

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

In the matter of
PanAmSat Corporation
Application for PAS-8B Satellite
Request for Waiver and Refund of
Filing Fees for the PAS-8B Satellite
Fee Control No. 9810308210288001

Memorandum Opinion and Order

Adopted: September 1, 2004

Released: September 9, 2004

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by PanAmSat Corporation (PanAmSat) on February 6, 2002. PanAmSat seeks review of a decision of the Office of Managing Director denying its petition for reconsideration.

II. BACKGROUND

2. PanAmSat applied for and received authorization to launch and operate a Ku-band fixed-service satellite PAS-8B to replace PanAmSat's PAS-8 satellite. The PAS-8B satellite, launched on December 21, 1998 pursuant to special temporary authorization, commenced service in February 1999. At

1 Letter from Mark Reger, Chief Financial Officer, Office of Managing Director, Federal Communications Commission, to Joseph A. Godles, Esquire, Request for Waiver and Refund of Filing Fees, PanAmSat Corporation Application for PAS-8B Satellite, Fee Control No. 9810308210288001 (dated January 7, 2002) (January 7 Letter Decision).

2 Letter from Mark A. Reger, Chief Financial Officer, Office of Managing Director, Federal Communications Commission, to Joseph A. Godles, Esquire, Request for Waiver and Refund of Filing Fees, PanAmSat Corporation Application for PAS-8B Satellite, Fee Control No. 9810308210288001 (dated August 1, 2000) (August 1 Letter Decision).

that time PanAmSat removed the PAS-8 satellite from service and turned off its communications payload. PanAmSat's application for the PAS-8B satellite represented that replacement was necessary because its PAS-8 satellite, launched in late 1997, lacked full payload capacity due to losses to its power generating system. The attached request sought waiver and refund of the \$89,460 application fee paid in connection with its application to construct, launch, and operate a replacement satellite technically comparable to the previously authorized satellite.³ PanAmSat claimed that "the fees contained in the fee schedule bear scant relationship to the resources required to process the replacement satellite's application," and that the Managing Director has granted partial refunds in similar circumstances in which minimal regulatory review is required to authorize replacement satellites.⁴

3. OMD denied PanAmSat's waiver request as well as its petition for reconsideration of that letter ruling. OMD concluded that PanAmSat had not demonstrated good cause for the waiver or shown that a waiver would promote the public interest, as is required by Section 8 of the Communications Act, 47 U.S.C. § 158, and Section 1.1117(a) of the Commission's Rules, 47 C.F.R. § 1.1117. Specifically, as OMD pointed out, PanAmSat had indicated only that PAS-8B would "replace the PAS-8 satellite ... [that] lacks full payload capacity" without explaining the extent to which unspecified losses in its power generating system reduced the satellite's useful life or otherwise demonstrating extraordinary and compelling circumstances. In the absence of a showing that the PAS-8 satellite had suffered a catastrophic in-orbit failure or would not be available to provide further service, OMD concluded that PanAmSat had not met its burden of demonstrating good cause for a waiver. In so concluding, OMD relied on the then applicable space station cut-off rule, 47 C.F.R. § 25.113(g), under which an application to launch an on-ground spare satellite is considered newly filed unless "determined to be an emergency replacement ... that has been lost as a result of a launch failure or catastrophic in-orbit failure." OMD also distinguished earlier fee decisions granting partial relief of fees associated with applications to replace satellites destroyed during launch, including one involving PanAmSat's Galaxy X-R satellite.⁵ Finally, OMD rejected PanAmSat's further argument that relief is warranted because the assessed fee does not reflect the actual effort expended by the Commission on a particular application or type of application.

4 In its Application for Review, PanAmSat maintains that relief is warranted under a policy that originated in *Hughes Communications Galaxy, Inc.*, 9 FCC Rcd 2230 (OMD 1994), of assessing the modification fee instead of the replacement fee in connection with an application to construct, launch, and operate a space station that is technically comparable to one that failed prematurely, and that OMD granted such relief in at least one case, *AT&T Corporation*, 10 FCC Rcd 8924, 8928-29 (OMD 1995), involving a post-launch failure. Relief in those cases, PanAmSat contends, was not predicated on a showing that the

³ The PAS-8B satellite has the same technical characteristics, covers the same areas of Latin America, uses the same frequency bands, and operates at the same EIRPs as PAS-8.

