

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

In re applications of	)	
	)	
Mobile Communications Holdings, Inc. and ICO	)	File No. SAT-T/C-20020719-00104
Global Communications (Holdings) Limited	)	
for Transfer of Control	)	
	)	
Constellation Communications Holdings, Inc. and	)	File No. SAT-T/C-20020718-00114
ICO Global Communications (Holdings) Limited	)	
for Transfer of Control	)	
	)	
Mobile Communications Holdings, Inc. for	)	File No. SAT-MOD-20020719-00105
Modification of 2 GHz MSS License	)	
	)	
Constellation Communications Holdings, Inc. for	)	File No. SAT-MOD-20020719-00103
Modification of 2 GHz MSS License	)	

**Memorandum Opinion and Order**

**Adopted: January 29, 2003**

**Released: January 30, 2003**

By the Chief, International Bureau:

**I. INTRODUCTION**

1. Mobile Communications Holdings, Inc. (“MCHI”) and Constellation Communications Holdings, Inc. (“Constellation”) have applied for permission to transfer control of their licenses for unbuilt 2 GHz Mobile-Satellite Service (“MSS”) systems to ICO Global Communications (Holdings), Limited (“ICO”). MCHI and Constellation also request modification of the technical specifications and feeder-link frequency assignments in these licenses to match the corresponding terms of ICO’s 2 GHz MSS authorization. We also have before us certification statements and copies of satellite capacity-sharing agreements that MCHI and Constellation filed to demonstrate compliance with the conditions in their licenses that specify a deadline for contracting for satellite construction. We conclude, for reasons stated herein, that MCHI and Constellation have failed to satisfy those license conditions and that their 2 GHz MSS licenses are therefore null and void. Hence we dismiss, as moot, the applications for license modification and transfer of control.

**II. BACKGROUND**

**A. Current Authorizations**

2. In an order released on July 17, 2001, the Commission granted a license to MCHI for construction, launch, and operation of 26 satellites in non-geostationary satellite orbit (“NGSO”) for provision of MSS in the United States, using specific segments of the 1990-2025 MHz and 2165-2200 MHz bands for service links and 200 megahertz segments of the 6775-7075 MHz and 15.43-15.63 GHz

bands for feeder links.<sup>1</sup> In an order released on the same date, the Commission licensed Constellation to construct, launch, and operate 46 NGSO satellites for provision of MSS in the United States, likewise using specific segments of the 1990-2025 MHz and 2165-2200 MHz bands for service links and using portions of the 5091-5250 MHz, 6700-7075 MHz, and 15.43-15.63 GHz bands for feeder link transmission.<sup>2</sup>

3. ICO is a Delaware corporation controlled by Craig O. McCaw, a U.S. citizen who holds 69.9 percent of its voting stock. Through subsidiaries, ICO obtained authority from the United Kingdom to construct, launch, and operate a 12-satellite, NGSO MSS system and subsequently obtained a Letter of Intent authorization from the Commission for provision of MSS in the United States, using specific segments in the 1990-2025 MHz and 2165-2200 MHz bands for service links, 5150-5250 MHz for feeder uplinks, and 6975-7075 MHz for feeder downlinks.<sup>3</sup>

## **B. Capacity-Sharing and Transfer of Control Agreements**

4. In July 2002, MCHI and Constellation each entered into an arrangement with ICO involving two contracts: a “Satellite Sharing Agreement” and a “Stock Purchase Agreement.” The arrangements were similar in all material respects. Under the terms of the Satellite Sharing Agreements, MCHI and Constellation would each purchase a portion of the channel capacity of the ICO system<sup>4</sup> for independent provision of MSS to its own customers, using service-link frequencies assigned under its own license. The Sharing Agreements stipulated that ICO was to make the channel capacity available to MCHI and Constellation “on a schedule that does not preclude [MCHI or Constellation] from satisfying the milestones imposed by the FCC in ... [its] License.”<sup>5</sup> ICO would perform routine tracking, telemetry, and control for the shared system, but MCHI and Constellation would each have the right to order ICO to suspend or terminate transmission on their channels, if necessary to avoid or curtail violation of regulatory requirements.<sup>6</sup> In exchange for the promised channel capacity, MCHI and Constellation each tendered a down-payment and agreed to pay ICO an additional sum of money, plus 25% of its subsequently-incurred construction cost, after ICO made the capacity available to them for commercial operation. The Sharing Agreements required MCHI and Constellation to apply promptly to the FCC for

---

<sup>1</sup> *Mobile Communications Holdings, Inc. (Order and Authorization)*, DA 01-1637, 16 FCC Rcd 13794 (Int’l Bur. and OET 2001) (“*MCHI License Order*”).

<sup>2</sup> *Constellation Communications Holdings, Inc. (Order and Authorization)*, DA 01-1633, 16 FCC Rcd 13724 (Int’l Bur. and OET 2001) (“*Constellation License Order*”).

