

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

In re applications of
Mobile Communications Holdings, Inc. and ICO
Global Communications (Holdings) Limited
for Transfer of Control
Constellation Communications Holdings, Inc. and
ICO Global Communications (Holdings) Limited
for Transfer of Control
File No. SAT-T/C-20020719-00104
File No. SAT-T/C-20020718-00114

DISCLOSURE ORDER

Adopted: January 8, 2003

Released: January 9, 2003

By the Chief, Satellite Division:

1. On July 18, 2002, Constellation Communications Holdings, Inc. and Mobile Communications Holdings, Inc. ("Applicants") filed the above-captioned applications for permission to transfer control of their 2 GHz MSS licenses to ICO Global Communications (Holdings) Limited, pursuant to agreements to sell controlling shares of their stock to ICO ("Stock Purchase Agreements"). On September 4, 2002, AT&T Wireless Services, Inc., Cingular Wireless LLC, and Verizon Wireless ("Petitioners") jointly filed a petition to deny the transfer applications - arguing, among other things, that the proposed transactions would violate the Commission's pertinent anti-trafficking rule, 47 C.F.R. § 25.143(g)(3).

2. The Applicants and ICO contended in a Joint Opposition that the proposed transfers of control were permissible under the anti-trafficking rule because they were incidental to larger transactions involving other assets and because the Applicants' current owners would not realize a profit from the sale of license interests. In support of the latter contention, the Applicants submitted affidavits from ICO's President, Craig Jorgens ("Jorgens Affidavits"), describing the consideration that ICO would pay under the Stock Purchase Agreements. Pursuant to 47 C.F.R. § 0.459, ICO asked the Commission to withhold the Jorgens Affidavits from public inspection, asserting that the affidavits revealed sensitive commercial and financial information, public disclosure of which could cause substantial competitive harm. The Chief of the Satellite Division of the Commission's International Bureau ("Satellite Division") subsequently directed the Applicants to submit additional information relevant to the anti-trafficking issue. Specifically, the Satellite Division asked for: 1) an account of expenses incurred by the Applicants in preparing and prosecuting their 2 GHz MSS license applications and making arrangements to implement their authorizations; 2) a copy of the Applicants' most recent audited financial statements; and 3) an assessment of the fair market value of the non-license assets to be sold pursuant to the Stock

1 Joint Opposition to Petition to Deny of Constellation, MCHI and ICO (filed Sept. 18, 2002) at pp. 23-28.

2 Request for Confidential Treatment filed Sept. 18, 2002.

Purchase Agreements.³ The Applicants provided the information on October 15, 2002 (“October 15th Responses”) and requested that this, too, be withheld from public inspection.⁴

3. On November 12, 2002, the Petitioners filed a request under the Freedom of Information Act (“FOIA”)⁵ and Section 0.461 of the Commission’s rules,⁶ asking to inspect the Jorgens Affidavits and the October 15th Responses. The Petitioners contended that they should be granted access to these documents because they provide information materially relevant to the anti-trafficking issue raised in their joint petition to deny the transfer applications. They maintained that for the Commission to resolve the anti-trafficking issue based on information to which the Petitioners were denied access would constitute a denial of due process. Although they did not dispute the Applicants’ contention that the information in question was of a confidential nature, the Petitioners maintained that issuance of a suitable protective order would suffice to protect the Applicants’ interest in limiting disclosure. The Petitioners therefore asked the Commission to order the Applicants to make the documents available to the Petitioners pursuant to a protective order similar to one that the International Bureau issued recently in a similar case.⁷

4. In response, the Applicants argue that the FOIA request should be denied because they have already disclosed all information necessary for resolution of the anti-trafficking issue in a publicly-filed pleading. Specifically, they point to previous assertions that MCHI and Constellation had respectively invested approximately \$80 million and \$35 million “in the development of [their] system[s]” and that the value of the consideration that either licensee’s current owners would receive from ICO under the Stock Purchase Agreements was less than the amount of their prior investment.⁸ The Applicants also contended that a protective order would not suffice to prevent improper use or improper disclosure of the confidential information in the documents in question. In the alternative, the Applicants argued for adoption of a more-restrictive protective order, advocating various revisions to the terms of the protective order proposed by the Petitioners. For instance, the Applicants contend that the protective order should limit disclosure to outside counsel for the Petitioners, excluding in-house counsel and outside consultants, and that the Petitioners should be allowed no more than fourteen days after obtaining access to the confidential documents in which to file comments on their substantive significance.

