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

In the Matter of	)	
	)	File Nos. SAT-T/C-20020718-00114
Joint Application for Review of	)	SAT-T/C-20020719-00104
Constellation Communications Holdings, Inc.,	)	SAT-MOD-20020719-00103
Mobile Communications Holdings, Inc. and	)	SAT-MOD-20020719-00105
ICO Global Communications (Holdings) Limited	)	
	)	Call Signs S2318, S2319
	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 2004 **Released:** June 24, 2004

By the Commission: Commissioner Martin approving in part, concurring in part, and issuing a statement; Commissioner Copps dissenting and issuing a statement.

I. INTRODUCTION

1. In this Order, we deny the joint application for review filed by Constellation Communications Holdings, Inc. (Constellation), Mobile Communications Holdings, Inc. (MCHI), and ICO Global Communications (Holdings) Limited (ICO).[1] These parties request that we overturn the International Bureau (Bureau) Order that found Constellation's and MCHI's 2 GHz Mobile-Satellite Service (MSS) authorizations to be null and void for failure to satisfy the first implementation milestone.[2] The first milestone requires a 2 GHz MSS system licensee to enter into a non-contingent satellite manufacturing contract within one year of authorization.[3] Milestone requirements promote efficient use of limited

[1] Joint Application for Review of Constellation Communications Holdings, Inc., Mobile Communications Holdings, Inc., and ICO Global Communications (Holdings) Limited, File Nos. SAT-T/C-20020718-00114, SAT-T/C-20020719-00104, SAT-MOD-20020719-00103, SAT-MOD-20020719-00105 (March 3, 2003) (ICO *et al.* Joint Application for Review).

[2] *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, Mobile Communications Holdings, Inc. for Modification of 2 GHz License, Constellation Communications Holdings, Inc. for Modification of 2 GHz License*, Memorandum Opinion and Order, 18 FCC Rcd 1094 (Int'l Bur. 2003) (*Constellation/MCHI Milestone Order*).

[3] *The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, Report and Order, 15 FCC Rcd 16127, 16177 ¶ 106 (2000) (*2 GHz MSS Report and Order*). In this *Order*, we sometimes use the term "authorization" to refer to both MSS systems licensed by the Commission to serve the United States, as well as non-U.S.-licensed satellite systems for which the Commission reserved spectrum to serve the United States. Specifically, ICO is a United Kingdom-authorized system operator seeking access to the U.S. market. Section 25.137 of the Commission's rules permits a non-U.S. licensed space station to participate in a space station processing round by submitting a Letter of Intent (LOI). 47 C.F.R. § 25.137 (continued….)

spectrum resources and are an especially important mechanism by which we can assure that satellite licensees utilize their spectrum assignments.[4] As discussed in detail below, the Bureau properly enforced our milestone requirements, and therefore, we affirm the Bureau's decision.

II. BACKGROUND

A. The Commission's Milestone Policy

1. Purpose

2. It is longstanding Commission policy to impose milestones for satellite system implementation upon licensees.[5] Milestone schedules are designed to ensure that licensees are proceeding with construction and will launch their satellites in a timely manner, and that the orbit spectrum resource is not being held by licensees unable or unwilling to proceed with their plans.[6] Milestones ensure speedy delivery of service to the public and prevent warehousing of valuable orbit locations and spectrum, by requiring licensees to begin operation within a certain time.[7] Warehousing could hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to

(Continued from previous page)
(2002). The grant of an LOI in a space station processing round reserves spectrum for eventual use in the United States by earth stations to be licensed at a later date to communicate with the non-U.S. licensed space station.

[4] In promulgating the licensing and service rules for 2 GHz MSS, we stated that "milestone requirements are especially important because we are declining to adopt financial qualifications as an entry criterion for 2 GHz MSS systems." *2 GHz MSS Report and Order*, 15 FCC Rcd at 16177 ¶ 106. More recently, we reiterated that "[m]ilestones remain an important tool to prevent warehousing of scarce orbit and spectrum resources" and "strict enforcement of milestones will help safeguard against speculative satellite applications." *Amendment of the Commission's Space Station Licensing Rules and Policies*, IB Docket No. 02-34, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760, 10828 ¶ 175 (2003) (*First Space Station Reform Order*).

[5] *See, e.g.*, *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, Report and Order, 90 F.C.C.2d 676, 719 ¶ 114 (1982) (adopting rule requiring DBS licensees to "begin construction or complete contracting for construction" of satellites within one year after receiving construction permits), and *MCI Communications Corp.*, Memorandum Opinion and Order, 2 FCC Rcd 233, 233 ¶ 5 (Com. Car. Bur. 1987) (*MCI*) (noting that a milestone schedule is included in each domestic space station authorization issued by the Commission). *See also Norris Satellite Communications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 22299 (1997) (*Norris Review Order*); *Morning Star Satellite Company, L.L.C.*, Memorandum Opinion and Order, 15 FCC Rcd 11350 (Int'l Bur. 2000), *aff'd*, Memorandum Opinion and Order, 16 FCC Rcd 11550 (2001) (*Morning Star Reconsideration Order*).

[6] *See, e.g.*, *Advanced Communications Corporation*, Memorandum Opinion and Order, 10 FCC Rcd 13337, 13338 ¶ 4 (Int'l Bur. 1995) (*Advanced*), *aff'd*, Memorandum Opinion and Order, 11 FCC Rcd 3399 (1995) (*Advanced Review Order*), *aff'd*, *Advanced Communications Corporation v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996) (unpublished order available at 1996 WL 250460); *National Exchange Satellite, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 1990 (Com. Car. Bur. 1992); *AMSC Subsidiary Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 4040, 4042 ¶ 13 (1993) (*AMSC Order*); *Motorola, Inc. and Teledesic LLC*, Memorandum Opinion and Order, 17 FCC Rcd 16543 (Int'l Bur. 2002) (*Motorola/Teledesic*).

[7] *2 GHz MSS Order*, 15 FCC Rcd at 16177 ¶ 106. *See also* Columbia Communications Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd 15566, 15571, ¶ 11 (Int'l Bur. 2000) (*First Columbia Milestone Order*).

proceed immediately with the construction and launch of their satellite systems.[8] Moreover, warehousing undercuts decisions by the Commission to allocate scarce spectrum resources to satellite services over other competing services. Consequently, to ensure that unused spectrum is reassigned as quickly as possible, the Commission has strictly enforced the construction commencement milestone.[9]

2. Milestone Framework

3. The Commission has required satellite licensees to adhere to milestone schedules for over two decades. For most of that time, the Commission has imposed three milestones for each space station or satellite system it has licensed. These milestones require that, within specified time periods, licensees must (1) begin construction – which the Commission has defined as entering into a non-contingent construction contract;[10] (2) complete construction; and (3) launch. As early as 1983, the Commission stated that including specified dates for each milestone as a condition of each license will "discourage warehousing" and noted that "delays in the commencement and completion of construction and launch activities beyond the specified dates will render the orbital assignment null and void."[11] The Commission noted, at that time, that the milestone dates it imposed were generally based upon the implementation schedule proposed in the license application for a particular satellite.[12] In 1985, the Commission stated, however, that given the inherent uncertainty in long-term traffic projections and rapidly changing satellite technology, it would deny applications proposing to launch satellites more than five years after grant. [13]

4. In the last decade, the Commission has often imposed uniform schedules for each of the three milestones in each license granted in a processing round. For example, in granting the first licenses for constellations of non-geostationary satellite orbit (NGSO) satellites in 1991 for "Little LEO" systems, the Commission required all licensees to begin construction of the first two satellites in the constellation within one year of license grant, to begin construction of the remaining satellites within three years of grant, to complete construction of the first two satellites within four years of grant, and to have the entire

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[8] Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order*, IB Docket No. 02-34, 18 FCC Rcd 10760, 10827 ¶ 173 (2003) (*First Space Station Reform Order*), *citing PanAmSat Ka-Band License Revocation Review Order*, 16 FCC Rcd at 11537-38 (para. 12), *citing Nexsat Order*, 7 FCC Rcd at 1991 (para. 8); *MCI Order*, 2 FCC Rcd at 233 (para. 5); *First Columbia Milestone Order*, 15 FCC Rcd at 15571 (para. 11).

[9] *See Columbia Communications Corporation, Application for Amendment to Pending Application to Extend Milestones*, Memorandum Opinion and Order, 15 FCC Rcd 16496, 16502 ¶ 16 (Int'l Bur., 2000) (Second Columbia Milestone Order); AMSC Order, 8 FCC Rcd at 4042 (para. 13); Norris Review Order, 12 FCC Rcd at 22306 (para. 17).

[10] *See* Section II.A.3., *infra*.

[11] *Licensing of Space Stations in the Domestic Fixed-Satellite Service*, Report and Order, CC Docket No. 81-704, 48 Fed. Reg. 40233 (1983) at para. 82.