⁴ Request for Waiver and Refund of Filing Fees, at 2 & nn.3-4, citing *Fee Decisions of the Managing Director*, 9 FCC Rcd 2223, 2230-31 (1994) (*Hughes Communications Galaxy*); Letter of Marilyn McDermett, FCC Associate Managing Director to Joseph A. Godles, Attorney for PanAmSat (Feb. 24, 1997).

⁵ *Hughes Communications Galaxy*, 9 FCC Rcd 2223, 2230-2231 (OMD 1994) (granting partial fee relief in connection with application to replace satellite where the original satellite was destroyed during launch); Letter from Mark A. Reger, Chief Financial Officer, Office of Managing Director, Federal Communications Commission, to Joseph A. Godles, Esquire, Counsel for PanAmSat, Request for Waiver and Refund of Filing Fees (Fee Control # 99051982103300), dated June 16, 2000 (granting partial fee relief in connection with an application to replace the Galaxy X satellite, which had suffered a launch failure) (*PanAmSat Galaxy X Letter*).

original satellite suffered a “catastrophic in-orbit failure” or that the replacement event demonstrates “extraordinary and compelling circumstances” and, in any event, it claims the failure of the PAS-8 was every bit as catastrophic and the circumstances just as compelling and extraordinary as in any case in which OMD has granted relief. PanAmSat points specifically to extensive circuitry failures occurring soon after launch that, although not the result of an explosion, had a devastating impact on the service PAS-8 could provide.

III. DISCUSSION

5. We conclude that the Managing Director properly denied PanAmSat’s waiver request but that, in the circumstances of this case, we will consider additional information presented in the Application for Review and afford partial fee relief. To begin with, we affirm OMD’s principal conclusion that PanAmSat must show that its PAS-8 satellite failed prematurely under compelling and extraordinary circumstances in order to demonstrate the requisite good cause for a fee waiver under Section 158(d). We also consider for the first time OMD’s policy initiated in *Hughes* of assessing the fee for modification of a space station (instead of the full fee for a replacement satellite) in certain circumstances where a replacement satellite is technically comparable to the satellite it replaces. In addition, we clarify that, consistent with congressional intent and established precedent, application fees are not adjusted to reflect the actual work done on any particular application – including one to authorize a replacement satellite. Once extraordinary and compelling circumstances resulting in the satellite’s premature failure are shown, however, as is the case here, we believe it is appropriate to assess the lower modification fee.

6. The Commission is statutorily required to assess and collect application fees in accordance with the Schedule of Fees prescribed by Congress.⁶ 47 U.S.C. § 158; 47 C.F.R. § 1.1102-1.1107. *See also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989*, 5 FCC Rcd 3558, 3574 ¶ 36 (1990), *citing* Conference Report at 433. Such fees represent a fair approximation by Congress as to how the Commission’s costs should be distributed and may be waived or deferred only “for good cause shown, where such action will promote the public interest.” 47 U.S.C. § 158(d)(2); 47 C.F.R. § 1.1117(a). *See also Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Budget Reconciliation Act of 1985 (Section 8 Fees Report and Order)*, 2 FCC Rcd 947 (1987). The Commission narrowly interprets its waiver authority to require that “those requesting a waiver or deferral will have the burden of demonstrating that, for each request, a waiver or deferral would override the public interest, as determined by Congress, that the government should be reimbursed for that specific regulatory action of the FCC,” *id.* at 961 ¶¶ 87-88, and interprets good cause to require a showing of compelling and extraordinary circumstances. *Sirius Satellite Radio, Inc.*, 18 FCC Rcd 12551, 12554 ¶ 11 (2003), *citing Section 8 Fees Report and Order*, 2 FCC Rcd at 958 ¶ 70.

7. Under the Schedule of Fees prescribed by Congress, the application fee is the same for an initial and for a replacement space station, but a significantly lower fee is prescribed under the separate fee category for modification of a space station. 47 U.S.C. §§ 158(g)(16)(b)(i), (b)(ii), (d) (Common Carrier

⁶ The Commission may only adjust the Fee Schedule every two years to reflect changes in the Consumer Price Index. *See* 47 U.S.C. § 158(b)(1).

