order* at ¶ 327.

²⁰ *See id.*

*it plans to transfer control or assign its license to another party, so that the Commission can afford interested parties an opportunity to comment . . .*²¹

Thus, the language of the rule as adopted requires non-U.S.-licensed satellite operators to notify the Commission *before*, rather than after, a transfer of control.

SIA urges the Commission to revise the text of new Section 25.137(g) to reflect the subsequent review procedure originally proposed by the Commission and purportedly adopted in the *Order*. The *NPRM* and *Order* establish that the Commission plainly contemplated consideration of transfers of control of non-U.S.-licensed satellites after they occurred, and prior notification is fundamentally inconsistent with the Commission's clear intent.

In addition, requiring prior notification of a "planned" transfer of control would be misguided for a number of reasons. For example, it is not at all clear when a planned transfer of control of a non-U.S.-licensed satellite would be sufficiently definite as to require notice to the Commission. A planned transfer of control may be cancelled for any number of reasons after the transaction has been announced publicly, after the parties to the transaction have signed definitive agreements, and even after it has been approved by relevant regulatory authorities.²² A planned transfer also may not be consummated because it is not approved by the responsible administration.²³ Thus, the only point at which transfer of control is sufficiently definite so as require Commission notification is after the transaction has actually been consummated.

²¹ See *id.* at App. B (new Section 25.137(g)) (emphasis added).

²² For example, the Commission requires subsequent notification that a proposed transfer has been consummated because, among other reasons, an approved transaction may not actually close. In addition, the Commission routinely grant transfers of control and assignments in the bankruptcy context that are subject to the approval of bankruptcy courts, and to the possibility of third parties coming in with higher and better offers for the licensed facilities.

²³ Indeed, a prior notification requirement suggests the possibility of prior Commission consent for the transfer, which would impinge on the licensing authority of other administrations.

For these reasons, SIA believes that new Section 25.137(g) must be revised to reflect a subsequent review procedure as originally intended by the Commission. Specifically, SIA would suggest the following changes to Section 25.137(g):

A non-U.S.-licensed satellite operator that has ~~acquired control of a non-U.S.-licensed satellite that has been permitted to serve the United States pursuant to a Petition for Declaratory Ruling~~ must notify the Commission within 30 days of the if it plans to transfer of control or assignment of its license to another party, so that the Commission can afford interested parties an opportunity to comment on whether the proposed transaction affects any of the considerations we made when we allowed the satellite operator to enter the U.S. market. A non-U.S.-licensed satellite that has been transferred to new owners may continue to provide service in the United States unless and until the Commission determines otherwise. . . .

The proposed changes comport with the Commission’s stated intent to review a transfer of control of a non-U.S.-licensed satellite after such a transfer has occurred, and with its decision to permit non-U.S.-licensed satellites to continue to provide service in the United States unless and until the Commission determines otherwise. In addition, the proposed changes expand the notification and review requirement for transfers of control of non-U.S.-licensed satellites to foreign satellites authorized to serve the U.S. market, and not just those on the Permitted List.

D. Amendments Reflecting a Substantial Change in Ownership or Control Should Be Addressed Under the Standard Set Forth in Rule 25.116(c)(2)

In the *Order*, the Commission noted that under Section 25.116(b)(3) of the Rules transfers of control have been treated as major amendments to a pending satellite application.²⁴ “In light of the evidence in the record that continuing to treat transfers of control as major amendments in a first-come, first-served procedure might deter legitimate business transactions,”

²⁴ *Order* at ¶ 140 (citing former 47 C.F.R. § 25.116(b)(3), which provided that amendments specifying a substantial change in beneficial ownership or control would be considered “major”).

however, the Commission eliminated this rule.²⁵ Thus, the Commission sought to permit transfers of control of a space station applicant without loss of the applicant's place in the queue.²⁶

However, the text of the *Order* suggests that the Commission intended to revise its major amendment rule only with respect to transfers of control, and not space station application assignments (*i.e.*, changes in applicants). Labeling application assignments as “selling a place in the queue,” the Commission decided that it should prohibit applicants from assigning pending applications to another entity willing to implement a proposed satellite system to avoid facilitating speculation.²⁷ This language suggests that the Commission would permit changes in beneficial ownership or control of a satellite application if an applicant is purchased by another entity, but not if the applicant assigns the underlying application to the same entity.

The rules adopted in the *Order*, however, do not conform to the Commission's stated intent. New Section 25.158(c) provides that “[a]n applicant for a GSO-like satellite system license is not allowed to transfer, assign or otherwise permit any other entity to assume its place in any queue.”²⁸ This suggests that all transactions involving applications in the queue are prohibited, notwithstanding the Commission's statement that it would permit transfers of control without loss of an applicant's place in the queue.²⁹ Furthermore, as noted above, the

²⁵ *Id.* The Commission revised this rule for all satellite systems, including NGSO-like satellite system applications considered in modified processing rounds. *Id.*

²⁶ *See id.* at ¶¶ 136-140.

²⁷ *See id.* at ¶¶ 240-243.

²⁸ *See id.* at App B. (new Section 25.158(c)).

²⁹ At a minimum, the Commission must reconsider or clarify this rule. As written, the language of new Section 25.158(c) could be read to prohibit even transfers of control of space station

Commission eliminated Section 25.116(b)(3) because it stated that transfers of control should not be considered major amendments. Section 25.116(b)(3), however, classifies both transfers of control and assignments as major amendments. By deleting this rule section, the Commission has arguably sanctioned assignments of pending applications, again contrary to its stated intentions.

SIA believes that the Commission should clarify and reconsider the rules and adopt a single standard for considering both transfers of control and assignments of pending space station applications to other entities. Specifically, we propose that the Commission consider both types of transactions under the standard set forth in Section 25.116(c)(2) of the Commission's rules.