<sup>3</sup> *ICO Services Limited (Order)*, DA 01-1635, 16 FCC Rcd 13762 (Int’l Bur. and OET 2001). Section 25.137 of the Commission’s rules permits a non-U.S. licensed space station to participate in a space station processing round by submitting a “letter of intent.” 47 C.F.R. § 25.137 (2001). The grant of a letter of intent in a space station processing round reserves spectrum for eventual use in the United States by licensed earth stations communicating with the non-U.S. licensed space station.

<sup>4</sup> The number of service-link channels that MCHI or Constellation would have in the United States under the Sharing Agreements would be a fraction of the total number of available ICO-System channels, the numerator of which would be the amount, in megahertz, of domestic 2 GHz service-link spectrum licensed to and cleared by MCHI or Constellation, and the denominator of which would be the total amount of service-link spectrum domestically available to the licensees sharing the ICO satellites, subject to a proviso that MCHI’s or Constellation’s portion was not to exceed 25% of the satellites’ total channel capacity. Satellite System Sharing Agreement By and Between ICO Global Communications (Operations) Limited and Mobile Communications Holdings, Inc. dated July 12, 2002, Article 1, “MCHI Channels”; Satellite System Sharing Agreement By and Between ICO Global Communications (Operations) Limited and Constellation Communications Holdings, Inc. dated July 16, 2002 Art. 1, “Holdings Channels.”

<sup>5</sup> *Id.*, Article 2.8 “Delivery of MCHI Channels.”

<sup>6</sup> *Id.*, Art. 3.2. “Operations Services.”

modification of their licenses to permit the proposed sharing arrangement and were conditioned on grant of such license modification.

5. Under its Stock Purchase Agreement with ICO, MCHI agreed to assign its 2 GHz MSS license to a wholly-owned subsidiary of MCHI, ESBH, Inc., and then sell all of the subsidiary's stock to ICO in exchange for cash and shares of ICO's stock, contingent on FCC approval.<sup>7</sup> The sale would be effected in two steps: MCHI would immediately sell a non-controlling 49% share of the subsidiary's voting stock to ICO and would sell the remaining stock to ICO if and when the Commission granted approval for the transfer of control of the license. Similarly, under the terms of the ICO-Constellation Stock Purchase Agreement Constellation's parent company was to immediately sell 49% of Constellation's voting stock to ICO and would transfer the balance of Constellation's stock to ICO upon grant by the Commission of consent for transfer of control of Constellation's 2 GHz MSS license. Consummation of the proposed transactions would provide ICO with an additional 14 MHz of authorized spectrum for service-link transmissions, which ICO would use in conjunction with its currently-assigned spectrum to support provision of an integrated service through a single facilities platform.<sup>8</sup>

6. If consummated, the Stock Purchase Agreements would supercede the Satellite Sharing Agreements by placing MCHI's and Constellation's 2 GHz MSS licenses under ICO's common control. MCHI and Constellation have represented, however, that they intend to provide service independently pursuant to the Sharing Agreements in the event that the Commission permits them to share ICO's facilities but bars consummation of the Stock Purchase Agreements.<sup>9</sup>

### C. Applications for License Modification and Permission to Transfer Control

7. On July 18, 2002, MCHI and Constellation each filed an application for modification of license and an application for permission to transfer license control.<sup>10</sup> In the transfer applications, they requested permission to transfer control of their 2 GHz MSS licenses to ICO pursuant to the Stock Purchase Agreements. In the applications for license modification, they each asked the Commission to alter the terms of their 2 GHz MSS licenses to permit consolidated operation, as contemplated by the Stock Purchase Agreements or, alternatively, to permit them to operate using channel capacity on ICO's system, as contemplated by the Satellite Sharing Agreements. To that end, they requested that their authorized feeder-link frequencies be changed to the frequency bands that had been reserved for the feeder-link operation of ICO's system: *viz.*, 5150-5250 MHz for uplinks and 6975-7075 MHz for downlinks, and that other technical specifications currently authorized by their licenses likewise be altered to conform to the corresponding specifications for ICO's system.<sup>11</sup>

8. MCHI and Constellation contended that in facilitating the alternative arrangements pursuant to their agreements with ICO the proposed license modifications would further the public

---

<sup>7</sup> The Bureau has granted the *pro forma* assignment of MCHI's license to ESBH, Inc. Letter from Jennifer Gilsonan, Chief, Policy Branch, Satellite Division to Tom Davidson, Counsel to Mobile Communications Holdings, Inc., File No. SAT-ASG-20020719-00106 (Sept. 11, 2002).

<sup>8</sup> Constellation Application for Transfer of Control filed July 18, 2002, Exhibit 2, p.4; MCHI Application for Transfer of Control filed July 18, 2002, Exhibit 3, p.3.

