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

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

FIRST ORDER ON RECONSIDERATION AND FIFTH REPORT AND ORDER

Adopted: June 22, 2004 Released: July 7, 2004

By the Commission:

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I. INTRODUCTION

1. In this *Order*, we deny petitions for reconsideration of the *First Report and Order* in this proceeding to the extent they seek to eliminate or substantially revise the requirement that satellite licensees submit a bond within 30 days of receiving their licenses.[1] However, we grant these petitions to the extent that they seek clarification of the bond requirement.[2] Further, after reviewing the comments filed in response to the *Further Notice of Proposed Rulemaking* in this proceeding,[3] we find that modification of the interim bond amounts established in the *First Report and Order* is warranted to the extent that they may tend to discourage new entry into the market for satellite services. Thus, the bond requirement for geostationary satellite orbit (GSO) space stations is reduced to $3 million for each satellite. The requirement for non-geostationary satellite orbit (NGSO) constellations is reduced to $5 million for each constellation.[4] We find that these amounts as revised are sufficient to discourage speculative applicants from applying for satellite licenses, without unreasonably discouraging applicants willing and able to construct their licensed satellites. Finally, we decline to adopt rules that allow licensees to establish an escrow account as an alternative to posting a bond.

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[1] Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order*, IB Docket No. 02-34, 18 FCC Rcd 10760 (2003) (*First Report and Order*).

[2] A number of petitioners raise issues other than or in addition to the bond requirement. For example, petitioners seek reconsideration of some of the new milestone requirements, the limits on pending applications and unbuilt satellites, and the procedures for second or additional modified processing rounds. We will address those issues in a future Order.

[3] The *Further Notice* was adopted together with the *First Report and Order*. Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order*, IB Docket No. 02-34, 18 FCC Rcd 10760, 10882 (paras. 333-35) (2003) (*Further Notice*).

[4] In addition, we lower the bond amount for GSO MSS satellite licenses from $7.5 million to $3 million rather than $5 million. We explain the basis for this treatment in more detail below.

II. BACKGROUND

2. In 2003, the Commission substantially reformed and streamlined its space station licensing procedures. For NGSO-like applications,[5] the Commission adopted a modified processing round procedure. When an NGSO-like application is filed, the Commission will announce a cut-off date for competing applications, and then divide equally the available spectrum among all the qualified applicants.[6] For GSO-like applications,[7] the Commission adopted a first-come, first-served procedure. The Commission will consider applications in the order they are filed, and grant each application if the applicant is qualified, and the application does not conflict with any previously filed application.[8]

3. The Commission also considered several other proposals to reform the satellite rules. As part of its original reform proposals, the Commission proposed eliminating the requirement that satellite applicants demonstrate that they have the financial resources needed to construct and launch a satellite and operate it for one year.[9] The Commission reasoned that the financial demonstration served the same purpose as its milestone requirements, to ensure that the licensee constructs its licensed facilities in a timely fashion.[10] Therefore, the Commission proposed relying only on milestones to ensure that the licensee constructs its satellite in a timely manner, and it invited parties to suggest alternatives.[11]

4. In response, Intelsat argued that some measure was needed to deter the filing of frivolous applications, and recommended requiring applicants to post a $10 million bond, payable if the Commission revokes a satellite license for failure to meet the required construction milestones and the licensee had not spent at least 10 percent of the cost of constructing its satellite at that time.[12] Intelsat noted that the Commission had previously imposed a bond requirement on licensees for another service.[13] Other commenters opposed Intelsat's proposal.[14]

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5 NGSO-like satellite systems are those in which the earth station has little or no directivity towards a satellite, so that the earth station must track the satellite in all directions. Examples of NGSO-like satellite systems are NGSO satellite constellations, and GSO MSS service links. NGSO-like systems generally cannot operate on the same spectrum without causing unacceptable interference to each other. *First Report and Order*, 18 FCC Rcd at 10773 (para. 21).

6 *First Report and Order*, 18 FCC Rcd at 10777 (para. 32).

7 GSO-like satellite systems use earth stations with antennas with directivity towards the satellites, such as FSS, and MSS feeder links which use GSO satellites. GSO satellites can operate on the same spectrum at two-degree orbit spacings. *First Report and Order*, 18 FCC Rcd at 10773 (para. 21).

8 *First Report and Order*, 18 FCC Rcd at 10805 (paras. 108-10).

9 Amendment of the Commission's Space Station Licensing Rules and Policies, *Notice of Proposed Rulemaking*, IB Docket No. 02-34, 17 FCC Rcd 3847, 3880-81 (paras. 99-102) (2002) (*NPRM*).

10 *NPRM*, 17 FCC Rcd at 3881 (para. 102).

11 *NPRM*, 17 FCC Rcd at 3883 (para. 108).

12 *First Report and Order*, 18 FCC Rcd at 10824 (para. 166).

13 *See* Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, *Report and Order*, PR Docket No. 93-35, 8 FCC Rcd 8318,

5. The Commission unanimously adopted a satellite bond requirement because it found that requiring satellite licensees to make a financial commitment to construct and launch their satellites would help deter speculative satellite applications.[15] It further concluded that a bond requirement would involve the financial community in determining whether a licensee is likely to construct its satellite, and so would be more market-oriented than the previous financial demonstration.[16]

6. The Commission adopted a bond requirement based in part on Intelsat's proposal. In particular, the Commission found that the record was not adequate to determine the proper bond amount.[17] The Commission concluded that the bond amount should help deter speculation, without deterring legitimate satellite applications.[18] Accordingly, the Commission adopted $5 million for GSO-like satellite licenses and $7.5 million for NGSO-like satellite system licenses on an interim basis, rather than $10 million for all satellite applications as Intelsat recommended.[19]

7. Seven parties filed petitions for reconsideration of the *First Report and Order*, including eight satellite companies that filed a joint petition (Joint Commenters). Four parties filed oppositions to the petitions, and three filed replies. These petitions, oppositions, and replies are listed in Appendix A. Many of those petitioners advocate eliminating or revising the bond requirement. Some request clarification of the bond requirements, and one, SES Americom, suggests an alternative bond requirement in the event that we decide to keep any bond requirement.

8. In its *Further Notice of Proposed Rulemaking*, the Commission invited parties to comment on the appropriate bond amount.[20] The Commission also invited comment on whether

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8325-27 (paras. 22-23) (1993) (*Private Paging Exclusivity Order*). In that Order, the Commission adopted a bond requirement for paging companies seeking an extension of their milestones.

[14] *First Report and Order*, 18 FCC Rcd at 10824-25 (para. 166).

[15] *First Report and Order*, 18 FCC Rcd at 10825 (para. 167). *See also* Amendment of the Commission's Space Station Licensing Rules and Policies, *Erratum*, IB Docket No. 02-34, 18 FCC Rcd 12674 (2003) (correcting Section number of bond rule to Section 25.165).

[16] *First Report and Order*, 18 FCC Rcd at 10825 (para. 167).

[17] *First Report and Order*, 18 FCC Rcd at 10825 (para. 168). The Commission also made the bond payable upon a license revocation, regardless of whether the licensee had spent 10 percent of the costs of the satellite. It reasoned that the bond should require licensees to construct a satellite, rather than merely incurring some fraction of the costs of the satellite. *First Report and Order*, 18 FCC Rcd at 10826 (para. 170). Moreover, the Commission was concerned that Intelsat's proposal would create an incentive to project unreasonably low satellite costs, and that the procedures for reviewing satellite costs could be overly complex. *First Report and Order*, 18 FCC Rcd at 10826 n.398. *See also First Report and Order*, 18 FCC Rcd at 10838 (para. 207).

[18] *First Report and Order*, 18 FCC Rcd at 10825 (para. 168).

[19] *First Report and Order*, 18 FCC Rcd at 10825 (para. 168).

[20] *Further Notice*, 18 FCC Rcd at 10882 (para. 334).

to allow licensees to establish an escrow account as an alternative to posting a bond.[21] One party, Intelsat, filed comments, and three parties filed replies. These pleadings are also listed in Appendix A.[22] We address the bond issues raised in the petitions for reconsideration of the *First Report and Order* and comments on the *Further Notice* below, and defer consideration of the remaining issues raised in those petitions to a future order.[23]

III. DISCUSSION

A. Retention of Bond Requirement

1. Authority

9. *Background.* The Joint Commenters claim that the Commission does not have the authority to require satellite licensees to post bonds, because the Communications Act of 1934 as amended (Communications Act) specifies that the Commission can require payments only in the following instances: (1) application fees and regulatory fees; (2) forfeiture penalties for violating the Commission's rules, and (3) payments in connection with license auctions.[24] The Joint Commenters also argue that the Commission misplaced its reliance on the bond requirement it imposed in the *Private Paging Exclusivity Order*,[25] because that Order also did not cite any statutory authority.[26]

10. Intelsat responds that Section 4(i) of the Communications Act empowers the Commission to adopt regulations needed to ensure that the "public interest, convenience, and necessity" will be furthered by the grant of a space station license, as specified in Section 309 of the Act.[27] Intelsat explains further that the bond requirement furthers the public interest by ensuring that only qualified, committed applicants receive space station licenses, and that this in turn helps preserve the integrity of the Commission's licensing framework.[28] Intelsat also

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21 *Further Notice*, 18 FCC Rcd at 10882 (para. 335).

22 For purposes of this Order, we refer to the Intelsat Comments filed in response to the *Further Notice* as "Further Comments," and the replies as "Further Replies."

23 Hughes argues that several safeguards against speculation, including the bond requirement, should not apply to satellites outside the arc between 60° W.L. and 140° W.L., including the bond requirement. Hughes Petition at 9. We will address Hughes's proposals on this issue in a future Order.

24 Joint Commenters Petition at 4-5. *See also* Joint Commenters Further Reply at 2, SES Americom Further Reply at 2.

25 Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, *Report and Order*, PR Docket No. 93-35, 8 FCC Rcd 8318, 8325-27 (paras. 22-23) (1993) (*Private Paging Exclusivity Order*), *cited in First Report and Order*, 18 FCC Rcd at 10826 (para. 170).