That rule was designed to address situations in which a pending application was amended to reflect a change in ownership or control. As noted above, such amendments were considered to be "major" amendments under Section 25.116(b)(3). The amendment thus would have caused the pending application to be treated as newly filed for purposes of any applicable processing round cut-off. However, Section 25.116(c)(2) provided an explicit exception. An amendment would not result in treatment of the underlying application as newly filed if:

The amendment reflects only a change in ownership or control found by the Commission to be in the public interest and for which a requested exemption from a "cut-off" date is granted.

The *Order's* discussion of the appropriate treatment of amendments reflecting ownership or control changes surprisingly does not even mention this provision. Under the revised rules adopted in the *Order*, this section survives but is limited to applications for NGSO-like

applicants, which the Commission expressly sought to permit. Accordingly, SIA believes that the Commission should modify or otherwise clarify the text of this provision.

systems.³⁰ SIA urges the Commission to apply the same standard reflected in Section 25.116(c)(2) to GSO-like applications, as it has in the past.

Specifically, SIA proposes that the Commission reinstate Section 25.116(b)(3) and adopt the following change to the text of Section 25.116(d), which now contains the general rule regarding major amendments to applications for GSO-like system licenses:

Any application for a GSO-like satellite license within the meaning of Section 25.158 of the chapter will be considered to be a newly filed application if it is amended by a major amendment (as defined in paragraph (b) of this section), and will cause the application to lose its status relative to later-filed applications in the “queue” as described in Section 25.158 of the Chapter unless the amendment reflects only a change in ownership or control found by the Commission to be in the public interest and for which a requested exemption from the “newly-filed” rule is granted.

Thus, under SIA’s proposal, both assignments and transfers of control would continue to be considered major amendments, but the Commission would determine in each instance whether an amendment reflecting the change should result in the underlying application being treated as newly filed.

Adopting this approach has several advantages. First, it relies on a long-standing and well-understood standard that the Commission has applied in numerous transactions over the years. Thus, there is established Commission precedent that parties can look to in considering how a transaction involving pending satellite applications is likely to be treated.

Second, our approach applies the same standard to both transfers of control and assignments. SIA agrees that the Commission’s space station licensing rules should deter speculation but not legitimate business transactions. SIA believes, however, that disparate treatment of transfers of control and assignments, both of which result in a change in beneficial

³⁰ See new Section 25.116(c).

ownership and control of the application, is not supportable from a regulatory perspective and will have no impact on potential speculation.

For example, former Section 25.116(b)(3) properly focused on the change in beneficial ownership and control of an application, rather than the form of the transaction associated with such a change (*i.e.*, transfers of control versus assignments). In addition, the prohibition on assignments can be easily bypassed by holding applications in separate subsidiaries, and simply transferring control of that entity. Thus, the prohibition cannot be effective in deterring speculation.

SIA also notes that in the context of both transfers of control and assignments involving pending applications, the Commission's other safeguards against speculation will remain in place. Of course, the Commission also has discretion to deny applications that do not otherwise meet the requirements of its Rules. Accordingly, SIA urges the Commission to reconsider its decision to prohibit space station applicants from assigning their pending applications to other entities. Instead, the Commission should revise Section 25.116(d) as we have proposed and apply that rule to amendments reflecting both transfers of control and assignments.

II. MILESTONE AND PERFORMANCE BOND REQUIREMENTS

A. The Critical Design Review Milestone Should Be Extended by Six Months

The Commission should reconsider the milestone schedule adopted in the *Order* and extend the date for completion of critical design review ("CDR") by six months, so that the milestone would occur two and a half years following licensing. This adjustment will better align the milestone requirements with typical construction schedules while still permitting timely recovery of licenses if an operator is not proceeding with construction.

In its comments in this proceeding, SIA suggested that if the Commission adopted a new CDR milestone requirement it should permit licensees to develop their own CDR deadlines,

which would be reported to the Commission at the time of satisfying the first milestone (*i.e.*, at the time of entering into a non-contingent contract).³¹ Likewise, Intelsat requested that the CDR milestone be based on the CDR date contained in each licensee’s manufacturing contract in order to “preserve a licensee’s existing flexibility to negotiate for the construction of a satellite in a manner that best promotes that licensee’s system development and provision of service to the public.”³²

Rather than adopting the flexible approach supported by commenters, the Commission instead fixed the milestone at two years after licensing, the same milestone date it adopted in the 2 GHz proceeding.³³ This gives a licensee only a year after the milestone for executing a satellite construction contract to complete all the necessary steps required to prepare for CDR. Much of a satellite’s detailed design work is performed by the manufacturer after contract signing. Moreover, in addition to the design work, the Commission contemplates that the manufacturer will have already contracted for the long lead time components by the time CDR occurs.³⁴

SIA members are well aware based on their past experience that it is not always possible to complete CDR within one year of contract signing, especially in the case of new or particularly complex satellite designs. Forcing satellite licensees and manufacturers to rush to complete CDR on an accelerated schedule for a complicated system could adversely affect the

³¹ SIA Comments at 32-33.

³² Intelsat Reply Comments at 21.

³³ See *Order* at ¶ 189 citing Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band, Report and Order, 15 FCC Rcd 16127, 16179 (2000)(“2 GHz Order”).

³⁴ See *Order* at ¶ 191.

quality and reliability of the satellite. Given that the Commission has decided against permitting individualized CDR dates that are appropriate to a particular satellite system's level of complexity, SIA believes that the "fixed" CDR completion date should be extended by six months. By setting the CDR milestone at two and a half years after licensing, the Commission will conserve its own resources, as well as those of licensees, by avoiding the need to process what SIA believes would be a considerable number of requests for extension of the CDR deadline.