<sup>9</sup> MCHI Application for Minor License Modification filed July 18, 2002 ("*MCHI Modification Application*") at n.2; Constellation Application for Minor License Modification filed July 18, 2002 ("*Constellation Modification Application*") at n.2.

<sup>10</sup> The Bureau placed the applications on public notice on August 5, 2002. Report No. SAT-00116.

<sup>11</sup> Among other such conforming changes, MCHI and Constellation both proposed to change their channelization method from Code Division Multiple Access ("CDMA") to Time Division Multiple Access ("TDMA").

interest in a variety of ways. They asserted that the elimination of separate MCHI and Constellation satellites would alleviate orbital debris problems, reduce interference potential, and facilitate coordination with other licensed systems.<sup>12</sup> Further, they asserted that the proposed modifications would result in more efficient spectrum use by eliminating separate feeder-link frequencies for MCHI and Constellation.<sup>13</sup> They also asserted that the proposed consolidation of facilities, either pursuant to the Satellite Sharing Agreements or pursuant to the Stock Purchase Agreements, would entail a substantial cost savings by avoiding the need for construction and launch of additional satellites.

9. In the transfer applications, MCHI and Constellation contended that the proposed transfer of their license interests to ICO pursuant to the Stock Purchase Agreements would enable ICO to acquire additional service-link spectrum needed to sustain the long-term commercial viability of its system, thereby improving the ultimate prospects for successful implementation of 2 GHz MSS. The applicants contended that the proposed transactions would not violate the rule against trafficking in bare licenses<sup>14</sup> because the transfer of license interests would be incidental to corporate mergers involving other significant assets. In the alternative, the applicants requested waivers of the anti-trafficking rule, on the premise that consummation of the transfers would better serve the public interest in this instance than strict enforcement of the rule. They argue that waivers would be particularly appropriate in view of the Commission's recent discussion, in a pending rulemaking proceeding, of grounds for concluding that the satellite anti-trafficking rules should be repealed.<sup>15</sup>

#### D. Milestone Certification

10. The 2 GHz MSS licenses issued to MCHI and Constellation are expressly conditioned on compliance with an implementation "milestone" schedule that, among other things, required the licensees to enter into non-contingent contracts for construction of their authorized satellites by July 17, 2002.<sup>16</sup> On July 29, 2002, MCHI and Constellation filed affidavits from their chief executive officers to certify compliance with that requirement. The affiants contended that their respective companies had met the requirement by entering into the Satellite Sharing Agreements for purchase of capacity on ICO's system, pointing out that ICO had previously certified that it had not only entered into a non-contingent contract for construction of its system but had also met subsequent milestone requirements pertaining to completion of critical design review and commencement of physical construction of all of its satellites.<sup>17</sup> MCHI and Constellation submitted copies of their Sharing Agreements with the certification affidavits.

---

<sup>12</sup> MCHI Application for Minor Modification of Authorization at pp.9 and 10; Constellation Application for Minor Modification of Authorization at pp. 9 and 10.

<sup>13</sup> The applicants maintain that because the ICO system is designed to use narrow-band TDMA channelization, it could accommodate MCHI's and Constellation's feeder-link operation under the proposed sharing arrangement without any increase in its currently-authorized feeder-link bandwidth. *MCHI Modification Application* at p.10; *Constellation Modification Application* at p.10.

<sup>14</sup> Section 25.143(g) of the Commission's rules, 47 C.F.R. § 25.143(g) (2001), prohibits "[t]rafficking in bare licenses" for 1.6 GHz or 2 GHz MSS systems. The Commission adopted this restriction to prevent the sale for profit of interests in licenses for unbuilt stations. *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band (Report and Order)*, FCC 00-302, 15 FCC Rcd 16127 (2000) ("*2 GHz MSS Report and Order*"), at ¶128.

<sup>15</sup> *See Amendment of the Commission's Space Station Licensing Rules and Policies (Notice of Proposed Rulemaking and First Report and Order)*, FCC 02-45, 17 FCC Rcd 4218 (2002) at ¶¶ 109-117.

<sup>16</sup> *MCHI License Order* at ¶30; *Constellation License Order* at ¶30.

<sup>17</sup> *See* Letter dated October 15, 2001 from Cheryl A. Tritt, Counsel for ICO, to Magalie Roman Salas, FCC Secretary.