26 Joint Commenters Petition at 5.

27 Intelsat Comments at 2-3, *citing* Sections 4(i) and 309 of the Communications Act, 47 U.S.C. §§ 154(i), 309.

28 Intelsat Comments at 4.

observes that the Court has upheld the imposition of a financial obligation on a Title III license when it was necessary for the Commission to meet the requirements of Section 309, even though it was not expressly authorized by the Act.[29] Intelsat further contends that the bond requirement is not a penalty, but a remedial "administrative sanction ... reasonably related to the purpose of the enabling statute," for which no express statutory authority is required.[30]

11. The Joint Commenters reply that the bond requirement is a sanction on licensees that do not comply with milestone requirements, and that, in contrast to Intelsat's position, administrative agencies must have statutory authority to impose a sanction.[31] According to the Joint Commenters, the bond requirement is a sanction rather than a financial qualification showing, because otherwise licensees would be given alternatives, such as establishing an escrow account or submitting an irrevocable letter of credit.[32]

12. *Discussion.* The Commission has explicit authority to adopt both license conditions and financial qualification requirements for licensees. The financial qualification requirement derives from Section 308(b) of the Communications Act.[33] This statutory provision provides the Commission with ample authority to adopt a bond requirement.[34] In the *First Report and Order,* the Commission explained that the bond requirement is a new financial qualification requirement.[35] The Commission imposes financial qualification requirements to help prevent warehousing of the orbit/spectrum resource, by ensuring that satellite licenses have the financial resources necessary to construct and launch a satellite.[36] Specifically, requiring satellite licensees to make a real financial commitment to construct and launch a satellite, and to demonstrate to a surety company that they will be financially able to proceed, limits the likelihood that the licensee will hold a license simply to preclude another party from going forward.[37] The Commission

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[29] Intelsat Comments at 3-4, *citing* Mobile Communications Corp. v. FCC, 77 F.3d 1399, 1404-06 (D.C. Cir., 1996), *cert. denied* 519 U.S. 823 (1996) (*Mtel*).

[30] Intelsat Comments at 5-6, *citing* Gold Kist, Inc. v. U.S. Dept. of Agriculture, 77 F.3d 1399, 1404-06 (D.C. Cir., 1996).

[31] Joint Commenters Reply at 4-5, *citing* Section 558(b) of the Administrative Procedure Act, 5 U.S.C. § 558(b).

[32] Joint Commenters Reply at 2 n.3.

[33] 47 U.S.C. § 308(b). "All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station . . . ."

[34] We also note that courts defer to agencies' interpretation of statutes unless Congress has spoken directly to the precise question at issue. Chevron, U.S.A. Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984); Texas Rural Legal Aid v. Legal Services Corp., 940 F.2d 685, 694 (D.C. Cir., 1991); *Mtel*, 77 F.3d at 1405.

[35] *First Report and Order*, 18 FCC Rcd at 10824, 10825 (paras. 165, 167).

[36] Loral Spacecom Corp., *Order*, 18 FCC Rcd 16374, 16382 (para. 22) (2003).

[37] *First Report and Order*, 18 FCC Rcd at 10825 (para. 167).

adopted the bond requirement in part because the previous financial qualification requirement, showing that the applicant has financial resources to construct and launch a satellite and operate it for one year, did not accurately reflect whether the applicant would be able to go forward with its business plans, and construct and launch a satellite.[38] Moreover, the bond requirement ensures that financial qualification determinations are market-driven rather than a regulatory conclusion,[39] and provides an independent assessment of the licensee's financial condition.

13. In addition, as the Commission noted in the *First Report and Order*, it had previously adopted a bond requirement in the 1993 *Private Paging Exclusivity Order*.[40] The Commission also adopted a bond-based financial qualification requirement in 1991.[41] Petitioners are correct that the Commission did not discuss its statutory authority for the bond requirement in either case. None of the commenters in either proceeding raised a question or concern as to whether the Commission had such authority. In any case, the Commission clearly has authority for the bond requirement under Section 308(b) of the Communications Act.

14. Moreover, the Commission has other statutory authority for the bond requirement, in addition to Section 308(b). Section 303(*l*)(1) of the Communications Act[42] empowers the Commission to prescribe qualification requirements of station operators. This provision complements the Commission's authority under Section 308(b). Moreover, as Intelsat observes, we have authority for the bond requirement under Section 4(i) of the Communications Act. Section 4(i) empowers the Commission to adopt any and all rules, not inconsistent with the Act, as may be necessary in the execution of its functions.[43] The bond requirement is necessary to ensure that satellite licensees are financially qualified, within the meaning of Section 308(b) of

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[38] *First Report and Order*, 18 FCC Rcd at 10824 (para. 164).

[39] *First Report and Order*, 18 FCC Rcd at 10825 (para. 167).

[40] *First Report and Order*, 18 FCC Rcd at 10826 (para. 170), *citing* Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, *Report and Order*, PR Docket No. 93-35, 8 FCC Rcd 8318 (1993) (*Private Paging Exclusivity Order*).

[41] Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, *Report and Order*, CC Docket No. 90-358, 7 FCC Rcd 719, 723-24 (paras. 22-25) (1991).

[42] 47 U.S.C. § 303(*l*)(1). ("Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [h]ave authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to persons who are found to be qualified by the Commission and who otherwise are legally eligible for employment in the United States, except that such requirement relating to eligibility for employment in the United States shall not apply in the case of licenses issued by the Commission to (A) persons holding United States pilot certificates; or (B) persons holding foreign aircraft pilot certificates which are valid in the United States, if the foreign government involved has entered into a reciprocal agreement under which such foreign government does not impose any similar requirement relating to eligibility for employment upon citizens of the United States.")

[43] 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.")

the Act.[44] In addition, the bond requirement helps to prevent speculators that may or may not obtain the financing needed to build the system from holding spectrum to the exclusion of entities financially able to proceed. Contentions that Section 4(i) is not a "stand-alone" source of authority are not relevant,[45] because our authority is also based on Section 308(b) of the Communications Act.

15. Furthermore, Section 303(r) of the Communications Act[46] allows the Commission to place conditions on licenses necessary to carry the provisions of the Act. The bond is a license condition, as well as a financial qualification requirement under Section 308(b) of the Communications Act. Thus, this is analogous to *Conrail v. ICC*.[47] In that case, plaintiffs were New York City and State authorities requesting the Interstate Commerce Commission (ICC) to issue a certificate allowing abandonment of a rail line, to facilitate their condemning the property on which the tracks laid so that it could be put to another use.[48] The ICC issued the abandonment certificate, conditioned on the plaintiffs posting a surety bond to cover part of the rail demolition costs.[49] The Court upheld the condition, not based on any specific statutory language authorizing the ICC to adopt a bond requirement, but on general language allowing the ICC to adopt conditions that further the public convenience and necessity.[50] Similarly, Section 303(r), along with authority under Sections 303(*l*)(1), 308(b), and 4(i) of the Communications Act, allow the

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[44] 47 U.S.C. § 308(b) ("All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.")

[45] Joint Commenters Reply at 6.

[46] 47 U.S.C. § 303(r). ("Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall ... [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.")

[47] Consolidated Rail Corporation v. ICC, 29 F.3d 706 (D.C. Cir., 1994) (*Conrail v. ICC*).

[48] *Conrail v. ICC*, 29 F.3d at 708.

[49] *Conrail v. ICC*, 29 F.3d at 709.

[50] *Conrail v. ICC*, 29 F.3d at 714. At the time of the *Conrail* case, the relevant language appeared at 49 U.S.C. § 10903(b)(1)(A)(ii). Since then, the ICC has been replaced with the Surface Transportation Board. The relevant language now appears at 49 U.S.C. § 10903(e)(1)(B), and states that the Board may "approve the [abandonment certificate] application with modifications and require compliance with conditions that the Board finds are required by public convenience and necessity; ..."

FCC to adopt a bond requirement as a license condition even though the Communications Act does not specifically authorize it.

16. Commenters are also mistaken in claiming that the Commission is prohibited from any action that might result in payment of funds to the U.S. Treasury, except for fees, forfeitures, and auction payments. Congress contemplated that miscellaneous receipts could flow to administrative agencies, and has adopted legislation, the "Miscellaneous Receipts Act," governing those funds.[51] Furthermore, we note that the Commission has adopted conditions for the merger of two Bell Operating Companies, Ameritech and Southwestern Bell, that requires the new company to make payments of money to the U.S. Treasury if it did not comply with certain conditions on the merger and transfer of licenses and permits.[52] Given that the bond requirement is a license condition as well as a financial qualification requirement, the *Southwestern Bell/Ameritech Merger Order* provides a good precedent for the bond requirement.

17. Parties contending that we do not have authority to adopt a bond requirement characterize the requirement as a penalty rather than a financial qualification showing. Although these commenters discuss at length why the bond requirement would not be permissible if it were a penalty, they provide very little explanation for why the bond requirement should be considered a penalty. In part, they claim that the bond requirement must be a penalty because it requires the payment of money upon failure to meet a license condition.[53] We disagree. The test of whether a sanction is a "penalty" is whether it is intended to punish, or whether it is relevant or germane to the purpose of the statute.[54] In this case, the "purpose of the statute" is to ensure that licensees are financially qualified to construct the licensed facilities.[55] The bond is relevant to the purpose of Section 308(b) of the Act because it requires licensees to show a surety company that they are willing and able to proceed with the construction of the satellite they have requested authority to construct. In addition, the bond discourages licensees from warehousing scarce orbit and spectrum resources while they decide whether to proceed with construction of their satellite.

18. The only other argument that the commenters make on this issue is that, if the bond were not a penalty, licensees would be given alternatives such as establishing an escrow account or submitting an irrevocable letter of credit.[56] As a preliminary matter, we note that licensees are given 30 days after the grant of a license to decide whether to post the bond or to surrender the license. In that sense, licensees choose to accept the bond requirement when they choose to

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[51] 31 U.S.C. § 3302(b).

[52] *See* Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, *Memorandum Opinion and Order*, CC Docket No. 98-141, 14 FCC Rcd 14712 (1999) (*Southwestern Bell/Ameritech Merger Order*), *as modified in* Ameritech Corp., and SBC Communications, Inc., *Order*, 16 FCC Rcd 5714 (2001).

[53] *See* Joint Commenter Reply at 3-4.

[54] L.P. Steuart & Bro., Inc. v. Bowles, 322 U.S. 398, 406-07 (1944); Copper Plumbing and Heating Co. v. Campbell, 290 F.2d 368, 372 (D.C. Cir. 1961).

[55] 47 U.S.C. § 308(b).

[56] Joint Commenters Reply at 2 n.3.

accept the license. Moreover, we consider an escrow account option and a letter of credit option, and explain why we cannot adopt them, in this Order below.[57]

19. In summary, the bond requirement is not a penalty. It is not only a financial qualification requirement expressly authorized by Section 308(b) of the Communications Act, but also a license condition authorized under Sections 303(r), 303(*l*)(1), and 4(i) of the Communications Act. In other words, it is a market-based mechanism for ensuring that licensees are willing and able to proceed with constructing their satellites. Moreover, the bond requirement is also an important safeguard against speculation. By limiting eligibility to applicants that are able to procure a bond, we discourage applications from those with uncertain business plans, as well as speculators who seek only to profit from the Commission's regulations.