Extension of the CDR milestone will also serve the public interest by accommodating licensees' need to respond to technical or business developments that are relevant to a new satellite project. CDR represents the point at which all system and subsystem designs and specifications are finalized. Any modifications to incorporate newly-developed technology or respond to changed market conditions must occur prior to the CDR date, because changes after this point will be expensive and result in schedule delays. Extending the CDR milestone will permit licensees to effectively implement any market changes affecting the mission, as well as any technology advancements that may be developing in this period. This flexibility is especially important for projects involving complex satellites or the implementation of service at a new orbital location or in a new frequency band. In these cases, extending the period prior to the CDR date will allow the licensee to adopt the most efficient design to satisfy customer requirements.

Significantly, nothing in either the *Order* or in the earlier *2 GHz Order* establishes a rationale for selecting two years as a logical milestone date for CDR.³⁵ While the Commission

³⁵ Instead, the Commission simply observes in the *Order* that "we have not found anything" and "we know of no reason" that would prevent compliance with the milestone. *See Order* at ¶¶ 189-90.

credits the European Milestone Review Committee (“MRC”)³⁶ for the concept of designating CDR as a milestone,³⁷ it is noteworthy that CDR dates under the MRC’s purview are not fixed at the two-year mark, but are based on “the construction milestones indicated in the satellite manufacturing [contract]” – *i.e.*, precisely the same flexible approach suggested by SIA and Intelsat.³⁸ Moreover, the Commission justified its adoption of the two year CDR milestone in the Order based on the fact that it had “not found anything in our experience with 2 GHz licensees that would weigh against applying” the same milestone schedule.³⁹ At the time of the Order’s May 2003 release, however, the Commission’s experience was still quite limited, given that the CDR milestone deadline for 2 GHz licensees had not yet occurred.⁴⁰

Finally, extending the CDR milestone by six months represents a more logical spacing of the milestones with regard to the time between milestones two and three. As the rules currently stand, GSO licensees can take up to a full year between the CDR milestone’s start of “manufacturing,” and the “commencement of physical construction” required by the third milestone. On the other hand, an NGSO licensee is only given six months after the CDR to

³⁶ The MRC, formed under the auspices of the European Conference of Postal and Telecommunications Administrations (“CEPT”), was established as an advisory body to assist the various national regulatory bodies in determining whether satellite licensees in the 1.6/2.4 GHz and 2 GHz MSS bands are in compliance with the recommended CEPT milestones. See CEPT/ECTRA, “On Harmonisation of Authorisation Conditions and Coordination of Procedures in the Field of Satellite Personal Communications Services in Europe,” Decision (July 3, 1997) (ECTRA/DEC(97)02) (“CEPT Decision”).

³⁷ See *2 GHz Order* at ¶ 108. Indeed, the Commission’s definition of CDR is identical to that contained in the CEPT Decision. See CEPT Decision at Annex 3 (“The Critical Design Review is the stage in the spacecraft implementation process at which the design and development phase ends and the manufacturing phase starts.”).

³⁸ See CEPT Decision at Annex 3.

³⁹ *Order* at ¶ 189.

⁴⁰ See, *e.g.*, Celsat America, Inc., *Order and Authorization*, 16 FCC Rcd 13712 (2001).

commence construction of the first satellite in its constellation. SIA presumes that manufacturing sub-contractors (such as those working on long lead-time items) will typically be active after CDR, but SIA does not believe that a full year after CDR is generally needed before “physical construction” of a GSO spacecraft can begin. As a result, the change proposed here would make the overall milestone schedule more consistent with the Commission’s objective of ensuring that licensees make regular progress toward completion of construction by reducing the gap between the CDR and commencement of physical construction milestones.⁴¹

Furthermore, the revised schedule we propose will still achieve the Commission’s goal of ensuring that scarce orbital and spectrum resources do not lie fallow for an unacceptable amount of time.⁴² The Commission will still be able to reclaim licenses from operators who enter into construction contracts but do not complete CDR within a reasonable time, permitting reassignment to another applicant.

For the foregoing reasons, the Commission should reconsider the construction milestone schedules adopted in the Order by extending the date for CDR by six months.

B. The Commission Should Reconsider The Grounds For Granting Extensions Of Milestone Deadlines

In the *Order*, the Commission revised its milestone requirements for GSO-like and NGSO-like space station licenses. In Appendix B of its decision, the Commission modified Section 25.161(a) of its rules, providing that space station licenses will terminate automatically upon failure to satisfy a milestone. Under Section 25.161(a) as revised, the only basis for avoiding automatic termination is if the licensee demonstrates that the failure was attributable to

⁴¹ SIA recommends that the next two NGSO milestones after CDR (for commencement of construction of the first satellite in the satellite system and for launch of the first satellite) be adjusted accordingly, but maintained at six months and 18 months after CDR, respectively.

⁴² See *Order* at ¶ 189.

circumstances beyond its control. The Commission did not explain in the text of its milestone discussion why it was instituting a “beyond its control” standard as the only basis for milestone extension, and that standard conflicts with the Commission’s other rules and policies.

For example, Section 25.117(e) governs applications seeking to modify a license by extending a required date of completion (*e.g.*, a milestone). The rule provides two grounds for obtaining an extension: (1) if additional time is needed due to “unforeseeable circumstances beyond the applicant’s control”; and (2) if “there are unique and overriding public interest concerns that justify an extension.” Thus Section 25.117(e), unlike Section 25.161(a) as revised by the *Order*, allows for the possibility of obtaining a milestone extension based on circumstances that the licensee might have foreseen, or over which it might have exerted some control. The revised version of Section 25.161(a) also conflicts with the Commission’s milestone enforcement policies to date, under which the Commission has given licensees additional leeway, not limited to unforeseeable circumstances or circumstances beyond the licensee’s control, in cases in which satellite construction is well along and the licensees have spent significant sums.⁴³