11. In the alternative, MCHI and Constellation contended that if the Commission were to find that the execution of the capacity-purchase agreements did not satisfy the requirement to enter into a “non-contingent satellite manufacturing contract” it should either waive that and all subsequent milestone requirements or extend all of their milestone deadlines for one year. They argued that waiving their milestone requirements would not disserve the milestone policy because it would enable them to use capacity on a system that is already in an advanced state of construction. As precedent for their alternative waiver request, they cited a decision in which the International Bureau waived a DBS licensee’s initial “due diligence” requirement based on findings that the licensee’s contractual arrangement to lease capacity on an existing satellite would facilitate earlier deployment of service and would be more cost-effective than construction of separate facilities.<sup>18</sup>

#### E. Petitions to Deny and Related Pleadings

12. AT&T Wireless Services, Inc., Cingular Wireless LLC, and Verizon Wireless (“Petitioners”) jointly filed a petition to deny the applications for license modification and transfer of control.<sup>19</sup> The Petitioners argued, first, that neither MCHI nor Constellation had met its initial milestone requirement and had not shown good cause for waiving or extending it; that their licenses were consequently null and void; and that their applications for license modification and transfer of license control should therefore be denied, as they no longer had licenses to modify or transfer. Second, the Petitioners argued that grant of either transfer application would contravene the anti-trafficking rule and that neither applicant had shown good cause for waiving that requirement. Third, the Petitioners argued that the Commission could not properly grant either transfer application without first resolving a substantial question of fact: *viz.*, whether satellite-only MSS is commercially viable. Finally, the Petitioners contended that the applications for transfer of control should not be granted before the Commission resolves pertinent issues in the pending rulemaking in ET Docket No. 00-258.<sup>20</sup>

13. In subsequent pleadings MCHI, Constellation, and ICO (“MSS Parties”) reasserted that MCHI and Constellation had met their initial milestone requirement by signing the Sharing Agreements. That is, they maintained that the Sharing Agreements were, in fact, non-contingent contracts for construction of their 2 GHz MSS systems, under which MCHI and Constellation had made binding commitments to pay ICO for construction of the satellite facilities that their systems would use and ICO, in return, had made a binding commitment to make the facilities available to them within the milestone timeframe specified in their licenses. Thus, according to the MSS Parties, the Sharing Agreements obligated ICO to deliver the platform required to implement MCHI’s and Constellation’s systems in the same way that other satellite construction contracts obligate the manufacturers to deliver facilities comprising the licensed systems. The MSS Parties contended that to construe the milestone condition so narrowly as to preclude reliance on contracts that permit efficient satellite-sharing arrangements would disserve the objectives of the milestone policy. The policy’s objectives, they maintain, are to ensure speedy delivery of service to the public and prevent warehousing of valuable orbital locations and spectrum, rather than to ensure construction of separate satellite constellations. They contended that their Sharing Agreements serve those objectives by providing for implementation of a shared system that

<sup>18</sup> *Dominion Video Satellite, Inc. (Order and Authorization)*, DA 99-915, 14 FCC Rcd 8182 (Int’l Bur. 1999).

<sup>19</sup> Petition to Deny filed September 4, 2002.

<sup>20</sup> *See Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems (Memorandum Opinion and Order and Further Notice of Proposed Rulemaking)*, FCC 01-224, 16 FCC Rcd 16043 (2001) at ¶¶ 22-30 and ¶35 (inviting comments regarding redistribution of “abandoned” 2 GHz spectrum and as to “whether we should permit [2 GHz] MSS operators to consolidate operations, such that system operators that reach an agreement would be able to use, for a single system, all or some portion of the spectrum assigned to their individual systems”)(“*Advanced Wireless Services NPRM*”).

would allow Constellation and MCHI to make full use of their authorized service-link spectrum and independently commence operation on a timely basis. Further, the MSS Parties contended that their proposed sharing arrangement is no different than satellite-sharing arrangements that the Commission has approved in other instances.<sup>21</sup>

14. In response to the Petitioners' arguments concerning trafficking, the MSS Parties maintained that consummation of the Stock Purchase Agreements would not violate the anti-trafficking rule because the proposed transactions involved substantial assets other than licenses. They also argued that the current owners of MCHI and Constellation would retain a minority interest in the transferred license rights and would not receive compensation in excess of their relevant previous investment.<sup>22</sup>

### III. DISCUSSION

15. *Milestone Requirement.* It is longstanding Commission policy to impose milestones for system implementation upon licensees.<sup>23</sup> Milestone schedules are designed to ensure that licensees are proceeding with construction and will launch their satellites in a timely manner, and that the orbit spectrum resource is not being held by licensees unable or unwilling to proceed with their plans.<sup>24</sup> The first milestone requires the licensee to commence the construction process by entering into a non-contingent satellite construction contract. This first milestone requirement is especially important because it provides an early objective indication as to whether a licensee is committed to proceeding with implementation of its proposal.<sup>25</sup> The "non-contingent" requirement contemplates that there will be neither significant delays between the execution of the construction contract and the actual commencement of construction, nor conditions precedent to construction.<sup>26</sup>