2. Need for Bond Requirement

20. *Background.* In addition to the bond requirement, the Commission adopted other licensing rules in the *First Report and Order*, including safeguards against speculation. The Commission placed a limit on the number of pending applications and unbuilt satellites one licensee can have in any frequency band at any time because, for both financial and logistical reasons, companies cannot build more than a few GSO satellites or NGSO systems simultaneously.[58] The Commission also adopted an attribution rule, so that licensees could not evade the limits merely through a corporate restructure.[59] Furthermore, the Commission prohibited applicants from selling their place in the Commission's application queue.[60] In addition, the Commission adopted a policy of strict enforcement of milestones.[61]

21. *Discussion.* The Joint Commenters assert that the other safeguards adopted in the *First Report and Order* are sufficient to deter speculation without the bond requirement.[62] The Joint Commenters further argue that the first-come, first-served procedure adopted will not create a "land-rush" mentality, and question whether the Commission relied too heavily on the prospects of speculation when it adopted the bond requirement in addition to other safeguards.[63] In addition, the Joint Commenters maintain that the Commission did not need a bond requirement to deter speculation when it adopted a similar first-come, first-served procedure for FM radio licenses in 1985.[64]

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[57] Section III.E. In that section, we also discuss why the letter of credit is not a viable option at this time.

[58] *First Report and Order*, 18 FCC Rcd at 10847-49 (paras. 230-33).

[59] *First Report and Order*, 18 FCC Rcd at 10849-51 (paras. 236-39).

[60] *First Report and Order*, 18 FCC Rcd at 10851-52 (paras. 242-43).

[61] *First Report and Order*, 18 FCC Rcd at 10828 (para. 175).

[62] Joint Commenters Petition at 7-10, Joint Commenters Reply at 8. *See also* Joint Commenters Further Reply at 2, SES Americom Petition at 9-12; Space Imaging Comments at 8-10; SES Americom Reply at 3.

[63] Joint Commenters Petition at 6-7.

[64] Joint Commenters Petition at 7. *See also* Amendment of the Rules Concerning Cut-Off Procedures for FM and TV Broadcast Stations, *Report and Order*, MM Docket No. 84-750, FCC 85-125,

22. Intelsat emphasizes that there are real costs associated with warehousing and speculation in orbit and spectrum resources, such as increased opportunity and transaction costs for satellite operators and manufacturers.[65] Intelsat emphasizes that there is greater need for safeguards against speculation in satellite applications now than in the past, because the anti-trafficking rule has been eliminated.[66] Therefore, Intelsat argues that we need a meaningful financial incentive to comply with milestone requirements, including an incentive that cannot be evaded through factors within the control of the licensee, such as bankruptcy.[67]

23. We disagree with the commenters who argue that the bond requirement is not necessary. The bond requirement is a significant component of the package of rules intended to limit license grants to those that are able and willing to build their proposed systems. The bond requirement provides a marketplace mechanism to evaluate an applicant's plans that is not present in any of the other safeguards adopted in the *First Report and Order*.

24. Moreover, we noted above that the Commission adopted several rule revisions in the *First Report and Order*. The Commission premised many of those reforms on adequate safeguards against speculation. For example, one of the reforms was eliminating the anti-trafficking rule. While we expect substantial benefits to result from eliminating the anti-trafficking rule,[68] there is also an increased risk of speculation unless the Commission adopts adequate safeguards.[69] In addition, the Commission adopted a first-come, first-served procedure for GSO-like applications.[70] Several commenters expressed concerns about the potential for speculation in a first-come, first-served procedure. It is clear that we need adequate safeguards to protect against such speculation.[71]

25. In addition, we agree with Intelsat that there are real costs associated with warehousing and speculation in orbit and spectrum resources, in that it precludes another party willing and able to construct a satellite from doing so. As a result, warehousing and speculation delay service to the public, until the speculator's license is revoked and reassigned to another party. One of the primary goals of the *First Report and Order* was to expedite service to the public,[72] and relaxing the safeguards against speculation could undercut that goal.

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50 Fed. Reg. 19936 (May 13, 1985) (*TV and FM Broadcast Order*), *cited in First Report and Order*, 18 FCC Rcd at 10769 (para. 12).

65 Intelsat Comments at 6; Intelsat Further Comments at 2.

66 Intelsat Comments at 6-7; Intelsat Further Comments at 2.

67 Intelsat Further Comments at 2.

68 In particular, eliminating the anti-trafficking rule helps facilitate post-licensing negotiations among NGSO-like licensees, and may lead to the development of a secondary market for satellite capacity. *First Report and Order*, 18 FCC Rcd at 10842-43 (paras. 217-19).

69 *First Report and Order*, 18 FCC Rcd at 10841-42 (para. 216).

70 *First Report and Order*, 18 FCC Rcd at 10804-18 (paras. 108-50).

71 *First Report and Order*, 18 FCC Rcd at 10797 (para. 86).

72 *First Report and Order*, 18 FCC Rcd at 10776 (para. 16).

26. Finally, although the *TV and FM Broadcast Order* provided a good starting point for developing a first-come, first-served procedure for satellite licenses,[73] we conclude that commenters misplace their reliance on that Order with respect to the need for safeguards against speculation. In the *First Report and Order*, the Commission eliminated the prohibition against selling bare satellite licenses for profit.[74] There was nothing comparable in the *TV and FM Broadcast Order*. While the Commission had previously eliminated the three-year holding rule for broadcast licenses,[75] it retained the prohibition against selling bare broadcast licenses for profit.[76] Because the Commission eliminated the anti-trafficking rule more completely in the *First Report and Order* than it did in the *TV and FM Broadcast Order*, more safeguards against speculation are needed here. Moreover, broadcast licensees can build television and radio stations more quickly than satellite licensees can build satellites, and so the Commission's rules require broadcast licensees to provide service earlier than satellite licensees.[77] Because there is a shorter construction period required for broadcast licenses, there is less opportunity for warehousing, and the additional safeguards against speculation required for broadcast licensees are not needed for satellite licensees.

3. Costs of Bond

27. *Background.* The Joint Commenters note that most construction bonds require an annual fee of four percent of the bond amount.[78] The Joint Commenters also assert that surety companies might ask satellite licensees to place some amount of money in an escrow account, in addition to the bond fee, in which case the licensee would lose the difference between the interest on the escrow account and the amount it might earn if that money were invested elsewhere.[79] The

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[73] *See First Report and Order*, 18 FCC Rcd at 10804 (para. 107).

[74] *See First Report and Order*, 18 FCC Rcd at 10822-23 (para. 161).

[75] The three-year holding rule prohibited transfers of broadcast licenses unless the licensee had held the license for a minimum of three years.

[76] Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control), *Report and Order*, BC Docket No. 81-897, FCC 82-519, 52 Rad. Reg. 2d 1081, 1088 (para. 29) (1982) (*Broadcast Trafficking Report and Order*).

[77] Currently, the Commission requires broadcast licensees to complete construction and to begin operation of their facilities within three years. *See* 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes, *Report and Order*, MM Docket No. 98-43, 13 FCC Rcd 23056, 23090-94 (paras. 83-90) (1998).

[78] Joint Commenters Petition at 13. *See also* Space Imaging Comments at 5; SES Americom Petition at 7. SES Americom claims that it has discussed the Commission's bond requirements with insurers familiar with the satellite industry, and based on those discussions, SES Americom believes that the costs of the bond will be up to 3 or 4 percent of the bond amount. SES Americom Reply at 4-5. *See also* EchoStar *Ex Parte* Statement at 1-3 (costs of bond are one to three percent of face value of bond, plus 0.4 to 0.5 percent in cases where surety company requires 100 percent collateral in form of irrevocable letter of credit). EchoStar claims that such a letter of credit requirement is typical. EchoStar *Ex Parte* Statement at 2.

[79] Joint Commenters Petition at 13-14. *See also* Space Imaging Comments at 5.

Joint Commenters estimate that this could amount to $700,000 per year, or $2.8 million over four years.[80] The Joint Commenters are also concerned that this cost would increase the prices of satellite services.[81]

28. According to several commenters, the costs of bonds will tend to discourage new or innovative services, because new satellites are often riskier than replacement satellites with a customer base, and because innovative proposals are generally riskier than proven business models.[82] They also assert that new entrants are often thinly capitalized, and so any additional costs might affect them disproportionately.[83] These parties contend that the bond's effects on new and innovative satellite services warrant eliminating the bond requirement.[84]

29. Some commenters are concerned that the Commission's bond requirement could encourage other administrations to adopt similar requirements, and subject satellite operators to multiple and inconsistent obligations.[85] Finally, @Contact argues that the bond requirement imposes significant costs that encourage applicants to withdraw their applications, and so undercuts the Commission's goal of expediting satellite service to the public.[86] Hughes accuses Intelsat of supporting the bond requirement to gain a competitive advantage over smaller satellite operators.[87]

30. Intelsat asserts that the bond fee is usually about two percent, and might decrease as surety companies become more familiar with satellite operators.[88] Furthermore, Intelsat notes that the amount of the bond decreases as the licensee meets each milestone.[89] Intelsat also

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80 Joint Commenters Petition at 14.

81 Joint Commenters Petition at 14. *See also* SES Americom Reply at 5-6.

82 Joint Commenters Petition at 14-15, Joint Commenters Further Reply at 2-3, SES Americom Petition at 3-4, SES Americom Reply at 6; SES Americom Further Reply at 1-2. *See also* Space Imaging Comments at 5. In Intelsat's Further Comments, it argues that establishing an escrow account might create a higher barrier to entry than the bond requirement. Intelsat Further Comments at 6. The Joint Commenters interpret this as an acknowledgement that the bond requirement is a barrier to entry. Joint Commenters Further Reply at 2-3.

83 Joint Commenters Petition at 15-16; SES Americom Petition at 7-8; SES Americom Reply at 6. *See also* Space Imaging Comments at 5-6.

84 SES Americom Petition at 4-5; Space Imaging Comments at 5-6.

85 SIA Petition at 22-23; Joint Commenters Petition at 16-17; SES Americom Petition at 8-9, 24; Space Imaging Comments at 8; SES Americom Reply at 3. *See also* SES Americom Reply at 9 (proposing exemption of non-U.S.-licensed satellite operators from bond requirement, to avoid encouraging bond requirements in foreign Administrations).

86 @Contact Comments at 2-3.