Preserving the Commission’s flexibility to grant milestone extensions for public interest reasons, even if based on circumstances that a licensee might have foreseen or influenced, is the more prudent course. For example, a licensee preparing to launch a replacement satellite might reasonably defer launch if the satellite to be replaced is still operational. Or an operator with a

⁴³ See, *e.g.*, *In the Matter of AMSC Subsidiary Corporation Applications to Modify Space Station Authorizations in the Mobile Satellite Service*, Memorandum Opinion and Order, FCC 93-243, 8 FCC Rcd 4040 (1993); *In the Matter of American Telephone And Telegraph Company Application for Modification of Construction Permits and Licenses for the Telstar 401, 402 and 403 Satellites*, Order and Authorization, DA 90-1221, 5 FCC Rcd 5590 (1990); and *In the Matter of Hughes Communications Galaxy, Inc., Application for Modification of Construction Permits and Licenses for the Galaxy 4-R and Galaxy A-R Domestic Fixed-Satellites*, Order and Authorization, DA 90-780, 5 FCC Rcd 3423 (1990).

satellite that is substantially constructed might make modifications to its spacecraft to accommodate a request from the U.S. military to reorient its beams based on an anticipated need for capacity in an emerging trouble spot. The Commission would not normally consider these circumstances to be beyond a licensee's control, but the circumstances plainly warrant an extension.

Accordingly, SIA respectfully requests that, on reconsideration, the Commission revise Section 25.161(a) to make it consistent with Section 25.117(e) and longstanding milestone enforcement policies.

C. The Commission Should Revise Section 25.149 To Reflect The Fact That Replacement Satellites Are Exempt From The Bond-Posting Requirement.

The *Order* adopted a new rule, Section 25.149, requiring satellite licensees (other than DBS and DARS licensees) to post a bond within 30 days of the grant of their license applications. The Commission stated that this bond-posting requirement would apply to new satellite licensees only, and not to replacement satellite licensees, because “[o]nce a licensee has begun to provide service, [the Commission is] confident that its replacement satellite application will be intended to continue service, and would not be filed for speculative purposes.”⁴⁴

The exemption for replacement satellite licensees, however, does not appear in the text of Section 25.149. On reconsideration, therefore, and in accordance with its finding in the *Order*, the Commission should revise Section 25.149 to reflect the fact that replacement satellite licensees are exempt from the bond-posting requirement.

⁴⁴ *Order* at ¶ 167.

D. Replacement Satellites that Add Extended Bands or Additional Spectrum in the Same Band Should Not Be Subject to a Bond or Escrow Requirement

Replacement satellites that add extended bands or additional spectrum in the same band should not be subject to a bond or escrow requirement because applying such a requirement in this situation will not advance the intended policy. The *Order* indicates that the objective of the bond/escrow obligation is to deter speculative applications and prevent spectrum warehousing.⁴⁵ As noted above, the FCC has already expressly recognized that this objective is not furthered where an existing licensee applies for a replacement satellite. Accordingly, the Commission properly exempted replacement satellite licenses from the bond requirement.

For the same reasons that the FCC decided not to apply the bond to replacement satellites, the FCC should not apply the bond to replacement satellites that add authority in an extended band or in additional spectrum within the same band.⁴⁶ The incentive to warehouse spectrum is not marginally greater for an applicant that seeks to add extended C- and/or Ku-bands to a replacement satellite than for an applicant that seeks to operate its replacement satellite only in the conventional C- and Ku-bands. The same is true for a Ka-band licensee that seeks to utilize additional Ka-band frequencies in a follow-on spacecraft.⁴⁷ First, as with all replacement satellites, the licensee has an incentive to build the satellite in order to continue and enhance

⁴⁵ *Order* at ¶¶ 167, 170 (bond requirement is intended to “deter speculative satellite applications, and help expedite provision of service to the public” and also “provide assurance that the licensee is fully committed at the time its license is granted to construct its satellite facilities”).

⁴⁶ *Greater Boston v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (requiring the Commission to provide a “reasoned” explanation for disparate treatment).

⁴⁷ For example, there is a portion of the Ka-band (18.3-18.58 GHz) in which blanket licensing was initially prohibited by the Commission. That restriction was recently lifted, but the change occurred after numerous systems were already under construction. Licensees who opted not to include this portion of the Ka-band on their first satellites because of the restriction may well want to add this spectrum to their follow-on satellites.

service to its customers. Second, on balance, the benefit of gaining the ability to offer customers expansion capacity far outweighs the small cost of introducing an extended band or additional spectrum within the same band to a replacement satellite.

Moreover, exempting replacement satellites from any bond or escrow requirement in these cases will not harm competitors. There is nothing in this exemption that would prevent a competitor from filing for this same spectrum, and nothing that would alter the competitor's rights in the satellite licensing process. In any event, it is very unlikely that a prospective competitor will be interested in acquiring extended C- or Ku-band authority where another operator has a replacement expectancy for the conventional bands. The extended bands are too small to justify a stand-alone system, and the spectrum is subject to use restrictions that further limit the commercial value of the bands.

In sum, the existing licensee for a particular frequency band has little or no incentive to warehouse the extended bands or additional spectrum in the same band. Thus, for the same reason that the FCC does not apply its bond requirement to a replacement satellite application, the FCC should not apply the bond requirement to a replacement satellite application that also seeks to add extended band authority or additional spectrum within the same band.