Services); 47 C.F.R. §§ 1.1107(9)(a)(i), (a)(ii), (c).⁷ Relying on a series of fee letters that began with *Hughes*, PanAmSat seeks to be assessed the lower modification fee because, it argues, this more accurately reflects the processing cost to the Commission entailed in authorizing a replacement satellite in these circumstances. It is well established, however, that “there is no justification in the statute or legislative history for apportioning fees in accordance with the actual work done on any particular application.”⁸ The Commission, as OMD noted, carefully considered but rejected the argument that prescribed fees should reflect actual costs when it implemented its responsibility to assess and collect application fees. *January 7 Letter Decision, citing Establishment of a Fee Collection Program To Implement the Provisions of the Omnibus Budget Reconciliation Act of 1985 (Memorandum Opinion and Order)*, 3 FCC Rcd 5987 ¶ 5 (1988) (recognizing that “the amount of a fee represents the Commission’s estimate, accepted by Congress, of the average cost to the Commission;” declining to “make individualized determinations of the ‘appropriate fee,’” although the actual cost may be more or less in individual situations; and indicating an intent to “levy the fee as determined by Congress ... except in unusual cases in which the public interest requires otherwise.”).

8. We agree with OMD that PanAmSat did not make the requisite showings for a fee waiver. In support of its waiver request, as is noted in the OMD *January 7 Letter Decision*, PanAmSat represented only that the PAS-8B satellite will “replace the PAS-8 satellite... [that] lacks full payload capacity due to losses in its power generating system.” Having provided no information to explain the cause or ultimate impact of these losses on PAS-8’s useful life, however, PanAmSat clearly failed to meet its “burden of demonstrating that, for each request, a waiver or deferral would override the public interest, as determined by Congress, that the government should be reimbursed for that specific regulatory action of the FCC.”⁹ *Section 8 Fees Report and Order*, 2 FCC Rcd at 961 ¶ 88. Without such information, there was no basis to determine that PAS-8 had failed prematurely under extraordinary and compelling circumstances analogous to the in-orbit failures or failure at or soon after launch deemed sufficient to warrant partial fee waivers in the *Hughes, PanAmSat (Galaxy X-R)*, and *AT&T* cases, and OMD properly denied PanAmSat’s waiver request on that basis. Insofar as language in the cited OMD rulings suggests that fee relief may properly be based on any reduced processing burdens associated with authorizing a technically comparable replacement satellite, we clarify that, consistent with congressional intent and established agency precedent, good cause for fee waiver or deferral requires a showing of compelling and extraordinary circumstances.¹⁰ *See Vernal*

⁷ The fees at issue here are \$89,460 for an initial or replacement space station authorization and \$5740 for modification of a space station authorization. *Amendment of the Schedule of Application Fees Set Forth in Sections 1.1102 Through 1.1107 of the Commission’s Rules*, 13 FCC Rcd 13614 (1998).

⁸ *Lockheed Martin Corp.* 16 FCC Rcd 12805, 12807 ¶ 5 (2001). *See also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1985 (Section 8 Fees Report and Order)*, 2 FCC Rcd 947, 949 (1987) (stating that “processing costs were but one factor in the rough calculus that resulted in the legislated fees”).

⁹ There is no merit to PanAmSat’s suggestion that this burden applies only to requests to defer legislated fees, not to requests to waive such fees. Section 158(d)(2) of the Act expressly governs waivers, as well as deferrals, as does the implementing rule, Section 1.1117(a) and the quoted language from the Commission’s Report and Order implementing its obligations to collect and assess application fees.

¹⁰ *Sirius Satellite Radio, Inc.*, 18 FCC Rcd at 12554 ¶ 11; *Section 8 Fees Report and Order*, 2 FCC Rcd at 958 ¶ 70 (Commission interprets its statutory authority under Section 158(d)(2) as allowing the grant of waivers or deferrals to specific applicants upon a showing of compelling and extraordinary circumstances); *Revisions to Broadcast Auxiliary Service Rules in Part 74 and Conforming Technical Rules for Broadcast Auxiliary Service, Cable Television Relay Service and Fixed Services In Parts 74, 78 and 101 of the Commission’s Rules*, 18 FCC Rcd 21134, 21140 ¶ 15 (OET 2003) (Individualized fee

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Enterprises, Inc. v. FCC, 355 F.3d 650, 660 (D.C. Cir. 2004) (the Commission is not required to adhere to an OMD fee refund policy that it never endorsed).

