

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

In the Matter of)	
)	
CONSTELLATION COMMUNICATIONS)	File Nos. 17-DSS-P-91(48); CSS-91-013; 9-
HOLDINGS, INC.)	SAT-LA-95; 10-SAT-AMEND-95;
)	159-SAT-AMEND-96
Application for Authority to Construct, Launch)	
and Operate a Low-Earth Orbit Mobile Satellite)	Call Sign S2113
System in the 1610-1626.5/2483.5-2500 MHz)	
Bands)	
)	
And)	
)	
Request for Limited Waiver and Extension of)	File Nos. SAT-MOD-20000907-00131;
Time)	SAT-AMD-20010829-00081;
)	SAT-AMD-20020828-00160
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 28, 2003

Released: September 17, 2003

By the Commission:

I. INTRODUCTION

1. Constellation Communications Holdings, Inc. (“Constellation”) has petitioned for reconsideration¹ of the International Bureau’s declaration that Constellation’s authorization for a “Big LEO” satellite system² is null and void due to its failure to comply with the “milestone” implementation requirements on which the authorization was conditioned.³ We uphold the decision to declare Constellation’s Big LEO authorization null and void. We find that Constellation presents no basis to change the previous determination, and that the decision to declare Constellation’s authorization null and

¹ Constellation’s petition for reconsideration has been referred to the Commission pursuant to Section 1.106 of the Commission’s rules, 47 C.F.R. § 1.106 (2002).

² The Big LEO service provides for the use of non-geostationary satellite systems that subscribers equipped with mobile transceivers could use to conduct two-way voice and data communications with similarly-equipped subscribers or telephone users anywhere else in the world. The Commission’s rules specify that the 1610-1626.5 MHz and 2483.5-2500 MHz bands are to be used for transmission between Big LEO satellites and mobile terminals. See 47 C.F.R. § 25.143.

³ *Constellation Communications Holdings, Inc.*, Memorandum Opinion and Order, DA 02-3086, 17 FCC Rcd 22584 (Int’l Bur. 2002) (“*Nullification Order*”). Constellation had separately sought to assign its Big LEO authorization to ICO Global Communications (Holdings) Limited (“ICO”). See File No. SAT-T/C-20020718-00114. Constellation’s request was dismissed as moot as a result of its Big LEO authorization being declared null and void. See *Mobile Communications Holdings, Inc. and ICO Global Communications (Holdings) Limited et al.*, Memorandum Opinion and Order, DA 03-285, 18 FCC Rcd 1094 (Int’l Bur. 2003).

void is fully consistent with Commission precedent and the public interest. Accordingly, Constellation's petition for reconsideration is denied.

2. We also dismiss without prejudice the applications filed by TRW, Inc. ("TRW"), Motorola Satellite Communications, Inc. ("Motorola"), and L/Q Licensee, Inc. ("LQL") for review of the International Bureau's 1997 order authorizing Constellation to construct, launch, and operate a "Big LEO" mobile-satellite system.⁴ We do not reach the merits of the arguments presented in these applications because the declaration that Constellation's authorization is null and void removes the basis of the parties' objections.

II. BACKGROUND

3. In 1997, the International Bureau ("Bureau") authorized Constellation to launch and operate a 46-satellite system in low-earth orbit ("LEO").⁵ The Bureau authorized Constellation despite Constellation's failure to demonstrate that it was financially qualified to construct and operate its proposed satellite system, as required by the Commission's rules for Big LEO applicants.⁶ The Bureau found that a waiver of the financial qualifications requirement was warranted due to the availability of spectrum to accommodate all remaining Big LEO applicants and the possibility of entry by additional applicants in the future in newly allocated Mobile-Satellite Service ("MSS") spectrum in the 2 GHz frequency band.⁷ The Bureau also stated that the implementation of Constellation's system could promote the public interest by providing additional competition and consumer choice in the mobile-satellite market.⁸ TRW, Motorola, and LQL – each a proponent of an MSS system proposing to operate in the Big LEO frequency band – filed applications for review challenging the Bureau's waiver decision.

4. Like all Big LEO licenses, Constellation's authorization was conditioned on Constellation complying with a construction-progress schedule for the implementation of its system. According to this schedule, Constellation was required to commence construction of the first two satellites of its satellite system by July 1998, to commence construction of the remaining satellites of its system by July 2000, to complete construction of the first two satellites by July 2001, and to place the system fully into operation by July 2003.⁹ Constellation's authorization clearly stated that it would become null and void in the event that Constellation failed to meet any of these milestone deadlines, unless the Commission were to extend the schedule for good cause shown.¹⁰

5. As required by the Commission's rules,¹¹ Constellation certified that it met the July 1998

⁴ *Constellation Communications, Inc.*, Order and Authorization, DA 97-1366, 12 FCC Rcd 9651 (Int'l Bur. 1997) ("*Constellation License Order*").