E. Non-U.S.-Licensed Operators of GSO-Like Satellites Should Not Be Subject to Milestone and Bond Requirements

In the *Order*, the Commission determined that non-U.S.-licensed satellite operators should be subject to the same performance bond and milestone requirements as U.S.-licensed satellite operators.⁴⁸ Although SIA agrees that foreign satellite operators should be held to the same standards as U.S. entities when seeking equivalent FCC authorizations, granting foreign-

⁴⁸ *Order* at ¶¶ 308-313.

licensed satellites authority to serve the U.S. market (*i.e.*, “landing rights”) is fundamentally distinct from granting authority to launch and operate a satellite (*i.e.*, a U.S. space station license) and should not be treated the same. Thus, SIA believes that non-U.S.-licensed operators of GSO-like satellites should not be subject to performance bond and milestone requirements, but the Commission must confirm that unlaunched non-U.S.-licensed satellites authorized to serve the U.S. market should not prevent the interim use of the spectrum by other satellites. When a foreign licensee files a Letter of Intent (“LOIs”) to participate in a processing round for NGSO-like systems, however, where a reservation of spectrum could preclude use by another NGSO-like satellite system, SIA believes that the foreign operator should be subject to the same requirements as a U.S.-licensed system.

In the *NPRM*, the Commission proposed to modify the procedures applicable to operators of non-U.S.-licensed satellites seeking access to the U.S. market to make them consistent with any revisions to the procedures for U.S.-licensed satellites that the Commission might adopt in this proceeding.⁴⁹ The Commission suggested that this approach was consistent with the United States’ WTO commitments to treat non-U.S.-licensed satellite operators no less favorably than it treats U.S. satellite operators.⁵⁰ SIA fully agrees that, pursuant to U.S. WTO commitments, the Commission should treat non-U.S.-licensed space station operators no less favorably than their U.S. counterparts for similar authorizations.

Although the Communications Act plainly affords the Commission jurisdiction to regulate the terms of non-U.S.-licensed satellite access to the U.S. market (*e.g.*, operational and technical parameters, trade and market access issues, etc.), the agency has repeatedly disclaimed

⁴⁹ *NPRM* at ¶ 125.

⁵⁰ *Id.* at ¶ 127.

any intent to “re-license” foreign-licensed satellites.⁵¹ Thus, the FCC has treated foreign requests for landing rights as fundamentally dissimilar from U.S. space station applications. The Commission should continue to distinguish between requests to access the U.S. market and applications for authority to launch and operate a satellite system, and should not impose milestones or enforce system implementation requirements with financial penalties (such as bonds or escrows) in the context of foreign requests for landing rights for several reasons.

Significantly, space station implementation requirements for foreign-licensed satellites (including the establishment and enforcement of milestones) are squarely within the jurisdiction of a licensing administration. The milestones established by the Commission were derived from U.S. domestic policy and precedent, and do not reflect the implementation time frames established by foreign administrations or the bringing-into-use deadlines imposed by the ITU’s International Radio Regulations.⁵² Independently imposing space station implementation milestones and enforcing them with performance bonds is akin to re-licensing the satellite (at least with respect to system implementation), and creates the risk of multiple and inconsistent obligations.

Moreover, treating foreign requests U.S. landing rights the same as U.S. space station applications for performance bond and milestone purposes could encourage other administrations to do the same, potentially increasing significantly costs and regulatory complexity for U.S.-licensed global satellite systems. For example, financial requirements for market access imposed under the guise of ensuring that spectrum is not warehoused could take the form of performance

⁵¹ See generally *id.* at ¶¶ 121-138; *Order* at ¶¶ 285-312.

⁵² For example, the Radio Regulations now afford administrations seven years from the date of receipt of Advance Publication information to bring GSO satellite networks into use. However, the FCC allows space station licensees only five years from license grant to launch and operate GSO satellites.

bonds, spectrum fees, auctions or other payment mechanisms.⁵³ Indeed, if every foreign country imposed a multi-million dollar performance bond, escrow requirement or similar obligation in connection with a request to provide service, the expansion of U.S. satellite operations (and the domestic and international public benefits associated therewith) would come to an abrupt halt; and the satellite industry around the world could face crippling new fees. Similarly, U.S. operators could be subject to multiple, inconsistent system implementation milestones imposed by the numerous countries they seek to serve.

In reconsidering the application of performance bonds and milestone requirements on non-U.S.-licensed GSO-like satellite operator requests to serve the U.S. market, SIA also believes that the Commission should clarify that the grant of U.S. market access to an unlaunched non-U.S.-licensed GSO-like satellite does not prevent the interim use of conflicting spectrum/orbital resources by other satellites or preclude the filing and grant of an application for interim use of such spectrum/orbital resources under the first-come, first-served procedure. In the *NPRM*, the Commission sought comment on “treating Letters of Intent and earth station applications like space station applications for purposes of determining application status. In other words, a Letter of Intent filed by a non-U.S. space station operator would cut off the rights of subsequently filed U.S. space station applications and Letters of Intent filed by other non-U.S. space station operators.”⁵⁴ In the order, the Commission “conclud[ed] that Letters of Intent

⁵³ Of course, the Commission is well aware of the dangers of runaway, sequential auctions and spectrum fees to the U.S. satellite industry, and SIA believes that the imposition of performance bonds on non-U.S.-licensed satellites could unintentionally promote the adoption of such burdensome financial requirements. In particular, foreign administrations could view such financial mechanisms as a means of revenue generation, and could impose non-cost-based fees or other financial requirements on U.S. satellite operators.

