

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

In the matter of)	
)	
Mobile Communications Holdings, Inc.)	File Nos. 11-DSS-P-91(6)
)	18-DSS-P-91(18)
)	11-SAT-LA-95
)	12-SAT-AMEND-95
Authority to Construct, Launch, and Operate)	158-SAT-AMEND-96
an Elliptical Low-Earth-Orbit Mobile-Satellite)	
Service System)	Call Sign S2111

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 2003

Released: June 4, 2003

By the Commission:

I. Introduction

1. In this Order we deny an application for review of a decision in which the International Bureau¹ affirmed a previous determination that the license issued to Mobile Communications Holdings, Inc. ("MCHI") for a "Big LEO" satellite system is null and void because MCHI failed to comply with a "milestone" implementation requirement. Specifically, the Bureau found that MCHI failed to contract for construction of all of its authorized satellites by the end of July, 2000, thereby violating the second milestone requirement in its license.

II. Background

2. In 1997, MCHI received a license to launch and operate a sixteen-satellite "Big LEO" system for provision of two-way voice and data communications.² The license order prescribed a construction-progress milestone schedule: MCHI was to commence construction of at least two satellites by July 1998, commence construction of the other fourteen satellites by July 2000, complete construction of the first two satellites by July 2001, and place the system fully into operation by July 2003.³ The order declared that the license would become null and void in the event that MCHI failed to meet the milestone

¹ *Mobile Communications Holdings, Inc.* (Mem. Opinion and Order), DA 02-1468, 17 FCC Rcd 11898 (Int'l Bur. 2002) ("Recon Order").

² *Mobile Communications Holdings, Inc.* (Order and Authorization), DA 97-1367, 12 FCC Rcd 9663 (Int'l Bur. 1997), applications for review pending ("MCHI License Order").

³ The schedule afforded MCHI the same amounts of time as were afforded to other Big LEO licensees. See, e.g., *Motorola Satellite Communications, Inc.* (Order and Authorization), DA 96-1789, 11 FCC Rcd 13952 (Int'l Bur. 1996), and *L/Q Licensee, Inc.* (Order and Authorization), DA 96-1924, 11 FCC Rcd 16410 (Int'l Bur. 1996). See also *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands* (Report and Order), CC Docket No. 92-166, FCC 94-261, 9 FCC Rcd 5936, ¶189 (1994).

schedule. *I.e.*, the license was conditioned upon compliance with that schedule.⁴

3. Under the Commission's rules, each Big LEO licensee must file a statement within ten days of each milestone deadline, either certifying that it has met the corresponding milestone requirement or giving notice that it has failed to meet it.⁵ In an attested letter filed on June 22, 1998, a company official reported that

MCHI has commenced construction of the first two spacecraft ... by entering into a noncontingent spacecraft construction contract with The Boeing Company for those two spacecraft. Thus, MCHI has met the July 1998 commencement of construction milestone
....⁶

The same MCHI official reiterated in an annual report filed later in the same month that MCHI had met the July 1998 milestone requirement by signing a contract with Boeing for construction of two satellites.⁷ The official added, in the annual report, that "[d]esign work for the rest of the spacecraft ... also has commenced," but he did not assert that MCHI had contracted for construction of more than two satellites, nor did he assert that the execution of the construction contract with Boeing met any milestone requirement beyond the one pertaining to commencement of construction of the first two satellites.

4. On July 31, 2000, the deadline specified in MCHI's license for commencing construction of the other fourteen satellites, counsel for MCHI filed an affidavit signed by MCHI's president, David Castiel.⁸ Counsel, in a cover letter, and Castiel, in the affidavit, both declared that the affidavit was being submitted pursuant to the rule that requires Big LEO licensees to certify compliance with each milestone deadline within ten days. Castiel stated in the affidavit that

MCHI has entered into a binding, non-contingent contract with Teledyne Brown Engineering, Inc., effective as of July 1, 2000, relating to the construction of the satellites consistent with the milestones and technical specifications set forth in MCHI's [license].

Neither the affidavit nor the cover letter mentioned any contract aside from the contract with Teledyne Brown Engineering ("TBE"), and there was no suggestion in either the letter or the affidavit that any other contract was relevant to compliance with the milestone requirement that fell due on July 31, 2000.