[12] *Id.*

[13] *Licensing Space Stations in the Domestic Fixed-Satellite Service*, Report and Order, CC Docket No. 85-135, 50 Fed. Reg 36071 (1985) at para. 28 and n. 43.

system launched and in operation within six years of grant.[14] In other services, such as the Ka-band service, the Commission has based milestone dates on other considerations, such as the date by which the satellites must be "brought into use" under international Radio Regulations in order to protect their international filing priority status.[15]

5. In the *2 GHz Order* adopted in 2000, the Commission adopted two new milestones for 2 GHz mobile-satellite service systems.[16] It did so because of its concern that the often three-year gap between the commencing construction and completing construction milestones did not provide adequate assurance that licensees are taking sufficient steps toward system implementation.[17] Consequently, the Commission imposed two new milestones on 2 GHz licensees – Critical Design Review (CDR) and Commencement of Physical Construction – that would occur between the beginning construction and completing construction milestones.[18] For both 2 GHz geostationary- satellite orbit (GSO) and non-geostationary-satellite orbit (NGSO) licensees 2 GHz licensees, CDR must be completed within two years of grant.[19] Further, NGSO licensees must commence physical construction of the first two satellites in their systems within two-and-a-half years of licensing, while GSO licensees must commence physical construction within three years of licensing.[20]

6. In the *2003 First Space Station Reform Order*, the Commission extended the CDR and Commencement of Physical Construction milestones from 2 GHz licensees to all satellite licensees (except for Direct Broadcast Satellite systems and Digital Audio Radio Service systems) on a going-forward basis.[21] It also codified uniform milestone dates for these satellites, requiring all licensees to enter into a binding non-contingent contract for the satellite or satellite system within one year of grant and to complete CDR within two years of grant.[22] GSO operators must begin physical construction of the satellite within three years of grant and must launch and operate the satellite within five years of grant.[23] NGSO operators must begin physical construction of the first satellite in the system within two and one-half years of grant, launch and operate the first satellite within three and one-half years of grant, and bring

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14 *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile-Satellite Service,* Report and Order, CC Docket No. 92-76, 8 FCC Rcd 8450, 8455 ¶ 18 (1993) (*Little LEO Order*).

15 *See, e.g., VisionStar, Inc*., Order and Authorization, 13 FCC Rcd 1428 (Int'l Bur. 1997).

16 For a detailed discussion of these new milestone requirements*, see Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz band*, Report and Order, IB Docket No. 99-81, 15 FCC Rcd 16127, 16177-78 ¶ 106 (2000) (*2 GHz MSS Order*).

17 *2 GHz MSS Order*, 15 FCC Rcd at 16178-79 ¶ 108.

18 *2 GHz MSS Order*, 15 FCC Rcd at 16177-78 ¶ 106.

19 *2 GHz MSS Order*, 15 FCC Rcd at 16177-78 ¶ 106.

20 *2 GHz MSS Order*, 15 FCC Rcd at 16177-78 ¶ 106.

21 *See First Space Station Reform Order*, 18 FCC Rcd at 10827-28 ¶ 174.

22 47 C.F.R. § 25.164.

23 47 C.F.R. § 25.164.

all the satellites in the licensed system into operation within six years of grant.[24]

3. "Beginning Construction" Milestone

7. The Commission has viewed the first milestone condition – the "beginning construction" or "contract" milestone – as especially important because it provides an early objective indication of whether a licensee is committed to proceeding with implementation of its proposal.[25] The Commission established the criteria for meeting this first milestone requirement in the *Tempo Order*. First, licensees must enter into a binding, non-contingent contract with a spacecraft manufacturer to construct the licensed satellite system.[26] Second, satellite construction contracts must describe the licensee's payment terms and schedule sufficiently to demonstrate the parties' investment and commitment to completion of the system.[27] In other words, the Commission established two general principles for milestone review in the *Tempo Order*: (1) the contract must be binding and non-contingent, and (2) the contract must demonstrate that the licensee is committed to completing the construction of the satellite system within the time frame specified in the license.[28]

8. Since the *Tempo Order*, the Bureau has correctly clarified that the first prong of this analysis, the "binding, non-contingent contract" requirement, requires that the contract identify specific satellites and their design characteristics, and specify dates for the start and completion of construction.[29] The Bureau also correctly found that there must be neither significant delays between the execution of the construction contract and the actual commencement of construction nor conditions precedent to construction.[30]

9. In order to meet the second prong of this analysis, the construction contract must set forth a

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[24] 47 C.F.R. § 25.164.

[25] *See, e.g., Motorola/Teledesic*, 17 FCC Rcd at 16547 ¶ 11.

[26] *Tempo Enterprises, Inc., et al.,* Memorandum Opinion and Order, 1 FCC Rcd 20, 21 ¶ 7 (1986) (*Tempo Order*). *See also MCI Order*, 2 FCC Rcd at 234 ¶ 10, *Nexsat Order,* 7 FCC Rcd at 1990 ¶¶ 3-4. *See also* Letter from Chief, Domestic Facilities Division, Common Carrier Bureau to Counsel, Hughes Communications Galaxy, Inc. (June 7, 1990) stating that "[r]equiring a non-contingent construction contract provides a uniform standard for all licensees and tangible evidence that implementation is proceeding."

[27] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

[28] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

[29] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

[30] *Norris Satellite Communications, Inc*., Memorandum Opinion and Order, 12 FCC Rcd 22299, 22303-04 ¶ 9 (1997) (*Norris Review Order*), *PanAmSat Licensee Corp*., Memorandum Opinion and Order, 15 FCC Rcd 18720 (Int'l Bur. 2000), *PanAmSat Licensee Corp. Application for Authority to Construct, Launch, and Operate a Ka-Band Communications Satellite System in the Fixed-Satellite Service at Orbital Locations 58° W.L. and 125° W.L.*, Memorandum Opinion and Order, 16 FCC Rcd 11534, 11539 (para. 16) (2001); *Mobile Communications Holdings, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 11898 (Int'l Bur. 2002), aff'd 18 FCC Rcd 11650 (2003).

specific construction schedule that is consistent with the licensee's milestones.[31] In particular, the contract must require the licensee to make significant initial payments and the majority of payments well before the end of the construction period.[32]

10. Under the two prong analysis for the first milestone, there is substantial FCC precedent that provides guidance to the Commission and licensees in making a determination as to whether a licensee[33] has met its first milestone. Specifically, in determining whether a satellite system construction contract demonstrates the requisite investment and commitment to meet the standards of the two-prong analysis, the Commission has generally considered several factors, including but not limited to the following: 1) it sets forth a specific construction schedule that is consistent with the licensee's milestone schedule and that does not unduly postpone commencement of construction work; 2) the licensee is required to make significant initial payments; 3) most of the consideration to be paid by the licensee under the contract will be due well before the end of the construction period; 4) the contract identifies specific satellites and their design characteristics, consistent with the license, in appropriate detail; and 5) obligations under the contract are not contingent upon future performance of an elective action by the licensee. During the milestone review process, if the individual case analysis does not demonstrate that the licensee has met these or other factors, the Commission, in the absence of some countervailing factor,[34] will find that the licensee has not met its first milestone commitment.

11. Bureau decisions have correctly followed this two-prong analysis in determining whether a licensee has met the first milestone. For example, in nullifying a license held by Norris Satellite Communications, Inc. in 1994 for failure to meet the first milestone, the International Bureau noted that while Norris had, in fact, "signed a construction contract with Harris Corporation, it failed to make the $3 million down payment necessary to render that contract non-contingent."[35] Thus, Norris's contract was not binding and non-contingent. Similarly, on several occasions, the Commission has found that satellite construction contracts that do not provide for completion of the satellite system within the milestone schedule in the license are not sufficient to meet the second prong of the standard set forth in the *Tempo Order*, that the licensee is committed to completing the construction of the satellite system within the time

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[31] *See Morning Star Satellite Company, LLC*, Memorandum Opinion and Order, 15 FCC Rcd 11350, 11352 ¶ 6 (Int'l Bur., 2000), *aff'd in Morning Star Satellite Company, LLC*, Memorandum Opinion and Order, 16 FCC Rcd 11550 (Int'l Bur., 2001).

[32] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

[33] In this Order, the term "license" is used to refer both to licenses issued pursuant to Section 301 of the Communications Act, 47 USC § 301, and to a spectrum reservation adopted pursuant to the Commission's procedures for considering letter of intent filings. See 47 CFR § 25.137; *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and International Service in the United States*, Report and Order, IB Docket No. 96-111, 12 FCC Rcd 24094, 24173-74 ¶ 185 (1997) (*DISCO II*).

[34] One example of a countervailing factor is a case in which the licensee committed to build its own satellite system rather than hiring an outside satellite manufacturer. In that case, the licensee submitted an "Inter-organizational Work Order" committing a subsidiary to build the satellite system, and allocating $3 million to the project. The licensee also demonstrated that it had sufficient facilities to build a satellite system. *See The Boeing Company*, Order and Authorization, 18 FCC Rcd 12317, 12328-29 ¶¶ 30-31 (Int'l Bur. and OET, 2003) (listing factors that the Commission may consider in reviewing "in-house" satellite manufacturing arrangements).