⁵⁴ *NPRM* at ¶ 126.

should be treated the same as satellite applications.⁵⁵ It appears that the Commission decided to require non-U.S.-licensed satellite operators to post bond and satisfy milestones because it believes that speculative requests for access to the U.S. market, once granted, could preclude subsequent grant of conflicting applications or requests under its “first-come, first-served” procedures.⁵⁶ However, this concern only arises if a satellite’s authority to access the U.S. market (*e.g.*, by grant of a Letter of Intent, earth station application or placement on the Permitted List) would prevent use of the orbital location and spectrum. To alleviate any possibility that a non-U.S. licensed GSO-like satellite could warehouse spectrum to the detriment of U.S. satellite operators and consumers, SIA believes that the Commission should clarify that unlaunched non-U.S.-licensed satellites authorized to serve the U.S. market do not prevent the interim use of the spectrum by other satellites or preclude the filing and grant of an application for interim use of such spectrum with the Commission. This clarification would further eliminate any need to impose performance bond and milestones requirements on non-U.S.-licensed operators of GSO-like satellites.⁵⁷

⁵⁵ *Order* at ¶ 294. The Commission found this approach would be “consistent with its WTO commitments to treat non-U.S. satellite operators no less favorably than we treat U.S. satellite operators.” *Id.*

⁵⁶ When either a U.S. or foreign satellite operator seeks a license for speculative purposes rather than to construct a satellite system, it creates a risk that the spectrum assigned through the license would not be put to any use until after the license is sold. *NPRM* at ¶ 110; *Order* at ¶ 308. The Commission did clarify that conflicting requests to operate satellites with higher ITU priority will be accepted by the Commission (*i.e.*, will not be considered conflicting or “mutually exclusive”) and that, in the event of such a request, satellite operators with lower ITU priority will be permitted to operate subject to proof of coordination with the higher priority satellite. *See id.* at ¶¶ 95-96, 295-296. Absent such a demonstration, however, the lower priority satellite would be required to cease operations or be subject to further conditions designed to address potential harmful interference to a satellite with ITU date priority. *See id.* at ¶¶ 96, 296.

⁵⁷ At a minimum, the Commission should amend new rule Section 25.137(d)(4) to eliminate these requirements for earth station licensees seeking to add a foreign-licensed satellite as an authorized point of communication. Where market access is sought by a U.S. earth station

SIA believes that foreign-licensed NGSO-like systems filing LOIs to participate in a U.S. processing round, however, should be subject to the same rules as applicants for a U.S. license.⁵⁸ U.S.-licensed and non-U.S.-licensed NGSO-like systems must participate in a modified processing round to obtain operating authority and a reservation of spectrum, respectively. Unlike a non-U.S.-licensed GSO satellite, however, where SIA believes that grant of authority to serve the U.S. market prior to launch should not preclude interim service by another satellite, a reservation of spectrum *could* preclude use by another NGSO-like system because the spectrum may be divided among competing applicants. This important distinction -- the Commission's affirmative reservation of spectrum to the exclusion of other uses -- provides both a policy justification and a jurisdictional basis for applying uniform requirements to all NGSO-like systems.

Finally, SIA notes that a non-U.S.-licensed NGSO-like system retains the ability to rely on ITU priority and coordination, rather than participation in a processing round, to ensure access to spectrum to serve the United States. Thus, the actual effect of imposing uniform requirements on all NGSO-like filers would be de minimis, and certainly would not pose any impediment to satellite licensing or services competition.

licensee, there would be no practical way for the applicant to pledge compliance with construction milestones, much less guarantee payment in case of default. In addition, there is no reason to suppose any corporate affiliation between a U.S. earth station licensee and the operator of the foreign-licensed satellite to which access is sought. Thus, there is no reason to require U.S. earth station licensees to provide the demonstrations imposed by that new rule.

⁵⁸ SIA recognizes that there may be circumstances in which performance bonds and implementation milestones for NGSO-like systems may not be necessary. For example, with respect to L-band MSS spectrum that is already in use and is subject to ongoing multi-lateral negotiations, traditional processing rounds are not conducted and performance bonds and implementation milestones would neither be useful nor appropriate.

III. TREATMENT OF CONFIDENTIAL SATELLITE CONTRACT INFORMATION

SIA urges the Commission to reconsider the *Order* to the extent it purports to modify existing procedures with respect to treatment of requests for confidential treatment of satellite contracts. Specifically, the *Order* suggests that on a going-forward basis, any licensee that requests that its construction contract be withheld from public disclosure will be required to file a redacted version of the contract, which presumably then would be made publicly available.⁵⁹ The Commission does not provide any rationale for adopting this procedure, which differs significantly from the Commission's past practices.

The new process fails to adequately protect competitively-sensitive information that is exempt from public disclosure pursuant to the Freedom of Information Act ("FOIA").⁶⁰ Furthermore, broad disclosure of satellite construction contracts will harm both satellite operators and manufacturers. Accordingly, the Commission should reconsider its decision and retain its existing procedures for handling satellite contract confidentiality requests.

A. The Procedures Described in the *Order* Depart Without Explanation from Long-Standing Commission Precedent

In past cases where it has required satellite licensees to file construction contracts to verify milestone compliance, the Commission has taken a case-by-case approach to making determinations regarding protection of confidential information. This approach has permitted the Commission to fairly balance the need to protect proprietary data against the public interest in disclosure of the information.

⁵⁹ See *Order* at ¶ 187.

⁶⁰ 5 U.S.C. § 552.

Consistent with the procedures set forth in its rules,⁶¹ the Commission has permitted licensees to request confidential treatment at the time they are required to file a satellite contract. Once such a request is made, the Commission's practice has been to withhold the contract from public disclosure unless a request for access to the document is filed under FOIA. Deferral of action on a request for confidential treatment is expressly contemplated by section 0.459(d)(1) of the Commission's rules, 47 C.F.R. § 0.459(d)(1). By treating the documents confidentially absent a request seeking disclosure, the Commission conserves its resources because it only needs to address the confidentiality request if and when a FOIA petition is submitted.

If a party does file a FOIA request seeking disclosure of the contract, the Commission has afforded the licensee an opportunity to respond to the request. In its response, the licensee can provide additional details regarding the risks presented by disclosure and can propose appropriate measures to minimize any competitive harm that could result from disclosure. The Commission then makes its determination based on a consideration of the specific facts before it. In some cases, the Commission has denied access to contracts altogether.⁶² In other cases, limited access to contracts was permitted pursuant to a protective order,⁶³ or the Commission allowed access to a redacted version of the contract.⁶⁴

⁶¹ See 47 C.F.R. § 0.459 *et seq.*

⁶² See, e.g., American Satellite Company, 1985 FCC LEXIS 3117 (1985) (denying request for information on the basis that it would cause licensee to "lose its competitive edge" and permit competitors "to develop a competitive strategy adverse to" the licensee).