5. The Commission subsequently asked MCHI to submit copies of its contracts for satellite construction, including any amendments.⁹ In response, MCHI submitted copies of a "Memorandum of Agreement" between MCHI and Boeing dated April 22, 1998, with later amendments; an MCHI/Boeing "Satellite Construction and System Definition Contract" dated June 17, 1998 ("Boeing SCSD Contract"), with later amendments; and a "Program Management Contract for the Construction of the ELLIPSO

⁴ *MCHI License Order* at ¶42.

⁵ 47 C.F.R. § 25.143(e)(2) (2001).

⁶ Letter dated June 19, 1998 to the Commission's Secretary from Pedro L. Rustan, Vice President, Space Segment Technology and Operations Group.

⁷ Mobile Communications Holdings, Inc. Annual Status Report to the Federal Communications Commission, filed June 30, 1998.

⁸ Letter dated July 31, 2000 to the Commission's Secretary from Raul Rodriguez and David Keir, counsel for MCHI, with attached affidavit.

⁹ Letter dated September 28, 2000 to counsel for MCHI from Thomas Tycz, Chief of Satellite and Radiocommunication Division, International Bureau, FCC.

System” between MCHI and TBE dated July 1, 2000.¹⁰

6. In an order released in May 2001, the International Bureau found, from examination of the submitted contractual documents, that MCHI had, as reported, entered into a two-satellite construction contract with Boeing prior to the July 1998 deadline for commencing construction of two satellites.¹¹ The Bureau also found, however, that MCHI and Boeing had adopted an amendment in 1999 that essentially nullified their construction contract.¹² Furthermore, the Bureau found that the contract with TBE, on which MCHI had predicated its certification of compliance with the requirement to commence construction of the remaining satellites, did not actually require TBE to build or deliver any satellites.¹³ Hence the Bureau concluded that MCHI had not entered into a contract by the end of July 2000 that provided for construction of fourteen more satellites, as required by its second milestone condition. Because MCHI had not requested an extension of the July 2000 milestone deadline, moreover, the Bureau concluded that its Big LEO license was null and void by operation of the license condition requiring adherence to the milestone schedule.¹⁴

7. MCHI filed a petition for reconsideration of the *License Cancellation Order*, asking the Bureau to reverse the holding regarding milestone compliance and reinstate MCHI’s Big LEO license nunc pro tunc. Further, MCHI asked for waiver of the requirement to complete construction of two satellites by the end of July 2001 and for postponement of the deadline for commencing operation.

8. MCHI conceded in the reconsideration petition that its contract with TBE was not, in fact, a satellite construction contract and therefore that the execution of that contract did not satisfy the requirement to commence construction of fourteen additional satellites by the end of July 2000.¹⁵ Nevertheless, MCHI maintained that it had met the July 2000 milestone requirement. MCHI argued that the execution of the Boeing SCSD Contract in June 1998 had satisfied the July 2000 milestone requirement (as well as MCHI’s initial milestone requirement) because the SCSD Contract not only required Boeing to construct the first two satellites but also to perform system-wide design work. MCHI asserted that it had presented the same view of the matter earlier, in its annual report filed on June 30, 1998, referring to its statement in that report that “design work” had commenced for the remaining satellites. In fact, however, the June 1998 report said nothing about the second milestone requirement.¹⁶ MCHI did not attempt to reconcile its contention that the execution of the Boeing SCSD Contract met the second milestone requirement with the fact that both its counsel and its president had referenced the TBE contract, rather than the Boeing contract, when they certified compliance with the second milestone requirement in July 2000.

9. MCHI also disputed the finding that the Boeing SCSD contract was essentially abrogated by amendment prior to the July 2000 milestone deadline. MCHI contended, moreover, that this finding was immaterial, arguing that the execution of a non-contingent contract for satellite construction in

¹⁰ These documents have been treated as confidential at MCHI’s request.

¹¹ *Mobile Communications Holdings, Inc.* (Mem. Opinion and Order), DA 01-1315, 16 FCC Rcd 11,766 (Int’l Bur. 2001) (“*License Cancellation Order*”).