[35] *Norris Satellite Communications, Inc*., Order, 11 FCC Rcd 5402, 5402 ¶ 4 (Int. Bur. 1996), *aff'd* 12 FCC Rcd 22299 (1997).

frame specified in the license.[36] Also, the Bureau has stated that contracts that unduly delay the commencement of satellite construction do not show that the licensee has sufficient commitment to proceed with construction of the satellite.[37] Moreover, the Commission has determined that a contract to use capacity on another satellite does not show that the licensee is committed to construct and operate a licensee's own satellite, and so cannot meet the *Tempo Order* standard.[38] Last, the Bureau held that a licensee had met its first milestone when its commonly-controlled sister corporation had entered into a non-contingent construction contract with a spacecraft manufacturer, where the contract provided for construction of a satellite with design characteristics fully consistent with those specified in the license.[39]

12. The Commission is not required to prescribe all-inclusive, specific, and detailed terms for contractual arrangements that meet the requirements of the contract execution milestone.[40] Such an intrusion into a licensee's business decisions is not necessary to determine whether it is sufficiently committed to constructing and launching a satellite system. In addition, we have never found it to be desirable or possible to try to anticipate and articulate every possible scenario that we might be asked to rule on in deciding compliance with our milestone requirements. Instead of adopting such detailed rules requiring or prohibiting certain contract provisions or types of arrangements, the Commission has adopted general standards. Under those standards, (1) the contract must be binding and non-contingent, and (2) the contract must demonstrate that the licensee is committed to completing the construction of the satellite system.[41] As a result, licensees have more flexibility to consider different construction and related financing arrangements, as long as they meet the general standards developed in the Commission's precedents.[42]

B. 2 GHz MSS Milestones

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[36] *See Direct Broadcasting Satellite Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 7959, 7960 ¶6 (Mass Media Bur., Video Services Div. 1993) (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.*, Memorandum Opinion and Order, 3 FCC Rcd 6858, 6861 ¶ 20 (1988) (*USSB/Dominion Order*); *Morning Star Satellite Co., LLC*, Memorandum Opinion and Order, 15 FCC Rcd 11350, 11352 ¶ 8 (Int'l Bur. 2001), *aff'd.* 16 FCC Rcd 11550 (2001) (contract found contingent in part because it did not specify a construction schedule), *EchoStar Satellite Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 12780, 12783 ¶7 (Int'l Bur. 2002).

[37] *EchoStar Satellite Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 12780, 12783 ¶ 7 (Int'l Bur., 2002).

[38] *Advanced Review Order*, 11 FCC Rcd at 3414 ¶ 39.

[39] *KaStarCom World Satellite, LLC*, Order and Authorization, 18 FCC Rcd 22337, 22339 n.16 (Int'l. Bur. 2003) (*KaStarCom Order*).

[40] Lakeshore Broadcasting, Inc., v. FCC, 199 F.3d 468 (D.C. Cir., 1999) (*Lakeshore*), Trinity Broadcasting of Florida v. FCC, 211 F.3d 618 (D.C. Cir. 2000) (*Trinity*).

[41] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

[42] It is well established that administrative agencies may develop policy in either rulemaking or adjudicatory proceedings. SEC v. Chenery Corp., 332 U.S. 194 (1947), *cited in* Winter Park Communications, Inc. v. FCC, 873 F.2d 347, 351 n.4 (D.C. Cir. 1989); SBC Communications, Inc. v. FCC, 138 F.2d 410, 421 (D.C. Cir. 1998) (Commission is allowed to proceed in adjudications so that it can develop policy in small steps).

13. As noted above, the Commission adopted the milestone requirements for 2 GHz MSS licensees as part of the rulemaking proceeding to establish service rules governing operation of 2 GHz MSS systems.[43] After notice and an opportunity for comment, the Commission adopted the 2 GHz MSS milestone requirements proposed in the *2 GHz Notice*, including a binding, non-contingent contract within one year of the date the license is issued.[44] No party sought reconsideration or clarification of the milestones, or their definitions. The Commission also indicated in the *2 GHz MSS Report and Order* that, after the passage of each milestone, it would evaluate what to do with any "abandoned" spectrum, including spectrum that the Commission reclaims as a result of the licensee missing milestones.[45] We sought comment on how to redistribute abandoned spectrum in the *AWS Further Notice*,[46] wherein we once again underscored that achievement of milestones is a condition of the 2 GHz MSS authorization.[47]

C. 2 GHz MSS Authorizations

14. On July 17, 2001, the Bureau (along with the Office of Engineering and Technology) granted the 2 GHz MSS system license applications of several parties, including Constellation, ICO,[48] and MCHI. Each authorization incorporated the construction milestones adopted in the *2 GHz Report and Order* as conditions, and stated that the authorization would become null and void with no further action required on the Commission's part in the event the space station(s) are not constructed, launched and placed into operation in accordance with the technical parameters and terms and conditions of the authorization by the milestones dates.[49] The first milestone requirement for each system was to enter into a non-contingent satellite-manufacturing contract by July 17, 2002.

D. 2 GHz Milestone Review

15. On July 17-18, 2002, Constellation, MCHI, and ICO filed a set of applications proposing to: (1) transfer control of Constellation's and MCHI's MSS licenses to ICO (the "Transfer of Control Applications");[50] and (2) modify the technical specifications of Constellation's and MCHI's 2 GHz MSS

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[43] *The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, Notice of Proposed Rulemaking, 14 FCC Rcd 4843, 4881-83 ¶¶ 83-90 (1999) (*2 GHz MSS Notice*).

[44] In the *2 GHz Report and Order*, the Commission also adopted milestone requirements after the contact execution milestone, including critical design review, and commencement of physical construction. For a complete discussion of 2 GHz MSS milestone requirements, see *2 GHz MSS Report and Order*, 15 FCC Rcd at 16177-78 ¶ 106.

[45] *Id.* at 16139 ¶ 18.

[46] *See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 16043, 16056 ¶ 28 (2001) (*AWS Further Notice*).

[47] *AWS Further Notice*, 16 FCC Rcd at 16051 ¶ 16 (citing 47 C.F.R. § 25.143(e)(3)).

[48] In this document, the term "ICO" refers to either ICO Services Limited or its parent, ICO Global Communications (Holding) Limited, depending on context.

[49] *See Constellation Communications Holdings, Inc.*, Order and Authorization, 16 FCC Rcd 13724, 13731 ¶ 15 (Int'l Bur./OET 2001) (*Constellation 2 GHz MSS Order*); *Mobile Communications Holdings, Inc.*, Order and Authorization, 16 FCC Rcd 13794, 13800 ¶ 16 (Int'l Bur./OET 2001) (*MCHI 2 GHz MSS Order*).

[50] FCC Form 312 Application of Constellation Communications Holdings, Inc. and ICO Global (continued….)

systems to conform with the technical specifications of ICO's 2 GHz MSS system (the "Constellation/MCHI Modification Applications").[51] These applications stated that, if the proposed system modifications were granted, Constellation and MCHI would implement their 2 GHz MSS systems by sharing satellite infrastructure with ICO pursuant to a Satellite System Sharing Agreement (the "Sharing Agreements"),[52] pending approval of the Transfer of Control Applications. Should the Commission deny the Transfer of Control Applications, Constellation and MCHI stated they would continue to operate their respective systems off of ICO's platform pursuant to the Sharing Agreement. In other words, MCHI and Constellation argued that, since ICO had met its milestone, the execution of the Sharing Agreements with ICO satisfied their initial construction milestone as well. The Constellation/MCHI Modification Applications requested that, if the Commission determined the Sharing Agreements did not satisfy the first milestone, the Commission should waive or extend each of Constellation's and MCHI's system milestones for one year.

16. The Bureau declared Constellation's and MCHI's authorizations null and void in the *Constellation/MCHI Milestone Order*.[53] First, the Bureau found that Constellation and MCHI did not enter into satellite manufacturing agreements, despite the clear terms of their authorizations.[54] Specifically, the Bureau stated: "Rather than providing for satellite construction, the Sharing Agreements are merely contracts for purchase of satellite capacity *if and when* the satellites in question have been constructed, launched, and made ready for operation, pursuant to a separate contract to which MCHI and Constellation are not parties."[55] In addition, the Bureau dismissed as moot applications to modify Constellation's and MCHI's systems and transfer control of their authorizations to ICO.[56]

17. In a Joint Application for Review, ICO, Constellation, and MCHI (collectively, "ICO *et al.*")

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Communications (Holdings) Limited, File No. SAT-T/C-20020718-00114 (July 18, 2002) and FCC Form 312 Application of Mobile Communications Holdings, Inc. and ICO Global Communications (Holdings) Limited, File No. SAT-T/C-20020719-00104 (July 18, 2002). These transfers of control were to take place pursuant to agreements for the sale of the outstanding capital stock of Constellation and ESBH, Inc., a wholly-owned subsidiary of MCHI, respectively (the "Stock Purchase Agreements"). The Bureau granted consent to the *pro forma* assignment of MCHI's license to ESBH, Inc. by Letter from Jennifer Gilsenan, Chief, Policy Branch, Satellite Division, International Bureau, FCC to Tom Davidson, Counsel to Mobile Communications Holdings, Inc., File No. SAT-ASG-20020719-00106 (September 11, 2002).