⁵ *See id.* at 9651. Although Constellation's petition for reconsideration refers to a deployment scheme involving a total of 54 satellites, Constellation has not requested a modification of its license to authorize such a system.

⁶ *See id.* at 9656. *See also* 47 C.F.R. §§ 25.143(b)(3) and 25.140(c) and (d) (2002) (requiring Big LEO applicants to demonstrate that they could meet the costs of building and launching all proposed system space stations and meet operating expenses for one year after the launch of the first satellite).

⁷ *See id.* at 9656.

⁸ *See id.*

⁹ *See id.* at 9661.

¹⁰ *See id.*

¹¹ Section 25.143(e)(2) of the Commission's rules requires Big LEO licensees, within ten days after a required implementation milestone, to certify to the Commission by affidavit that the milestone has been met or notify the Commission by letter that the milestone has not been met. 47 C.F.R. § 25.143(e)(2).

milestone for commencing construction of its first two satellites by executing a satellite construction contract with Orbital Sciences Corp. (“Orbital Sciences”).¹² Constellation has not certified compliance with any of its remaining license milestones. Instead, in the period from August 2000 to August 2002, Constellation filed three separate requests seeking to extend the milestone deadlines upon which its authorization was conditioned.¹³ By means of these extension requests, Constellation sought to extend its original July 2001 milestone for the completion of construction of its first two satellites until July 2004 and to extend its original July 2003 milestone to place its system fully into operation until July 2006.¹⁴ A table summarizing Constellation’s extension requests is provided below:

	Commencement of Construction of First Two System Satellites	Commencement of Construction of Remaining System Satellites	Completion of Construction of First Two System Satellites	System Fully Operational
Original Milestone	July 1998	July 2000	July 2001	July 2003
1 st Ext. Request (August 2000)			July 2001	July 2004
2 nd Ext. Request (August 2001)			July 2002	July 2005
3 rd Ext. Request (August 2002)			July 2004	July 2006

6. Constellation’s extension requests relied on the following arguments to justify an extension of the milestone deadlines. First, Constellation argued that the financial difficulties of other

¹² See Letter from Robert A. Mazer, Counsel to Constellation Communications, Inc., to Magalie Roman Salas, Secretary, FCC, dated July 2, 1998 (File No. 159-SAT-AMEND-96). We note that the Commission has not ruled whether this contract with Orbital Sciences was non-contingent, as required to satisfy the construction commencement condition of Constellation’s authorization. See *infra* footnote 50 and accompanying text. In any event, we need not decide this matter at this time because Constellation’s failure to meet subsequent construction milestones has rendered its authorization null and void.

¹³ See Constellation Communications Holdings, Inc., Request for Limited Waiver and Extension of Time, File No. SAT-MOD-20000907-00131 (filed August 9, 2000) (“August 2000 Extension Request”); Constellation Communications Holdings, Inc., Request for Modification of Request for Limited Waiver and Extension of Time, File No. SAT-AMD-20010829-00081 (filed August 29, 2001) (“August 2001 Extension Request”); Constellation Communications Holdings, Inc., Request for Modification of Request for Limited Waiver and Extension of Time, File No. SAT-AMD-20020828-00160 (filed August 28, 2002) (“August 2002 Extension Request”). The August 2002 Extension Request was not addressed in the *Nullification Order*, but it repeats arguments contained in Constellation’s August 2000 and August 2001 Extension Requests that the *Nullification Order* did address. We have reviewed the August 2002 Extension Request and address the issues raised by it in this Order.

¹⁴ In its extension requests, Constellation also seeks to extend the deadline for the “construction completion of its remaining satellites” until July 2005. See August 2000 Extension Request at 4; August 2001 Extension Request at 1; August 2002 Extension Request at 1. This request does not correspond to any milestone in Constellation’s authorization, which does not set out a deadline for the completion of construction of Constellation’s remaining satellites. See *Constellation License Order*, 12 FCC Rcd at 9661. The Bureau interpreted Constellation’s request as a request to extend the milestone for the commencement of construction of Constellation’s remaining satellites. See *Nullification Order*, 17 FCC Rcd at 22585 n.9. Constellation did not address this issue in its Petition for Reconsideration.

satellite licensees – such as Iridium LLC (“Iridium”), Globalstar Telecommunications LP (“Globalstar”), and ICO Global Communications, Ltd. (“ICO”) – made the financial community reluctant to provide Constellation with the funding necessary to implement its Big LEO system, and that this lack of funding represented a circumstance beyond its control that warranted an extension of its milestone deadlines.¹⁵ In this regard, Constellation argued that the Commission’s grant of additional time to New Skies Satellites, N.V. (“New Skies”) and Inmarsat Ventures Ltd. (“Inmarsat”) to consummate initial public offerings (“IPOs”) required by the Open-Market Reorganization for the Betterment of International Telecommunications Act (“ORBIT Act”)¹⁶ due to adverse market conditions demonstrated that an unfavorable business climate is a valid consideration when evaluating requests to extend a licensee’s milestone deadlines.¹⁷ Second, Constellation claimed that an extension of its milestones would better serve the public interest than the cancellation of its license.¹⁸ Finally, Constellation argued that, even if the Bureau were to determine that Constellation has not met the precedential criteria for justifying milestone extensions, the Bureau should waive these deadlines based on its prior decision to waive the milestone deadlines for an allegedly similarly-situated satellite licensee, Earth Watch Inc.¹⁹