87 Hughes Reply at 3.

88 Intelsat Further Comments at 4.

89 Intelsat Comments at 7, Intelsat Further Comments at 4 n.6, Intelsat Further Reply at 3.

observes that the Commission incorporated safeguards into the bond requirement, such as not requiring execution of the bond in cases where the licensee has shown that a milestone extension is warranted, and considering waivers for operators proposing public safety services.[90] In any case, Intelsat points out that the costs of constructing and launching a satellite is about $250 million, and that the costs of a bond is about two percent of that amount.[91] Moreover, Intelsat argues that the value of a satellite license can be as much as or more than the cost of constructing and launching a satellite, and cites a number of Orders in which parties purchased satellite licenses.[92] SES Americom contends that Intelsat's comparisons to recent satellite license sales are not relevant because those sales involved desirable orbit locations that are no longer available.[93]

31. *Discussion.* Assuming initially that the Joint Commenters are correct in their cost valuations, they fail to demonstrate that the fees and other costs associated with maintaining a $5 million bond will be so great as to discourage the vast majority of serious satellite applicants. As Intelsat points out, the costs of constructing and launching a satellite are approximately $250 million. Thus, even using the Joint Commenters' $2.8 million cost figure, this is only about one percent of the cost of the satellite itself. Most licensees who are unable to assume the costs of a bond of this nature also would not be financially able to construct, launch, and operate a satellite.

32. In addition, we conclude that the Joint Commenters' concerns regarding bond requirements in foreign administrations do not warrant eliminating it here. As we explained above, the bond requirement is a necessary part of the Commission's protections against speculative satellite applications, because it helps ensure that licenses are granted only to parties willing and able to construct a satellite system.[94] We also explained that relaxing this protection against speculation would undercut the policy goals of the *First Report and Order*,[95] which include expediting service to the public, and promoting efficient spectrum management policies by reducing the amount of time that spectrum lies fallow.[96] Given that the costs of a bond are such a small fraction of the costs of constructing and launching a satellite, and the importance of the policy objectives noted above, we are not persuaded by the Joint Commenters' objectives.

33. Furthermore, the Joint Commenters are mistaken in asserting that any bond requirement could result in increased prices for satellite services. The licensee would not incur any bond costs after the satellite is launched and operating. Thus, the costs of the bond would become part of the operator's fixed cost at that point. As we explained in the *First Report and Order*, however, satellite service prices in a competitive market are based on the marginal cost of

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90 Intelsat Comments at 8.

91 Intelsat Comments at 7, Intelsat Further Comments at 4-5, Intelsat Further Reply at 2. In response to concerns about the costs of maintaining a bond, Intelsat also recommends allowing licensees to establish an escrow account instead of posting a bond. Intelsat Comments at 8. We will address the escrow account proposal in another section of this Order.

92 Intelsat Comments at 7; Intelsat Further Reply at 2 n.7.

93 SES Americom Reply at 7.

94 Section III.A.2.

95 Section III.A.2.

96 *First Report and Order*, 18 FCC Rcd at 10765-66 (para. 4).

the operator with the highest marginal cost rather than the operators' fixed costs.[97] Thus, the costs of the bond will not affect the prices of satellite services.

34. Moreover, we emphasize that we have based our analysis on the Joint Commenters' estimate that the bond might cost as much as $2.8 million over four years.[98] The Joint Commenters have likely overestimated this amount. First, the Joint Commenters base their estimate on an assumption that the costs of the bond are $700,000 per year, and do not decrease over time. Thus, the Joint Commenters failed to account for the fact that the bond amount decreases by 25 percent each time the satellite operator meets a milestone. Thus, using the Joint Commenters figures, the cost of the bond over four years would be $1.75 million rather than $2.8 million. Moreover, Intelsat estimates that the cost of the bond is two percent of the face value of the bond, rather than four percent as the Joint Commenters asserts. If Intelsat is correct, the cost of the bond over four years is much less than $1.75 million, about $250,000.[99] We do not need to quantify the dollar amount of the costs of a bond, however, because even if Joint Commenters' estimate is accurate, they still have not shown that those costs warrant eliminating the bond requirement.

35. While none of the commenters have justified eliminating the bond requirement, we are sensitive to concerns regarding new and innovative satellite services. Such services are generally riskier than more established services, and so some fraction of satellite operators proposing such services are more likely than the average satellite operator to be deterred by any increase in costs, including the costs of the bond.[100] Although we recognize that there is a possibility that the bond requirement may discourage some parties with new or innovative satellite service proposals from applying for a satellite license, this does not warrant complete elimination of the bond requirement. Eliminating the bond requirement would create an unacceptable increase in the potential for speculation and warehousing. Instead, in this Order below, we will lower the bond amount to avoid discouraging applicants that intend to construct and launch a satellite system, while continuing to discourage speculators from applying for licenses.

4. Licensee's Obligation to Proceed

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[97] *See First Report and Order*, 18 FCC Rcd at 10843-44 (para. 220).

[98] We do note, however, that the costs of a bond may vary depending upon the surety company's evaluation of a particular licensee's business plan and its assessment of the risk associated with the licensee's ability to construct and launch the satellite.

[99] Under Intelsat's estimate, the cost of the bond in the first year would be two percent of $5 million, or $100,000. In the following three years, the cost of the bond would be $75,000, $50,000, and $25,000. These figures would be reduced further if they were discounted for present value.

[100] In the *First Report and Order*, the Commission found that the interim bond amounts were less likely to affect small and innovative applicants than the previous financial qualification requirements, under which applicants were required to show that they had the financial resources to construct and launch a satellite and operate it for one year, at the time they applied for a license. *See First Report and Order*, 18 FCC Rcd at 10841 (para. 215). Although replacing the previous financial qualification requirements with the interim bond requirement reduced a significant obstacle for new and innovative applicants, the interim bond requirement still presented an obstacle, although much smaller. By reducing the bond amounts, we reduce that obstacle as much as possible without creating an unacceptable risk of speculation.

36. *Background.* The Joint Commenters argue that failing to launch and operate a satellite system is often a reflection of changed economic circumstances rather than speculation.[101] The Joint Commenters observe that the bond would not be payable if the licensee faces circumstances beyond its control of the kind that warrant a milestone extension, but argue that this would not help a licensee who chooses to abandon its business plans without facing such circumstances.[102] According to the Joint Commenters, it is unfair to penalize a licensee for deciding to change its business plan in response to changes in economic conditions.[103] SES Americom claims that, while bonds are often included as part of non-satellite construction contracts, in which a contracting party has a legally enforceable obligation to build something, such bonds are inappropriate in satellite licenses because licensees do not have a legally enforceable obligation to build a satellite.[104]

37. *Discussion.* To the extent petitioners are asserting that satellite entrepreneurs should be free to apply for and obtain satellite licenses and later abandon their licenses because of economic changes in the marketplace, we believe that such practices are inconsistent with the public interest. We realize that licensees may file applications with the Commission fully intending to construct their satellites, and then face changes in economic conditions that lead them to alter their business plans. Nonetheless, such changes in a licensee's plans and the resulting delays in construction and provision of service would preclude some other interested company from constructing a satellite in a more timely fashion. Therefore, we conclude that we must maintain the bond requirement, to create incentives for companies to consider their business risks before applying for a license. Furthermore, regardless of its intent, the actions of a licensee who obtains a license and surrenders it later have the same effect as the actions of a licensee who warehouses scarce orbit and spectrum resources. The bond requirement was designed to prevent such valuable resources from lying fallow when another party might be able to put those resources into use.[105]

38. Moreover, in the *First Report and Order*, the Commission explained that the International Telecommunications Union (ITU) now requires that space station licensees bring their systems into use within five years, although that can be extended to seven years under certain circumstances.[106] The Commission also observed that satellite licensees need about three to six years to construct and launch satellite systems.[107] These new ITU bringing-into-use requirements provided an important part of the rationale for reforming the satellite licensing

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101 Joint Commenters Petition at 10-12; Joint Commenters Reply at 8-9. *See also* Space Imaging Comments at 6-8.

102 Joint Commenters Petition at 12-13.

103 Joint Commenters Petition at 13. *See also* SES Americom Petition at 5, SES Americom Reply at 2-3.

104 SES Americom Reply at 5.

105 "By requiring satellite licensees to make a financial commitment to construct and launch their satellites, we help deter speculative satellite applications, and help expedite provision of service to the public." *First Report and Order*, 18 FCC Rcd at 10825 (para. 167).

106 *First Report and Order*, 18 FCC Rcd at 10771 n.48.

107 *First Report and Order*, 18 FCC Rcd at 10771 (para. 16).

procedures.[108] Thus, licensees must not be allowed to let orbit and spectrum resources lie fallow for up to a year, and preclude other qualified entities from pursuing business plans, while they decide whether they will go forward.

39. We recognize that economic conditions can change during the time it takes to construct and launch a satellite. Therefore, we generally permit licensees to modify their systems to adapt to changing business and customer needs.[109] In this way, the Commission has often granted licensees the flexibility to adjust to changed circumstances and to better serve their customers' needs. This flexibility does not extend to allowing orbit and spectrum resources to lie fallow while a licensee decides whether to proceed at all with its business plan.

B. Bond Amount

40. *Background.* As noted above, the $5 million bond requirement for GSO-like licenses and $7.5 million bond requirement for NGSO-like licenses are interim requirements. In the *Further Notice*, the Commission invited comment on other amounts. The Commission stated that the bond amounts should be high enough to deter speculative applications, without discouraging new or innovative satellite applications.[110] The Commission also requested parties advocating lower bond amounts to provide a convincing showing that those lower amounts would be sufficient to deter speculation.[111]

41. Intelsat agrees with the Commission that the standard should be whether the bond amounts are high enough to deter speculation, without creating an undue burden on committed and qualified licensees.[112] Intelsat asserts that the current bond amounts meet this standard.[113] SES Americom asserts that the current bond amounts would deter legitimate satellite applications.[114] At a minimum, SES Americom opposes increasing the bond amounts.[115]

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108 *First Report and Order*, 18 FCC Rcd at 10771 (para. 16). *See also NPRM*, 17 FCC Rcd at 3855 (paras. 19-20).

109 AMSC Subsidiary Corporation, *Order and Authorization*, 13 FCC Rcd 12316 (Int'l Bur. 1998) (*AMSC Modification Order*); GE American Communications, Inc., *Memorandum Opinion, Order and Authorization*, 15 FCC Rcd 23583 (Int'l Bur., Sat. and Rad. Div., 2000) (*GE Americom Modification Order*); Intelsat LLC, *Order and Authorization*, 16 FCC Rcd 16208 (Int'l Bur., Sat. and Rad. Div., 2000); Hughes Communications Galaxy, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd 4497 (Com. Car. Bur. 1990) (*Hughes Modification Order*).

110 *First Report and Order*, 18 FCC Rcd at 10882 (para. 334).

111 *First Report and Order*, 18 FCC Rcd at 10882 (para. 334).

112 Intelsat Further Comments at 3.

113 Intelsat Further Comments at 3-5.

114 SES Americom Further Reply at 3.

115 SES Americom Further Reply at 3-4. SES Americom also advocates its proposed alternative bond requirement, in the event that the Commission retains a bond requirement. SES Americom Further Reply at 4 n.8. We consider SES Americom's alternative below.