¹² *Id.* at ¶7.

¹³ *Id.* at ¶8. Further, the Bureau found that the TBE contract was subject to unresolved material contingencies. *Id.* at ¶9.

¹⁴ *Id.* at ¶10.

¹⁵ “Petition for Reconsideration and Reinstatement *Nunc Pro Tunc*, and Request for Waiver of Construction Milestones” filed July 2, 2002 (“*Recon Petition*”) at n.28.

¹⁶ MCHI re-submitted a copy of the 1998 annual report with its petition for reconsideration. *See Recon Petition*, Attachment 2.

advance of a construction-commencement milestone deadline satisfies the milestone requirement whether or not the contract remains in force thereafter.

10. In addressing the reconsideration petition, the Bureau acknowledged that the SCSD Contract required Boeing to perform various tasks pertaining to planning or design for all of MCHI's proposed satellites.¹⁷ The Bureau stressed, however, that the contract only required Boeing to *construct* two satellites, finding that the parties had made this plain in the contract's preamble, in which they declared that their intention was "to enter now into a contract for ... the construction of the first two (2) satellites of the Initial ELLIPSO Constellation" and negotiate another contract for construction of the remaining satellites at a later time.¹⁸ The Bureau also noted that, while the SCSD Contract explicitly required Boeing to complete construction of the first two satellites and prepare them for shipping to the launch site by a specified date in advance of MCHI's milestone deadline for completing their construction, there were no provisions that required Boeing to undertake physical construction of the other fourteen proposed satellites, let alone complete their construction on or before the milestone deadline for the system to become fully operational.¹⁹

11. In conversations with Bureau staff after the filing of MCHI's petition for reconsideration, counsel for MCHI alleged that there were further documents in Boeing's possession that confirmed that Boeing was contractually obliged to construct and deliver the other fourteen satellites by a date consistent with MCHI's milestone schedule.²⁰ At the staff's request, counsel submitted copies of the documents, which consisted of a proposed work schedule and a proposed testing plan that Boeing had been required to present to MCHI for approval.²¹ The Bureau found that, contrary to the previous representations of counsel, neither document purported to require Boeing to build the additional fourteen satellites. The Bureau found, moreover, that neither document appeared to have had any binding effect. Neither was signed by representatives of Boeing and MCHI; the testing plan was prominently marked "DRAFT"; and the work schedule was prominently marked with a boldfaced notation that "[t]hese documents are provided for informational purposes only and are not contractually binding." The Bureau therefore concluded that the documents were immaterial.²²

12. Having found that the Boeing SCSD Contract expressly provided only for the construction and delivery of MCHI's first two satellites, the Bureau concluded that the execution of that contract did not constitute compliance with the license condition requiring MCHI to commence construction of fourteen additional satellites by the end of July 2000. The Bureau therefore reaffirmed its prior ruling that MCHI's Big LEO license was subject to cancellation for failure to meet that condition, finding it unnecessary to address MCHI's arguments that the SCSD Contract had not been abrogated.²³ The Bureau also dismissed, as moot, the requests for waiver and extension of later milestone deadlines.²⁴

13. In an unopposed application for review filed on July 24, 2002, MCHI asks the

¹⁷ *Recon Order* at ¶8.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at ¶9.

²¹ Letter dated March 29, 2002 to Donald Abelson, Chief, International Bureau, from Raul R. Rodriguez, Stephen D. Baruch, and Philip A. Bonomo, counsel to MCHI.

²² *Recon Order* at ¶9.

²³ *Id.* at n.16 ("[w]e do not reach this argument, since our determination that the SCSD contract did not cover construction of the satellites to which the second milestone requirement pertained is ... dispositive").

²⁴ *Id.* at ¶13 and n.13.

Commission to overrule the Bureau's finding that MCHI failed to meet the milestone requirement for commencing construction of additional satellites and the holding that its license is therefore subject to cancellation. Further, MCHI urges us to grant its previous requests for waiver of the milestone requirement for completing construction of its first two satellites, which fell due on July 31, 2001, and for postponement of the July 2003 milestone deadline for commencing full system operation.