---

<sup>21</sup> In particular, the MSS Parties pointed to the holding in *United States Satellite Broadcasting Co., Inc. and Hughes Galaxy, Inc. (Memorandum Opinion and Order)*, DA 92-1462, 7 FCC Rcd 7247, 7251 at ¶21 (MMB 1992) ("USSB"), that a DBS licensee had met its "due diligence" requirement to enter into a non-contingent satellite construction contract by signing a satellite-sharing contract. They also cited *GTE Spacenet Corp. (Memorandum Opinion, Order and Authorization)*, DA 87-1176, 2 FCC Rcd 5312 (CCB 1987); *Columbia Communications Corp. (Memorandum Opinion, Order, and Authorization)*, FCC 91-429, 7 FCC Rcd 122 (1991); *Volunteers in Technical Assistance (Order)*, DA 97-501, 12 FCC Rcd 3094 (Int'l Bur. 1997) ("VITA"); *AMSC Subsidiary Corp. (Order and Authorization)*, DA 98-493, 13 FCC Rcd 12316 (Int'l Bur. 1998); *Dominion Video Satellite, supra*; and *Columbia Communications Corp. (Memorandum Opinion and Order)*, DA 00-113, 15 FCC Rcd 15566 (Int'l Bur. 2000).

<sup>22</sup> See Joint Response to Petition to Deny, filed on October 22, 2002. In response to inquiries from Bureau staff, MCHI and Constellation submitted information pertaining to their incurred expenses for preparing and prosecuting their license applications, constructing authorized facilities, and complying with relevant regulatory requirements, requesting that the information be treated as confidential. See letters dated October 15, 2002 from Tom W. Davidson, Counsel for MCHI, and Robert A. Mazer, Counsel for Constellation, to Marlene F. Dortch, FCC Secretary.

<sup>23</sup> See, e.g., *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites* (Report and Order), FCC 82-285, 90 FCC 2d 676 (1982) at ¶114 (adopting rule requiring DBS licensees to "begin construction or complete contracting for construction" of satellites within one year after receiving construction permits), and *MCI Communications Corp. (Memorandum Opinion and Order)*, DA 87-24, 2 FCC Rcd 233 (1987) at ¶5 (noting that a milestone schedule is included in each domestic space station authorization issued by the Commission).

<sup>24</sup> See, e.g., *AMSC Subsidiary Corp. (Memorandum Opinion and Order)*, FCC 93-243, 8 FCC Rcd 4040 (1993) at ¶13, and *Motorola, Inc. and Teledesic LLC (Memorandum Opinion and Order)*, DA 02-2146, 17 FCC Rcd 16543 (Int'l Bur. 2002).

<sup>25</sup> *Motorola, Inc. and Teledesic LLC, supra*, at ¶11.

<sup>26</sup> *Panamsat Licensee Corp., Application for Authority to Construct, Launch, and Operate a Ka-Band Communications Satellite system in the Fixed-Satellite Service at Orbital Locations 58 degrees W.L. and 125* (continued....)

16. We conclude that MCHI and Constellation have not satisfied the license conditions that required them to meet their first milestone by July 17, 2002. In the 2 GHz proceeding and in the resulting licenses, the Commission emphasized that it would strictly enforce the milestone requirements and that, with respect to the first milestone, it was specifically looking for the licensees to enter into “non-contingent satellite manufacturing contract[s].”<sup>27</sup> The Satellite Sharing Agreements with ICO are not satellite manufacturing contracts. Rather than providing for satellite construction, the Sharing Agreements are merely contracts for purchase of satellite capacity *if and when* the satellites in question have been constructed, launched, and made ready for operation,<sup>28</sup> pursuant to a separate contract to which MCHI and Constellation are not parties.<sup>29</sup>

17. Even if we could agree with the MSS Parties that the Sharing Agreements are satellite manufacturing contracts, we would not agree that their execution satisfied the initial milestone requirement, because the Sharing Agreements do not provide evidence of a sufficient commitment to satisfy the requirement for a non-contingent contract. Under the terms of the Sharing Agreements, MCHI and Constellation each paid ICO a specified amount of money when the agreements were signed. The down-payments were miniscule, however, relative to the total purchase price that MCHI and Constellation each agreed to pay for the capacity that ICO was to provide. More precisely, each down-payment comprised less than one-half of one percent of the total purchase price specified in each contract. The remainder is due to be paid on a “Closing Date,” defined as the date thirty days after ICO makes the capacity available to MCHI or Constellation for commercial operation.<sup>30</sup> A “satellite manufacturing contract” of this type commits the licensee to no more than delaying its own construction plans until it can be determined whether another licensee will complete construction of a system, at which time it would utilize capacity on the completed system.<sup>31</sup>

(...continued from previous page)

*degrees W.L. (Memorandum Opinion and Order)*, DA 00-1266, 15 FCC Rcd 18720 (Int'l Bur. 2000) *aff'd*, FCC 01-178, 16 FCC Rcd 11534 (2001). *See also Norris Satellite Communications, Inc.*, FCC 97-377, 12 FCC Rcd 22299 (1997) (“A contract with unresolved contingencies, such as further payments required to commence construction,” does not meet the first milestone requirement.) The Commission provided a more-detailed general description of a non-contingent construction contract in *Tempo Satellite, Inc. (Memorandum Opinion and Order)*, FCC 92-458, 7 FCC Rcd 6597 (1992) at ¶13:

The [contract] identifies specific satellites and their design characteristics, and specifies the dates for the start and completion of construction. The payment terms and schedule demonstrate the applicant's investment and commitment to completion of the system. The payments are spread throughout the [term of the] contract, the initial payments are significant, and the majority of payments will be made well before the end of the construction period.

