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The FCC Giveth . . . and the FCC Taketh Away

It was a busy summer for those at the FCC responsible for satellite licensing matters. In July, the International Bureau licensed eight new 2 GHz mobile-satellite service (MSS) systems. Less than a month later, 11 more companies were authorized to operate new Ka-band geostationary (GSO) satellites at a total of 34 orbital locations.

While the licenses issued by the Commission this summer anticipate the construction of a variety of systems, all have at least one thing in common. Each license comes with conditions - "milestones" - requiring construction to be commenced and completed by specific dates. Operators that fail to meet these obligations could lose their licenses automatically.

Milestone-Conditioned Licenses

GSO licensees, for example, are generally required to commence construction within one year of licensing, to complete construction within five years and to launch within a few months following completion. As in the case of the recent Ka-band authorizations, however, shorter operational milestones may be imposed to coincide with operational dates established through registration with the International Telecommunication Union. (Networks not "brought into use" within five to seven years of ITU filing may lose ground in the international coordination process.) As a result of these international considerations, most of the recently licensed second round Ka-band GSO satellites are required to be completed within four years of licensing.

The fact that construction milestones are a serious obligation also was made clear this summer, as the Commission upheld the nullification of the licenses of MorningStar Satellite Company and PanAmSat Corporation for failure to satisfy the construction conditions on their 1997 Ka-band GSO licenses. With so many milestone-conditioned licenses now issued, such milestone enforcement activities can be expected to consume an increasing amount of time for both the FCC and the companies it regulates.



Difficulties with Milestone Enforcement

One of the critical difficulties in milestone enforcement is determining when construction has commenced. The standard for meeting this initial benchmark is entry into a non-contingent construction contract. It is not always easy to determine when a contract is free of contingencies, however, and FCC staff resources can be stretched thin reviewing lengthy satellite construction agreements. Complicating matters is the fact that the Commission has not always held closely to the minimal requirement that a construction contract be in place no later than one year after licensing.

For example, at the same time that it upheld the nullification of the PanAmSat and MorningStar licenses, the Commission reversed a Bureau determination that NetSat 28 Company's Ka-band license was void. NetSat was required to begin construction no later than May 1998. When asked in December 1999 for a copy of a contract evidencing commencement of construction, NetSat provided an agreement dated 18 months after the initial milestone date. NetSat argued that it was proceeding with construction and that its plans had been delayed by an FCC investigation that initially involved a principal in one of its investors, and which resulted in the NetSat license being briefly conditioned on the outcome of the investigation. NetSat argued that these events hindered its efforts to raise the capital necessary to proceed with construction, yet it offered no explanation for simply allowing the milestone to pass without seeking relief from its effect. The International Bureau determined that the license was void because no construction program was in place when NetSat was required to begin construction.

In seeking Commission review of the Bureau decision, NetSat argued that the Commission should waive the milestone because the Commission's own actions had thwarted its financing efforts, and that, after the condition on its license was removed, NetSat had entered into a contract and commenced construction. Despite the fact that this rationale and the request for waiver of the May 1998 construction commencement date itself did not come until long after the milestone date had passed, the Commission granted a waiver of the condition, reinstated the NetSat license, and granted extensions of the remaining construction milestones.

The NetSat decision suggests that even where a satellite authorization has become void by its own terms, it may still be viable - if the licensee can articulate a plausible reason for its failure to comply. This is one of the incongruities that can arise under the current milestone system as a result of uncertainties in the application of the existing standard for construction commencement.

Potential Changes in Satellite License Conditions

In the near future, the FCC is expected to initiate a proceeding to determine how best to condition future licenses to ensure that those authorized proceed with their plans. This proceeding has the potential to provide licensees with clearer guidelines - for example, licensees could be required to document annually the actual



expenditure of funds for satellite construction, rather than simply relying on the existence of an agreement to signify initiation of construction. The satellite industry will need to monitor closely potential changes in satellite license conditions that may be implemented as a result of such a proceeding.

The above article, authored by David Keir, a member of Leventhal, Senter & Lerman PLLC, originally appeared in the October/November 2001 issue of "The Orbiter," the newsletter of the Society of Satellite Professionals International. LS &L has represented several clients before the FCC in satellite milestone matters, including those opposed to the waiver granted to NetSat 28.