III. Discussion

14. It is a longstanding Commission policy to condition satellite licenses on compliance with prescribed milestone schedules for system implementation. The Commission prescribes milestone schedules to ensure that licensees will construct and launch their satellites in a timely manner and thus that orbital assignments and spectrum will not be "warehoused" by licensees who are unwilling or unable to carry out their plans.²⁵ Milestone requirements for commencement of satellite construction are especially important, moreover, because they provide an initial objective indication as to whether licensees are committed to proceeding with implementation of their proposals.²⁶ To meet a milestone deadline for commencing construction of satellites, a licensee relying on a third party to perform the work must enter into a "non-contingent" contract for construction of the satellites in question.²⁷ The Commission has given the following generic description of a non-contingent satellite-construction contract:

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 demonstrates the [licensee'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.²⁸

15. Failure to Meet Second Milestone Requirement In its application for review MCHI makes several arguments for reversing the Bureau's holding that the execution of the Boeing SCSD Contract did not satisfy the requirement to commence construction of fourteen additional satellites by the end of July 2000. First, MCHI asserts that the Bureau ignored the significance of the duties that Boeing was contractually obligated to perform beyond construction of the first two satellites. To the contrary, the Bureau did not ignore the fact that the SCSD Contract required Boeing to perform tasks pertaining to planning or design for all of MCHI's proposed satellites. Rather, the Bureau acknowledged that fact but deemed it immaterial because the contract did not require Boeing to *build or deliver* more than two

²⁵ See, e.g., *MCI Communications Corporation* (Mem. Opinion and Order), DA 87-24, 2 FCC Rcd 233 ¶5 (CC Bur. 1987); *National Exchange Satellite, Inc.* (Mem. Opinion and Order), DA 92-294, 7 FCC Rcd 1990 (CC Bur. 1992); *AMSC Subsidiary Corp.* (Mem. Opinion and Order), FCC 93-243, 8 FCC Rcd 4040 (1993) ("*AMSC I*") at ¶13; and *Motorola, Inc. and Teledesic LLC* (Mem. Opinion and Order), DA 02-2146, 17 FCC Rcd 16543 (Int'l Bur. 2002) ("*Motorola/Teledesic*").

²⁶ *Motorola/Teledesic* at ¶11.

²⁷ *Norris Satellite Communications Corporation* (Mem. Opinion and Order), FCC 97-377, 12 FCC Rcd 22299 ¶9 (1997).

²⁸ See, e.g., *In re Petition and Application of Tempo Satellite, Inc.* (Mem. Opinion and Order), 7 FCC Rcd 6597 (1992) at ¶13, quoted in *TMI Communications and Company, Limited Partnership* (Mem. Opinion and Order), DA 03-385, rel. Feb. 10, 2003, at ¶8. See also *Direct Broadcasting Satellite Corp.* (Mem. Opinion and Order), DA 93-1332, 8 FCC Rcd 7959 (Int'l Bur. 1993) at ¶6 (a non-contingent contract must specify a construction timetable with "regular, specific" progress deadlines), quoting *United States Satellite Broadcasting Co., Inc. and Dominion Video Satellite, Inc.*, 3 FCC Rcd 6858 (1988) ("*USSB/Dominion*"), and *CBS, Inc. and Dominion Video Satellite, Inc.* (Mem. Opinion and Order), 98 FCC 2d 1056 (1984) ("*CBS/Dominion*") at ¶16.

satellites.²⁹ We agree with the Bureau that this omission in the contract is of crucial significance and that Boeing's obligation to perform tasks other than building and delivering additional satellites is immaterial to the issue of whether MCHI met the license condition requiring it to commence construction of fourteen more satellites by the end of July 2000.

16. Next, MCHI contends that the Bureau failed to give due weight to a letter from a Boeing official that MCHI filed with its reconsideration petition.³⁰ This letter points out that, in a preliminary Memorandum of Agreement ("MOA") signed in April 1998, MCHI and Boeing agreed that Boeing would be the prime contractor for construction of MCHI's entire satellite system. Although MCHI thus agreed to employ Boeing as prime contractor, and Boeing agreed in return to provide financing for MCHI, those commitments were expressly contingent upon subsequent execution of satellite construction contracts on terms to be negotiated. Thus, the MOA was merely an "agreement to agree" on concrete arrangements for construction of satellites for MCHI's proposed Big LEO system, rather than a non-contingent satellite-construction contract.