9. We find, however, that additional information provided in PanAmSat's application for review is sufficient to establish that the satellite failed prematurely in compelling and extraordinary circumstances and that assessing the lower modification fee promotes the public interest.¹¹ In particular, PanAmSat reports that reduced payload capacity caused by extensive electrical failures detected within five days of launch significantly impacted existing service being provided by PAS-8. Ensuring continuous service to the public thus necessitated that PanAmSat replace the satellite less than two years after launch at a cost of more than \$200 million, of which less than \$30 million was covered by insurance. We agree with PanAmSat that for fee purposes it is not dispositive that the events requiring that PAS-8 be replaced stemmed from failures occurring soon after launch, rather than during launch or as a result of an in-orbit catastrophe, as was the case in other situations in which OMD assessed the space station modification fee. In this regard, we note the general presumption that "applicants applying for, and submitting the filing fee for, replacement or expansion satellites are operating their in-orbit satellites at full capacity,"¹² and that, even for purposes of the cut-off rule cited by OMD,¹³ catastrophic failures were never restricted to those

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waiver request must demonstrate compelling and extraordinary circumstances in addition to the good cause and public interest showings and other criteria specified in Section 1.1117).

¹¹ In relying on factual information that OMD did not have an opportunity to consider, we note that Section 1.115(c) provides that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." The accompanying Note specifies that, "[s]ubject to the requirements of Section 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration." However, we find good cause for a waiver in the circumstances of this case. In particular, it is clear from PanAmSat's application for review that it was only after OMD's *January 7 Letter Decision* that PanAmSat appreciated the potential relevance of the circumstances surrounding the failure of the PAS-8 satellite to obtaining a fee waiver where the replacement satellite is technically comparable to the failed satellite. Given that language in earlier OMD fee waiver rulings was not entirely clear on the nature of the showing required, we do not believe that dismissing PanAmSat's application for review on procedural grounds would serve the public interest. See *Lunenburg County Public Schools Victoria, Virginia*, 17 FCC Rcd 24179, 24184 ¶ 8 (2001) (finding good cause to waive section 1.115(c) where the applicant could not have reasonably known the significance of addressing the issue at the time of the designated authority's decision); *Mercury PCS II*, 15 FCC Rcd 9654, 9660 n.52 and cases cited therein (public interest is a basis to waive Section 1.115(c)).

¹² See *Streamlining the Commission's Rules and Regulations for Satellite Application and Licensing Procedures*, 10 FCC Rcd 10624, 10626 ¶ 10 (1995) (proposing to eliminate as unnecessary the requirement that applicants supply detailed information as to the historical use of their satellite when requesting a replacement satellite).

¹³ Pursuant to 47 C.F.R. 25.113(g), in effect at the time of the *January 7 Decision Letter*, "an application for authority to launch and operate an on-ground spare satellite will be considered to be a newly-filed application for cut-off purposes, except where the space station to be launched is determined to be an emergency replacement for a previously authorized space station that has been lost as a result of a launch failure or a catastrophic in-orbit failure." The Commission since amended section 25.113(g) to change the processing of on-ground spare satellites, but subparagraph (g)(3) retains an exception for those applications "determined to be an emergency replacement for a previously authorized space station that was lost as a result of a launch failure or a catastrophic in-orbit failure." *Amendment of the Commission's Space Station Rules and Policies*, 18 FCC Rcd 12764 (2003).

occurring within the first year after launch.¹⁴ What happened here was clearly not the end-of-life event in which a satellite is operating at full or near full payload capacity but with outmoded facilities in need of upgrading for which a replacement fee equivalent to that collected for initial authorization of the satellite was intended. Rather, extensive power failures, manifested soon after launch, severely reduced the satellite's payload capacity and jeopardized existing service, meaning that its costly and premature replacement was required to ensure continuity of service to PanAmSat's customers. Under these circumstances, and because no new orbital assignment was requested, the International Bureau granted the replacement application for the PAS-8B satellite outside of a processing round.¹⁵ In these compelling and extraordinary circumstances, we likewise find good cause that overrides the public interest in the Commission's recovering the full costs apportioned to processing authorizations for replacement space stations, and that a waiver will promote the public interest. Instead of the full space station replacement fee, PanAmSat should therefore be assessed the space station modification fee. It is therefore entitled to a refund in the amount of \$83,720, representing the difference between the space station replacement fee already paid and the space station modification fee.

10. ACCORDINGLY, IT IS ORDERED, That the application for review filed on February 6, 2002 by PanAmSat IS GRANTED in part; and that the Managing Director IS DIRECTED to issue a refund to PanAmSat as described above.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁴ *Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed Satellites At Reduced Orbital Spacings and To Revise Application Processing Procedures For Satellite Communications Services*, 6 FCC Rcd 2806, 2812 ¶ 40 (1991) (deleting the proposed requirement that catastrophic failures must occur within the first year of operation but making clear that the rule does not cover the replacement of outmoded facilities near the end of the satellite's useful life).

¹⁵ *PanAmSat Licensing Corp.*, 14 FCC Rcd 7725, 7727 (IB 1999).