5. The Commission has inferred from judicial precedent that petitioners to deny “generally must be afforded access to all information submitted by licensees that bear upon their applications,”⁹ and the Applicants have not shown that there is justification for an exception in this instance. The FOIA request is not superfluous merely because the public file includes conclusory statements from the Applicants’ counsel and chief executive officers alleging that the consideration to be paid under the Stock Purchase Agreements is of less value than the Applicants’ relevant expenditures. On the contrary, the

³ Letter dated Oct. 4, 2002 from Thomas S. Tycz, Chief, Satellite Division, to Tom W. Davidson, Counsel to Mobile Communications Holdings, Inc. Letter dated Oct. 4, 2002 from Thomas S. Tycz, Chief, Satellite Division, to Robert A. Mazer, Counsel to Constellation Communications Holdings, Inc.

⁴ Request for Confidential Treatment with attached Confidential Response to FCC Inquiry filed by Constellation Communications Holdings, Inc. on Oct. 15, 2002. Request for Confidentiality with attached Response to FCC Inquiry filed by Mobile Communications Holdings, Inc. on Oct. 15, 2002.

⁵ 5 U.S.C. § 552 *et seq.*

⁶ 47 C.F.R. § 0.461.

⁷ *See Motorola Inc. and Teledesic LLC*, 16 FCC Rcd 17056 (Int’l Bur. 2001).

⁸ *See Joint Opposition to Petition to Deny, supra*, at p.27; attached affidavit of C.J. Waylan, President of Constellation Communications Holdings, Inc., at p.2; and attached affidavit of David Castiel, President of Mobile Communications Holdings, Inc. at pp. 2 and 3.

⁹ *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816 (1998), at ¶33 and n.109.

Petitioners clearly have a legitimate interest in reviewing documents that the Applicants have filed with us that specifically describe the consideration to be paid for the license interests at stake and ostensibly provide a detailed account of the expenses incurred in obtaining the licenses and making further preparations for implementation of the authorized satellite systems – information that clearly has a material bearing on resolution of the anti-trafficking issue that the Petitioners have raised.¹⁰

6. We therefore order the Applicants to disclose the documents in question to the Petitioners under the terms of the attached protective order, which is substantially identical to other protective orders that have been adopted in recent proceedings.¹¹ We are not restricting access to outside counsel, which would hinder the Petitioners from supervising the performance of their outside counsel and might hamper effective advocacy. The Applicants cite a case where the International Bureau adopted a protective order that allowed the licensee to withhold confidential documents from other parties' in-house counsel, based on a finding that such a restriction was warranted in view of the serious harm that the licensee would suffer if the protected information – which included “all ... analyses and reports ... prepared ... for the purpose of evaluating ... the proposed acquisitions with respect to market shares, competition, ... markets, [or] potential for sales growth or expansion into product or geographic markets” – were disclosed to competitors.¹² The Applicants have not convincingly shown in this instance, however, that the risk of harm from disclosure of the confidential information in question here is sufficiently great to warrant imposition of a similar restriction on the Petitioners' right of access.¹³ Rather, we believe that it will suffice to insert the customary proviso excluding inside counsel involved in competitive decision-making. (See Paragraph 3 of the protective order.) Nor have the Applicants shown that there is good reason to afford only fourteen days for the Petitioners to file comments discussing the confidential information, contrary to our practice in *Motorola Inc. and Teledesic LLC, supra*, where we specified a substantially longer period for filing comments on previously-undisclosed information.¹⁴

7. Comments on protected material from petitioners to deny may be filed no later than thirty days after the release date of this order, and reply comments may be filed no later than ten business days after the deadline for filing initial comments.

¹⁰ See *Open Network Architecture Tariffs of Bell Operating Companies*, 10 FCC Rcd 1619, 1621 (1995) (“[t]he Administrative Procedure Act and the Due Process Clause of the Constitution generally entitle parties in administrative proceedings to have access to the documents necessary for effective participation in those proceedings”).