17. Rather than lending any support to MCHI's contention that the SCSD Contract covered construction of sixteen satellites, the MOA bears out the Bureau's finding that the SCSD Contract merely provided for construction of two satellites. MCHI and Boeing declared in the MOA that they intended to negotiate two successive satellite construction contracts: an "Early Start Contract" and a "Definitive Contract." The Early Start contract was to provide for performance of "any ... activities necessary to commence construction of the first two satellites of [MCHI's] System with the objective of satisfying the July 1998 progress schedule requirement in MCHI's FCC license."³¹ The Early Start Contract for construction of two satellites was to be superseded by a Definitive Contract to be negotiated later, which was to provide for construction and in-orbit delivery of all sixteen MCHI satellites.³² The plan to negotiate a two-satellite Early Start Contract was fulfilled by the execution of the SCSD Contract, as the parties acknowledged in a subsequent amendment to the MOA.³³ On the other hand, MCHI and Boeing evidently failed to carry out their plan to negotiate a superseding contract providing for construction and delivery of sixteen satellites. MCHI has not alleged that it ever signed a second construction contract that superseded the SCSD Contract, and MCHI did not produce any such contract when the Commission directed it to submit all pertinent satellite construction contracts, including amendments.³⁴

18. MCHI also contends that the Bureau improperly "second-guess[ed]" the two parties' mutual understanding of the SCSD Contract. But there is no evidence that either party to the contract ever understood it to mean that Boeing was obligated to construct and deliver more than two satellites. The best evidence of intent is what was plainly said in the SCSD Contract, itself, and in the preceding MOA. These documents fully support the Bureau's finding that the SCSD Contract provided for

²⁹ *Recon Order* at ¶¶ 8-10. Specifically, the Bureau found that there were no provisions in the SCSD Contract requiring Boeing "to undertake physical construction of the other fourteen proposed ELLIPSO satellites and complete their construction on or before MCHI's milestone deadline for making its system fully operational." *Id.* at ¶8. In fact, the contract did not even require Boeing to commence physical construction of those other satellites, let alone to complete their construction by any date certain.

³⁰ Letter to the Federal Communications Commission dated July 2, 2001 from W.R. Collopy, Vice President and Chief Financial Officer, Space and Communications Group, The Boeing Company, refiled as Attachment 1 to MCHI's Application for Review filed July 24, 2002.

³¹ Memorandum of Agreement executed on April 22, 1998, Article 5.1(a).

³² *Id.*, Articles 5.1(b) and 5.2.

³³ Fourth Amendment to Memorandum of Agreement, executed on June 17, 1998, at p.1.

³⁴ *See* n.9, *supra*.

construction and delivery of only two satellites.³⁵

19. Finally, MCHI argues that the Bureau ignored precedent in holding that “the execution of a contract that does not provide for complete construction of the satellites in question by a specified date consistent with the licensee’s milestone deadline for making its system fully operational cannot satisfy a construction-commencement milestone requirement.”³⁶ The Commission has not prescribed “specific content requirements” for satellite construction contracts, according to MCHI, but has instead found them sufficient if they are binding and non-contingent. MCHI maintains that the absence of a specified completion date for satellite construction does not render a contract either contingent or non-binding. A contract may be non-contingent and legally binding between the parties but nonetheless fail to meet an FCC construction-commencement milestone requirement because it does not establish that the licensee is committed to proceeding consistently with its milestone schedule. To hold that a licensee can satisfy a construction-commencement requirement by entering into an agreement that does not obligate the contractor to finish building its satellites before the milestone deadline for placing them into operation would, as the Bureau rightly observed, disserve the purposes of the milestone policy.³⁷ More specifically, it would defeat the purpose of prescribing deadlines for entering into satellite construction contracts, which serves the overall objectives of the milestone policy by affording early, objective assurance that satellite licensees are genuinely committed to implementing their systems in a timely manner, in accordance with their milestone schedules for completing satellite construction and commencing operation.³⁸ A contract that does not require satellite construction to be completed before the licensee’s milestone deadline for placing the satellites into operation does not afford such assurance. Furthermore, the problem with the Boeing SCSD Contract is not just that it does not specify a construction-completion date for the second batch of satellites but that it simply does not obligate anyone to *build* – i.e., physically construct – those satellites at all.