⁶³ See, e.g., GE American Communications, Inc., *Order Adopting Protective Order*, 16 FCC Rcd 17607 (Int'l Bur. 2001) (adopting a protective order to "protect the confidentiality of competitively sensitive information, while enabling other parties to participate adequately in ongoing proceedings").

⁶⁴ See, e.g., Letter of Donald Abelson, Chief, International Bureau, to David S. Keir, Counsel to Columbia Communications Corporation, May 12, 2000 (determining that release of redacted version of construction contract submitted by licensee was responsive to FOIA request and

In contrast, the *Order* suggests that in future proceedings, the Commission will require the filing of a redacted contract whenever a licensee seeks confidential treatment and regardless of whether a request for access to the contract has been submitted.⁶⁵ The *Order* also indicates that the scope of the acceptable redactions will be very limited, covering only pricing and specific technical information.⁶⁶

The Commission provides no justification in the *Order* for its proposed departure from past practices relating to treatment of confidential contract information, and cites no support for its decision. Although redaction has in the past been one option for addressing the need to prevent disclosure of confidential information, the Commission does not give any reason why other alternatives should be categorically excluded in the future.

The Commission's case-by-case approach to confidentiality issues in past proceedings has worked well, permitting a reasoned analysis of the interests for and against disclosure of proprietary data in each instance. There is no reason why this approach should be abandoned now.

B. The Changed Procedures Do Not Comply with FOIA

The Freedom of Information Act specifically exempts from public disclosure “trade secrets and commercial or financial information obtained from any person and privileged or confidential.”⁶⁷ The FCC's rules implementing FOIA also recognize the need to protect such

would permit requester to participate in proceedings without disclosure of proprietary information).

⁶⁵ See *Order* at ¶ 187.

⁶⁶ See *id.* (recognizing only that “specific dollar amounts and some of the detailed technical specifications of satellites warrant confidential treatment”).

⁶⁷ 5 U.S.C. § 552(b)(4).

competitively-sensitive information from disclosure and provide procedures for individualized determinations regarding requests for confidential treatment of such documents.⁶⁸

These policies permit the Commission to balance the need for protection of proprietary information against the public interest in disclosure of information that may be of decisional significance in a Commission proceeding. This balancing is critical, as recognized by the Commission's rules, which provide that in instances where a request is made for information, and the Commission has the authority under FOIA to withhold the documents, "the considerations favoring disclosure and non-disclosure will be weighed in light of the facts presented" so that the Commission can determine whether to grant or deny the disclosure request, in whole or in part.⁶⁹

Prior Commission cases applying these standards have recognized that satellite construction contracts typically include information that could result in competitive harm to the licensee if the information is publicly disclosed.⁷⁰ As noted above, in some instances, the Commission's balancing of the factors in a given case has led the Commission to include that submission of a redacted contract is an appropriate disclosure mechanism. In other cases,

⁶⁸ See 47 C.F.R. § 0.459.

⁶⁹ See 47 C.F.R. § 0.461(f)(4).

⁷⁰ See, e.g., American Satellite Company, *Memorandum Opinion and Order*, 1985 FCC LEXIS 3117 (1985) at ¶ 16 (release of satellite construction contract would cause competitive harm); Letter of Donald Abelson, Chief, International Bureau, to Peter Rohrbach, Counsel to GE American Communications, Inc., Dec. 1, 2000 (licensee's construction contract and exhibits warranted confidential treatment because disclosure would give competitors access to licensee's business plan and satellite specifications). See also Orion Satellite Corp., *Memorandum Opinion and Order*, 54 RR 2d 1315, 1317 (1983) (information regarding INTELSAT's future plans and business strategies withheld under Exemption 4); Satellite Syndicated Systems, Inc., *Memorandum Opinion and Order*, 50 RR 2d 999 (1981); Ward & Mendelsohn, P.C., *Memorandum Opinion and Order*, 88 FCC 2d 1049 (1981).

however, the Commission has required execution of a protective order or has denied access to the agreement altogether.

In contrast, the summary procedures described in the *Order* suggest that no individualized determinations would be made. Instead, the new procedures would apparently require submission of information that would then be made publicly available even absent a request demonstrating a need to review the contract. The *Order* suggests that the Commission will not consider alternatives to redaction of the contract such as disclosure pursuant to a protective order, even if such alternatives might result in a better balance between the interests in favor of and against disclosure.

The *Order* does not even discuss the Commission's obligations under FOIA to protect competitively-sensitive information, much less attempt to explain how the changed procedures permit the Commission to comply with those obligations. Similarly, the *Order* fails to address the requirements under Section 0.461 for a weighing of interests in favor of and against disclosure.

Furthermore, because the Commission did not raise the issue of confidential treatment of contracts in the *NPRM*, there is no record in this proceeding on which the Commission could conclude that alteration of its procedures is appropriate. In effect, the *Order* purports to make a blanket determination regarding disclosure of satellite construction contracts without inviting or considering any input by affected parties, in contravention of Administrative Procedure Act requirements.⁷¹

The Commission cannot, consistent with its responsibilities pursuant to FOIA, make such a radical change in its policies. Instead, FOIA requires the Commission to consider in each

⁷¹ See 5 U.S.C. § 553(b)(3); see also *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

instance whether the interests asserted by a party seeking disclosure to competitively-sensitive information outweigh the need to protect licensees from competitive harm. Because the new procedures announced in the *Order* do not permit such an individualized determination, they must be rejected.