7. In November 2002, the Bureau determined that Constellation’s arguments failed to justify either an extension of its milestone deadlines or a waiver of the Commission’s rules. The Bureau rejected Constellation’s argument that a failure to obtain financing due to an unfavorable business climate justified an extension of its milestone deadlines.²⁰ The Bureau cited the Commission’s statement in *United States Satellite Broadcasting Co.* (“USSB”)²¹ in 1988 that “a 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.”²² The Bureau also cited two more recent decisions, *EchoStar Satellite Corp.* and *Advanced Communications Corp.*,²³ in which the Bureau affirmed the vitality of the Commission’s statement in *USSB* that unfavorable market conditions do not justify a failure to meet a construction schedule.²⁴

8. In addition, the Bureau concluded that the Commission’s decision to grant New Skies and Inmarsat additional time to consummate initial public offerings due to adverse market conditions did not support an extension of Constellation’s construction milestones.²⁵ The Bureau observed that former intergovernmental satellite organizations (“ISOs”) like New Skies and Inmarsat were required to conduct public offerings under the ORBIT Act.²⁶ The Bureau noted that, although the ORBIT Act establishes

¹⁵ See *Nullification Order* at 22587.

¹⁶ ORBIT Act, Pub. L. 106-180, 114 Stat. 48 (2000).

¹⁷ See *Nullification Order* at 22588.

¹⁸ See *id.*

¹⁹ See *id.* at 22588 (citing *Earth Watch Inc.*, Order and Authorization, DA 00-909, 15 FCC Rcd 13594 (Sat. and Radiocomm. Div. 2000) (“*Earth Watch*”).

²⁰ See *id.* at 22587.

²¹ *United States Satellite Broadcasting Co.*, Memorandum Opinion and Order, FCC 88-383, 3 FCC Rcd 6858 (1988) (“*USSB*”).

²² *Nullification Order* at 22587 (citing *USSB*, 3 FCC Rcd at 6859).

²³ *EchoStar Satellite Corp. et al.*, Memorandum Opinion and Order, DA 02-1164, 17 FCC Rcd 8831 (Int’l Bur. 2002); *Advanced Commun. Corp.*, Memorandum Opinion and Order, DA 95-944, 10 FCC Rcd 13337 (Int’l Bur. 1995).

²⁴ See *Nullification Order* at 22587 n.23.

²⁵ See *id.* at 22588.

²⁶ See *id.*

deadlines for public offerings by ISOs, the statute specifically allows the Commission to extend these deadlines for a limited amount of time due to adverse business and market conditions.²⁷ The Bureau observed that no market condition exception exists for the Commission's construction milestone rules, and the Commission had already stated in *USSB* that unfavorable market conditions do not justify an extension of construction milestones.²⁸

9. The Bureau also found that Constellation's reliance on *Earth Watch* was misplaced.²⁹ The Bureau pointed out that *Earth Watch* presented a clearly distinguishable factual situation from that of Constellation. In *Earth Watch*, the licensee had already commenced physical construction of its satellite system, the waiver extended the licensee's construction completion milestone for only six months, and the licensee was actively proceeding with construction of its system.³⁰ By contrast, the Bureau found that Constellation had held its license for five years without any demonstration that it had commenced physical construction of its satellites and that Constellation had indicated that it had deferred physical construction of its system until some indefinite time when market conditions improve.³¹ The Bureau concluded that, unlike the situation in *Earth Watch*, the public interest would not be served by a waiver of Constellation's milestone obligations because waiver would only further undermine the stated purpose of the milestone rules, which is to ensure that scarce orbital and spectrum resources are not being held by licensees that are unable or unwilling to utilize such resources.³² For all these reasons, the Bureau declared that Constellation had failed to comply with the milestone schedule upon which its authorization was conditioned and that a waiver of the Commission's rules was not warranted. As a result, Constellation's authorization was declared null and void.