¹¹ See, e.g., *Motorola Inc. and Teledesic LLC, supra*; *Hispanic Broadcasting Corp. and Univision Communications, Inc.*, DA 02-3227 (MM rel. Nov. 22, 2002); *TCI Satellite Entertainment, Inc. and Primestar, Inc.*, 13 FCC Rcd 10927 (Int'l Bur. 1998); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp. to SBC Communications, Inc.*, 13 FCC Rcd 21,724 (CC Bur. 1998); *Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control*, 15 FCC Rcd 6117 (Cable Bur. 2000); *Voicestream Wireless Corporation, Powertel, Inc., Transferors, and DeutscheTelekom AG, Transferee*, 15 FCC Rcd 24042 (2000); and *GE American Communications, Inc.*, DA 01-173 (rel. Jan. 25, 2001), 2000 WL 867953.

¹² See *TCI Satellite Entertainment, Inc. and PRIMESTAR, Inc.*, 13 FCC Rcd 10927 (Int'l Bur. 1998).

¹³ A more pertinent precedent is *Motorola Inc. and Teledesic LLC, supra*, where we declined to limit access to expense data relevant to an anti-trafficking issue to outside counsel.

¹⁴ 16 FCC Rcd 17056 at ¶8.

8. This order shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Thomas S. Tycz
Chief
Satellite Division

APPENDIX A

**Before the
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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)	

PROTECTIVE ORDER

1. On July 18, 2002, Constellation Communications Holdings, Inc. and Mobile Communications Holdings, Inc. (“Applicants”) filed applications to transfer control of their 2 GHz MSS authorizations to ICO Global Communications (Holdings) Limited (“ICO”). On September 4, 2002, AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (“Petitioners”) filed a Petition to Deny the applications, contesting, *inter alia*, the Applicants’ assertions that the proposed transfers did not fall within the scope of the anti-trafficking rule, 47 C.F.R. § 25.143(g)(3). In a Joint Opposition to Petition to Deny filed on September 18, 2002, the Applicants included affidavits of Craig Jorgens, President of ICO (“Jorgens Affidavits”) relevant to this issue with a request that they be accorded confidential treatment. On October 4, 2002, the International Bureau (“Bureau”) directed the Applicants to submit additional information to determine compliance with, or whether waiver is warranted with respect to, the anti-trafficking rule. The Applicants provided this information on October 15, 2002 (“October 15th Response”), again requesting that the information be accorded confidential treatment. On November 12, 2002, Petitioners submitted a request under the Freedom of Information Act (“FOIA”) seeking the right to inspect the Jorgens Affidavits and the October 15th Response. The International Bureau issues this Protective Order for the purpose of facilitating and expediting review of the documents designated by the Applicants as confidential or proprietary and in order to avert harm to the Applicants’ interests. This Protective Order does not constitute a determination as to whether any information is exempt from mandatory disclosure under the Freedom of Information Act (“FOIA”) or otherwise.

2. *Non-Disclosure of Stamped Confidential Documents.* Except with the prior written consent of the Applicants, or as hereinafter provided under this Order, neither a Stamped Confidential Document nor the contents thereof may be disclosed by a reviewing party to any person. “Stamped Confidential Document” shall mean the Jorgens Affidavits and any document previously submitted to the Commission in compliance with the October 4, 2002 information request. Each Stamped Confidential Document shall bear the legend “CONFIDENTIAL” and any copy of any such document that is prominently marked “CONFIDENTIAL – NOT FOR PUBLIC INSPECTION – SUBJECT TO PROTECTIVE ORDER IN FILE NOS. SAT-T/C-20020719-00104 and SAT-T/C-20020718-00114” to signify that it contains information that the Applicants contend is entitled to protection under the FOIA and the Commission’s implementing rules, unless, on its own motion or in response to a petition, the Commission determines

pursuant to Sections 0.459 or 0.461 of its rules that such document is not entitled to confidential treatment. For purposes of this Order, the term “document” means all written, recorded, or graphic material, whether produced or created by a party or another person.