<sup>27</sup> 2 GHz MSS Report and Order, *supra*, at ¶¶ 46, 48, and 106. *See also* n.16 and associated text, *supra*.

<sup>28</sup> The Sharing Agreements include a provision that ostensibly requires ICO to make the facilities available to MCHI and Constellation on a schedule consistent with their milestone requirements, but ICO would incur no liability for failing to provide the capacity on time or refusing to provide it at all, aside from a duty to refund the downpayments. Article 7.4 in each Sharing Agreement states that in the event of a breach by ICO, the other party's remedy is limited to terminating the contract and obtaining a refund of any prior payment.

<sup>29</sup> We are reviewing ICO's satellite manufacturing contract with The Boeing Company as part of the 2 GHz MSS milestone review process and will rule separately on the adequacy of that contract for purposes of milestone compliance. We also note that this order addresses the narrow question of whether the sharing agreements presented in this case meet 2 GHz MSS milestone requirements, not the much broader question of whether such agreements are permissible under any circumstances.

<sup>30</sup> Sharing Agreements at pp. 2 and 5.

<sup>31</sup> Each Sharing Agreement originally stipulated that the parties' obligations to consummate the proposed capacity-purchase transaction were contingent upon negotiation and execution of another contract, pertaining to

(continued...)

18. In view of the fact that the Sharing Agreements would be superseded by consummation of the simultaneously-executed Stock Purchase Agreements, and in view of the fact that they do not demonstrate the capability or commitment of MCHI and Constellation to take any immediate steps, much less to contribute in any meaningful way to the construction of a satellite system, there is ample reason to suspect that the Sharing Agreements do not reflect a market-driven business arrangement, but instead were devised merely as a temporary expedient to preserve MCHI's and Constellation's licenses pending disposition of their applications for permission to transfer control. Thus, the situation here is not unlike the situation presented in *Advanced Communications Corp.*,<sup>32</sup> where the Commission concluded that a DBS licensee deserved no due-diligence credit for signing a capacity-sharing agreement pending action on an application for transfer of control. We therefore conclude that the execution of the Satellite Sharing Agreements did not satisfy the license conditions that required MCHI and Constellation to enter into non-contingent satellite construction contracts by July 17, 2002.

19. MCHI and Constellation's reliance on previous decisions<sup>33</sup> approving satellite sharing arrangements and finding licensees in compliance with milestones, is misplaced. Unlike any of the contracts at issue in the earlier cases, the contract in question here does not demonstrate a sufficiently meaningful commitment to meet FCC requirements. In those cases, in contrast with the situation here, the question of whether the licensee could rely on a satellite sharing agreement to meet milestone requirements arose after the licensee had already met its first (contract) milestone. Our determination of MCHI/Constellation's capability and commitment to launching their own systems are, consistent with precedent, important to our analysis of their compliance with their milestones. For example, in *USSB*, which involved a request to extend a launch milestone, the licensee had met its initial milestone requirement<sup>34</sup> but subsequently entered into a contract involving sharing of satellite facilities at one of three orbital locations at which it was authorized. The Commission analyzed the satellite sharing arrangement to determine whether it was sufficient to meet the licensee's ongoing obligations, under the DBS "due diligence" requirements, to have a satellite construction contract in place. While it found that the contract was sufficient to meet that requirement, it took into consideration additional facts beyond the mere terms of the contract. For example, under the sharing contract, USSB had already paid more than 40% of the contract price, and had arranged financing for its remaining payment obligation.<sup>35</sup> Similarly, in *Volunteers in Technical Assistance*, a licensee that had previously met its first milestone requirement entered into a spectrum sharing arrangement after constructing a satellite that was lost in a failed launch.<sup>36</sup> These actions showed that the licensees were committed to launch their own systems, and that they had

---

(...continued from previous page)

operation and management of the satellite system, prior to the Closing Date. The MSS Parties amended the Sharing Agreements on January 13, 2003, after the milestone date, to eliminate that closing condition. (See letter to Marlene H. Dortch, FCC Secretary, from counsel for MCHI, Constellation, and ICO, filed on January 13, 2003.) Without determining whether the post-milestone contract amendment cured any defect, we conclude for other reasons that MCHI and Constellation failed to meet their initial milestone requirements.

<sup>32</sup> *Advanced Communications Corp. (Memorandum Opinion and Order)*, FCC 95-428, 11 FCC Rcd 3399 (1995).

<sup>33</sup> See n.22 and associated text, *supra*.

<sup>34</sup> *United States Satellite Broadcasting Company, Inc. (Memorandum Opinion and Order)*, FCC 90-402, 5 FCC Rcd 7576 (1990) (finding that USSB's contract with G.E. Astro-Space satisfied the requirement for a construction contract with respect to its third satellite and noting an earlier finding that USSB had met the construction contract requirement for two other satellites).

<sup>35</sup> *USSB, supra*, at ¶¶ 11 and 17.

<sup>36</sup> *VITA, supra, aff'd*, FCC 97-308, 12 FCC Rcd 13995 (1997) (affirming the International Bureau's determination that the satellite sharing arrangement did not involve an unauthorized transfer of control, and that the licensee had not engaged in unauthorized and premature construction). The *AMSC* decision cited by MCHI and Constellation, *supra*, did not involve a milestone issue.



taken steps, including incurring substantial expenditures, to do so. In the MCHI/Constellation case, however, the licensees presented no evidence that they have taken any significant steps other than to enter into their Sharing and Stock Purchase agreements.

20. *Waiver.* We also conclude that the alternative requests for waiver of milestone deadlines are without merit. A waiver is appropriate only when granting such relief would not dissuade the underlying purpose of the requirement in question and would better serve the public interest than enforcing the requirement.<sup>37</sup> The requirement that 2 GHz MSS licensees must enter into non-contingent satellite manufacturing contracts within one year after receiving their space-station licenses serves the general purpose of preventing “warehousing” of spectrum by licensees who are not willing and able to promptly make authorized use of the spectrum reserved for them. It would dissuade that purpose to waive the requirement in order to allow the owners of a licensee that has failed to meet a milestone for entering into a satellite manufacturing contract to sell their interest in the license pursuant to a transfer-of-control application filed just before the deadline. To grant such relief here would establish a precedent that would make it possible for parties with marginal prospects and uncertain intentions to delay for as long as a year after receiving licenses before arranging for disposition of their license interests and then continue to hold the licenses past the one-year deadline for as long as it would take to resolve any issues presented by their last-minute assignment or transfer-of-control applications. Such a precedent would also tend to encourage speculative filings by applicants with no reasonable prospect or intention of constructing a system.

21. That concern is particularly relevant in the context of 2 GHz MSS systems, given the 2 GHz MSS licensing plan. As the Commission has indicated, the 2 GHz licensing plan was premised on the award of spectrum for the purpose of constructing satellite systems.<sup>38</sup> One year after accepting a license, the award of which was premised on the construction of a satellite system, Constellation and MCHI seek to significantly alter their plans, in a manner which in effect would authorize the use by one system of the spectrum awarded to support three systems. While there may be benefits from operation of fewer systems, such as lesser interference potential, reduction of potential orbital debris, and simplification of coordination, these benefits could have been identified and addressed through agreements prior to licensing. (The same alleged benefits will be achieved by the result we reach here; *i.e.*, cancellation of the 2 GHz MSS licenses that were issued to MCHI and Constellation.) In any event, approval of the type of arrangement before us would create substantial incentives for applicants to pursue authorizations to construct satellite systems, even if they do not intend to construct and operate the system, and would create an unacceptably high risk of gaming of the licensing process.

22. In support of their waiver requests, MCHI and Constellation point out that in *Dominion Video Satellite, Inc.*,<sup>39</sup> the International Bureau found justification for waiving a DBS licensee’s initial “due diligence” requirement in order to permit consummation of a satellite-sharing arrangement. Furthermore, MCHI and Constellation stress that the Bureau based the waiver determination on findings that the proposed sharing arrangement would result in public-interest benefits of the same sort that, according to MCHI and Constellation, would result from consummation of their proposed satellite-sharing arrangement with ICO.<sup>40</sup> MCHI and Constellation overlook important distinctions, however.

---

<sup>37</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>38</sup> See *Advanced Wireless Service NPRM*, 16 FCC Rcd 16043 at ¶35; see also *2 GHz MSS Service Rules (Report and Order)*, 15 FCC Rcd 16127 at ¶16.

<sup>39</sup> Cited in n.18, *supra*.

<sup>40</sup> In particular, the Bureau found that allowing Dominion to lease extra transponders on another DBS licensee’s existing satellite instead of constructing and launching a separate satellite of its own would expedite

(continued....)

First, the licensee that obtained the waiver in *Dominion* had previously met its initial due-diligence requirement by entering into a non-contingent contract for construction of two satellites.<sup>41</sup> Entering into a non-contingent contract for the system authorized in an initial license grant lessens the concerns about gaming the licensing process, discussed above.<sup>42</sup> Second, the ruling in *Dominion* facilitated immediate institution of new service,<sup>43</sup> because the single satellite that Dominion was proposing to use was already in orbit and operational.