10. Constellation seeks reconsideration of the Bureau's decision to declare its authorization null and void,³³ arguing that this decision is inconsistent with precedent. It faults the Bureau's reliance on the Commission's statement in *USSB* that a failure to attract investors, an uncertain business situation, or an unfavorable business climate in general does not justify an extension of a licensee's construction milestones. Constellation argues that the Commission's 1988 decision in *USSB* actually supports the extension of its milestones. Constellation points out that, despite the statement that unfavorable market conditions do not justify milestone extensions, the Commission in *USSB* nonetheless granted milestone extensions to two direct broadcast satellite ("DBS") permittees. In reaching that result, the Commission found that "explosive" advances in DBS technology had made it imprudent for DBS permittees to proceed with construction of outdated system designs and observed that earlier failed or abandoned DBS and direct-to-home video ventures "may have cooled the ardor of potential investors."³⁴ Constellation argues that it is similarly situated to the permittees who were granted extensions of time in *USSB* because the MSS satellite industry also witnessed the failure of early ventures, such as Iridium and Globalstar, and because, in the view of Constellation, its system involves a new technology and service.³⁵ Constellation

²⁷ See *id.* See also ORBIT Act §§ 621(5)(A)(ii) and 623(1) (establishing a deadline for the required public offering, but explicitly providing that "the Commission may extend this deadline in consideration of market conditions and relevant business factors relating to the timing of an initial public offering.").

²⁸ See *Nullification Order* at 22588.

²⁹ See *id.*

³⁰ See *Nullification Order* at 22588-89 (citing *Earth Watch*, 15 FCC Rcd at 13596, 13598.)

³¹ See *id.* at 22589.

³² See *id.* at 22586, 22589.

³³ Constellation Communications Holdings, Inc., Petition for Reconsideration (filed December 9, 2002) ("Petition for Reconsideration").

³⁴ See *USSB*, 3 FCC Rcd at 6859.

³⁵ See Petition for Reconsideration at 10.

also asserts that, like the permittees in *USSB*, it has made significant progress in the actual development of its system.³⁶ Thus, Constellation argues that an extension of its milestones would be consistent with Commission precedent in *USSB*.

11. Constellation also argues that the Bureau did not properly weigh its argument that the extensions of time given to Inmarsat and New Skies to conduct the IPOs required under the ORBIT Act due to adverse market conditions demonstrate the inability of even large-satellite operators to raise funding from capital markets.³⁷ It contends that the Commission is well aware of these conditions and asserts that a poor macroeconomic climate represents a circumstance beyond Constellation's control that should have justified an extension of its milestones.³⁸

12. Constellation also contends that the Bureau did not properly consider whether the termination of its authorization was consistent with the public policy goals underlying the milestone rules.³⁹ It acknowledges that the milestone rules are designed to prevent licensees from warehousing valuable spectrum resources and orbital locations, and that failure to meet a milestone may create a presumption of warehousing.⁴⁰ Constellation asserts, however, that it is not warehousing spectrum and presents a list of work performed on its system to demonstrate that it has been diligently implementing its system.⁴¹ Furthermore, Constellation argues that the Bureau's decision does not serve the public interest because it will not preserve the option for future entrants to use Constellation's spectrum since the spectrum assigned to its system is likely simply to be reassigned to the remaining Big LEO licensees, Globalstar and Iridium, and since the state of the current economy puts a chill on prospective new market entrants.⁴² It also argues that if market conditions change favorably in the future, for example as a result of the authorization of an ancillary terrestrial component ("ATC") for mobile-satellite services or renewed market interest in MSS systems, then Constellation should benefit from this change based on its status as a "pioneer in the industry" and its active promotion of ATC at the Commission.⁴³

13. Finally, Constellation asserts that the factual distinctions drawn by the Bureau between its situation and the situation in *Earth Watch*, in which a waiver of milestones was granted, are immaterial.⁴⁴ Constellation claims that the key criteria established by *Earth Watch* for grant of a waiver

³⁶ See *id.* at 13.

³⁷ See *id.* at 7 (citing *Inmarsat Ventures, Ltd.*, Memorandum Opinion and Order, FCC 01-193, 16 FCC Rcd 13494 (2001) ("*Inmarsat*") and *New Skies Satellites, N.V.*, Memorandum Opinion and Order, FCC 00-234, 15 FCC Rcd 11934 (2000) ("*New Skies*"). In both *Inmarsat* and *New Skies*, the Commission determined that the companies acted reasonably in postponing IPOs under the ORBIT Act due to the poor market conditions at the time. See *Inmarsat*, 16 FCC Rcd at 13500; *New Skies*, 15 FCC Rcd at 11936.

³⁸ See Petition for Reconsideration at 8 (arguing that, "As a practical matter, there is nothing further from a licensee's ability to control than the macroeconomic climate.").

³⁹ See *id.* at 11-12, 13.

⁴⁰ See *id.* at 13.

⁴¹ See *id.* This list of work includes: (1) development of initial system design; (2) formation of technical team; (3) negotiation and execution of construction contract with Orbital Sciences; (4) negotiation and execution of contract with Raytheon for satellite subsystems; (5) negotiation and execution of ground segment contract with ASRC; (6) completion of proprietary technical specification for overall system; (7) completion of Preliminary Design Review; (8) development of air interface; (9) development of phased array antenna; (10) development of high gain antenna for fixed applications; (11) development and execution of a business plan; and (12) raising of more than \$50 million in equity investment.

⁴² See Petition for Reconsideration at 13-14 and n.37.

⁴³ See *id.* at 15.