3. *Permissible Disclosure.* Subject to the requirements of paragraph 5, Stamped Confidential Documents may be reviewed by outside counsel of record for the parties in this proceeding and also by such of their in-house counsel who are actively engaged in the conduct of this proceeding and are not involved in competitive decision-making. Counsel is deemed to be involved in competitive decision-making if counsel’s activities, association, and relationship with a client include giving advice concerning, or participating in, any of the client’s business decisions made in light of similar information about a competitor. Subject to the requirements of paragraph 5, such counsel may disclose Stamped Confidential Documents to: (i) the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in this proceeding; (ii) Commission officials involved in this proceeding; (iii) outside consultants or experts retained for the purpose of assisting counsel in this proceeding who do not participate directly in the business decisions of any competitor of either of the Applicants or provide analysis underlying the business decisions of such competitor; (iv) employees of such counsel involved solely in organizing, filing, coding, converting, storing, and/or retrieving data or designing programs for handling data connected with this proceeding; and (v) employees of third-party contractors performing one or more of these functions under counsel’s supervision.

4. *Duty to Limit Access and Ensure Compliance.* Persons described in paragraph 3 shall ensure that access to Stamped Confidential Documents is strictly limited as prescribed in this Order. Such persons shall further ensure that Stamped Confidential Documents are used only as provided in this Order and that Stamped Confidential Documents provided pursuant to paragraph 6 are not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 7.

5. *Procedures for Obtaining Access to Confidential Documents.* Before reviewing or having access to Stamped Confidential Documents, anyone seeking such access shall execute the Declaration of Confidentiality in the form attached hereto as Appendix B. The executed Declaration shall be filed with the Commission and a copy thereof shall be provided to the Applicants so that it is received by them at least five business days before the Declarant reviews or obtains access to any Stamped Confidential Document. The Applicants may object to disclosure of Stamped Confidential Documents to any such Declarant, provided that they file the objection at the Commission and serve it on counsel representing, retaining, or employing that person within three business days after receiving the person’s Declaration. Until such objection is resolved by the Commission or a court of competent jurisdiction, and unless the objection is resolved in favor of the party seeking access, persons subject to such an objection shall not have access to Stamped Confidential Documents. The Applicants shall allow eligible persons to examine the Stamped Confidential Documents at the offices of either Applicant’s outside counsel.

6. *Copying.* If, in the judgment of the Applicants, a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend “Copying Prohibited,” and no copies of such document, in any form, shall be made except as authorized by further order of the Commission. Application for relief from this restriction against copying may be made to the Commission with notice to counsel for the Applicants. On request, the Applicants shall provide, at cost, partial or complete copies of Stamped Confidential Documents not marked “Copying Prohibited” to persons reviewing them at the offices of the Applicants’ outside counsel pursuant to this Order. Alternatively, the Applicants shall provide, at cost, one complete set of the Stamped Confidential Documents not marked “Copying Prohibited” to any party to this proceeding within two business days after receiving a request therefor from counsel of record for such party who has submitted an executed Declaration of Confidentiality – or, if the request for copies is received less than three days after the submission of such Declaration, at the end of the five-day period specified in the preceding paragraph. Such copies will be

stamped as described in Paragraph 3 above and must be returned in accordance with Paragraph 12. Anyone with custody of Stamped Confidential Documents provided pursuant to this Paragraph shall ensure that access thereto is strictly limited as required by this Order.

7. *Use of Confidential Information.*

(A) *In Filings in this Proceeding.* Persons who have reviewed Stamped Confidential Documents pursuant to this Order may, in documents they file in this proceeding, refer to information found in Stamped Confidential Documents or derived therefrom (hereinafter, “Confidential Information”) if they comply with the following procedure:

- i. Any portion of a pleading that contains or discloses Confidential Information must be physically segregated from the remainder of the pleading;
- ii. The portions disclosing Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing this Protective Order;
- iii. Each page of any party's filing that discloses Confidential Information must be clearly marked “Information from Confidential Documents included pursuant to Protective Order, File No. SAT-ASG-20010109-00005”; and
- iv. The portions containing Confidential Information pertaining to the MCHI transfer of control application shall be served upon the Secretary of the Commission, ICO, and MCHI under seal and shall not be placed in the Commission’s public file. The portions containing Confidential Information pertaining to the Constellation transfer of control application shall be served upon the Secretary of the Commission, ICO, and Constellation under seal and shall not be placed in the Commission’s public file. A party filing a pleading containing Confidential Information shall also file a copy of the pleading with the Confidential Information redacted, which shall be placed in the public file. Parties may file courtesy copies of pleadings containing Confidential Information to Commission staff under seal. Persons who are otherwise eligible under paragraph 3 and have signed a Declaration shall be entitled to review unredacted copies of pleadings containing Confidential Information.
- v. In the event the Commission relies upon or otherwise refers to the content of any of the Stamped Confidential Documents or Confidential Information in its decision in this proceeding, it will redact any Confidential Information from the public version of the decision and make the unredacted version available only to a court or to persons entitled to access to such information under this Protective Order.