42. *Discussion.* As an initial matter, we adopt the standard for review of the bond amount proposed in the *Further Notice*, that the bond amounts should be high enough to deter speculative applications, without discouraging new or innovative satellite applications.[116] Intelsat supports adoption of this standard.[117] SES Americom does not criticize this standard, but questions whether the interim bond amounts meet it.[118] Accordingly, we conclude that the standard proposed in the *Further Notice* represents a reasonable balance of the competing policy goals affected by the bond requirement, discouraging speculation without discouraging new or innovative applications.

43. We conclude that the interim bond amounts adopted in the *First Report and Order* must be lowered to meet this standard. While the bond amounts are not so high that they discourage new satellite applications in most cases, new and innovative satellite services are generally riskier than more established services, and so it is possible that satellite operators proposing such services are more likely to be deterred by any increase in costs, including the costs of the bond. Accordingly, we reduce the required bond amounts from $7.5 million to $5 million for NGSO licenses, and from $5 million to $3 million for GSO licenses.[119]

44. We expect that the bond amounts as revised will not discourage applicants that intend to construct and launch a satellite system. We note that, with the possible exception of new and innovative satellite applications, the interim bond amounts did not discourage a significant number of satellite applications. From the time the bond requirement took effect to the end of the first quarter of 2004 (August 27, 2003 to March 31, 2004), we have received over 60 applications for satellite licenses that would require a bond to be posted upon grant, not counting duplicate applications. We have granted 11 of these applications. Of these, eight licensees filed the required bond, and only three decided not to file a bond, and instead surrendered their licenses. The number of applications filed during this period weighs against any conclusion that a significant number of parties have been discouraged from applying for satellite applications. Furthermore, in this Order above, we considered and rejected arguments from several commenters alleging that the costs of bonds at the interim amounts are unreasonably burdensome, in cases other than new or innovative applications.[120] Lowering the required bond amounts should address our concerns regarding new and innovative satellite applications.

45. Furthermore, while the revised bond amounts are less than the interim amounts, we believe that they remain sufficient to deter a significant number of potential speculative applications. We note that, in this Order above, commenters characterize the bond as a limit on licensees' ability to abandon a half-completed satellite construction project. We concluded that such abandonment has the same effect as warehousing of scarce orbit and spectrum resources, and so was part of what the bond requirement was designed to prevent.[121] In as much as the bond

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116 *First Report and Order*, 18 FCC Rcd at 10882 (para. 334).

117 Intelsat Further Comments at 3.

118 SES Americom Further Reply at 3-4.

119 We address licensees who have filed bonds at the interim amounts in this Order below.

120 Section III.A.3. above.

121 Section III.A.4. above.

requirement as revised will continue to discourage licensees from waiting until the first milestone date to decide whether to proceed with construction of their satellite systems, we find that it is sufficient to discourage speculative applications.

46. We also conclude that an additional small adjustment to the bond requirement is warranted. The Commission adopted different bond amounts for GSO-like and NGSO-like licenses because a greater commitment is required to implement a multiple-satellite system.[122] Upon further examination, we have determined that the costs of implementing a GSO MSS system are comparable to the costs of implementing other GSO satellites, even though they are classified as "NGSO-like" for purposes of the Commission's application processing rules. Accordingly, we adopt $3 million for all GSO licensees, including GSO MSS licensees, and $5 million for all NGSO licensees, as permanent bond requirements. This is a reduction from $7.5 million to $3 million for GSO MSS licensees.

47. Finally, we take this opportunity to clarify that licensees of satellite systems that include both GSO and NGSO satellites will be required to construct the GSO portions of their system within the GSO milestones, and NGSO portions of their system within the NGSO milestones. This is consistent with the approach adopted in the *2 GHz Order*, on which the Commission based the milestones adopted in the *First Report and Order*.[123] Such licensees will also be required to post a $5 million bond, and will be allowed to reduce the bond amount when the Commission has determined that it has met an NGSO milestone. This is because costs of constructing and launching a hybrid GSO/NGSO system are comparable to the costs of an NGSO-only system, and so such hybrid systems should be required to meet the NGSO bond requirement. We note, however, in the hybrid GSO/NGSO system, the GSO satellite must operate in the same frequency bands as the NGSO system. If the licensee intends to operate the GSO satellites in a different frequency band, it will be subject to the requirement to post a $3 million bond for each GSO satellite. We will revise the rules to make this clear.[124]

48. Licensees with bonds currently on file with the Commission will be allowed to file new bonds in the amounts we adopt in this Order. They may withdraw the bonds they currently have on file if and when they file their new bonds. GSO licensees will continue to be allowed to reduce their bond amount by 25 percent each time they meet a milestone. Under the rules we adopt today, that 25 percent is $750,000. Similarly, NGSO licensees may reduce their bond amount by 20 percent, now $1 million, each time they meet a milestone.

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[122] *First Report and Order*, 18 FCC Rcd at 10825 (para. 168).

[123] *See* The 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 (para. 106) (2000) (*2 GHz Order*), *cited in NPRM*, 17 FCC Rcd at 3881 (para. 103). *See also First Report and Order*, 18 FCC Rcd at 10829 (para. 178).

[124] We note, however, that if licensees of NGSO/GSO constellation systems frequently seek to modify the license to surrender the NGSO portion while retaining the GSO satellites, we may revisit whether $ 7.5 million is the appropriate bond amount for a combined NGSO/GSO system.

C. Proposed Revisions to Bond Requirement

1. Background

49. SES Americom proposes a number of revisions to the bond requirement, in the event that we decide to keep the requirement. We address these proposals here.

2. Reducing Bond Amounts Upon Completion of Milestone

50. *Background.* SES Americom is particularly concerned that the bond requirement imposes its greatest costs during the first year of the satellite construction process, while the satellite operator is negotiating with potential customers.[125] As a result, SES Americom recommends requiring a $500,000 bond for "earnest money" within 90 days of the date the license is granted. According to SES Americom, this amount is sufficient to deter speculative applications.[126] SES Americom further proposes requiring licensees to post a bond of $1.25 million at the time of the contract execution milestone, and to increase the amount at each subsequent milestone. According to SES Americom, this would penalize the licensee for warehousing spectrum longer.[127] SES Americom also argues that licensees should be required to post the new bonds at the time of the milestone deadline date rather than the time the milestone is completed, to avoid creating any disincentive against completing milestones ahead of schedule.[128] Intelsat opposes this proposal, stating that it would provide the least deterrence to speculation when the risk of speculation is greatest.[129]

51. *Discussion.* Above, we determined that the costs of maintaining a bond are not unreasonably burdensome. Accordingly, we reject SES Americom's proposal to set the bond amount at $500,000. We also reject SES Americom's proposal to increase the required bond as milestones become due. Under SES Americom's proposal, licensees would incur the greatest bond costs at the same time that it incurs the greatest costs of construction. We believe it is more reasonable to decrease the required bond amount as the licensee meets each milestone. This is because reducing the bond amount would give the licensee more resources to devote to constructing the satellite,[130] and because licensees generally are more likely to complete construction of the satellite once they have progressed with construction.[131]

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125 SES Americom Petition at 13-15; SES Americom Reply at 7-8.

126 SES Americom Petition at 16-17; SES Americom Reply at 8.

127 SES Americom Petition at 17-18.

128 SES Americom Petition at 17.

129 Intelsat Further Reply at 3 n.9.

130 *First Report and Order*, 18 FCC Rcd at 10826-27 (para. 172).

131 AMSC Subsidiary Corporation, Applications to Modify Space Station Authorizations in the Mobile Satellite Service, *Memorandum Opinion and Order*, 8 FCC Rcd 4040, 4042 (para. 13) (1993); Norris Satellite Communications, Inc., Application for Review of Order Denying Extension of Time to Construct and Launch Ka-band Satellite System, *Memorandum Opinion and Order*, 12 FCC Rcd 22299, 22306 (para. 17) (1997); Columbia Communications Corporation, Application for Amendment to Pending Application to Extend Milestones, *Memorandum Opinion and Order*, 15 FCC Rcd 16496, 16503 (para. 16) (Int'l Bur., 2000).

3. Bonds for Multiple Satellites

52. *Background.* SES Americom also argues that licensees should be allowed to post one bond for multiple satellites, at an amount equal to the highest amount applicable for any single satellite. Under SES Americom's proposal, the Commission could execute all or part of the bond, depending on which milestone was missed. Then, licensees missing a milestone would be given 60 days to "replenish" the bond, *i.e.*, post a new bond at the required amount. If the licensee fails to do so, the Commission would revoke all the licenses for unbuilt satellites.[132] SES argues that this provides the same deterrent effect as the current bond requirement, but at a lower cost.[133]

53. *Discussion.* The current bond requirement deters speculation by requiring licensees to make a real financial commitment to construct and launch *each* of the satellites for which they sought licenses.[134] Under SES Americom's proposal, licensees would be required to make a financial commitment only for the first satellite or satellite constellation for which it is licensed. It would not be required to make any financial commitment for any additional licenses. We believe this would not adequately reflect the licensee's financial ability to build *all* the satellites for which it is licensed, and would lead to increased speculation. We therefore reject this proposal.

D. Clarification of Bond Requirements

1. Replacement Satellites

54. *Background.* Given the huge costs of building and operating GSO space stations, we have found that there should be some assurance that operators will be able to continue to serve their customers.[135] Therefore, the Commission has stated that, when an orbit location remains available for a U.S. satellite with the technical characteristics of the proposed replacement satellite, it will generally authorize the replacement satellite at the same location.[136] In the *First Report and Order*, the Commission adopted a streamlined procedure for replacement satellite applications.[137] The Commission also clarified its replacement satellite policy. In particular, the

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132 SES Americom Petition at 18-20; SES Americom Reply at 9.

133 SES Americom Petition at 20-21; SES Americom Reply at 9.

134 *First Report and Order*, 18 FCC Rcd at 10825 (para. 167).

135 *NPRM*, 17 FCC Rcd at 3887 (para. 119), *citing* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, *Memorandum Opinion and Order*, 3 FCC Rcd 6972, 6976 n.31 (1988) (*1988 Orbit Assignment Order*); Hughes Communications Galaxy, Inc., *Order and Authorization*, 6 FCC Rcd 72, 74 n.7 (1991) (*Hughes Replacement Order*); GE American Communications, Inc., *Order and Authorization*, 10 FCC Rcd 13775, 13775-76 (para. 6) (Int'l Bur. 1995) (*GE Americom Replacement Order*).

136 *NPRM*, 17 FCC Rcd at 3887 (para. 119), *citing 1988 Orbit Assignment Order*, 3 FCC Rcd at 6976 n.31; *GE Americom Replacement Order*, 10 FCC Rcd at 13775-76 (para. 6).

137 *First Report and Order*, 18 FCC Rcd at 10856 (paras. 253-54).