20. Arguments for Extension or Waiver In addition to disputing the finding that it failed to meet the second milestone requirement, MCHI argues that there are equitable and public-policy reasons for reinstating its license and allowing it to proceed on a delayed schedule. It contends that the milestone requirements should not be “mechanistically” enforced against it, because its construction progress was disrupted due to adverse economic conditions beyond its control after it had spent some \$80 million on development of its system and otherwise demonstrated sustained commitment to the project. It asserts that the Commission has routinely granted more latitude to meet milestone requirements under similar circumstances.³⁹ MCHI notes that no one is currently applying for authority to use the Big LEO service-link spectrum to provide new satellite service and contends that it is unlikely that anyone else will seek such authority under the prevailing economic conditions. MCHI maintains, moreover, that it is in a better position to establish a commercially-viable Big LEO service than any potential new entrant and that if

³⁵ As mentioned in ¶11, *supra*, counsel alleged in conversations with Bureau staff that MCHI and Boeing specified construction-completion and delivery deadlines for the second batch of fourteen satellites in previously-undisclosed amendments to the SCSD contract. The Bureau found, however, that the “amendments” were merely non-binding proposals which, even if adopted, would not have required Boeing to build fourteen additional satellites. MCHI does not contest that finding.

³⁶ *Recon Order* at ¶11.

³⁷ See *Tempo Satellite* at ¶13; *Direct Broadcasting Satellite Corp.* at ¶16; *USSB/Dominion* at ¶20; and *CBS/Dominion* at ¶16. Cf. *Morning Star Satellite Co., LLC* (Mem. Opinion and Order), FCC 01-179, 16 FCC Rcd 11550 (2001), at ¶5 (contract found contingent because, *inter alia*, it did not specify a construction schedule), and *EchoStar Satellite Corp.* (Mem. Opinion and Order), DA 02-1534, rel. July 1, 2002, at ¶7.

³⁸ See *Motorola/Teledesic* at ¶11.

³⁹ As cases in point, MCHI cites *AMSC Subsidiary Corp.*, 10 FCC Rcd 3791 (Int’l Bur. 1995) (“*AMSC II*”); *USSB/Dominion*, *supra*; and *USSB/Dominion; Advanced Communications Corp. and Hughes Communications Galaxy, Inc.* (Mem. Opinion and Order), FCC 91-133, 6 FCC Rcd 2269 (1991) (“*Advanced/Hughes*”).

allowed to proceed it would have better prospects for success than existing Big LEO licensees because its elliptical orbit architecture would enable it to provide service at lower cost. Hence MCHI contends that allowing it to proceed under a relaxed milestone schedule would be of potential public benefit and would cause no countervailing harm. Furthermore, MCHI argues, citing *NetSat 28*,⁴⁰ that it deserves special consideration because the Commission did not grant its license until more than two years after having issued licenses to other parties whose Big LEO license applications were under consideration concurrently with MCHI's.

21. It is unclear whether MCHI is merely presenting these arguments in support of its renewed requests for waiver of the deadline for completing construction of two satellites and postponement of later milestone deadlines, or whether it also means to argue in the alternative for postponement or waiver of the July 31, 2000 deadline for commencing construction of fourteen additional satellites. Insofar as MCHI now seeks extension or waiver of the July 31, 2000 deadline, the request is untimely. It is foreclosed from obtaining such relief at this point, not having raised any argument for such relief before the Bureau.⁴¹

22. On their merits, moreover, these additional arguments fail to sustain MCHI's request for reinstatement of its license. To begin with, we do not agree with MCHI's contention that there is no public interest to be served by enforcing milestone requirements in this case. MCHI's underlying assumption that there is no potential alternative use, under present economic conditions, for the spectrum reserved for Big LEO CDMA systems is unsupported. The assumption is belied, moreover, by the recent filing of a petition for reapportionment of the Big LEO service-link spectrum to allow the Iridium System to use some of the spectrum currently reserved for CDMA systems⁴² -- which is currently under consideration, together with other proposals for alternative use of the spectrum in question, in a pending rulemaking proceeding.⁴³