23. *Extension.* Finally, MCHI and Constellation have not shown good cause for extending the first milestone period. The Commission has repeatedly held that to justify a request for extension of a milestone period, a licensee must show that extraordinary circumstances beyond its control prevented it from meeting the deadline.<sup>44</sup> Accordingly, Section 25.117(e) of the Commission's rules states that licensees that request postponement of a milestone deadline must file a verified statement that the additional time is needed because of unforeseeable circumstances beyond their control, describing the circumstance in detail, or must point to "unique and overriding public interest concerns" that justify an extension. Neither MCHI nor Constellation has identified any unforeseeable circumstance beyond its control that prevented it from entering into a non-contingent satellite-construction contract by July 17, 2002, nor has either of them shown that extension of that deadline is warranted because of unique and overriding public interest concerns.

#### IV. CONCLUSION

24. We have determined that MCHI and Constellation failed to meet the condition in their 2 GHz MSS licenses that required them to enter into non-contingent satellite-construction contracts by July 17, 2002. Further, we have found that they have not shown good cause for waiving that requirement or extending the time prescribed for compliance. We therefore conclude that the licenses are now null and void by their own terms, due to the licensees' failure to satisfy that condition. Consequently, the pending applications for modification of those licenses and for permission to transfer control of them to ICO have become moot.

#### V. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that the 2 GHz MSS licenses granted to Constellation Communications Holdings, Inc., DA 01-1633, 16 FCC Rcd 13724 (Int'l Bur./OET 2001), File Nos. 181-

---

(...continued from previous page)

institution of new service and make more efficient use of infrastructure by "avoid[ing] the enormous expense and delay involved in constructing and launching a separate satellite." *Id.* at ¶11.

<sup>41</sup> See *Dominion Video Satellite, Inc. (Memorandum Opinion and Order)*, 10 FCC Rcd 10480 (Int'l Bur. 1995).

<sup>42</sup> See ¶¶ 20 and 21.

<sup>43</sup> *Dominion Video Satellite (Order and Authorization)*, *supra*, at ¶12.

<sup>44</sup> See *Loral Space & Communications Corporations*, 16 FCC Rcd 11044, 11047 (Int'l Bur. 2001); *GE American Communications, Inc.*, 16 FCC Rcd 11038 (Int'l Bur. 2001); *PanAmSat Licensee Corp.*, 15 FCC Rcd 18720 (Int'l Bur. 2000), *aff'd* 16 FCC Rcd 1154 (2001); *Columbia Communications Corp.*, 15 FCC 16496, 16496-97 (Int'l Bur. 2000), and 15 FCC Rcd 15566, 15571-72 (Int'l Bur. 2000); and *Advanced Communications Corp.*, *supra*, 10 FCC Rcd at 13340-41. The Commission has generally been more lenient when considering requests for extension of later milestone deadlines from licensees that made substantial progress and continued to demonstrate commitment after having met their initial milestone requirement. See, e.g., *AMSC Subsidiary Corp. (Memorandum Opinion and Order)*, FCC 93-243, 8 FCC Rcd 4040 (1993); *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service (Memorandum Opinion, Order and Authorization)*, DA 00-2096, 15 FCC Rcd 23583 (Int'l Bur. 2000); and *USSB*, *supra*.

SAT-P/LA-97(46), SAT-LOA-19970926-00148, SAT-AMD-19991230-00134, and SAT-AMD-20001103-00152, and Mobile Communications Holdings, Inc., DA 01-1637, 16 FCC Rcd 13794 (Int'l Bur./OET 2001), File Nos. 180-SAT-P/LA-97(26), SAT-LOA-19970926-00150, and SAT-AMD-20001103-00157, ARE DECLARED NULL AND VOID.

26. IT IS FURTHER ORDERED that the alternative requests by MCHI and Constellation for waiver or extension of milestone requirements ARE DENIED, that their applications for minor modification of license (File Nos. SAT-MOD-20020719-00103 and SAT-MOD-20020719-00105) ARE otherwise DISMISSED as moot, and that their applications for permission to transfer license control to ICO Global Communications (Holdings) Limited (File Nos. SAT-T/C-20020718-00114 and SAT-T/C-20020719-00104) ARE also DISMISSED as moot.

27. IT IS FURTHER ORDERED that the associated application for permission to transfer control of Constellation's Big LEO satellite license to ICO Global Communications (Holdings) Limited (File No. SAT-T/C-20020718-00114) IS also DISMISSED as moot as a result of the decision in *Constellation Communications Holdings, Inc. (Memorandum Opinion and Order)*, DA 02-3086 (Int'l Bur., Nov. 8, 2002).<sup>45</sup>

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson  
Chief, International Bureau

---

<sup>45</sup> In that decision the Bureau declared Constellation's Big LEO MSS license null and void for failure to meet a milestone requirement.