Commission explained that a conventional C-band or Ku-band satellite operator's replacement expectancy does not include extended C-band or Ku-band authority for the new satellite.[138]

55. *Discussion.* SIA argues that the rule specifying the bond requirements should make clear that bonds are not required for replacement satellites.[139] As an initial matter, we reiterate that the Commission did not adopt a bond requirement for replacement satellites.[140] We will revise the rules to make this clear.

56. SIA and SES Americom also maintain that "replacement" satellites that add "extended" bands to the "conventional" bands on which the retired satellite is authorized to operate should not be subject to a bond requirement. According to SIA, there is little incentive to warehouse orbit or spectrum resources with respect to replacement satellites, and that incentive is not affected by whether the licensee wishes to use the extended bands.[141] SIA and SES Americom further argue that it is unlikely that a prospective competitor would want to operate only in the extended C-band or extended Ku-band. and that, therefore, the Commission need not be concerned about orbit or spectrum warehousing in this situation.[142]

57. We will retain the bond requirement in such cases. SIA's suggestion can be interpreted in two ways: (1) the Commission should expand the replacement expectancy to include the extended bands, or (2) the Commission should create an exception to the bond requirement for satellites that could be considered replacements but for the addition of extended bands. For reasons discussed below, we find that both results would be contrary to the public interest.

58. We will not include extended C-band or Ku-band authority in the replacement expectancy for conventional C-band or Ku-band satellites. As the Commission explained in the *First Report and Order*, we will not tie up the extended C or Ku-bands to the exclusion of others merely because a current licensee might request that authority in a future satellite application.[143] Given that satellite license terms are now 15 years long, SIA's suggestion would require us to keep the extended bands unused for up to 15 years. SIA argues that it is unlikely that any entity

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138 *First Report and Order*, 18 FCC Rcd at 10857-58 (para. 258). For clarity, we provide the following listing of frequencies in the conventional C and K-bands and the extended C and Ku-bands for Region 2 (North and South America): Conventional C-band (3700 - 4200 MHz downlink and 5925 - 6425 MHz uplink), Conventional Ku-band (11.7 - 12.2 GHz downlink and 14.0 - 14.5 GHz uplink), Extended C-band (3400 - 3700 MHz downlink, 5850 - 5925 MHz uplink and 6425 - 6725 MHz uplink), Extended Ku-band (10.95 - 11.2 GHz downlink , 11.45 - 11.7 GHz downlink. and 13.75 - 14.0 GHz uplink), Fixed Satellite Service Appendix 30 Plan C-Band (4500 - 4800 MHz downlink and 6725 - 7025 MHz uplink), Fixed Satellite Service Appendix 30 Plan Ku-band (10.7 - 10.95 GHz downlink and 11.2 - 11.45 GHz downlink and 12.75 - 13.25 GHz uplink).

139 SIA Petition at 18.

140 *First Report and Order*, 18 FCC Rcd at 10825 (para. 167).

141 SIA Petition at 19-20; SES Americom Petition at 21-22, SES Americom Reply at 9, SES Americom Further Reply at 2.

142 SIA Petition at 20; SES Americom Petition at 22-23.

143 *First Report and Order*, 18 FCC Rcd at 10857-58 (para. 258).

would build an extended-band-only in any event. We prefer to leave such matters to the marketplace. If an extended-band-only satellite or hybrid using the extended bands is consistent with a qualified company's business plans, we see no reason to preclude that company from going forward. If it turns out that such an extended C- or Ku-band-only satellite is not viable enough to attract investment, then the licensee will probably not be able to construct its satellite, and its license will be cancelled. In that case, the extended C- or Ku-bands should become available again to the conventional C or Ku-band satellite operator at the time it launches its next-generation satellite. We also note that an entity may wish to use the extended C- or Ku-band with some other band, *e.g.*, Ka-band, or as a feeder link for another satellite service.

59. Further, we will not eliminate the bond requirement for next generation satellites that are authorized to expand into the extended bands. Such an exception would result in eliminating the bond requirement for next-generation satellites that add certain frequencies but retaining it for those that add others. We know of no reason to create such a discrepancy.

2. Non-U.S.-Licensed Satellites

a. Background

60. The Commission has several procedures available for non-U.S.-licensed satellite operators seeking to access the U.S. market. The first procedure allows the non-U.S. satellite operator to participate in a modified processing round through (1) an earth station application seeking to communicate with the satellite or (2) through a "letter of intent" to use its non-U.S. satellite to provide service in the United States.[144] The second procedure is applicable in cases where the non-U.S.-licensed satellite operator seeks immediate access to the U.S. market through an in-orbit satellite.[145] Under this procedure, a prospective U.S. earth station operator seeking to communicate with the in-orbit non-U.S.-licensed space station must file an application for an initial earth station license or a modification of an existing license, listing the non-U.S.-licensed space station as a "point of communication."[146]

61. Later, the Commission streamlined the second procedure for non-U.S.-licensed satellite operators seeking immediate access to the U.S. market.[147] Most importantly, once a non-U.S.-licensed space station is permitted to access the U.S. market in the conventional C-band or Ku-band, it is placed on the Permitted Space Station List (Permitted List) upon the applicant's request. This list includes all satellites with which U.S. earth stations with routinely-authorized technical parameters in the conventional C- and Ku-band (known as "ALSAT" earth stations) are permitted to communicate without additional Commission action, provided that those communications fall within the same technical parameters and conditions established in the earth

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144 *DISCO II*, 12 FCC Rcd at 24173 (para. 184).

145 *DISCO II*, 12 FCC Rcd at 24174 (para. 186).

146 *See generally* 47 C.F.R. § 25.137.

147 Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Order, IB Docket No. 96-111, 15 FCC Rcd 7207 (1999) (*DISCO II First Reconsideration Order*).

stations' original licenses.[148] A non-U.S.-licenses satellite operator can also file a petition for declaratory ruling to have its satellite considered for access to the U.S. market in other frequency bands as well. However, earth station applications will be considered on an individual basis to access the satellite as a point of communication in the specific frequency band. In all these cases, the non-U.S.-licensed satellite operator must meet all Commission requirements that apply to U.S.-licensed satellites before it will be authorized to provide service in the United States.[149]

62. In the *First Report and Order*, the Commission modified the procedures applicable to operators of non-U.S.-licensed satellites seeking access to the U.S. market, to the extent necessary to make them consistent with the new procedures for U.S.-licensed satellites.[150] Specifically, the Commission determined that it did not need to revise the *DISCO II* procedures for modified processing rounds.[151] For the first-come, first-served procedure, the Commission decided that Letters of Intent and earth station applications to access foreign-based satellites should be placed into the Commission's space station application processing queue.[152] In addition, the Commission eliminated the financial qualification requirements,[153] and adopted a bond requirement for operators of non-U.S.-licensed satellites that have not yet been launched, comparable to the bond requirement for U.S. licensees.[154] Now, several parties request revision or clarification of the bond requirement for non-U.S.-licensed satellite operators in their petitions for reconsideration. We address those arguments below.

b. Bonds for Earth Station Applications Seeking Access to a Non-U.S.-Licensed Satellite

63. *Background.* Telesat requests that the Commission clarify that the bond requirement does not apply to non-U.S.-licensed satellite operators seeking access to the U.S. market by the earth station license modification procedure, the petition for declaratory ruling, or the Permitted

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148 *DISCO II First Reconsideration Order*, 15 FCC Rcd at 7214-16 (paras. 16-20). "ALSAT" means "all U.S.-licensed space stations." Originally, under an ALSAT earth station license, an earth station operator providing fixed-satellite service in the conventional C- and Ku-bands could access any U.S. satellite without additional Commission action, provided that those communications fall within the same technical parameters and conditions established in the earth stations' licenses. *See DISCO II First Reconsideration Order*, 15 FCC Rcd at 7210-11 (para. 6). The *DISCO II First Reconsideration Order* expanded ALSAT earth station licenses to permit access to any satellite on the Permitted List. *DISCO II First Reconsideration Order*, 15 FCC Rcd at 7215-16 (para. 19).

149 *DISCO II*, 12 FCC Rcd at 24173-74 (paras. 184-85, 188).

150 *First Report and Order*, 18 FCC Rcd at 10868-71 (paras. 290-97).

151 *First Report and Order*, 18 FCC Rcd at 10869 (para. 291).

152 *First Report and Order*, 18 FCC Rcd at 10869-70 (para. 294).

153 *First Report and Order*, 18 FCC Rcd at 10874 (para. 307).

154 *First Report and Order*, 18 FCC Rcd at 10874-75 (paras. 308-09).

List procedure.[155] Telesat argues that the policy concerns regarding warehousing of orbit or spectrum apply only to non-U.S.-licensed satellite operators filing Letters of Intent.[156]

64. *Discussion*. We agree with Telesat in part. In cases where an earth station operator seeks access to a non-U.S.-licensed satellite that is in-orbit and operating, the non-U.S.-licensed satellite operator is not required to post a bond.[157] In cases where the non-U.S.-licensed space station is not in-orbit, the bond requirement serves the same purpose as it does for U.S.-licensed satellites; that is, to demonstrate financial ability to construct and launch the satellite and to discourage speculative filings. We will revise the rules to make it clear that the bond requirement also applies to petitions for declaratory ruling to have a satellite considered for access to the U.S. market, and to requests to place a non-U.S. licensed space station on the Permitted List, in cases where the satellite has not been launched.

c. Bonds for Non-U.S.-Licensed GSO Satellites

65. *Background*. While SIA agrees that non-U.S.-licensed satellite operators should be held to the same standards as U.S. licensees, SIA also maintains that non-U.S.-licensed operators of GSO satellites should not be subject to a bond requirement. This is because, according to SIA, GSO satellites at a particular orbit location do not preclude U.S. licensees from entering the market from other orbit locations. Alternatively, SIA supports imposing the same requirements on U.S. and non-U.S. licensees with respect to non-U.S. licensees participating in a modified processing round, where a reservation of spectrum could preclude use by another NGSO satellite system.[158] SIA contends that granting "landing rights" for non-U.S.-licensed satellite operators are distinguishable from granting a license to a U.S.-licensed satellite operator, and so do not need to be comparable under U.S. WTO commitments.[159] SIA further contends that the Commission does not have jurisdiction over milestones or other implementation requirements of non-U.S.-licensed satellites.[160]

66. *Discussion*. While we agree with SIA that allowing a non-U.S.-licensed satellite operator to enter the U.S. market does not generally preclude further entry by U.S. operators at other orbit locations and frequency bands, it does preclude other applicants from seeking a license at that particular orbit location in that frequency band. This is because our authorization for market access is a reservation of spectrum at that orbit location. It is for this reason that we impose a bond requirement on all U.S.-licensed GSO satellites -- even when other orbit locations remain available for assignment in that frequency band. The orbit-spectrum resource is limited and consequently, if any GSO licensee does not construct or launch its satellite, scarce orbit and

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155 Telesat Petition at 1-3.