⁴⁴ See *id.* at 17.

are that the licensee is not warehousing spectrum and that new entry would not be precluded by the waiver.⁴⁵ Thus, the fact that the licensee in Earth Watch was closer to physically completing its satellite is not relevant according to Constellation, so long as it is demonstrated that Constellation is not warehousing its spectrum and that new entry would not be precluded by grant of the waiver. Constellation notes that the licensee in *NetSat 28*⁴⁶ was granted a waiver of its construction milestones even though Constellation claims it had not yet satisfied its construction commencement milestone.⁴⁷

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 ensure that orbital assignments and spectrum will not be “warehoused” by licensees who are unwilling or unable to carry out their plans.⁴⁸ 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.⁴⁹ 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.⁵⁰

15. As discussed more fully below, we reject Constellation’s contentions that the Bureau erred in declaring its authorization null and void and in finding that an extension or waiver of its milestone requirements was not warranted. We conclude that under relevant precedent Constellation’s reliance on unfavorable economic conditions to justify its requested extensions is misplaced. In this regard, we conclude that Constellation has not demonstrated, based on the information it has submitted concerning its progress during the six years since its authorization was granted, that it is willing or able to bring service promptly to the public. We conclude therefore that Constellation has not justified withholding the radio spectrum involved from other potential uses.

16. We reject Constellation’s contention that the Commission’s decision in *USSB* justified an extension of Constellation’s construction milestones. The Bureau cited *USSB* for the principle that a failure to attract investors, an uncertain business situation, or an unfavorable business climate in general does not justify an extension of a licensee’s construction timetable. *USSB* reiterates a longstanding principle in Commission cases that a failure to attract investors or an unfavorable business climate does not warrant an extension of a licensee’s construction deadlines.⁵¹ Constellation’s reliance on alleged

⁴⁵ See *id.*

⁴⁶ *NetSat 28 Company L.L.C.*, Memorandum Opinion and Order, DA 01-1284, 16 FCC Rcd 11025 (Int’l Bur. 2001), *pet. for recon. pending.*

⁴⁷ See Petition for Reconsideration at 17 n.43.

⁴⁸ See, e.g., *MCI Communications Corporation*, Memorandum Opinion and Order, DA 87-24, 2 FCC Rcd 233 (CC Bur. 1987); *National Exchange Satellite, Inc.*, Memorandum Opinion and Order, DA 92-294, 7 FCC Rcd 1990 (CC Bur. 1992); *AMSC Subsidiary Corp.*, Memorandum Opinion and Order, FCC 93-243, 8 FCC Rcd 4040 (1993); and *Motorola, Inc. and Teledesic LLC*, Memorandum Opinion and Order, DA 02-2146, 17 FCC Rcd 16543 (Int’l Bur. 2002) (“*Motorola/Teledesic*”).

⁴⁹ See *Motorola/Teledesic*, 17 FCC Rcd at 16547.

⁵⁰ *Norris Satellite Communications Corporation*, Memorandum Opinion and Order, FCC 97-377, 12 FCC Rcd 22299, 22303-04 (1997).

⁵¹ For this principle, *USSB* cites to the Commission’s statement in its 1983 *Two-Degree Spacing Order* that, “Failure to obtain financing by [a construction milestone] will not be considered to be circumstances beyond the control of the licensees.” See *Licensing of Space Stations in the Domestic Fixed-Satellite Service and Related*

(continued....)

similarities between its case and *USSB*, in which the Commission granted an extension of time, is unwarranted. Constellation submitted no evidence to suggest that there have been the sort of “explosive” advances in MSS technology comparable to those the Commission found in the early stages of the DBS licensing process.⁵² Furthermore, Constellation’s assertion that the market situation for Big LEO MSS systems is analogous to the market situation for DBS at issue in *USSB* is not supported by the facts. Whereas in *USSB* no DBS systems had been launched, the mobile-satellite service is long-established and two Big LEO licensees – although they have experienced disappointing initial financial results – have been able to launch their systems by the milestones established in their licenses and are today providing service to the public along with a number of other MSS providers.⁵³ Moreover, to the extent that *USSB* may stand for a generally applicable proposition that rapid changes in technology, or disappointing initial financial results, by themselves justify exempting licensees from their milestones requirements, it is hereby expressly overruled. Milestone compliance, like any licensee responsibility, is not excused merely because of changes in technology or poor market conditions. In industries characterized by rapid changes in technology and uncertain market conditions, such as satellite communications, these reasons would justify delays in the implementation of virtually all licensed systems, and acceptance of such reasons by themselves would undermine the objectives for our milestone policy.⁵⁴

17. In any event, we find that Constellation’s situation is identical to that of recent decision involving another Big LEO licensee, Mobile Communications Holdings, Inc. (“MCHI”), in which we found that an extension of construction milestones was not justified.⁵⁵ In *MCHI*, the licensee had initially entered into a contract for the construction of the first two satellites in its system, but failed to enter into a contract that satisfied the milestone for commencing construction of the remaining satellites in its system. The licensee in *MCHI* argued that its construction progress was disrupted due to adverse economic conditions beyond its control and that these adverse economic conditions warranted an extension of its