C. Public Disclosure of Satellite Construction Contracts Will Harm Competition

The *Order* does not address the potential effects of a change in the procedures for confidential treatment of satellite construction contracts on satellite operators and manufacturers. Broad availability of satellite contracts, as contemplated in the *Order*, will seriously undermine competitive forces in the satellite market, harming all parties involved.

First, public disclosure of contract information will allow competitors of a licensee access to information concerning the licensee's business plan, satellite design decisions, and procurement practices. Redacting pricing and technical information, which the Commission indicates will be acceptable, is not sufficient to protect all proprietary information from disclosure. Such information can be used by competitors to tailor their own business strategies to respond to the approach taken by the licensee.⁷² As the Commission has recognized, release of this type of information harms the licensee and inhibits full and fair competition among operators.

Public disclosure of contracts will also stifle innovation. A licensee or manufacturer that develops a new design element, testing process, or purchasing or pricing approach will not be

⁷² See, e.g., *Satellite Business Systems, Memorandum Opinion and Order*, 54 RR 2d 336, 339 (1983) (denying disclosure of SBS's satellite transponder use forecasts because it would permit competitors "to better assess SBS's capabilities, thereby assisting them in preparing their own market strategies and in acquiring customers who might otherwise seek SBS's services"); *M/A-COM, Inc., Memorandum Opinion and Order*, 55 RR 2d 641, 644 (1984) ("If an entrepreneur knows the technical and commercial aspects of a competitor's proposed operations, it may then structure its own system in order to take advantage of its competitor's weaknesses, whether they be technical or marketing.").

able to ensure protection of the proprietary information. A party will have significantly reduced incentives for developing innovative approaches if competing operators will have immediate access to information relating to the new process.

Finally, broad access to contracts will dramatically affect the negotiation of construction contracts. Contracts will become standardized, with both licensees and manufacturers reluctant to make concessions out of concern that the same concession will be demanded in the next contract negotiation. This will undermine the competitive bidding process typically used by licensees to select a manufacturer.

Thus, the overall effect of the changes in Commission practices outlined in the *Order* will be to undermine competitive forces in both the satellite services and satellite manufacturing markets and to create disincentives for innovation.

D. The New Procedures Will Result in Increased Administrative Burdens

These harms will not be counterbalanced by any benefits. The only indication of the Commission's objective for the procedural changes comes from the *NPRM*, which noted that addressing requests for confidential treatment of satellite construction contracts "takes time."⁷³ However, the changed procedures will increase, not decrease, the administrative burdens associated with processing sensitive documents.

It is likely that the issue of what information can appropriately be redacted from a contract will be highly controversial. As noted above, licensees can face significant competitive disadvantages if proprietary information is widely disclosed. As a result, they will have incentives to attempt to protect their competitive positions by redacting information that they

⁷³ *NPRM* at ¶ 105.

consider proprietary, even if it does not come within the narrow categories that the Commission has indicated are acceptable.

Furthermore, the changed procedures apparently will require consideration of requests for confidential treatment with respect to every contract filed with the Commission. In contrast, the Commission's practice today is to accept contracts for filing with requests for confidential treatment and make a determination regarding confidentiality only if there is a subsequent request for access to the contract. Under the current system, if no one seeks access to a contract, the staff need never determine whether and how to permit access.

Under the new procedures, Commission staff will be required to determine what level of redaction is appropriate for each contract filed before the Commission, regardless of whether any other party has requested access to the contract. Thus, the new procedures will increase, not lessen, the burdens associated with processing confidential documents.

In light of the significant harms that would result from modification of the procedures for addressing requests for confidential treatment of satellite construction contracts and the absence of any identified benefits from the new procedures, the Commission should reconsider its decision and retain its existing policies.

IV. COMMENTS ON THE *FURTHER NPRM*

The final section of the *Order* seeks input on several issues relating to the performance bond adopted by the Commission. SIA takes no position with respect to the bond itself, but comments here on two related questions raised in the *Further NPRM*.

First, the Commission invites comment on whether licensees should be allowed to establish an escrow account as an alternative to posting a bond.⁷⁴ To the extent the Commission

⁷⁴ *Order* at ¶ 335.

retains bond requirements, SIA supports this proposal as another option for U.S. space station licenses and non-U.S.-licensed NGSO-like systems that participate in a processing round.

Second, the Commission requests comment on any revisions needed to make the bond requirements for non-U.S. licensees consistent with the rules for U.S.-licensed operators.⁷⁵ As discussed above, SIA opposes the application of any bond requirements to foreign operators of GSO-like satellites that are simply seeking U.S. market access. However, to the extent the Commission retains such bond requirements, the rules for non-U.S. licensees must not be more onerous than the requirements for U.S.-licensed operators.⁷⁶

⁷⁵ *Id.* at ¶ 336.

⁷⁶ For example, currently new section 25.149(d) of the Commission's rules permits U.S. licensees to reduce their bonds as milestone deadlines are satisfied. The text of the *Order* makes clear that non-U.S. licensees are likewise entitled to reduce their bonds as they meet their system milestones. *See id.* at ¶ 309 (a non-U.S.-licensed operator "will be allowed to reduce the bond amount, as are U.S. licensees, at the time it meets each milestone"). However, there is no rule corresponding to section 25.149(d) rule that expressly authorizes non-U.S. licensees to reduce their bonds over time as their milestones are satisfied. The Commission must correct this omission in its rules in the event it retains bond requirements for foreign-licensed operators.

V. CONCLUSION

For the foregoing reasons, SIA urges the Commission to reconsider and/or clarify the *Order* as discussed in this petition, and to take action on the *Further NPRM* consistent with SIA's comments.

Respectfully submitted,

Satellite Industry Association

A handwritten signature in black ink, appearing to read "Richard DalBello". The signature is fluid and cursive, with the first name "Richard" and last name "DalBello" clearly distinguishable.

By: _____

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