156 Telesat Petition at 3-6. *See also* SES Americom Further Reply at 2-3; Joint Commenters Further Reply at 2.

157 *First Report and Order*, 18 FCC Rcd at 10875 (para. 309).

158 SIA Petition at 20-21, 25. *See also* SES Americom Petition at 21-22; SES Americom Further Reply at 2-3.

159 SIA Petition at 21-22. *See also* SES Americom Petition at 24-25.

160 SIA Petition at 22.

spectrum resources will be tied up until that license or authorization is revoked. Accordingly, we find that a bond requirement for non-U.S.-licensed GSO satellites serves the same purpose as it does for U.S.-licensed GSO satellites.

67. We also disagree with SIA's contention that the Commission does not have authority to impose milestone or other implementation requirements on non-U.S.-licensed satellites.[161] The Commission found in *DISCO II* that it has authority to impose all its rules and policies, including system implementation requirements on *all* systems serving the United States, including foreign-licensed satellites approved to serve customers in the United States under *DISCO II*.[162] Thus, SIA's argument is in fact a late-filed petition for reconsideration of *DISCO II*. As we have previously noted, "[t]he Communications Act, our rules, and the need for administrative orderliness require petitioners to raise issues in a timely manner."[163] Accordingly, we dismiss this untimely raised argument.

d. U.S. Satellites at Orbit Locations Licensed to Non-U.S. Operators

68. *Background.* In the *First Report and Order*, the Commission observed that it has authorized U.S.-licensed GSO satellites to operate in-orbit on a temporary basis pending launch and operation of a non-U.S.-licensed satellite with higher ITU-date priority in cases where the non-U.S.-licensed satellite has not been launched yet.[164] The Commission noted further that, when it has authorized a U.S. licensee to operate at an orbit location at which another Administration has ITU-date priority, it has issued the license subject to the outcome of the international coordination process, and has emphasized that the Commission is not responsible for the success or failure of the required international coordination.[165]

69. *Discussion.* SIA requests that the Commission "clarify" that U.S. licensees will be allowed to operate satellites at orbit locations licensed to non-U.S.-licensed satellite operators

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161 SIA Petition at 22.

162 *See DISCO II Order*, 12 FCC Rcd at 24183 (para. 214), 24174 n.359 ("We reiterate our intent to hold non-U.S. satellite operators to the same rules as we do our U.S.-licensed space station operators. Failure to comply with these requirements could result in ... reassignment of previously reserved or designated spectrum or orbit locations.").

163 Implementation of the AM Expanded Band Allotment Plan, *Memorandum Opinion and Order*, 13 FCC Rcd 21872, 21784 (para. 7) (1998).

164 *First Report and Order*, 18 FCC Rcd at 10870 (para. 295), *citing* PanAmSat Corporation, Request for Special Temporary Authority to Operate a Space Station at 60° W.L., *Order and Authorization*, 15 FCC Rcd 21802, 21804-05 (para. 11) (Int'l Bur., 1999); Application of Columbia Communications Corporation for Modification of Authorization to Permit Operation of Ku-band Satellite Capacity on the Columbia 515 Satellite Located at 37.7° West Longitude, *Memorandum Opinion and Order*, 16 FCC Rcd 12480, 12486 (para. 16) (Int'l Bur. 2001)(The Commission has often permitted satellite operators to provide service on a temporary basis from orbit locations that are not regularly assigned to them, provided the temporary operations do not adversely impact regularly licensed satellite systems).

165 *First Report and Order*, 18 FCC Rcd at 10870 (para. 295), *citing* KaStarCom World Satellite, LLC, Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service, *Order and Authorization*, 16 FCC Rcd 14322, 14330 (para. 25) (Int'l Bur. 2001) (*KaStarCom Authorization Order*).

until the regularly authorized operator begins operation at that location.[166] According to SIA, this would ensure that spectrum does not lie fallow, and so would eliminate the need for a bond requirement for non-U.S.-licensed satellite operators.[167]

70. As an initial matter, on a case-by-case basis, we will continue to consider authorizing U.S. licensees to operate at a particular orbit location on a temporary basis, pending the launch of a non-U.S.-licensed satellite with higher ITU-date priority at that location.[168] We emphasize, however, that these kinds of temporary authorizations are requested infrequently and we do not expect this to change. Further, the prospect of allowing a U.S. satellite to operate on a temporary basis only does not obviate the need a bond to be posted by the satellite operator that is ultimately authorized to serve the United States from that location. Relieving the foreign operator of the bond requirement could encourage speculation and would allow an entity that is not committed to going forward to dictate the terms of the service being provided from that location. That is, it would allow that party to limit a U.S. satellite operator immediately able to provide service to offering that service only on a temporary or interruptible basis.

3. Pending Applications

71. *Background.* In the *First Report and Order*, the Commission stated that it would apply the bond requirement to all satellite licenses it issues after the Order's effective date, including those for which the underlying applications were pending at the time the Order was adopted.[169] Northrop and @Contact argue that the bond requirement should not be applied to any application pending at the time the *First Report and Order* was adopted.[170] These parties also assert that the current weak economy has made speculation unlikely.[171] Furthermore, Northrop contends that the bond requirement cannot create a disincentive to speculative filers after the applications are filed.[172] Northrop further maintains that some parties have prosecuted their applications for years, and that they should not be "penalized" with a bond requirement now.[173]

72. *Discussion.* Contrary to Northrop's assumption, the bond requirement applies to all licenses granted after the requirement took effect, regardless of when the application for each of those licenses was filed. Further, Northrop has not persuaded us to eliminate the bond requirement for licensees whose applications were pending at the time the *First Report and Order* was adopted. The bond will still provide an assurance that the licensee remains committed to and is capable of implementing its system upon licensing. In addition, we disagree with Northrop that

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166 SIA Petition at 22-23.

167 SIA Petition at 23-24.

168 *See First Report and Order*, 18 FCC Rcd at 10870 (para. 295).

169 *First Report and Order*, 18 FCC Rcd at 10866 (para. 281).

170 Northrop Petition at 2-8; @Contact Comments at 3-4. *See also* SES Americom Reply at 2; SES Americom Further Reply at 2; Joint Commenters Further Reply at 2-3.

171 Northrop Petition at 8; @Contact Comments at 2-3. *See also* SES Americom Reply at 3.

172 Northrop Petition at 7-8.

173 Northrop Petition at 8.

applicants were less likely to file speculative applications in 1997 than they are under current economic conditions. This is because the V-band applications, including Northrop's application, were filed pursuant to a procedure that may have encouraged speculative applications.[174] In addition, a stronger economy would make it easier for a speculative applicant to sell a license for profit because there would be more potential buyers, and so would further encourage speculative applications. In any case, Northrop does not explain why prosecuting an application for a long time by itself shows that the applicant will proceed with its business plan and, accordingly, construct and launch its licensed satellite.

4. Earth Exploration Satellite Service

73. *Background.* Space Imaging, an Earth Exploration Satellite Service (EESS) licensee operating in the X-band,[175] argues that EESS licensees should be able to request additional frequencies within the X-band for next generation satellites without posting a bond. Space Imaging maintains that such a request reflects increased consumer demand rather than a speculative motive.[176] Space Imaging further contends that bonds are unnecessary because EESS licenses transmit only to a limited number of earth stations for only a few minutes a day. Thus, according to Space Imaging, EESS satellite systems are coordinated on the basis of the time of their transmissions, and so two EESS can use the same spectrum, provided that they schedule their transmissions at different times of day. Therefore, Space Imaging argues that increasing the spectrum assigned to one EESS operator does not preclude others from using that spectrum.[177]

74. *Discussion.* Although increasing the spectrum assigned to one EESS operator would not preclude others from using that spectrum, we find that this, by itself, is not a sufficient basis for creating an exception from the bond requirement for next-generation EESS systems. Because more than one EESS licensee can operate in the same frequency band, EESS satellites are similar to GSO satellites. In this Order above, we considered and rejected a proposal to exempt non-U.S.-licensed GSO satellite operators from the bond requirement. We found that, even though granting a GSO license does not preclude other licensees from operating in that spectrum, it does preclude other licensees from operating at that particular orbit location in that frequency band. Thus, if a GSO licensee does not construct or launch its satellite, scarce orbit and spectrum resources will be warehoused until that license is revoked.[178] Even though EESS systems are generally NGSO constellations, the same reasoning applies, because granting an EESS license precludes other EESS licensees from using the same frequencies, orbits, and transmission times. Therefore, EESS licensees can warehouse orbit and spectrum resources, in the same manner as GSO licensees, and so should be subject to a bond requirement.

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174 *See First Report and Order*, 18 FCC Rcd at 10796-97 (para. 85) (traditional procedure encourages "place holder" satellite applications).

175 For purposes of this Order, the term "X-band" refers to the 8025-8400 MHz band.

176 Space Imaging Comments at 10-11. *See also* SES Americom Reply at 9.

177 Space Imaging Comments at 11-12. *See also* Space Imaging Petition for Clarification, filed September 12, 2003, *cited in* Space Imaging Petition at 12 n.28. The International Bureau (Bureau) will address the Space Imaging Petition for Clarification in a separate Order.

178 *See* Section III.D.2.c. above.

5. Other Clarification Requests

75. SIA asserts that the *First Report and Order* is not clear on whether non-U.S.-licensed satellite operators may reduce the amounts of their bonds as they meet milestones.[179] This is implicit in Section 25.137(d)(4), which cross-references the rule for U.S. licensees' bond requirements, including the right to reduce the bond amount as the licensee meets its milestones. We will revise our rules to make this explicit for non-U.S.-licensed satellite operators posting bonds.

76. Intelsat argues that the surety should be a "bona-fide U.S.-licensed bond company."[180] The Commission's rules require that licensees use a surety company deemed acceptable within the meaning of 31 U.S.C. § 9304 *et seq.*, which authorizes the Department of the Treasury to establish criteria for surety companies.[181] We conclude that this adequately addresses Intelsat's concern.

E. Escrow Account

77. *Background.* The Commission also invited comment on allowing licensees to establish an escrow account, as an alternative to posting a bond.[182] Under this proposed option, licensees would be required to establish an escrow account equal to the final bond amount adopted by the Commission, and to turn over the account to the U.S. Treasury upon missing a milestone without an adequate basis for extending the milestone.[183] Licensees would also be permitted to withdraw interest from the account at any time, and withdraw principal upon meeting each milestone, just as licensees posting bonds may reduce the amount of the bond.[184]

78. *Discussion.* SIA and EchoStar support the escrow account option.[185] Intelsat also supports the escrow account, as long as it is an alternative to the bond requirement, because some licensees might consider an escrow account to be more burdensome than the bond requirement.[186] In addition, Intelsat argues that, in order to make the escrow account a real disincentive against speculation, the Commission will need to perfect its security interest in the escrow account so that its interest survives bankruptcy.[187] Intelsat explains that, in most states, the Commission can

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179 SIA Petition at 34 n.76.