[51] Application for Minor Modification of Authorization of Constellation Communications Holdings, Inc., File No. SAT-MOD-20020719-00103 (July 17, 2002) and Application for Minor Modification of Authorization of Mobile Communications Holdings, Inc., File No. SAT-MOD-20020719-00105 (July 18, 2002). *See* Public Notice, Report No. SAT-00116 (August 5, 2002).

[52] Satellite System Sharing Agreement By and Between ICO Global Communications (Operations) Limited and Constellation Communications Holdings, Inc. (July 16, 2002) (redacted version submitted by Letter of Robert A. Mazer, Counsel to Constellation Communications Holdings, Inc. to Marlene H. Dortch, Secretary, FCC (July 29, 2002) (Constellation-ICO Sharing Agreement); Satellite System Sharing Agreement By and Between ICO Global Communications (Operations) Limited and Mobile Communications Holdings, Inc. (July 12, 2002) (redacted version submitted by Letter of Tom W. Davidson, Counsel to Mobile Communications Holdings, Inc. to Marlene H. Dortch, Secretary, FCC (July 29, 2002) (MCHI-ICO Sharing Agreement).

[53] *Constellation/MCHI Milestone Order*, 18 FCC Rcd 1094.

[54] *Constellation/MCHI Milestone Order*, 18 FCC Rcd at 1100 ¶ 16.

[55] *Constellation/MCHI Milestone Order*, 18 FCC Rcd at 1100 ¶ 16 (emphasis in original) (footnotes omitted).

[56] *Constellation/MCHI Milestone Order*, 18 FCC Rcd at 1102-03 ¶ 20-23.

challenge the Bureau's conclusions that the Sharing Agreements were not satellite manufacturing contracts for milestone purposes,[57] and did not demonstrate sufficient commitment to proceed with system implementation.[58] ICO *et al.* also challenge the Bureau's denial of Constellation's and MCHI's alternative requests for waiver or extension of their milestones.[59] Therefore, ICO *et al.* request that we reinstate Constellation and MCHI's licenses, grant the Constellation/MCHI Modification Applications, and grant the requested transfers of those licenses to ICO.[60] AT&T Wireless Services, Inc., Verizon Wireless and Cingular Wireless LLC (collectively, "Wireless Carriers") opposed ICO *et al.*'s Application for Review, to which ICO *et al.* replied.[61]

18. For the reasons discussed below, we find that MCHI and Constellation have not met the *Tempo Order* standards for determining whether a licensee's satellite construction contract is adequate. In particular, neither MCHI nor Constellation submitted a binding, non-contingent contract to build either of their satellite systems. Nor did either MCHI or Constellation demonstrate an intent to construct their licensed satellite systems within the time frame specified in their licenses. Accordingly, we deny the ICO *et al*. application for review.

III. DISCUSSION

A. Construing Sharing Agreements as Construction Contracts

19. ICO *et al.* assert that their sharing agreement should be interpreted as a construction contract for purposes of our milestone review.[62] As an initial matter, we find that the Bureau correctly concluded that the Sharing Agreements that Constellation and MCHI submitted are not satellite manufacturing contracts. The Sharing Agreements contain none of the terms, conditions, and specifications typically included in a satellite manufacturing contract. In particular, the Sharing Agreement did not commit either Constellation or MCHI to implement the proposed satellite system they were licensed to operate.[63] Furthermore, for reasons explained further below, we disagree with ICO *et al*. to the extent that they argue that our precedents compel us to treat the Sharing Agreements as tantamount to satellite manufacturing contracts for the purposes of assessing compliance with the first milestone. Accordingly, we find that neither Constellation nor MCHI submitted a binding, non-contingent satellite construction contract, as required by the *Tempo Order*. We also conclude that neither Constellation nor MCHI demonstrated the commitment discussed in the *Tempo Order* to completing the construction of their satellite systems within the time frame specified in their licenses.

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57 *See, e.g.*, ICO *et al.* Joint Application for Review at 8 ("The Bureau based its revocation of the [Constellation] and MCHI licenses on the erroneous findings that that Sharing Agreements are not satellite manufacturing contracts").

58 ICO *et al.* Joint Application for Review at 6, 8-18.

59 ICO *et al.* Joint Application for Review at 7, 21-24.

60 ICO *et al.* Joint Application for Review at 25.

61 *See* Opposition to ICO *et al.* Joint Application for Review of AT&T Wireless Services, Inc., Verizon Wireless and Cingular Wireless LLC (March 18, 2003); Joint Reply of ICO *et al.* (March 28, 2003) (ICO *et al.* Joint Reply). Also on file are several *ex parte* letters cited in this Order below.

62 *See, e.g.*, ICO *et al.* Joint Application for Review at 8 ("The Bureau wrongly concluded that the Sharing Agreements are not manufacturing contracts . . . .").

63 *MCHI/Constellation Milestone Order*, 18 FCC Rcd at 1099-1100 (paras. 15-16).

B. Consistency with Precedent

1. Overview

20. *Background.* In the *MCHI/Constellation Milestone Order*, the Bureau concluded that Constellation and MCHI did not satisfy their first milestone because the arrangements they entered into with ICO did not show sufficient commitment and investment on Constellation's and MCHI's part to implement their respective 2 GHz MSS systems.[64] ICO *et al*. assert that the Bureau's Order is arbitrary and capricious because it was inconsistent with several Orders holding that sharing arrangements are sufficient to meet milestone requirements.[65]

21. The Bureau also found that MCHI's and Constellation's Sharing Agreements were comparable to the agreement in the *Advanced Review Order*, in which the Commission found that the sharing arrangement did not satisfy a milestone requirement. ICO *et al.* argue that their Sharing Agreements are distinguishable from that rejected in the *Advanced Review Order*.[66]

22. *Discussion*. ICO *et al.* claim that "the Bureau ignored or misstated relevant Commission precedent" in rejecting their alternative arrangements to satisfying the first construction milestone.[67] We disagree. As we noted above, the test for determining whether a licensee has met its first milestone is (1) has the licensee entered into a binding, non-contingent satellite construction contract, and (2) has the licensee demonstrated an adequate investment and commitment to construct its licensed satellite system within the time frame set forth in its license. The Bureau correctly concluded that Constellation and MCHI did not meet the two-prong test for the first milestone by submitting the specific Sharing Agreements that they submitted. ICO *et al.* have added nothing new to the record to change this result. In summary, neither Constellation nor MCHI submitted a contract to built *its own* satellite system, nor did they show a commitment to completing construction of *their own* satellite systems within the time frame specified in their licenses. Instead, Constellation and MCHI planned merely to use capacity in ICO's satellite system.

23. ICO *et al.* rely primarily on the *USSB* and *VITA* decisions,[68] claiming that these Orders provide "ample precedent approving other similar satellite sharing agreements for milestone purposes."[69] As the Bureau pointed out, however, the question of allowing a satellite sharing agreement to substitute for the licensee meeting its milestones was presented to us in both of these cases after the Commission

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64 *MCHI/Constellation Milestone Order*, 18 FCC Rcd at 1101.

65 ICO *et al.* Joint Application for Review at 8-18. *See also* Letter from Suzanne Hutchings, Counsel for ICO, to Marlene H. Dortch, Secretary, FCC (dated Oct. 28, 2003); Letter from Cheryl A. Tritt, Counsel for ICO, to Marlene H. Dortch, Secretary, FCC (dated Dec. 18, 2003).

66 ICO *et al.* Joint Application for Review at 17-18.

67 *See, e.g.*, ICO *et al.* Joint Application for Review at 2.

68 *United States Satellite Broadcasting Company, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 7247 (Vid. Serv. Div., Mass Med. Bur. 1992) (*USSB*), *Volunteers in Technical Assistance*, Order, 12 FCC Rcd 3094 (Int'l Bur. 1997) (*VITA*), *aff'd*, Memorandum Opinion and Order, 12 FCC Rcd 13995 (1997).

69 ICO *et al.* Joint Reply at 2.

determined that the relevant licensee had already met its first (contract) milestone.[70] ICO *et al*. assert that the distinction between the construction commencement milestone and later milestones was not relevant, because the Commission's approval of those sharing arrangements was not wholly premised on the licensee's previously meeting its construction contract milestones.[71] Constellation and MCHI are mistaken. The first milestone is especially important because it provides an early indication as to whether a licensee is committed to proceeding with implementation of its proposal.[72] If a licensee does not even begin construction of its satellite by the date specified in its license, it raises substantial doubts as to whether the licensee intends to or is able to proceed with its business plan.[73]

24. A comparison of the MCHI/Constellation case, on one hand, and *USSB* and *VITA*, on the other, illustrates that the Sharing Agreement was not adequate for meeting either MCHI's or Constellation's milestone requirements. In *USSB*, the licensee had started construction of its three authorized satellites, and had arranged for launch of one of those satellites to its authorized orbit location, 101° W.L.[74] In spite of this, USSB asked the Commission to allow it to purchase a payload of five transponders on a Hughes satellite, also to be located at 101° W.L., to modify the technical specifications of its license, and to extend the time within which to initiate service at 101° W.L. to match those of the Hughes satellite.[75] USSB maintained its contractual commitments to construct its other two satellites.[76] The payload purchase agreement between USSB and Hughes did not contain any unresolved contingencies that could preclude construction of the satellite, but it included a schedule of payments from USSB to Hughes that coincided with contractual construction milestones.[77] Moreover, at that time, USSB was not seeking to merge with Hughes, but planned its own stand-alone service on the satellite.[78] The Video Services Division of the Mass Media Bureau found that the payload purchase agreement complied with the construction contract due diligence requirement. Specifically, the Division found that USSB had made a real commitment to establish its own DBS system, and that its agreement with Hughes was not an indication of a weakening of that commitment.[79]

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[70] *Constellation/MCHI Milestone Order*, 18 FCC Rcd at 1101 ¶ 19, *citing USSB*, 7 FCC Rcd at 7249 ¶ 11, 7250 ¶ 17; *VITA*, 12 FCC Rcd at 3094.

[71] ICO *et al.* Joint Application for Review at 10.

[72] *Constellation/MCHI Milestone Order*, 18 FCC Rcd at 1099 ¶ 15, *citing Motorola/Teledesic*, 17 FCC Rcd at 16547 ¶ 11.

[73] *Constellation/MCHI Milestone Order*, 18 FCC Rcd at 1101 ¶ 18. *See also Second Columbia Milestone Order*, 15 FCC Rcd at 16502 ¶ 16, *citing AMSC Order*, 8 FCC Rcd at 4042 ¶ 13 (failing to begin construction raises questions regarding the licensee's intention to proceed); *Norris Review Order*, 12 FCC Rcd at 22306 ¶ 17 (by failing to commence construction or request extension within the milestone deadline, licensee in that Order did not demonstrate a commitment to proceed with its proposed system).

[74] *USSB*, 7 FCC Rcd at 7250 ¶ 17.

[75] *USSB*, 7 FCC Rcd at 7249 ¶ 11.

[76] *USSB*, 7 FCC Rcd at 7250 n.6.

[77] *USSB*, 7 FCC Rcd at 7250 ¶¶ 20-21.

[78] USSB subsequently transferred control of its DBS authorization to Hughes' DirecTV, never deploying its own satellites. *See United States Satellite Broadcasting Co., Inc. and DIRECTV Enterprises Inc.*, Order and Authorization, 14 FCC Rcd 4585 (Int'l Bur. 1999).

[79] *USSB*, 7 FCC Rcd at 7250 ¶ 17.

25. In the *VITA* case, VITA had already completed construction and attempted launch of its first satellite in compliance with its license.[80] When the launch failed, VITA asked to implement its communications payload on another licensee's experimental satellite pursuant to an agreement whereby that licensee would construct and launch a satellite containing both VITA's licensed payload and its experimental payload.[81] The Bureau permitted this sharing arrangement as VITA's inability to meet its milestones was caused by circumstances beyond its control (launch failure) and consistent with the Commission's policy to approve replacement satellites following launch failure.[82]

26. In light of this precedent, we conclude that the Bureau correctly found that the alternative arrangements presented by ICO *et al.* do not demonstrate sufficient commitment on Constellation's and MCHI's parts to proceed with system implementation. Neither Constellation nor MCHI have shown progress in launching their systems other than that purportedly made through the negotiation and execution of the various agreements with ICO, and doing so within mere days of the approaching milestone deadline.[83] Constellation and MCHI are purchasing nothing more than "title" to channels on ICO's satellites, and that is only if the merger the parties contemplate is not approved. Neither Constellation nor MCHI would own any satellites, or pay for any of the construction of the satellites prior to the date of the agreement, which is significantly less than the entire system's cost since the bulk of satellite construction has already occurred. Upon signing the Sharing Agreements, Constellation and MCHI each paid ICO less than one-half of one percent of the total contractual price.[84] Unlike *USSB*, there appears to be no capability or commitment on Constellation's or MCHI's part to launch their own services. Unlike *VITA*, their inability to satisfy their milestone obligations is not caused by circumstances beyond their control.

27. Moreover, we also affirm the Bureau's conclusion that ICO *et al.*'s sharing agreement is comparable to that in the *Advanced Review Order*. In that Order, the Commission disapproved a spectrum sharing arrangement because of Advanced's lack of commitment to establish its DBS system. After progressing no further than executing a construction contract, Advanced filed applications for consent to assign its DBS construction permit to TCI's Tempo subsidiary, and to modify its construction permit to allow it to substitute satellites that TCI was constructing for Tempo (the practical effect being that the satellites Advanced had contracted for – and were the basis of Advanced's initial due diligence showing – would not be built). As an alternative to the construction permit assignment, Advanced and TCI entered into a Capacity Purchase Agreement (CPA) by which TCI would provide Advanced with access to the Tempo satellites, TCI stock and other monetary incentives; in return, Advanced would irrevocably sell TCI all of its rights to the transponder capacity on those satellites. Advanced submitted the CPA to satisfy its previously-extended construction and launch milestones, characterizing the CPA as a binding contract for the launch, deployment, and operation of its own satellites, and asking the Commission to give it credit for Tempo's construction efforts. Under the CPA, Advanced would not own

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[80] *VITA*, 12 FCC Rcd 3094. VITA's first satellite was built under an agreement with CTA Commercial Systems that provided CTA would construct, launch, and provide certain operational services in return for commercial use of 50% of the satellite's capacity. CTA was not a Commission licensee, and thus, the fact that the Commission eventually approved of that agreement to allow the launch is inapposite to the analysis of whether a licensee can meet its milestones by sharing satellites with another licensee.

[81] *VITA*, 12 FCC Rcd at 3097 ¶ 7. Ultimately, this satellite failed to function properly.

[82] *VITA*, 12 FCC Rcd at 3108 ¶ 42 and 3110 ¶ 51.

[83] The Constellation-ICO Sharing Agreement was signed July 16, 2002 and the MCHI-ICO Sharing Agreement was signed July 12, 2002. The milestone date was July 17, 2002.

[84] *Constellation/MCHI Milestone Order*, 18 FCC Rcd at 1100 ¶ 17.

any satellites or pay for the construction, launch, or operation of any satellites. Rather, TCI was responsible for virtually every aspect of the transaction and subsequent operation of the DBS systems. Finally, the CPA provided for the complete liquidation of Advanced upon consummation of the sale of transponder capacity to TCI, leading the Bureau to conclude: "it appears that Advanced wants to abandon its business to Tempo DBS."[85] In these circumstances, the full Commission held that the CPA cannot be characterized as demonstrating Advanced's due diligence, and upheld the Bureau's actions nullifying Advanced's license and dismissing Advanced's requests to assign and modify its permit as moot.[86] The Commission distinguished *USSB* by noting that USSB was found to be in compliance with its due diligence obligations, showing the requisite capability and commitment to its own DBS service.[87]

28. ICO *et al*. contend that this precedent is not relevant because MCHI and Constellation would retain ownership of "channels" on ICO's satellite, while Advanced would not retain ownership of anything under its agreement. As noted above, MCHI and Constellation paid less than one percent of the costs of constructing the satellite system. The balance for title to the channels was not due until 30 days after "the ICO System Channels become available for commercial services *as reasonably determined by ICO*" (emphasis added).[88] In other words, ICO has complete control over when this agreement takes effect, and thus, were the Commission to approve the merger, ICO would consummate the merger prior to reasonably determining that its channels are available for commercial service. Indeed, it appears that, like *Advanced*, there is little independent business purpose of the Sharing Agreements other than an attempt at milestone compliance while waiting for action on a merger – in this case, a merger that would combine the spectrum of three systems under ICO's common control. In these circumstances, particularly where, based on all the information before us, the Sharing Agreements would be superceded by consummation of the simultaneously-executed Stock Purchase Agreements, and thus, Constellation and MCHI would disappear upon merger consummation,[89] the Sharing Agreements cannot fairly be characterized as an arrangement by Constellation and MCHI for the construction, launch, deployment, and operation of their own satellite systems. In sum, under our precedent, the Sharing Agreements are not tantamount to a non-contingent satellite construction contract.

2. Recent Precedent

29. In an *ex parte* statement, ICO claims that the recent *KaStarCom Milestone Order* compels us

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85 *Advanced*, 10 FCC Rcd at 13342 ¶ 15.

86 *Advanced Review Order*, 11 FCC Rcd at 3414-15 ¶¶ 38-41, *aff'g*, *Advanced*, 10 FCC Rcd 13337.

87 *Advanced Review Order*, 11 FCC Rcd at 3416 ¶ 42.

88 Constellation-ICO Sharing Agreement (redacted version) at Section 2.3.2 (the remainder of the Purchase Price to be paid at the Closing); *id.* at Section 2.4 (Closing shall occur on the date that is 30 days following the Commencement Date); *id.* at Section 1 (Commencement Date means the date on which the ICO System Channels become available for commercial services as reasonably determined by ICO). MCHI-ICO Sharing Agreement (redacted version) at Section 2.3.2 (the remainder of the Purchase Price to be paid on the date that is 30 days following the Commencement Date); *id.* at Section 1 (Commencement Date means the date on which the ICO System Channels become available for commercial services as reasonably determined by ICO).

89 *See Constellation/MCHI Milestone Order*, 18 FCC Rcd at 1096 ¶¶ 5-6 (noting that Constellation and MCHI represented that they would provide service independently only in the event that the Commission permitted them to share ICO's facilities but barred consummation of the Stock Purchase Agreements).

to grant the ICO *et al* Joint Application for Review.[90] The *KaStarCom Milestone Order* did not revise in any way the Commission's standard for determining compliance with the first milestone. Furthermore, these two cases are readily distinguishable. In the *KaStarCom Milestone Order*, KaStarCom, a second round Ka-band licensee, submitted the following for its first milestone requirement showing: (1) a satellite sharing agreement with WB Holdings 1 LLC (WB Holdings), a first round Ka-band licensee that was authorized for different Ka-Band frequencies at the same orbit location as KaStarCom, and (2) a satellite manufacturing contract between a WB Holdings' subsidiary and Loral. KaStarCom and WB Holdings had formulated and clearly disclosed their plans to construct and own a single satellite prior to the Bureau's licensing of KaStarCom, and thus, well prior to the first milestone.[91] The Bureau found that the WB Holdings contract satisfied KaStarCom's first milestone because KaStarCom and WB Holdings became commonly controlled during the pendency of the milestone review. The Bureau specifically did not address whether the earlier arrangements involving the satellite sharing agreement satisfied the first milestone requirement.[92] Thus, the *KaStarCom Milestone Order* does not provide any guidance regarding the use of sharing agreements to satisfy milestone requirements.

30. In contrast, Constellation and MCHI were issued licenses to construct their own satellite systems.[93] They submitted their requests to share ICO's satellite platform and transfer control of their 2 GHz MSS licenses to ICO within mere days of the approaching milestone deadline.[94] Thus, unlike KaStarCom and WB Holdings, who planned to build and obtained a license for only one satellite system, ICO, MCHI, and Constellation were licensed to build three satellite systems, and tried to use the construction progress for one of those systems to satisfy all three. Furthermore, this distinction is of particular significance in the 2 GHz MSS context because, unlike the Ka-band, the amount of spectrum awarded each 2 GHz MSS system proponent was based specifically on the fact that the system proponent was constructing its own system. Had ICO *et al.*'s plan been formulated and disclosed prior to authorization, the 2 GHz MSS band arrangement may well have been structured differently.[95]

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[90] *See*, *e.g.*, Letter from Cheryl A. Tritt, Counsel for ICO, to Marlene H. Dortch, Secretary, FCC (dated Oct. 31, 2003) (*ICO Oct. 31 Ex Parte Statement*), *citing KaStarCom. World Satellite, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 22337 (Int'l Bur., 2003) (*KaStarCom Milestone Order*).

[91] *See KaStarCom. World Satellite, LLC*, Order and Authorization, 16 FCC Rcd 20133, 20134 ¶ 3 (Int'l Bur. 2001).

[92] *See KaStarCom Milestone Order*, 18 FCC Rcd at 22339 ¶ 6 & n.16.

[93] *See Constellation 2 GHz MSS Order*, 16 FCC Rcd at 13724-25 ¶ 2 (describing Constellation's proposal to construct its own 2 GHz MSS system); *MCHI 2 GHz MSS Order*, 16 FCC Rcd 13794-95 ¶ 2 (describing MCHI's proposal to construct its own 2 GHz MSS system).

[94] The Constellation-ICO Sharing Agreement was signed July 16, 2002 and the MCHI-ICO Sharing Agreement was signed July 12, 2002. The milestone date was July 17, 2002.

[95] As the Bureau stated in the *Constellation/MCHI Milestone Order*:

> [A concern with speculative filings by applicants with no reasonable prospect or intention of constructing a system] is particularly relevant in the context of 2 GHz MSS systems, given the 2 GHz MSS licensing plan. As the Commission has indicated, the 2 GHz licensing plan was premised on the award of spectrum for the purpose of constructing satellite systems. One year after accepting a license, the award of which was premised on the construction of a satellite system, Constellation and MCHI seek to significantly alter their plans, in a manner which in effect would authorize the use by one system of the spectrum awarded to support three systems. While there may be benefits from operation of fewer systems, such as lesser interference potential, reduction of potential orbital debris, and simplification of coordination, these benefits could have been identified and addressed through agreements prior to licensing. (The same alleged benefits

(continued….)

31. In summary, starting with the 1986 *Tempo Order*, the Commission and the Bureau have held that, to meet the contract milestone, a licensee must (1) provide a binding, non-contingent satellite construction contract, and (2) the contract must demonstrate that the licensee is committed to completing the construction of the satellite system within the time frame specified in the license.[96] To determine whether a licensee has met these two standards, we look at, among other things, whether the contract requires the licensee to make significant initial payments, and to make the majority of payments well before the end of the construction period.[97] We also see whether there will be significant delays between the execution of the construction contract and the actual commencement of construction, or conditions precedent to construction.[98] For determining whether a sharing agreement can be used to meet the contract milestone, we examine whether the licensee has demonstrated the same financial investment and commitment in the shared project as if it were constructing the satellite system it was licensed to operate.[99]

C. Sufficient Notice of Legal Standard

32. *Background*. ICO *et al.* claim that the Commission's precedents were not sufficient to inform licensees adequately whether or to what extent Sharing Agreements could be used to meet milestone requirements.[100]

33. *Discussion*. We disagree with ICO *et al.* The Court set forth the standard for determining whether regulated parties have adequate notice of the requirements placed on them in the *Lakeshore* and *Trinity* cases.[101] In *Lakeshore*, the Court found that, while parties need "full and explicit notice of all prerequisites,"[102] the Commission need not have "made the clearest possible articulation." "[I]t is enough

(Continued from previous page)

> will be achieved by the result we reach here; *i.e.*, cancellation of the 2 GHz MSS licenses that were issued to MCHI and Constellation.) In any event, approval of the type of arrangement before us would create substantial incentives for applicants to pursue authorizations to construct satellite systems, even if they do not intend to construct and operate the system, and would create an unacceptably high risk of gaming of the licensing process.

Constellation/MCHI Milestone Order, 18 FCC Rcd at 1102 ¶¶ 21 (citing *AWS Further Notice*, 16 FCC Rcd at 16058 ¶ 35 and *2 GHz MSS Report and Order*, 15 FCC Rcd at 16138 ¶ 16).

96 *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

97 *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

98 *Norris Satellite Communications, Inc*., Memorandum Opinion and Order, 12 FCC Rcd 22299, 22303-04 ¶ 9 (1997) (*Norris Review Order*), *PanAmSat Licensee Corp*., Memorandum Opinion and Order, 15 FCC Rcd 18720 (Int'l Bur. 2000), *PanAmSat Licensee Corp. Application for Authority to Construct, Launch, and Operate a Ka-Band Communications Satellite System in the Fixed-Satellite Service at Orbital Locations 58° W.L. and 125° W.L.*, Memorandum Opinion and Order, 16 FCC Rcd 11534, 11539 (para. 16) (2001).

99 *Compare USSB*, 7 FCC Rcd at 7250 ¶ 19 *with Advanced Review Order*, 11 FCC Rcd at 3415 ¶ 41.

100 ICO *et al.* Joint Application for Review at 18-20.

101 *Lakeshore*, 199 F.3d 468, *Trinity*, 211 F.3d 618.

102 *Lakeshore*, 199 F.3d at 475, *citing* Salzer v. FCC, 778 F.2d 869, 871-72 (D.C. Cir. 1985); McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993) (*McElroy*).

if, based on a 'fair reading' of the rule, applicants knew or should have known what the Commission expected of them."[103] Similarly, in *Trinity*, the Court explained that "[w]e thus ask whether 'by reviewing the regulations *and other public statements by the agency*, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform...'"[104]

34. ICO *et al.* assert that the Commission's precedents do not meet this "ascertainable certainty" standard.[105] Again, ICO *et al*. misinterpret those precedents. As we discussed above, the *Tempo Order* explains that a licensee needs to enter into a binding, non-contingent contract to meet the construction commencement milestone.[106] The *Tempo Order* and its progeny further explain that a "binding, non-contingent contract" must have several characteristics, including significant initial payments, and a demonstration of a commitment to complete construction of the satellite system.[107] Furthermore, the Commission explained in *USSB* and *Advanced* that a sharing agreement cannot satisfy the requirements of the construction commencement milestone unless the licensee has made substantial progress constructing the satellite system it was licensed to operate.[108]

35. The Commission set forth its standard even more clearly in *Directsat*.[109] In that case, Directsat sought authority to merge with EchoStar, place its capacity on EchoStar's satellite, and extend time to launch and operate its DBS system. However, unlike ICO *et al*., Directsat had made substantial progress (*e.g.*, first satellite 2/3 complete; launch scheduled and all launch payments made; export license secured by satellite contractor) prior to its transfer of control request. The Bureau determined that Directsat had shown "a continuing capability and commitment to implement its DBS system."[110] In granting Directsat's requests, the Bureau noted that, had Directsat sought a milestone extension to merge with EchoStar (relying solely on EchoStar's satellite to meet its due diligence requirements) and had it not begun construction on its own satellites, the *Advanced* decision would govern and Directsat's requests would have been denied.[111]

36. Thus, it is clear that, to meet the construction commencement milestone, licensees must enter into a contract that requires the licensee to make significant initial payments, and to make a real

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[103] *Lakeshore*, 199 F.3d at 475, *citing McElroy*, 990 F.2d at 1358.

[104] *Trinity*, 211 F.3d at 628, *quoting* GE v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (*emphasis added*).

[105] ICO *et al.* Joint Application for Review at 18-20. *See also* Letter from Suzanne Hutchings, Counsel for ICO, to Marlene H. Dortch, Secretary, FCC (dated Jan. 8, 2004); Letter from Suzanne Hutchings, Counsel for ICO, to Marlene H. Dortch, Secretary, FCC (dated Feb. 26, 2004).

[106] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

[107] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7. *See also USSB*, 7 FCC Rcd at 7250 ¶ 19, *Norris Review Order*, 12 FCC Rcd at 22303-04 ¶ 9; *Second Columbia Milestone Order*, 15 FCC Rcd at 16500-01 ¶ 12; *PanAmSat Ka-band License Cancellation Review Order*, 16 FCC Rcd at 11539 ¶ 16.

[108] *USSB*, 7 FCC Rcd at 7250 ¶ 19, *Advanced Review Order*, 11 FCC Rcd at 3415 ¶ 41.

[109] *Directsat Corporation*, Order, 11 FCC Rcd 1775 (Int'l Bur. 1996) (*Directsat*).

[110] *Directsat*, 11 FCC Rcd at 1776 ¶ 12.

[111] *Directsat*, 11 FCC Rcd at 1777 ¶ 16.

commitment to completing construction of the satellite system it was licensed to launch and operate.[112] MCHI and Constellation clearly did not meet either of these standards. They did not make significant initial payments, because they paid less than one percent of the costs of constructing the satellite system.[113] They did not make a commitment to construct their licensed satellite systems, because they instead contracted to operate channels on ICO's satellite, and ICO would have retained discretion to decide whether to provide any capacity at all to MCHI or Constellation.[114]

D. Permissible Sharing Agreements

37. ICO *et al.* contend that the Bureau's decision generally would prohibit satellite capacity purchase agreements as a method to meet the first milestone.[115] We disagree. A review of the relevant precedent discussed above shows that the Commission does not prohibit sharing agreements. Rather, as we also discussed above, we require that (1) a licensee's satellite construction contract must be binding and non-contingent, and (2) the contract must demonstrate that the licensee is committed to completing the construction of the satellite system within the time frame specified in the license.[116] We further explained above that such a contract must require the licensee to make significant initial payments, and must make the majority of payments due well before the end of the construction period.[117] Moreover, we pointed out in this Order that a sharing agreement might satisfy the requirements of the construction commencement milestone set forth in the *Tempo Order* if the licensee seeking to share demonstrates substantial progress in its own right, *e.g.*, that it has the same financial investment and commitment in the shared project as if it were constructing the satellite system it was licensed to operate.[118] The Commission simply does not allow licensees simply to "piggy-back" on another licensee's satellite construction for their own for purposes of meeting the contract execution milestone. The ICO *et al.* sharing agreements are efforts by MCHI and Constellation to piggy-back on ICO's construction, and so neither MCHI nor Constellation can rely on those sharing agreements to meet their milestones.

E. Waiver Request

38. *Background*. As an alternative to their argument that their Sharing Agreements satisfy their construction commencement milestone, ICO *et al*. requested a waiver of the construction commencement milestone for one year.[119] The Bureau denied this request, finding that granting such a waiver would establish a precedent that would undercut efforts to limit warehousing of scarce orbit and spectrum

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[112] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7; *USSB*, 7 FCC Rcd at 7250 ¶ 19, *Advanced Review Order*, 11 FCC Rcd at 3415 ¶ 41; *Directsat*, 11 FCC Rcd at 1777 ¶ 16; *Review Order*, 18 FCC Rcd at 11656 ¶ 19.

[113] *MCHI/Constellation Milestone Order*, 18 FCC Rcd at 1100 ¶ 17.

[114] *Constellation/MCHI Milestone Order*, 18 FCC Rcd at 1100 n.28.

[115] ICO *et al.* Joint Application for Review at 8.

[116] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

[117] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

[118] *Compare USSB*, 7 FCC Rcd at 7250 ¶ 19 *with Advanced Review Order*, 11 FCC Rcd at 3415 ¶ 41.

[119] ICO *et. al*. Modification Application at 17.

resources.[120]

39. ICO *et al.* contend that the Bureau "misconstrued" Constellation's and MCHI's waiver requests as a request for waiver of all milestone deadlines, rather than "a waiver of the milestones, to the extent that they are interpreted to require construction of duplicative facilities."[121] We have reviewed the original waiver requests as filed in the Constellation/MCHI Modification Applications.[122] We believe the Bureau properly assessed the scope of Constellation's and MCHI's waiver requests and thoroughly articulated a number of reasons why it was inappropriate to grant their waiver requests in the context of 2 GHz MSS systems.[123] Moreover, ICO *et. al.* have not provided good cause for the more limited waiver they claim they requested originally, in either their waiver request or their application for review.[124]

F. Extension Request

40. *Background*. ICO *et al.* also request extension of Constellation's and MCHI's milestones, asserting that they need additional time to comply with the Bureau's so-called "newly announced" milestone requirements.[125]

41. *Discussion*. ICO *et al*. have not supplied any basis for us to extend any of Constellation's or MCHI's milestones. As discussed at length above, the Bureau's decision is wholly supported by Commission precedent and thus, does not contain "newly announced requirements." In any case, on the basis of the record before us, we agree with the Bureau that Constellation and MCHI have not demonstrated that additional time is required due to unforeseeable circumstances beyond their control, or that unique and overriding public interest concerns justify an extension.[126] Constellation and MCHI

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[120] *Constellation/MCHI Milestone Order*, 18 FCC Rcd at 1103 ¶ 20-22.

[121] ICO *et al.* Joint Application for Review at 21.

[122] Constellation/MCHI Modification Applications at 17-19.

[123] To grant such relief here would establish a precedent that would make it possible for parties with marginal prospects and uncertain intentions to delay for as long as a year after receiving licenses before arranging for disposition of their license interests and then continue to hold the licenses past the one-year deadline for as long as it would take to resolve any issues presented by their last-minute assignment or transfer-of-control applications. Such a precedent would also tend to encourage speculative filings by applicants with no reasonable prospect or intention of constructing a system.

Constellation/MCHI Milestone Order, 18 FCC Rcd at 1102 ¶ 20.

[124] Section 1.3 of the Commission's rules provides that waiver of a rule may be granted upon "good cause shown." 47 C.F.R. § 1.3. However, as noted by the Court of Appeals for the D.C. Circuit, agency rules are presumed valid, and "an applicant for waiver faces a high hurdle even at the starting gate." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). The Commission may exercise its discretion to waive a rule, where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). Further, if it grants a waiver, the Commission must articulate a rational justification for the exception that establishes a predictable, workable standard for non-discriminatory resolution of future cases. *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

[125] ICO *et al.* Joint Application for Review at 24.

[126] *Constellation/MCHI Milestone Order*, 18 FCC Rcd at 1103 ¶ 23 & n.44 (citing milestone extension precedent).

asked for the extension only in case their modification requests were denied. Filing applications to modify their licenses and merge with ICO are strictly business decisions within their control, and the Commission has held unequivocally that such business decisions do not warrant an extension of milestones.[127]

G. Hearing Requirement

42. ICO *et al.* argue that the Bureau violated Section 312(c) of the Communications Act by depriving them of an opportunity for a hearing prior to finding the authorizations null and void.[128] Section 312(c) provides that "[b]efore revoking a [station] license or [construction] permit pursuant to subsection (a), … the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation . . . should not be issued."[129] Failure to timely construct facilities is not one of the enumerated reasons for which the Commission may revoke a license or permit pursuant to Section 312(a).[130] Thus, Section 312(c) is not triggered by the Bureau's actions. Moreover, Constellation and MCHI accepted their authorizations as conditioned,[131] and were therefore on notice that failure to meet those conditions would result in nullification of the authorization.[132]

IV. CONCLUSION AND ORDERING CLAUSES

43. The Commission has been reviewing satellite licensees' milestone demonstrations for almost

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[127] *See, e.g.*, *MCI*, 2 FCC Rcd at 234 ¶ 7 (mergers do not justify extension of milestones); *see also Columbia Communications Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 15566, 15571 ¶ 12 (Int'l Bur. 2000) (*Columbia First Milestone Order*); *Columbia Communications Corporation*, Memorandum Opinion and Order, , 15 FCC Rcd 16496, 16497-98 ¶ 5 (Int'l Bur. 2000) (*Columbia Second Milestone Order*); *Advanced*, 10 FCC Rcd at 13341 ¶ 14.

[128] ICO *et al.* Joint Application for Review at 20, ICO *et.al* Reply at 4.

[129] 47 U.S.C. § 312(c).

[130] *Compare* 47 U.S.C. § 312(a) (listing seven bases for license or permit revocation) *with* 47 U.S.C. § 319(b) ("permits for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified"). For more on the Commission's policy incorporating space station construction permit authority into the launch and operation authority, see *Streamlining the Commission's Rules and Regulations for Satellite Application and Licensing Procedures,* IB Docket No. 95-117, Report and Order, 11 FCC Rcd 21581, 21584-85 ¶ 8 (1996) (waiving construction permit requirement for space stations will accelerate the provision of satellite-delivered services, and eliminate administrative burdens and potential delays). *See also 2 GHz MSS Report and Order*, 15 FCC Rcd at 16179-80 ¶ 111 (applying this policy to 2 GHz MSS).

[131] The authorizations included an ordering clause stating the licensee "may decline this authorization as conditioned within 30 days of the date of the release of this *Order and Authorization*. Failure to respond within this period will constitute formal acceptance of the authorization as conditioned." *See Constellation 2 GHz MSS Order*, 16 FCC Rcd at 13736 ¶ 34; *MCHI 2 GHz MSS Order*, 16 FCC Rcd at 13805 ¶ 33.

[132] *See, e.g.*, *P&R Temmer v. FCC*, 743 F.2d at 928 ("An FCC licensee takes its license subject to the conditions imposed on its use. . . . Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations."); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 740 (D.C.Cir.1974) ("When an applicant accepts a government permit which is subject to certain conditions, he cannot later assert alleged rights which the permit required him to surrender in order to receive it.").

20 years. During that time, we have developed a significant body of law regarding the requirements for meeting the construction commencement milestone. Most relevant for this Order, licensees must show that they have entered into a binding, non-contingent contract for the construction of the satellite system that they were licensed to operate. Such contracts include significant initial payments, require the majority of payments well before the end of the construction period, and demonstrate an intent to complete the satellite system construction. Moreover, licensees attempting to comply with the construction commencement milestone through executing a sharing agreement with another licensee must demonstrate the same investment and commitment to completing the satellite system construction as if it were constructing the satellite system it was licensed to operate. We find that the Bureau's decisions were correct and consistent with applicable precedent, and we therefore deny ICO *et al.*'s Joint Application for Review.

44. Accordingly, IT IS ORDERED that the Joint Application for Review filed on March 3, 2003 by Constellation Communications Holdings, Inc., Mobile Communications Holdings, Inc., and ICO Global Communications (Holdings) Limited, File Nos. SAT T/C 20020718-00114, SAT-T/C-20020719-00104, SAT-MOD-20020719-00103, SAT-MOD-20020719-00105 IS DENIED.

45. This *Memorandum Opinion and Order* is issued pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5) and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Joint Application for Review of Constellation Communications Holdings, Inc., Mobile Communications, Inc. and ICO Global Communications* (*Holdings*) *Limited*, Memorandum Opinion and Order.

Today's decision was an exceptionally difficult one. It was difficult because it pitted two important Commission responsibilities against one another. On one hand the Commission has a statutory responsibility to protect the people's spectrum. That means protecting against the warehousing of spectrum and working to maximize output for each band. Because the Commission does not auction satellite spectrum, it devised a series of milestones that allow it to measure commitment to achieve a fully operational satellite system according to a specified schedule. Each milestone provides a way to assess whether a licensee is on the path to delivering service to consumers or is underutilizing the spectrum resource that has been entrusted to it.

On the other hand the Commission has an ongoing responsibility to be clear about licensees' responsibilities and to give adequate notice of its policies. Regulatory transparency and predictability are critical. They encourage more investment because companies making large investments can do so with the knowledge that they understand the rules of the game and that those rules will not be changed without adequate notice. Transparency and predictability are also core legal requirements for regulatory agencies under the Administrative Procedures Act.

In a perfect world we would be able to meet both of these responsibilities to everyone's satisfaction. But in this case I fear that we cannot. In the relatively new world of satellite milestones, and in the very new world of "strict enforcement" of those milestones, our licensees' precise responsibilities are not adequately clear in all circumstances. In this case a milestone designed to further our goal of fighting warehousing and maximizing output was not clear enough. Despite that lack of clarity, today the Commission rescinds authorizations held by Constellation and MCHI – the equivalent of the death penalty for a satellite company.

I am not comfortable with this extreme remedy, given the confusion over the exact requirements of our milestone. In the related Globalstar milestone order the company's non-contingent contract would not have allowed it to launch a satellite system that met its deadlines. For this reason the Commission correctly found that the company did not demonstrate a commitment to complete the construction of the system within the time frame specified in the license.

Here, by contrast, Constellation and MCHI's contract did provide evidence of a commitment to complete their satellite system. The wrinkle was that the companies intended to do so using ICO satellites. While I would prefer licensees to build their own systems so that more satellite infrastructure becomes available, I am not convinced that our rules clearly prohibited this arrangement. For this reason, I am pleased that the Commission is using this opportunity to explain our standard more clearly so that licensees have better notice of what types of non-traditional contractual arrangements satisfy the milestone, but I believe that given

the circumstances of this case, granting a waiver as we did in the related TMI case, would have been more appropriate than the extreme act of rescinding authorizations.

CONSOLIDATED SEPARATE STATEMENT OF COMMISSIONER KEVIN J . MARTIN, CONCURRING IN PART

Re: *Joint Application for Review of Constellation Communications Holdings, Inc., Mobile Communications, Inc. and ICO Global Communications* (*Holdings*) *Limited*, Memorandum Opinion and Order, File Nos. SAT-T/C-20020718-00114 et al.;
Emergency Application for Stay of Globalstar, L.P., Memorandum Opinion and Order, File Nos. SAT-LOA-19970926-00151/52/53/54/56 et al.;

While I do not take issue with these Orders' interpretation of the "non-contingent satellite manufacturing contract" milestone, I question the usefulness of our approach. With respect to Globalstar, we take away its license because Globalstar's manufacturing contract would not have provided for completion of construction of Globalstar's originally proposed system within Globalstar's original construction milestones. But Globalstar sought modification of its system and extension of the construction milestones. Globalstar specifically sought an opportunity to cure its satellite manufacturing contract to conform to the original requirements should its modification and extension requests be denied. In light of these facts, I think Globalstar could rather easily have entered into the requisite contract in order to meet the first milestone and preserve its license. Whether Globalstar could have ultimately lived with such a contract is a harder question, but Globalstar would have bought itself time to try. It thus seems to me that Globalstar is here being penalized for taking a more honest approach.

With respect to Constellation and MCHI, we take away their licenses because we conclude that their agreements to share satellite infrastructure with ICO do not constitute satellite manufacturing contracts. As with Globalstar, we rely in large part on the fact that these agreements do not commit Constellation and MCHI to implement the systems they were originally licensed to operate. While it is unclear whether Constellation and MCHI could have entered into the kind of contracts we deem are required in order to preserve their licenses, it does seem clear that they could have provided a viable service through their sharing agreements. I am not sure that the penalty of taking away their licenses is a fair match to the perceived transgressions.

In the end, I think the strict enforcement of the "non-contingent satellite manufacturing contract" milestone may be too blunt an instrument to address these questions. Going forward, I would prefer a more nuanced approach.