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Revisions of Part 25 of the Rules and Regulations, Report and Order, FCC 83-184, 54 RR2d 577, 597 n.63 (1983) (“*Two-Degree Spacing Order*”). The Commission restated this principle in a number of other satellite proceedings. See, e.g., *Advanced Communications Corp.*, Memorandum Opinion and Order, FCC 95-428, 11 FCC Rcd 3399, 3409 (1995) (“*Advanced*”), *aff’d sub nom. Advanced Communications Corp. v. F.C.C.*, 84 F.3d 1452 (D.C. Cir. 1996) (stating that the Commission in *USSB* “explicitly put permittees on notice that uncertainties in or miscalculations of the business climate are not factors beyond permittees’ control that could justify an extension, but rather are risks that each permittee must bear alone.”); *Amendment to the Commission’s Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, a Radiodetermination Satellite Service*, Second Report and Order, FCC 86-209, 104 FCC2d 650, 665 n.48 (1986) (“Failure to obtain the financing necessary to proceed according to schedule will not be considered to be circumstances beyond the control of the licensee”); *Licensing Space Stations in the Domestic Fixed-Satellite Service*, Report and Order, FCC 85-395, 58 RR2d 1267, 1273 n.25 (1985) (“[Economic unfeasibility of a proposed system] will not justify an extension of time to construct or launch an authorized satellite”).

⁵² We note that the Commission has expressly held that the “pioneering era” of the rapid development of DBS technology and service has come to an end. See *Advanced*, 11 FCC Rcd at 3409.

⁵³ See, e.g., *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eighth Report, FCC 03-150, 18 FCC Rcd 14783 (rel. July 14, 2003) at para. 189 (finding that a number of operators are providing MSS in the United States). See also *Advanced*, 11 FCC Rcd at 3410 (stating that commencement of DBS operations by two systems weighs heavily against leniency in monitoring construction progress).

⁵⁴ See *Advanced*, 11 FCC Rcd at 3409 (observing that uncertainties in or miscalculations of the business climate are risks that each licensee must bear alone).

⁵⁵ *Mobile Communications Holdings, Inc.*, Memorandum Opinion and Order, FCC 03-122, 18 FCC Rcd 11650 (rel. June 4, 2003) (“*MCHI*”).

milestone deadlines.⁵⁶ We disagreed and found that a milestone extension was not justified because the licensee had not commenced construction of its remaining system satellites, had not demonstrated that it was diligently proceeding with the implementation of its system, and had not shown that it was ready and willing to proceed immediately with the remaining steps to complete implementation of its system.⁵⁷

18. Likewise, Constellation has not provided any evidence that it has entered into a non-contingent contract for the construction of the remaining satellites in its 46-satellite system. Nor has Constellation shown that it is diligently proceeding with the implementation of its system. As the Bureau observed, Constellation has held its authorization since 1997 and has not provided the Commission with any evidence that actual physical construction of a satellite system is imminent.⁵⁸ The Bureau concluded that all of the efforts cited by Constellation in its extension requests were preliminary efforts involving design, engineering, and business development that were not substitutes for the construction and implementation of a satellite system.⁵⁹ The list of work submitted by Constellation in its petition for reconsideration merely confirms the Bureau's assessment.⁶⁰ Of the twelve work items submitted by Constellation to support its claim of diligence, none of them goes beyond design and development work typically completed in the first year following signing of the initial satellite construction contract. Thus, it appears that Constellation seeks to justify an extension of its later milestones with nothing more than whatever progress it achieved, or should have achieved, approximately four years ago or before. Constellation argues that its failure to implement its system is due to its inability, or unwillingness, to proceed with an initial stock placement offering because of the unfavorable state of the economy.⁶¹ It is, however, precisely this type of inability or unwillingness to proceed that our milestone requirements are intended to address. Whether intentional or inadvertent,⁶² a licensee's failure to take concrete and continuing steps towards initiation of service to the public warrants termination of its FCC authorization. Furthermore, Constellation has not provided any information or plans to assure that it can and will complete construction of its system even within the requested timeframe of its extension requests, or to demonstrate when it will be in position to resume construction of its satellite system. Resumption of work appears contingent on the willingness of the public equity market to fund Constellation's system, which may – or may not – occur in the near future. Thus, consistent with our decision in *MCHI*, Constellation's situation does not warrant an extension of its construction milestone deadlines.

19. In addition, we reject Constellation's contention that our decisions to extend the deadlines for IPOs under the ORBIT Act provide precedent for milestone cases. The ORBIT Act's IPO implementation deadlines and the Commission's satellite construction milestones serve completely different purposes. The ORBIT Act requires former intergovernmental satellite organizations to conduct IPOs in order to become independent commercial entities with a substantial dilution in the aggregate ownership by Signatories to the former intergovernmental organizations.⁶³ To dilute the Signatories' ownership interests, the former intergovernmental organizations must attract additional investment.