(B) *In Other Documents Prepared for this Proceeding.* Notes, internal memoranda and other documents produced by a reviewing person that contain Confidential Information must be prominently marked “CONTAINS CONFIDENTIAL INFORMATION PROTECTED PURSUANT TO PROTECTIVE ORDER, File No. SAT-ASG-20010109-00005” and at the termination of the proceeding shall be dealt with in accordance with the provisions of paragraph 12.

8. *Requests for Additional Disclosure.* Requests for disclosure of Stamped Confidential Documents outside the terms of this Protective Order will be treated in accordance with Sections 0.442 or 0.461 of the Commission’s rules.

9. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein by any person shall not be deemed a waiver by the Applicants of any privilege or entitlement to confidential treatment of such Confidential Information. Persons reviewing these materials pursuant to this Order

agree that they shall not assert any such waiver and shall not use Confidential Information to seek disclosure in any other proceeding. Such persons also agree that accidental disclosure of Confidential Information by the Applicants shall not be deemed a waiver of any privilege or entitlement if the Applicants take prompt remedial action.

10. *Subpoena by Courts or Other Agencies.* If a court or another administrative agency subpoenas or orders production of Stamped Confidential Documents or other Confidential Information that a person has obtained under terms of this Protective Order, such person shall promptly notify the Applicants of the subpoena or order. Consistent with the independent authority of any such court or administrative agency, such notification must afford the Applicants a full opportunity to oppose such production prior to the production or disclosure of any Stamped Confidential Document or other Confidential Information.

11. *Violations of Protective Order.* Persons obtaining access to Stamped Confidential Documents or Confidential Information under this Order shall use the information only for conduct of this proceeding and any subsequent judicial proceeding arising directly from this proceeding, and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings. Should a party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, that party shall immediately inform the Commission and the Applicants of the violation. Should such violation consist of improper disclosure of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order.

12. *Termination of Proceeding.* The provisions of this Order shall not terminate at the conclusion of this proceeding. Unless otherwise ordered by the Commission or a court of competent jurisdiction, Stamped Confidential Documents and all copies thereof shall be returned to the Applicants within two weeks after conclusion of the proceeding, including any judicial review. No document containing Confidential Information may be retained by any person having access thereto, except that counsel to a party to this proceeding eligible to review such documents pursuant to Paragraph 3 may retain, under the continuing strictures of this Order, two copies of pleadings prepared on behalf of the party that contain Confidential Information. All counsel of record shall certify compliance herewith and shall deliver the certification to counsel for the Applicants not more than three weeks after conclusion of this proceeding.

13. *Effect of Protective Order.* This Protective Order is an order of the Commission and shall be an agreement between the reviewing persons executing a Declaration and the Applicants.

14. *Client Consultation.* Nothing in this order shall prevent counsel from rendering advice to their clients concerning the conduct of this proceeding and any judicial proceeding arising therefrom, provided that in rendering such advice and otherwise communicating with clients counsel shall not disclose Confidential Documents or Confidential Information.

15. *Authority.* This Protective Order is issued pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i); Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and authority delegated under Section 0.261 of the Commission's rules and is effective upon adoption.

APPENDIX B

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)

DECLARATION OF CONFIDENTIALITY

I have read the Protective Order in the above-captioned proceeding and acknowledge that I am bound by it. I will not disclose or use documents designated as Stamped Confidential Documents or Confidential Information obtained therefrom except as allowed by the Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or organization other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge that my access to any information obtained pursuant to the Order is due solely to my capacity as counsel or consultant to a party or other person described in paragraph 3 of the Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Order.

I acknowledge that it is my obligation to ensure that: 1) Stamped Confidential Documents and Confidential Information are used only as provided in the Protective Order and 2) Stamped Confidential Documents are not duplicated except as specifically permitted by the terms of the Protective Order, and I certify that I have verified that there are in place procedures, at my firm or office, to prevent unauthorized disclosure of Stamped Confidential Documents or Confidential Information.

Executed at _____ this ____ day of _____, 2003.

Signature

Title

Employer

Address

Phone Number