180 Intelsat Further Comments at 4 n.7.

181 *See* 47 C.F.R. § 25.165(b), *citing* 31 U.S.C. § 9304 *et seq.*

182 *First Report and Order*, 18 FCC Rcd at 10882 (para. 335), *citing Private Paging Exclusivity Order*, 8 FCC Rcd at 8326.

183 *First Report and Order*, 18 FCC Rcd at 10882 (para. 335).

184 *First Report and Order*, 18 FCC Rcd at 10882 (para. 335).

185 SIA Petition at 33-34; EchoStar *Ex Parte* Statement at 3.

186 Intelsat Further Comments at 5-6.

187 Intelsat Further Comments at 6-7.

perfect its security interest by notice to the escrow agent maintaining the funds.[188] Intelsat also recommends that we require the escrow account agreement to specify that the licensee cannot exert any direct control over the escrow account, including withdrawal of funds without Commission authorization.[189] In an *ex parte* statement, Intelsat explains in more detail the procedures for perfecting a security interest in escrow account funds. Intelsat notes, however, that many of those provisions can become the subject of litigation, can vary from state to state, and in any case, cannot entirely "bankruptcy-proof" the funds in an escrow account.[190]

79. We agree with Intelsat that the escrow account proposal would not provide a sufficient safeguard against speculation if the licensee's obligation to the U.S. Treasury does not survive bankruptcy. We disagree, however, that perfecting an interest in the escrow account would adequately address the concern raised by Intelsat. Specifically, a court could question whether the account in fact reflected a true escrow arrangement, given the Commission's role in identifying the triggering events for the disposition of the escrowed funds (*i.e.*, determining whether the licensee had met a particular milestone).[191] In a typical escrow relationship, the escrow agent holds the responsibility for assessing the conditions for release of the funds. If a bankruptcy court were to determine that the escrow agent lacked sufficient authority to make the requisite type of decisions that define an escrow relationship, then the court could treat the escrow agent as an agent of the FCC and the escrowed money as property of the licensee's estate in bankruptcy.[192] Under this scenario, the Commission would be regarded as a creditor of the estate, and the monies in escrow would be at risk (even if the Commission had perfected a security interest in the funds). In light of this possibility, we conclude that the proposed escrow account approach would not provide a sufficiently meaningful disincentive against speculation.

80. Moreover, as Intelsat notes, some licensees might consider establishing an escrow account to be more burdensome than the bond requirement because it would require the satellite company to deposit a significant amount of funds with the escrow agent (*i.e.*, $3 million dollars for GSO satellite licensees and $5 million dollars for NGSO satellite constellation licensees).[193] This might prove particularly difficult for smaller satellite operators. Therefore, even if the Commission were to adopt an escrow account option, it is at best unclear whether or to what

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188 Intelsat Further Comments at 7.

189 Intelsat Further Comments at 7-8.

190 *See* Letter from Carl R. Frank, Counsel for Intelsat, to Marlene H. Dortch, Secretary, FCC (dated Mar. 22, 2004).

191 5 COLLIER ON BANKRUPTCY, para. 541.09A (15th ed. rev. 2003) and cases cited therein. While the Commission would likely avoid this risk by ceding to the escrow agent the responsibility for determining whether the licensee had met the milestones, this responsibility is a core function of this agency and should not be delegated to a private party. Moreover, even if we attempted to limit such a delegation by stating that the escrow agent's determinations of milestone compliance were effective only with respect to the release of the escrowed funds; such an approach could give rise to conflicting determinations regarding such compliance, which, at best, would create the appearance of irrational decision making.

192 5 COLLIER ON BANKRUPTCY, para. 541.09A (15th ed. rev. 2003) and cases cited therein.

193 Intelsat Further Comments at 5-6.

extent licensees would choose that option. Accordingly, we conclude that the escrow account option would not result in a public policy benefit that would outweigh the risks associated with its adoption, and we decline to adopt this proposal.[194]

IV. PROCEDURAL MATTERS

81. In this *Fifth Report and Order*, the Commission adopts revisions to the current interim bond amounts. Those bond amounts are now $3 million for each GSO satellite and $7.5 million for each NGSO constellation as the required bond amounts on a going-forward basis. In addition, in this *Fifth Report and Order*, the Commission considered and rejected giving all satellite licensees the option of creating an escrow account rather than posting a bond. The effect of these rule revisions is to reduce the administrative burdens of space station licensees. We expect that this change will be minimal and positive. Therefore, we certify that the requirements of this *Fifth Report and Order* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Fifth Report and Order*, including a copy of this final certification, in a report to Congress pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the *Fifth Report and Order* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

V. ORDERING CLAUSES

82. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i), 301, 302, 303(r), 308, 309, and 310 of the Communications Act, 47 U.S.C. §§ 154(i), 301, 302, 303(r), 308, 309, 310, and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, the petitions for reconsideration listed in Appendix A to this Order ARE DENIED IN PART AND GRANTED IN PART, to the extent indicated above, and otherwise deferred to a future Order.

83. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 7(a), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 157(a), 303(c), 303(f), 303(g), 303(r), that this *Fifth Report and Order* in IB Docket No. 02-34 is hereby ADOPTED.

84. IT IS FURTHER ORDERED that Part 25 of the Commission's rules IS AMENDED as set forth in Appendix B. These rule revisions will take effect 30 days after a summary of this document is published in the Federal Register.

[194] As another alternative to the bond requirement, EchoStar recommends an irrevocable letter of credit payable under the same circumstances as the bond requirement. EchoStar *Ex Parte* Statement at 3. This proposal is beyond the scope of the *Further Notice*. *Further Notice*, 18 FCC Rcd at 10882 (para. 335). Moreover, EchoStar states that letters of credit "generally" are not considered part of a bankruptcy estate. EchoStar *Ex Parte* Statement at 3. Thus, it is unclear whether letters of credit are immune to the bankruptcy concerns raised above.

85. IT IS FURTHER ORDERED that the Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

Parties Filing Pleadings

I. *First Order on Reconsideration*

A. Petitions (Sept. 26, 2003)

1. Boeing Company, Hughes Network Systems, Inc., Iridium Satellite LLC, Lockheed Martin Corporation, Loral Space & Communications, Ltd., Mobile Satellite Ventures, LP, PanAmSat Corporation, and SES Americom, Inc. (together, "Joint Commenters.")
2. Hughes Network Systems, Inc. (Hughes)
3. ICO Global Communications (Holdings), Limited (ICO)
4. Northrop Grumman Space Technology and Mission Systems, Corporation (Northrop)
5. Satellite Industry Association (SIA)
6. SES Americom, Inc. (SES Americom)
7. Telesat Canada (Telesat)

B. Comments (Nov. 6, 2003)

1. @Contact, LLC (@Contact)
2. ICO
3. Intelsat
4. Space Imaging LLC (Space Imaging)

C. Replies (Nov. 19, 2003)

1. Hughes
2. Joint Commenters
3. SES Americom

II. *Fifth Report and Order*

A. Further Comment (Sept. 26, 2003)

1. Intelsat LLC (Intelsat)

B. Further Replies (Oct. 27, 2003)

1. Intelsat
2. Joint Commenters
3. SES Americom

III. *Ex Parte* Statement

1. Letter from Pantelis Michalopoulos, Counsel for EchoStar, to Marlene H. Dortch, Secretary, FCC (dated Feb. 11, 2004) (EchoStar *Ex Parte* Statement).

APPENDIX B

Rule Changes

For the reasons discussed above, the Federal Communications Commission amends title 47 of the Code of Federal Regulations, part 25, as follows:

PART 25 -- SATELLITE COMMUNICATIONS

1. The authority citation for Part 25 continues to read as follows:

Authority: 47 U.S.C. 701-744. Interprets or applies Sections 4, 301, 302, 303, 307, 309, and 332 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 302, 303, 307, 309, 332, unless otherwise noted.

2. Amend § 25.137 by revising paragraph (d)(4) to read as follows:

§ 25.137 Application requirements for earth stations operating with non-U.S. licensed space stations.

* * * * *

(d) Earth station applicants requesting authority to operate with a non-U.S.-licensed space station and non-U.S.-licensed satellite operators filing letters of intent or petitions for declaratory ruling to access the U.S. market must demonstrate that the non-U.S.-licensed space station has complied with all applicable Commission requirements for non-U.S. licensed systems to operate in the United States, including but not limited to the following:

(1) * * *

(4) For non-U.S.-licensed satellites that are not in orbit and operating, a bond must be posted. This bond must be in the amount of $5 million for NGSO satellite systems, or $3 million for GSO satellites, denominated in U.S. dollars, and compliant with the terms of Section 25.165 of this Chapter. The party posting the bond will be permitted to reduce the amount of the bond upon a showing that a milestone has been met, in accordance with the terms of Section 25.165(d) of this Chapter.

3. Amend § 25.164 by redesignating paragraph (b) as paragraph (b)(1), and adding paragraph (b)(2), to read as follows:

§ 25.164 Milestones.

* * * * *

(b)(1) * * *

(2) Licensees of satellite systems that include both non-geostationary orbit satellites and geostationary orbit satellites, other than DBS and DARS satellite systems, and licensed on or after **[insert effective date of rule]** will be required to comply with the schedule set forth in paragraph (b)(1) of this section.

* * * * *

4. Amend § 25.165 by revising paragraphs (a) and (d), and adding paragraph (e) to read as follows:

§ 25.165 Posting of Bonds.

(a) For all satellite licenses issued after **[Insert effective date of rule]**, other than DBS licenses, DARS licenses, and replacement satellite licenses as defined in paragraph (e), the licensee is required to post a bond within 30 days of the grant of its license. Failure to post a bond will render the license null and void automatically.

(1) NGSO licensees are required to post a bond in the amount of $5 million.

(2) GSO licensees are required to post a bond in the amount of $3 million.

(3) Licensees of satellite systems including both NGSO satellites and GSO satellites that operate in the same frequency bands as the NGSO satellites are required to post a bond in the amount of $5 million.

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(d) A GSO licensee will be permitted to reduce the amount of the bond by $750,000 upon successfully meeting a milestone deadline set forth in section 25.164(a) of this Chapter. An NGSO licensee will be permitted to reduce the amount of the bond by $1 million upon successfully meeting a milestone deadline set forth in section 25.164(b) of this Chapter.

(e) A replacement satellite is one that is

(1) authorized to be operated at the same orbit location, in the same frequency bands, and with the same coverage area as one of the licensee's existing satellites, and

(2) scheduled to be launched so that it will be brought into use at approximately the same time as, but no later than, the existing satellite is retired.