23. MCHI's reliance on *NetSat 28* is misplaced. The Bureau held in that case that waivers of Section 25.161(a) and of a construction-commencement requirement were equitably justified because the licensee had been materially hindered from meeting the requirement by an erroneously-imposed license condition.⁴⁴ No such equity weighs in MCHI's favor in this case. MCHI was not hindered from meeting either of its construction-commencement milestones by a Commission action that has since been found erroneous. Rather, the delay in grant of the license in this case was due to MCHI's own failure to show that it was financially qualified.⁴⁵ The delayed licensing did not affect MCHI's milestone schedule,

⁴⁰ *NetSat 28 Company, LLC* (Mem. Opinion and Order), DA 01-1284, 16 FCC Rcd 11025 (Int'l Bur. 2001).

⁴¹ See 47 C.F.R. § 1.115(c).

⁴² See Petition for Rulemaking of Iridium Satellite LLC, filed July 26, 2002, included in the record of IB Docket No. 02-364.

⁴³ See *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L Band, and the 1.6/2.4 GHz Bands* (Report and Order and Notice of Proposed Rulemaking), FCC 03-15, rel. Feb. 10, 2003, at ¶261 *et seq.*

⁴⁴ *NetSat 28* at ¶¶ 9 and 14. Cf. *Directsat Corp.* (Order), DA 96-6, 11 FCC Rcd 1775 (Int'l Bur. 1996), where the Bureau granted an extension of time to commence full operation because delayed assignment of channels and orbital positions was a circumstance beyond the licensee's control that hindered it from completing satellite construction.

⁴⁵ See *Mobile Communications Holdings, Inc.* (Order), DA 95-132, 10 FCC Rcd 2274 (Int'l Bur. 1995), *affirmed in Constellation Communications, Inc., et al.* (Mem. Opinion and Order), FCC 96-279, 11 FCC Rcd 18502 (1996), at ¶¶ 17-21, *appeal pending sub nom. Mobile Communications Holdings, Inc. v. FCC*, Case No. 96-1239 (D.C. Cir.).

moreover,⁴⁶ and occurred before its milestone periods began to run.

24. MCHI has not cited any precedent where the Commission excused non-compliance with a milestone deadline for commencing satellite construction because the licensee found it difficult to obtain financing under prevailing economic conditions.⁴⁷ On the contrary, the Commission has consistently held that such difficulty cannot justify extension of a deadline for commencing satellite construction.⁴⁸ Nor has MCHI cited a case where the Commission postponed a construction-commencement deadline simply because the licensee had spent a large amount of money on the project and/or devoted much effort to it. In cases cited by MCHI where the Commission granted requests for postponement of later milestone deadlines, the licensees had met the requirement to commence satellite construction, had continued to demonstrate diligence thereafter, and were ready and willing to proceed immediately with the remaining steps to complete implementation of their systems.⁴⁹ No such circumstances are present here. Although MCHI contracted with Boeing for construction of two satellites, the parties abrogated the contract by amendment one year later, in June 1999,⁵⁰ and there is no evidence that MCHI ever asked Boeing to resume work. MCHI did not report this change of circumstance to the Commission, which learned of the abrogating amendment when examining contractual documents that MCHI submitted in October 2000 at the Commission's request. MCHI never contracted for construction of any other satellites, though it certified that it met the July 31, 2000 deadline for commencing construction of fourteen more. In short, MCHI called off construction work one year after signing a two-satellite construction contract, has made no tangible progress since, has not contracted for construction of its other fourteen satellites, and has not been diligent in apprising the Commission of material facts. Furthermore, MCHI has given no assurance that it would promptly arrange for resumption of work on its first two satellites or promptly contract for complete construction of the remaining satellites in the event that its license were to be reinstated. Rather, MCHI has indicated that its willingness to resume implementation would be contingent upon future improvement, of an unspecified nature and

⁴⁶ When it granted MCHI's Big LEO license (after deciding to waive the financial requirement), the Bureau prescribed a milestone schedule that gave MCHI exactly as much time to meet each progress milestone as previous Big LEO licensees had been given. Compare *MCHI License Order*, *supra*, at ¶42 with *L/Q Licensee, Inc.* (Order and Authorization), DA 96-1924, 11 FCC Rcd 16410 (Int'l Bur. 1996), *Motorola Satellite Communications, Inc.* (Order and Authorization), DA 96-1789, 11 FCC Rcd 13952 (Int'l Bur. 1996), and *TRW, Inc.* (Order and Authorization), DA 96-1923, 11 FCC Rcd 20419 (Int'l Bur. 1996).

⁴⁷ In *Advanced/Hughes, AMSC II*, and *Earth Watch, Inc.* (Order and Authorization), DA 00-909, 15 FCC Rcd 13594 (Int'l Bur. 2000), which MCHI cites, extensions of time were granted for completing satellite construction, launching, or commencing system operation, but not for *commencing* satellite construction.

⁴⁸ See, e.g., *USSB/Dominion* at ¶11 ("failure to attract investors, an uncertain business situation, or an unfavorable business climate in general have never been adequate excuses for failure to meet a construction timetable") and *EchoStar Satellite Corp.* (Mem. Opinion and Order), DA 02-1164 (Int'l Bur. 2002) at ¶10.

⁴⁹ See *USSB/Dominion* at ¶¶ 5 and 9; *AMSC* at ¶14; *Advanced/Hughes* at ¶¶ 26-28; *United States Satellite Broadcasting Co., Inc.* (Mem. Opinion and Order), DA 92-1462, 7 FCC Rcd 7247 (MM Bur. 1992) at ¶17 ("*USSB II*"); *Earth Watch* at ¶10; *Volunteers in Technical Assistance* (Order), DA 97-501, 12 FCC Rcd 3094 (Int'l Bur. 1997); and *GE American Communications, Inc.* (Mem. Opinion, Order, and Authorization), DA 00-2096, 15 FCC Rcd 23585 (Int'l Bur. 2000), at ¶8.

⁵⁰ The amendment did not merely suspend performance obligations. Rather, it stipulated that Boeing was not to perform any further work except as subsequently authorized in writing by MCHI on terms to be negotiated. *License Cancellation Order*, *supra*, at ¶7. MCHI asserted in its petition for reconsideration that the Boeing contract had merely been "suspended" but did not dispute the finding that the June 1999 amendment relieved Boeing of any obligation to perform further work unless directed to do so under terms to be negotiated. Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* and Request for Waiver of Construction Milestones, filed July 2, 2001, at 15.

degree, in general economic conditions.⁵¹ To waive MCHI's non-compliance with past milestone deadlines and postpone the remaining deadlines in reliance on this equivocal and indefinite "commitment" would make the milestone requirements meaningless.

25. *Alleged Discrimination* Finally, MCHI alleges unfair discrimination by the Bureau in ruling that its Big LEO license is subject to cancellation without taking similar action against Constellation Communications Corporation, which did not certify compliance with the second milestone requirement in its Big LEO license. The factual premise for this objection has been eliminated by the Bureau's issuance of an order in November, 2002 that denied Constellation's request for extension of the milestone deadline and declared its license null and void.⁵²

IV. Conclusion

26. Finding no merit in MCHI's arguments, we affirm the Bureau's holding that MCHI failed to meet its second milestone requirement and that its Big LEO license is therefore null and void.

IV. Ordering Clause

27. Accordingly, IT IS ORDERED that the Application for Review of Mobile Communications Holdings, Inc. filed on July 24, 2002 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵¹ MCHI repeatedly asserts in the application for review that *current* economic conditions have prevented it from proceeding with implementation. It gives no assurance that it would be able or willing to immediately order a resumption of work on its first two satellites or promptly contract for construction of the other satellites if we were to reinstate its license.

⁵² *Constellation Communications Holdings, Inc.* (Mem. Opinion and Order), DA 02-3086, 17 FCC Rcd 22584 (Int'l Bur. 2002).