⁵⁶ See *MCHI* at para. 20.

⁵⁷ See *id.* at para. 24.

⁵⁸ See *Nullification Order*, 17 FCC Rcd at 22589.

⁵⁹ See *id.*

⁶⁰ See Petition for Reconsideration at 13.

⁶¹ See *id.* at 7-8.

⁶² See *Advanced*, 11 FCC Rcd at 3409 (citing *USSB*, 3 FCC Rcd at 6861).

⁶³ See Pub. L. 106-180 § 621(2), which provides, in part: “(2) INDEPENDENCE – The privatized successor entities and separated entities of INTELSAT and Inmarsat shall conduct an initial public offering . . . to achieve such independence. Such offerings shall substantially dilute the aggregate ownership of such entities by such signatories or former signatories.”

Investment in the form of publicly traded equity is harder to attract, however, when conditions in the publicly traded equity markets are unfavorable. Applying the dilution deadlines rigidly by forcing the former intergovernmental organizations to complete IPOs in an adverse financial climate would frustrate the very purpose of the ORBIT Act by resulting in less investment in the former intergovernmental satellite organizations and, consequently, a less diluted ownership in those companies. Satellite construction milestone requirements, by contrast, are intended to ensure that licensees are building their satellite systems in a timely manner, and that no company is warehousing spectrum. Under these circumstances, granting an extension of the milestone deadlines to a licensee, such as Constellation, that is unable or unwilling to build its satellite system only frustrates the objectives of the milestone requirements.⁶⁴ Given the different objectives of the two different requirements, we do not believe that the factual predicate for extension of the IPO requirement mandates that we also extend construction milestones.⁶⁵ In the one case, extension serves the purpose of the requirement. In the other, it frustrates the purpose.

20. We also disagree with Constellation's contention that cancellation of its authorization does not serve the public interest because it will not foster any new entrants into the Big LEO service. The Commission has initiated a rulemaking proceeding to examine alternative uses of Big LEO spectrum in light of changes in spectrum use and demand since the spectrum plan was first adopted in 1994.⁶⁶ As part of this rulemaking, the Commission is considering a proposal to initiate another license-processing round for Big LEO spectrum that has been returned by prior licensees either voluntarily or through failure to meet the terms of their licenses.⁶⁷ Although there is no guarantee that this proposal will be adopted, its consideration signifies that future entry into the Big LEO service by MSS applicants, including possibly Constellation, is not foreclosed by the cancellation of Constellation's license.⁶⁸ Regardless of the use to which this spectrum is eventually put, we believe it should be made available to parties that appear able and willing to use it to bring service rapidly to the public. In addition, we disagree with Constellation that equity dictates that it be the beneficiary of any change in market conditions or use of ATC, based on its alleged role of industry pioneer and supporter of ATC before the Commission. Any such considerations are secondary to the public interest benefits arising from enforcement of our milestone rules, and cannot be used to justify an extension of time to a licensee that is unable or unwilling to proceed with its system. Furthermore, the fact that a party has participated in unsuccessful efforts to commence operations or has participated in FCC proceedings does not in our view provide a material basis for continuing an FCC authorization. To the extent our decision in *USSB* suggested the contrary, it is hereby overruled.

21. We affirm the Bureau's decision that waiver of Constellation's milestone deadlines would undermine the policy objective of the Commission's milestone rules. In making its determination, the Bureau properly made an assessment concerning the state of progress of Constellation's system and

⁶⁴ The Commission's rules may be waived if there is good cause to do so, *see* 47 C.F.R. § 1.3, but, for the reasons discussed herein, we affirm that no waiver is warranted here. *See infra*, paras. 21-22.

⁶⁵ It should be noted that Intelsat has not claimed that the same factors justifying extension of the IPO deadline also justify milestone extensions, and, in fact, recently surrendered an authorization for a satellite contemporaneously with the satellite's milestone for construction completion. *See* Letter from Jennifer D. Hindin, Counsel for Intelsat, to Marlene H. Dortch, Secretary, FCC, File No. SAT-LOA-20000119-00027, dated June 25, 2003.

⁶⁶ *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 Further Notice of Proposed Rulemaking, FCC 03-15, 18 FCC Rcd 1962 (rel. February 10, 2003) ("*Big LEO Notice*"). *See also* Petition for Rulemaking of Iridium Satellite LLC, IB Docket No. 02-364 (filed July 26, 2002).

⁶⁷ *See Big LEO Notice*, 18 FCC Rcd at 2091.

⁶⁸ The Commission is also considering whether Big LEO spectrum should be made available for uses other than use by current or future Big LEO licensees. *See Big LEO Notice*, 18 FCC Rcd at 2091.

properly distinguished this case from another in which the Bureau granted a system an extension of milestones in order to permit the imminent completion of its deployment.⁶⁹ As discussed above, Constellation has not provided any information or plans to assure that it can and will complete construction of its system even within the requested timeframe of its extension requests.⁷⁰ Constellation does not provide any reason to expect that the extension it requests, until 2006, will lead to any more success in attracting financing than it has achieved in the six years it has already been licensed. Given the state of progress of Constellation's system, it is extremely unlikely that even this extension for another three years would result in deployment of its system. Thus, we might well be faced, in 2006, some nine years after having authorized Constellation's system, with the prospect for further delays. We decline to follow such a course. As we observed in *MCHI*, to waive construction deadlines in reliance on an equivocal and indefinite "commitment" to proceed would make our milestone requirements meaningless.⁷¹ Because our milestone requirements are designed to ensure that scarce spectrum resources are not held by licensees unable or unwilling to proceed with their plans,⁷² we affirm the Bureau's determination that the grant of additional time to Constellation would undermine the policy objective of our milestone requirements and that a grant of waiver is thus inappropriate in Constellation's situation.

22. The Bureau's decision in *NetSat 28* does not require us to reach a different determination.⁷³ The Bureau held in that case that a waiver of the licensee's construction timetable was equitably justified because the licensee had been materially hindered from meeting its milestone requirements by an erroneously-imposed license condition.⁷⁴ Furthermore, the Bureau found in *NetSat 28* that the licensee had entered into a construction contract that demonstrated that the licensee was committed to launch its entire system within a reasonable timeframe and was proceeding diligently with the implementation of its system.⁷⁵ Similar findings are not supported by the facts in Constellation's case. Constellation has not presented evidence supporting a firm commitment to launch any part of its system by a set date – for example through a revised and binding construction contract – and has not even provided a construction contract for the remaining satellites in its system. In addition, the record indicates that Constellation has not progressed beyond the preliminary stages of implementing its system despite having held its authorization since 1997.

23. Accordingly, we find no basis to change the Bureau's decision to deny Constellation's extension requests and to declare Constellation's Big LEO authorization null and void. The Bureau correctly applied Commission precedent in holding that Constellation's failure to meet its milestone obligations due to a failure to attract financing was not an unforeseeable circumstance beyond Constellation's control that can justify an extension of its milestone deadlines. Furthermore, for the reasons enumerated in this Order,⁷⁶ we agree with the Bureau that there are no unique and overriding public interest considerations that warrant a milestone extension. Finally, we uphold the Bureau's determination that waiving the milestone rules for Constellation would undermine the policy objective of the rules, and therefore a waiver of our milestone rules was not appropriate.

⁶⁹ See *Nullification Order*, 17 FCC Rcd at 22588-89.

⁷⁰ See *supra*, para. 18.

⁷¹ See *MCHI* at para. 24.

⁷² See, e.g., *MCI Communications Corp.*, Memorandum Opinion and Order, 2 FCC Rcd 233, 233 para. 5 (1987).

⁷³ The *NetSat 28* decision is subject to a petition for reconsideration. Our action is in no way intended to prejudice the outcome of the Bureau's consideration of that petition for reconsideration.

⁷⁴ See *NetSat 28*, 16 FCC Rcd at 11028-29; see also *MCHI* at para. 23.

⁷⁵ See *id.* at 11029, 11031-32.

⁷⁶ See *supra*, especially paras. 16-22.

24. *Applications for Review.* TRW, Motorola, and LQL (“the Applicants”) filed applications for review challenging the Bureau’s decision in the Constellation Licensing Order to waive the financial qualifications requirement for Constellation and to authorize it to launch and operate a Big LEO satellite system. In their applications for review, the Applicants argued generally that the award of a license to Constellation improperly granted scarce spectrum resources to an applicant without any demonstrated capability to construct its proposed system. At this time we need not reach the merits of the arguments presented in these applications for review because declaring Constellation’s authorization null and void removes the basis of the parties’ objections. Accordingly we dismiss the applications without prejudice to the parties’ abilities to reargue their views in connection with any further proceedings concerning Constellation’s authorization.

IV. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that the petition of Constellation Communications Holdings, Inc. for reconsideration of the Bureau’s order denying Constellation’s requests for a limited waiver and extension of milestones, File Nos. SAT-MOD-20000907-00131; SAT-AMD-20010829-00081; and SAT-AMD-20020828-00160, and declaring Constellation’s Big LEO authorization (Call Sign S2113) null and void, DA 02-3086, 17 FCC Rcd 22584 (Int’l Bur. 2002), is DENIED.

26. IT IS FURTHER ORDERED that the applications filed by TRW, Inc., Motorola Satellite Communications, Inc., and L/Q Licensee, Inc. in File Nos. 17-DSS-P-91(48) *et al.* for review of the International Bureau’s 1997 order authorizing Constellation to construct, launch, and operate a Big LEO mobile-satellite service system, DA 97-1366, 12 FCC Rcd 9651 (Int’l Bur. 1997), are DISMISSED WITHOUT PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary