ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Mobile Communications Holdings, Inc.	)	File Nos. 11-DSS-P-91(6)
	)	18-DSS-P-91(18)
	)	11-SAT-LA-95
	)	12-SAT-AMEND-95
Authority to construct, launch, and operate	)	158-SAT-AMEND-96
an elliptical low-earth-orbit Mobile-Satellite	)	
Service system	)	Call Sign S2111

To: The Commission

APPLICATION FOR REVIEW

MOBILE COMMUNICATIONS HOLDINGS, INC.

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SUMMARY

Mobile Communications Holdings, Inc. ("MCHI") seeks Commission review of the International Bureau's June 24, 2002 Memorandum Opinion and Order ("*Recon. Order*"), which affirmed the Bureau's May 2001 ruling declaring MCHI's 1.6/2.4 GHz mobile-satellite service ("MSS") authorization null and void. Grant of this application for review is warranted because, contrary to the factual conclusions reached by the Bureau, MCHI had in fact met both of its construction commencement milestone obligations as required under its authorization, having entered into a contract with The Boeing Corporation ("Boeing") in July 1998. Boeing has confirmed that its contract with MCHI relates to the entire Ellipso system, and that the contractual relationship between the two parties remains in place, but the *Recon. Order* does not even acknowledge Boeing's position, let alone recognize its significance.

In the *Recon. Order,* the Bureau instead arbitrarily second guesses the interpretation of the Boeing Contract held by the two contracting parties. Such action is in conflict with case precedent, and established Commission policy, in that the Commission, in evaluating licensee compliance with commencement of construction requirements, has not previously sought to offer its own interpretation of contract language that is distinct from the parties' understanding of their contractual obligations.

The Bureau has also invoked a never before imposed legal requirement, asserting that "the execution of a contract that does not provide for complete construction of the satellites in question by a specified date consistent with the licensee's milestone deadline for making its system fully operational cannot satisfy a construction-commencement milestone requirement." This language clearly adds an additional requirement to the notion of construction commencement that was not, prior to its announcement in the *Recon. Order.,* an aspect of Commission policy on compliance with commencement of construction milestones. As stated in

both the *Big LEO Order* and in MCHI's authorization, the requirement imposed is merely to commence construction – and, historically, all that has been necessary to satisfy this requirement is entry into a binding, non-contingent construction contract such as that executed by MCHI and Boeing. It is beyond the International Bureau's authority to impose additional substantive requirements – and the mere absence of a specific completion date for satellite construction does not render a contract either contingent or non-binding.

Moreover, at the same time that it has divested MCHI of its Big LEO license, the International Bureau has taken no such action concerning the Big LEO license of Constellation Communications Corporation ("Constellation"), issued at the same time as MCHI's license. Constellation has not met its full-system construction commencement milestone, has not been an active participant in industry activities, and has spent only a fraction of the time, money and effort that MCHI has toward implementation of its MSS system. While MCHI believes that the Bureau would be correct to permit both MCHI and Constellation to continue to pursue implementation of their MSS systems, the Bureau's apparent policy of selective milestone enforcement is patently discriminatory and completely unacceptable.

Finally, the Bureau's *Recon. Order* continues to apply mechanistically the requirements of the FCC's milestone rules without any consideration of the extreme financial turbulence that the satellite industry has experienced since Iridium's 1999 bankruptcy filing. These market conditions, which lie entirely beyond MCHI's control, have unavoidably slowed the progress of the Ellipso construction program. Despite these problems, MCHI remains optimistic that its elliptical orbit technical approach remains promising because of the critical need for the truly global mobile telecommunications capability that satellite technology alone can provide. Ellipso not only can provide this capability, it can do so at a low cost given the

advantages unique to its elliptical orbit technology. It would be contrary to the public interest to deny MCHI the opportunity to continue pursuing its business plan when present economic circumstances make it very unlikely that any new entity will emerge with a credible plan to provide the type of global service MCHI proposes.

MCHI requests that the Commission review the facts in this case and reinstate MCHI's authorization. MCHI further requests that the Commission direct the Bureau to consider favorably MCHI's request for waiver of its remaining construction milestones, which was included as part of MCHI's original Petition for Reconsideration, but was not considered by the Bureau. In part because MCHI's authorization has been declared void since the Spring of 2001, it has been unable to proceed with further construction of its satellite system. Accordingly, a waiver of the remaining milestones established under its authorization, including the July 2003 service implementation milestone contained in its authorization, is appropriate.

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To: The Commission

APPLICATION FOR REVIEW

Mobile Communications Holdings, Inc. ("MCHI"), by its attorneys and pursuant to Section 1.115 of the Commission's rules (47 C.F.R. § 1.115), hereby seeks Commission review of the International Bureau's June 24, 2002 Memorandum Opinion and Order,[1] which declined to overturn the Bureau's May 2001 ruling that MCHI's authorization for a satellite system in the 1.6/2.4 GHz mobile-satellite service ("MSS") is null and void.[2] MCHI requests that the Commission review the facts in this case and reinstate MCHI's authorization. MCHI further requests that the Commission direct the Bureau to consider favorably MCHI's request for waiver of its remaining construction milestones, which was included as part of MCHI's original Petition for Reconsideration, but was not considered by the Bureau. In part because MCHI's

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1 *Mobile Communications Holdings, Inc.*, DA 02-1468, slip op. (IB, released June 24, 2002) ("*Recon. Order*").

2 *Mobile Communications Holdings, Inc.*, 16 FCC Rcd 11766 (IB 2001) ("*Nullification Order*").

authorization has been declared void since the Spring of 2001, it has been unable to proceed with further construction of its satellite system. Accordingly, a waiver of the remaining milestones established under its authorization, including the July 2003 service implementation milestone contained in its authorization, is appropriate.

Grant of this application for review is warranted because, contrary to the factual conclusions reached by the Bureau, MCHI had met both of its construction commencement milestone obligations as required under its authorization. The contract that MCHI entered into with Boeing in 1998 expressly dealt with not only the construction of the first two satellites of the Ellipso System, but also provides for commencement of work relating to the remaining satellites in the system. In other words, MCHI satisfied its July 2000 construction commencement milestone more than two years in advance. Boeing and MCHI agree that the contract pertains to the entire Ellipso system.

In the *Recon. Order,* the Bureau ignores this fact and arbitrarily second guesses the interpretation of this contract held by the two contracting parties. Such action is in conflict with case precedent, and established Commission policy, in that the Commission, in evaluating licensee compliance with commencement of construction requirements, has not previously sought to offer its own interpretation of contract language that is distinct from the parties' understanding of their contractual obligations.

In addition, the Bureau's *Recon. Order* continues to apply mechanistically the requirements of the FCC's milestone rules without any consideration of the extreme financial turbulence that has been being suffered by the satellite industry since Iridium's 1999 bankruptcy filing. For reasons that are well documented, including the high-profile business failures of MCHI's predecessors in the 1.6/2.4 GHz "Big LEO" MSS, and completely outside MCHI's

control, these market conditions have unavoidably slowed the progress of the Ellipso construction program.[3] For this reason, MCHI requested last year, as part of its original Petition for Reconsideration of the International Bureau's *Nullification Order,* that the Bureau defer the effective dates of MCHI's milestones in order to preserve its ability to proceed with its system on a modified timetable. Because the Bureau has found the license to be null and void, it has not given any consideration to this request. In reversing the order below, the Commission should explicitly direct the Bureau to consider this request, and to grant it for good cause shown.

I. BACKGROUND

More than ten years ago, MCHI (then Ellipsat Corporation) became the first applicant for authority to provide MSS using non-geostationary satellite constellations in the 1.6/2.4 GHz "Big LEO" MSS bands. This application was placed on public notice along with the later-filed application of Motorola Satellite Communications, Inc. ("Motorola") for the Iridium MSS system. In response to this cut-off notice, four additional applications were submitted, each seeking authority to provide similar services in the 1610-1626.5 MHz (uplink) and 2483.5-2500 MHz (downlink) frequency bands.

In October 1994, the Commission adopted final service rules for Big LEO MSS, concluding that five systems could be licensed in the allocated spectrum, four using spread spectrum, code division multiple access ("CDMA") techniques to share spectrum at 1610-1621.35 MHz (uplink) and 2483.5-2500 MHz (downlink), and one (Iridium) using dedicated spectrum in the 1621.35-1626.5 MHz band and operating bidirectionally.[4] The applicants were

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[3] MCHI was candid about this prospect and so informed the Commission in a meeting with International Bureau staff on October 12, 2000.

[4] *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, 9 FCC Rcd 5936 (1994) ("*Big LEO Order*").

required to amend their proposals to conform to the rules adopted no later than November 16, 1994. Five of the six applicants, including MCHI, filed amendments to conform to the rules on this date.[5]

The first three Big LEO licenses were issued on January 31, 1995 to Loral/ Qualcomm Partnership ("LQP"), Motorola, and TRW Inc. ("TRW"). The Commission declined to license MCHI at that time, along with one other applicant that submitted an amended application, because it ruled that MCHI had not met the strict financial standard that was included in the final Big LEO rules. MCHI argued that there was no basis to delay the licensing of some applicants based on current financing, and that a two-tiered approach could damage later-authorized systems in the marketplace.

Almost two and a half years after the initial Big LEO systems were licensed, on June 30, 1997, MCHI was finally granted authority to construct, launch and operate the Ellipso system, based upon the Commission's eventual determination that all of the remaining applicants could, in fact, be licensed without the need to restrict entry based on financial qualifications.[6] Included in the authorization was a milestone schedule pursuant to the Commission's policy established in the *Big LEO Order*. Accordingly, MCHI was required to begin construction of its first two satellites no later than July 1998, to commence construction of the remaining satellites by July 2000, to complete construction of its initial satellites by July 2001, and to commence operation of its system by July 2003.[7]

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5 One applicant, AMSC, declined to pursue its application under the rules established by the Commission, and instead sought reconsideration of the service rules order. AMSC subsequently declined to proceed with its application after its reconsideration petition was denied.

6 *See Mobile Communications Holdings, Inc.*, 12 FCC Rcd 9663 (1997) ("*MCHI License Order*").

7 *Id.* at 9680 (¶ 42).

As explained more fully below, MCHI satisfied its commencement of construction obligations in advance of the July 1998 and July 2000 deadlines by entering into a binding, non-contingent spacecraft construction contract with Boeing on June 17, 1998 covering the entire Ellipso constellation.[8] The company's entry into this contract (the "Boeing Contract") was reported to the Commission on June 22, 1998.[9] All required progress payments provided for under this agreement were made to Boeing. During the latter part of 1998 and through much of 1999, MCHI and Boeing also negotiated a draft agreement for a substantial investment by Boeing in the Ellipso system.

The Iridium system commenced operations in November 1998, but almost immediately ran into financial difficulties. Within less than a year, the company filed for Chapter 11 bankruptcy protection. Just two weeks after the Iridium bankruptcy petition was filed, a 2 GHz MSS company, ICO Global Communications, Inc. ("ICO"), also sought bankruptcy protection prior to commencement of actual operations.[10] These high-profile, closely-spaced bankruptcy filings focused the attention of the capital markets and the public at-large on the extreme financial stresses to which satellite systems are subject at the outset of operations. Among the adverse effects of these marketplace developments – developments completely beyond the control of MCHI – was the suspension of the discussions between MCHI and Boeing concerning possible substantial investment by Boeing in the Ellipso project.

In March 2000, while Iridium was in the midst of negotiations to continue operations, LQP launched its competing MSS service, Globalstar, in the CDMA portions of the

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8 *See* Satellite Construction and System Definition Contract, dated June 17, 1998. Copies of the Boeing Contract and the Exhibits thereto were supplied to the International Bureau on October 12, 2000.

9 *See* Letter from Pedro L. Rustan, Vice President, Space Segment Technology and Operations Group, MCHI, to Magalie R. Salas, Secretary, FCC, dated June 19, 1998.

10 Elizabeth Douglass, "Satellite-Telephone Firm ICO Files for Bankruptcy Protection," *Los Angeles Times,* Business Section, August 28, 1999.

1.6 and 2.4 GHz Big LEO MSS bands. This service also suffered marketplace setbacks, and like Iridium, did not experience sufficient growth in its subscriber base to produce revenues adequate to finance continuing operations and service its debt. As a result, the company suspended principal and interest payments to bondholders in early 2001 in order to conserve cash.[11] Following lengthy negotiations with creditors restructure its debt, Globalstar also filed for voluntary bankruptcy protection in February of this year.[12]

Despite MCHI's significant efforts toward implementation of its system under the most adverse circumstances, the International Bureau determined in May 2001 that the contract between MCHI and Boeing was inadequate to meet the full-system commencement of construction milestone imposed in its authorization. In its *Nullification Order*, the Bureau, contrary to all existing precedent, delved deeply into the continuing progress of satellite construction under MCHI's contract with Boeing, and reached the novel conclusion that events subsequent to commencement of construction "essentially nullified the construction contract."[13]

MCHI sought reconsideration of the *Nullification Order* on July 2, 2001, which led to the *Recon. Order* of which Commission review is now sought. In the *Recon. Order*, without fully explaining the apparent changes in its rationale, the Bureau retreats from its assertions that mid-course changes in the progress of construction of its initial satellites can lead to license nullification, and instead bases its decision entirely on what it construes to be an omission from the original contract of terms relating to the completion date of the full complement of authorized Ellipso satellites.

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[11] *See* Globalstar Press Release, "Globalstar Reports Results for First Quarter of 2001," dated May 15, 2001 (available at http://www.globalstar.com/EditWebNews/195.html, viewed July 22, 2002).

[12] *See* Globalstar Press Release, "Globalstar, Creditors Finalize Agreement On Debt Restructuring and New Business Model: Company Makes Chapter 11 Filing; Satellite Telephone Service To Continue Uninterrupted," dated February 15, 2002 (available at http://www.globalstar.com/EditWebNews/300.html, viewed July 22, 2002).

[13] *Nullification Order,* 16 FCC Rcd 11768 (¶ 7).

II. MCHI's CONSTRUCTION CONTRACT WITH BOEING SATISFIED BOTH OF ITS CONSTRUCTION COMMENCEMENT MILESTONES

The International Bureau's decision to declare MCHI's authorization null and void should be reversed, and the license should be reinstated *nunc pro tunc*. The Bureau's initial revocation of the MCHI authorization was based in part, and its decision in the *Recon. Order* appears to be based entirely, on the unsound premise that MCHI failed to satisfy the milestone requirement that it commence construction of all of its 16 satellites by the end of July 2000. In fact, as both MCHI and Boeing have reported to the Commission, by entering into a binding contract with Boeing in 1998 that calls not only for the commencement of construction of the first two spacecraft, but also for the commencement of system-wide design, development and design validation activity, MCHI satisfied the July 2000 milestone requirement more than two years ahead of schedule.

In the *Recon. Order,* the International Bureau continues to parse too narrowly the scope of the Boeing Contract when it concludes that MCHI failed to meet the July 2000 full-systen construction commencement milestone. In so doing, the Bureau ignores the significance of the extensive duties that Boeing is contractually obligated to perform with respect to the entire Ellipso system.

The Boeing Contract provides for the construction of the first two satellites of the Ellipso constellation.[14] Of equal significance, the contract also requires Boeing, as the Ellipso System Engineering and Integration ("SE&I") contractor, to perform a lengthy list of duties in connection with the entire Ellipso system.[15] Specifically, as SE&I contractor, Boeing has been tasked with:

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[14] *See* Exhibit A-1 to the Boeing Contract at 5.

[15] *See* Exhibit A-2 to the Boeing Contract at 4.

- finalization of the Ellipso system and segment requirements;[16]
- simulation, analysis, and review of the Ellipso system architecture to validate system performance in the areas of link budgets, coverage, capacity, availability, quality of service, and latency;[17]
- development of a work breakdown structure and integrated master plan for the total Ellipso system;[18]
- scheduling and leading program status reviews;[19] and
- coordination of the Ellipso requirements and segment designs with all Ellipso segment contractors to meet the technical, scheduling, and operational requirements planned for the Initial Ellipso System.[20]

Boeing has confirmed the broad nature of its duties under the contract with MCHI, as well as its understanding that the contractual relationship between the two parties remains in place.[21] In a July 2, 2001 letter to the Commission, the Vice President & CFO of Boeing's Space & Communications Group stated clearly that the contract entered into by MCHI and Boeing implemented an arrangement providing that "Boeing would be the end-to-end system integrator and prime contractor for the entire Ellipso system, *including all sixteen operational satellites and one ground spare.*"[22] It is therefore evident that the parties agreed in 1998 that Boeing would construct the *entire* Ellipso system, including all 16 of the Ellipso satellites – and not just the initial two satellites. The *Recon. Order* does not even acknowledge the Boeing letter, let alone recognize its significance.

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16 *See id.* at § 2.1.1.

17 *See id.* at § 2.1.2.

18 *See id.* at § 2.1.5.

19 *See id.* at § 2.1.7.

20 *See id.* at § 2.1.9.

21 *See* Letter from W.R. Collopy, Vice President & Chief Financial Officer, Space and Communications Group, The Boeing Company to the Federal Communications Commission, dated July 2, 2001. A copy of this letter is attached hereto as Attachment 1.

22 *Id.* at 1.

Instead, the International Bureau has decided to take the extraordinary step of second-guessing the two parties' mutual understanding of their agreement. It is difficult to understand how a non-party to an agreement can believe that it possesses a better understanding of the agreement than do the parties themselves. Certainly, in most circumstances, no arbiter would even attempt to interpret the terms of a contract on its own in the absence of some dispute between the parties, or at least some suggestion that the contract's terms were ambiguous or unlawful. Here, no entity other than the Bureau has questioned the terms of the Boeing Contract.

In addition to making a finding of fact that is at odds with the understanding of the parties, the Bureau has also invoked a never before imposed legal requirement, asserting that "the execution of a contract that does not provide for complete construction of the satellites in question *by a specified date consistent with the licensee's milestone deadline for making its system fully operational* cannot satisfy a construction-commencement milestone requirement."[23] The italicized language in the quoted passage clearly adds an additional requirement to the notion of construction commencement that was not, prior to its announcement in the *Recon. Order,* an aspect of compliance with the commencement of construction milestone. No such language concerning compliance with the construction commencement milestone was proposed or adopted in the Big LEO proceeding, or raised at any point during the lengthy L-band processing round. As stated in both the *Big LEO NPRM* and in MCHI's authorization, the requirement imposed is merely to commence construction[24] – and, historically, all that has been necessary to satisfy this requirement is entry into a binding, non-contingent construction contract

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[23] *See Recon. Order,* DA 02-1468, slip op. at 4 (¶ 11) (emphasis added).

[24] *MCHI License Order,* 12 FCC Rcd at 9680 (¶ 42); *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands,* Notice of Proposed Rule Making, 9 FCC Rcd 1094, 1136-37 (¶ 85) ("With respect to the construction commencement milestone, we have traditionally viewed the execution of a non-contingent construction contract as fulfilling this milestone.")

such as that executed by MCHI and Boeing.[25] The term "commencement" is not commonly understood to encompass provision for the specific timing of completion as well.

Had the Commission intended to impose specific content requirements for satellite construction contracts, it could have done so. Instead, it has found such contracts sufficient if they are both binding and non-contingent. A separate milestone was established for satellite/system completion, and imposing a new requirement that licensees invoke this completion date in their construction contracts would have no impact on whether the licensee ultimately meets the completion deadline. In any case, it is beyond the International Bureau's authority to impose such an additional substantive requirement – the absence of a specific completion date for satellite construction does not render a contract either contingent or non-binding.

The sole precedent cited by the International Bureau for this requirement in the context of MSS or FSS satellite licensing is to a case decided just five days before the *Nullification Order* was issued – and thus long after MCHI and Boeing entered into their contract.[26] More importantly, the case cited by the Bureau is inapposite to the circumstances here in that the alleged construction contract at issue in that case was neither binding, nor entered

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[25] The Commission just recently reiterated this straightforward characterization of the construction commencement requirement. *See Amendment of the Commission's Space Station Licensing Rules and Policies 2000 Biennial Regulatory Review — Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations,* 17 FCC Rcd 3847, 3882 (¶ 105) & n.142 (2002) ("*2002 Space Stating Licensing NPRM*") ("The test for determining whether a licensee has met its construction commencement milestone is whether it has entered into a binding, non-contingent satellite construction contract"). The Commission further stated that "[b]y 'non-contingent contract,' we have always meant that there will be neither significant delays between the execution of the contract and the actual commencement of construction, nor conditions precedent to construction." *Id., citing Norris Satellite Communications, Inc.*, 12 FCC Rcd 22299, 22303-04 (¶ 9) (1997).

[26] *See Recon Order,* DA 02-1468, slip op. at 4 (¶ 11) n.24, *citing Morning Star Satellite Company, LLC,* 16 FCC Rcd 11550, at ¶ 5 (2001), *citing Morning Star Satellite Company, L.L.C.,*. 15 FCC Rcd 11350, 11351,(¶ 4) (IB 2000).

into prior to the expiration of the milestone.[27] Neither of these circumstances applies in this instance. Accordingly, it appears that the Bureau applied to MCHI in the *Recon. Order* a requirement that has never before been made known to MSS licensees – a requirement to provide specific completion dates in the construction contract for each satellite to be constructed.[28] This aspect of the decision alone demands scrutiny by the Commission and grant of the redress sought by MCHI – particularly in light of the arbitrary and inconsistent manner in which it has been applied to MCHI.[29]

MCHI is not aware of any case involving milestone enforcement where the International Bureau has found an otherwise timely, binding and non-contingent contract inadequate to meet the commencement of construction requirement based on the omission of specific terms relating to the date of completion of the satellites to be constructed. Instead, so long as a contract pertains to construction of spacecraft that comply with the technical parameters of its authorization and is both binding on the parties and devoid of unresolved contingencies, such contract has been held to satisfy the commencement of construction milestone, and the Bureau has declined to inquire into the specific terms of the construction contract.[30] This standard is well-established and understood, and is the standard that should have been applied to MCHI.

Moreover, at the same time that it has divested MCHI of its Big LEO license, the International Bureau has declined to take such action concerning the Big LEO license of

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27 *See Morning Star Satellite Company, L.L.C.,*. 15 FCC Rcd 11350, 11352 (¶ 8) (IB 2000).

28 While the Bureau also makes reference to several DBS decisions involving due diligence showings in that service, the Commission has previously made clear that standards established for DBS due diligence to not apply to other satellite services. *See Norris Satellite Communications, Inc.,* 12 FCC Rcd 22299, 22305 (¶ 14) (1997).

29 *See* 47 C.F.R. § 1.115(b)(2)(ii).

30 *Columbia Communications Corp.,* 16 FCC Rcd 10867, 10872 (¶ 12) (2001) (focus on contract terms limited to determination of whether contract is "binding" and "non-contingent").

Constellation Communications Corporation ("Constellation"), which was licensed at the same time as MCHI. The principal distinctions between MCHI and Constellation are that, unlike MCHI, Constellation has not met its full-system construction commencement milestone, has not been an active participant in industry activities, and has spent only a fraction of the time, money and effort that MCHI has toward implementation of its MSS system.[31] Despite these facts, Constellation continues to hold a valid Big LEO license fourteen months after the Bureau declared MCHI's license null and void. While MCHI believes that the Bureau would be correct to permit both MCHI and Constellation to continue to pursue implementation of their MSS systems, the Bureau's apparent policy of selective milestone enforcement is patently discriminatory and completely unacceptable.

Contrary to the findings of the International Bureau, MCHI satisfied the explicit requirements of its authorization to commence construction of its entire constellation when it entered into the Boeing Contract. That contract called for more than just the construction of two satellites, it provided for the commencement of work with respect to the entire Ellipso system, including work on all 16 satellites of the Ellipso constellation, as authorized in MCHI's system license.

When the contractual obligations of Boeing under its agreement with MCHI are properly seen as encompassing far more than just the construction of the initial two Ellipso satellites, even if no specific provision was provided for their time of completion, it is clear that MCHI formally commenced construction on its entire system on June 17, 1998 – the date it entered into the Boeing Contract. Thus, the July 2000 milestone is satisfied, and has been since 1998. MCHI therefore urges the Commission to re-examine the Boeing Contract in this light

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[31] *See also* Section III.D., below, with respect to MCHI's efforts to implement the Ellipso system.

and, in recognition of the fact that MCHI satisfied its construction commencement milestone in 1998, grant this application for review.

III. THE COMMISSION SHOULD TAKE INTO CONSIDERATION THE DEVASTATING IMPACT OF CURRENT NEGATIVE MARKET CONDITIONS ON ITS LICENSEES, AS WELL AS THE UNIQUE CIRCUMSTANCES CONCERNING MCHI

The Bureau's decision should be reversed not only because it is inconsistent with precedent and wrong on the facts, but also because it is simply bad policy. MCHI was handicapped from the outset because the Commission's misguided application of financial qualifications requirements in the Big LEO MSS delayed grant of a license to MCHI by more than two years. Despite this extreme disadvantage, MCHI has persevered and established a long-term contractual relationship that continues to this day with one of the country's premier satellite manufacturers. The Ellipso design and business model differs significantly from those of the other Big LEO licensees, and MCHI remains dedicated to implementing its vision for global MSS.

Although no new 1.6/2.4 GHz applications have been filed in more than a decade, and thus there are no concerns about the impact of "warehousing" pending applicants, the Bureau has changed its focus toward existing satellite companies from one of cooperation and facilitation to one of bureaucratic hostility. The public interest and underlying policies that led to the establishment and licensing of global MSS and other services seem no longer to be relevant. The reversal of the Bureau's focus in recent years is wrong, and the Commission should put a stop to it.

A. The Obstacles Faced By MCHI Are Endemic To The Entire Industry.

In MCHI's case, the Commission should not apply its construction requirements mechanistically in light of the very harsh economic environment currently faced by MSS licensees. MCHI has been forthright in its discussions with Commission staff about the marketplace obstacles that have impeded additional progress toward completion of the Ellipso system. And, as the Commission is well aware, the problems that MCHI faces are not unique to MCHI, but are endemic to the satellite communications industry and to the telecommunications industry as a whole.

The negative conditions in the current telecommunications marketplace need not be described in detail, as they are readily apparent, including the overextension of many telecommunications service providers and the high profile difficulties of multiple MSS service providers, including Iridium, ICO, Globalstar, and Orbcomm. These circumstances, among others, have dramatically impacted the telecom and satellite industries generally, but have had a particularly devastating effect upon the MSS segment of the industry, which was the segment of the marketplace first affected by high-profile commercial disappointments.

As Chairman Powell recently noted, the telecom industry is in a state of "utter crisis."[32] In making this observation, the Chairman explicitly indicated that the present adverse market circumstances could justify giving companies wider regulatory latitude than has previously been contemplated. Principal among the areas that Chairman Powell noted where greater flexibility might be granted was the possibility of a Regional Bell Operating Company acquiring a major long-distance carrier, such as WorldCom. If such a step, which could alter basic industry structure on a permanent basis, can be seriously considered, despite being branded

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[32] *See* "FCC, Faced with Telecom Crisis, Could Let a Bell Buy WorldCom," *Wall St. Journal*, at A1 (July 15, 2002).

"unthinkable" just a few years ago, then there would seem to be little reason not to grant substantial latitude to licensees in less sensitive areas, particularly the timing of facility build-out, where the present economic difficulties have produced the most immediate negative impact and where forbearance will not promote industry consolidation, but may foster greater competition.

The arrested progress of the Ellipso system thus results from economic conditions that lie entirely beyond MCHI's control. When licensee progress toward system completion has been disrupted by events not within the licensee's power, the Commission has routinely granted licensees greater latitude in meeting pre-established system completion deadlines.[33]

In this regard, the current state of development of the MSS industry as a whole, and its vulnerability to loss of confidence in the capital markets, is similar to the circumstances faced by DBS operators in the late 1980s and early 1990s. At that time, in granting multiple licensees additional time within which to construct their licensed DBS systems, the Commission noted that "the negative nature of much of the publicity surrounding earlier attempts at direct-to-home satellite services . . . may have cooled the ardor of potential investors."[34] Taking note of these obstacles, the Commission granted each of the licensed DBS operators affected by these adverse market conditions additional time to construct facilities.[35] In particular, the Commission found that the particular combination of negative economic conditions and the incipient state of the market for a new satellite service together constituted compelling reasons for extending the

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33 *See, e.g., AMSC Subsidiary Corp.*, 10 FCC Rcd 3791 (¶ 4) (IB 1995).

34 *United States Satellite Broadcasting Company, Inc.*, 3 FCC Rcd 6858, 6859 (¶ 12) (1988) ("*USSB*").

35 *See id.* at 6860 (¶ 17) (granting extensions of time to USSB and Dominion Video Satellite, Inc.); *Advanced Communications Corp. and Hughes Communications Galaxy, Inc.*, 6 FCC Rcd 2269, 2274 (¶¶ 27 & 30) (granting extensions of time to Hughes and Advanced).

deadlines for commencement of service,[36] even if neither one by itself would have justified such treatment.

This same confluence of factors is currently present with respect to global MSS services. Like DBS in the late 1980s, global MSS applications remain at a very early stage of development. While the launches of Iridium and Globalstar have provided demonstration of the general technical feasibility of specific MSS system designs, it is not yet clear what model of service delivery will prove to be the most economically viable, and which types of services are most desired by the marketplace. Both operators and licensees need an opportunity to adjust to these changing realities in order to make the best and most efficient use of the allocated spectrum.

B. Any Necessary Forbearance To MCHI Will Not Prejudice Other Parties.

Reinstating MCHI's license and permitting it to proceed with its plans on a delayed schedule would also pose no impediment to future entry. In the *Big LEO Order*, the Commission determined that up to four operators could be accommodated in the CDMA portion of the 1.6/2.4 GHz band on a full band-sharing basis. At the present time, only Globalstar is operational and two other licenses remain outstanding, including MCHI's. Thus, even if all three of the presently licensed systems begin operating simultaneously in the assigned bands, there would still be room for an additional operator, using the additional entry opportunity in the CDMA bands that was originally assigned to TRW.[37] The situation in this instance is therefore similar to the circumstances in *Earthwatch Inc.*, where the Commission noted as a key basis for

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[36] *See USSB*, 3 FCC Rcd at 6859 (¶ 12).

[37] On January 7, 1998, TRW tendered its authorization to the Commission, stating that it would "no longer pursue its Odyssey mobile satellite system and its authorization can be cancelled." Letter from Norman P. Leventhal, Counsel to TRW Inc., to Magalie R. Salas, Secretary, FCC, FCC File Nos. 69-SAT-ML-97 and 70-SAT-ML-97, filed January 7, 1998.

granting a waiver of system milestone requirements, *on its own motion*, the fact that a waiver would "not preclude . . . other service providers from going forward with their business plans."[38]

Moreover, at the present time, the existence of any possible future MSS entrants not currently licensed remains entirely theoretical. There are no applications now on file that seek authority to provide new satellite service in the 1.6/2.4 GHz band. Thus, there are no pending applicants that could be disadvantaged in any way by grant to MCHI of additional time to fully fund and construct its system. Given the present financial environment and its impact upon any entity interested in providing satellite-delivered telecommunications capability, it is very unlikely that new applicants will seek new authority to provide this service. Moreover, MCHI's long record of development of its technological solution for delivery of MSS (further discussed below) places it in a far better position to succeed in offering new competitive services than any potential new entrant that lacks this experience. Accordingly, not only would forbearance toward MCHI promote fulfillment of the promise that the Commission envisioned for MSS in the L- and S-bands, but it would not disadvantage any other current or potential MSS service provider.

In short, allowing Ellipso to retain and develop its license, even if not according to the original timetable imposed in its license, will produce only potential benefits to the public with no countervailing harms. Allowing MCHI to continue development of the Ellipso network will preserve the great potential for additional competition and specialized and innovative services in the global MSS in the L- and S-bands, and will not impinge on any current or potential interest in permitted alternative use of this spectrum.

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38 *Earthwatch Incorporated*, 15 FCC Rcd at 13598 (¶ 11).

C. The Timing Of The Commission's Initial Authorization Was A Contributing FactorTo MCHI's Current Situation.

The Commission itself is not without some responsibility for MCHI's current predicament, having forced MCHI to confront much more difficult marketplace circumstances from those that it might have enjoyed had its authorization been granted earlier. The effects on MCHI of the adverse, industry-wide market conditions described above may have been mitigated had the International Bureau not delayed authorizing MCHI for almost two and a half years, as it first imposed, and then waived, a financial qualification standard. While MCHI was forced to sit on the sidelines, two of its competitors (Iridium and Globalstar) were able to go forth into the capital markets and consume the limited financial resources available for NGSO MSS systems. By the time MCHI was able to secure its license, after a delay of more than 16 months, Iridium was already failing to establish the marketplace penetration necessary to sustain its original business plan, and questions were beginning to surface about the viability of Globalstar's system. The high profile difficulties of the two NGSO MSS service providers first to market serve to tighten the clamps on the investment capital that was available to MCHI

The Commission's role in this regard– *i.e.*, delaying MCHI's authorization due to the imposition of a financial qualification standard it eventually waived (and now contemplates eliminating)[39] – constitutes additional "special circumstances" justifying Commission lenience. Indeed, the delay in authorizing MCHI is akin to the Commission action determined last year to be a special circumstance justifying waiver of the construction commencement milestone of NetSat 28 Company, L.L.C. ("NetSat 28").[40]

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[39] *2002 Space Station Licensing NPRM,* 17 FCC Rcd at 3880 (¶ 99 *et seq.*).

[40] *See NetSat 28 Company, L.L.C.,*16 FCC Rcd 11025, 11027-29 (¶ 7-9) (IB 2001). This order was issued less than a week before the *Nullification Order.*

In the NetSat 28 case, the International Bureau conditioned the company's authorization on the outcome of a Commission investigation into the qualifications of a paging company to be a Commission licensee, as well as the qualifications of its officers and directors. The Bureau's action was made necessary because one of the paging company's principals was the owner of a company with ownership interests in NetSat 28. Ten months later, the Bureau reversed course and terminated the license condition following Commission clarification that its investigation was too broad in scope and should have been limited only to officers without any interest in NetSat 28. By then, however, the damage had been done, as NetSat 28 was unable to raise capital to implement its Ka-band satellite system in time to meet its milestone schedule. Recognizing the financing hardship that NetSat 28 faced "as a consequence of a Commission action," the Bureau took cognizance of the "equity considerations" weighing in favor of NetSat 28 and waived its construction commencement milestone.[41] Similar recognition of the equities of MCHI's circumstances is warranted in this instance.

D. Despite Daunting Setbacks, MCHI Has Diligently Pursued Construction and Implementation Of Its Unique Elliptical Orbit MSS Design And Business Model, And It Intends To Continue Its Efforts To Complete and Launch The Ellipso System.

Despite the many setbacks it has suffered, MCHI has not retreated from its obligations as a licensee to implement its MSS system, has aggressively maintained its relationship with Boeing, and has pursued and secured additional, complementary relationships in an effort to be able to proceed rapidly with implementation once market conditions improve. Far from being idle, MCHI has been as vigorous as it can be under extremely adverse market conditions in positioning itself to move forward quickly. The company continues to pursue multiple options that would allow it to bring its unique service proposal to fruition.

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41 *See id.* at 9.

MCHI remains convinced that its highly innovative orbital architecture, which enables capacity discrimination by population density and time of day, can successfully address a global market where others have failed by offering genuinely low-cost service—down to eight cents a minute wholesale. The Commission acknowledged Ellipso's potential by noting that ". . . MCHI's constellation design is substantially different from the designs of the other proposed Big Leo systems and . . . affording MCHI a chance to carry out its proposal might therefore result in significant enhancement of commercial competition, to the benefit of consumers."[42]

As MCHI has pointed out to the Commission from the beginning, the unique attributes of its elliptical orbit technology, particularly its capability of providing low-cost services that are price-competitive with terrestrial cellular, make it an especially attractive marketplace solution for many types of users. Potential consumers of mobile services, especially those in rural, isolated and other underserved regions, should not be denied the opportunity to benefit from this unique and economical alternative simply because MCHI was not among the first operators to obtain an FCC license.

MCHI has been pursuing the development of the Ellipso system for more than a decade, and made substantial progress toward implementation of its planned system. To date, the company has spent in excess of $80 million on system development, design and construction. The company has been active in industry activities related to spectrum sharing among MSS systems and between MSS systems and other spectrum users, and in 1999 commenced inter-system coordination with Globalstar. Among other significant regulatory developments in which MCHI has been very active was the negotiation of the memorandum of understanding relating to

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42 *MCHI License Order*, 12 FCC Rcd at 9674 (¶ 25).

end user equipment for Global Mobile Personal Communications by Satellite ("GMPCS MoU"), becoming the second entity of more than 125 to sign the agreement.

MCHI's record of progress and performance as a satellite licensee, which is replete with contributions and achievements both large and small, justifies Commission forbearance and lenience under the present crisis conditions in the industry. The instant case is not a circumstance where a licensee has failed to diligently pursue implementation of its planned system. MCHI has demonstrated a sustained commitment to implementing MSS service. However, the company's progress toward completion of its full system has been impeded by economic realities that, while temporary, are beyond its control or the control of any individual system proponent.

Regardless of the currently challenging outlook for MSS financing, MCHI remains bullish with respect to its technical approach to delivery of MSS services and hopeful in regard to the overall promise of the market. While the original premise of the service to be offered by others has been altered by marketplace realities, there remains a critical need for the truly global mobile telecommunications capability that only satellite technology can provide, and which MCHI's Ellipso system can provide at low cost. As the Commission observed in the *Big LEO Order*, global constellations of non-geostationary satellites present a unique platform offering "ubiquitous voice and data mobile services, position location services, search and rescue communications, disaster management communications, environmental monitoring, paging services, facsimile transmission services, cargo tracking, and industrial monitoring and control," providing "Americans in rural areas that are not otherwise linked to the communications infrastructure immediate access to a feature-rich communications network," and offering

"countries that have not been able to develop a nationwide communication service an 'instant' global and national telecommunication infrastructure."[43]

In similar situations of economic adversity, the Commission has found that innovators engaged in developing satellite systems to offer emerging services should be given significant latitude in pursuing their goals. In the context of the DBS licensees mentioned above, for example, the Commission observed that "[i]t would be short-sighted to eliminate the very parties whose efforts, to date, *even if not in accord with a pre-established timetable set without the benefit of experience*, now would appear to have brought them much closer to the threshold of providing service than any non-permittee."[44] In that case, relaxed Commission enforcement of due diligence requirements reaped great benefits in the establishment of healthy and dynamic competitors to terrestrial cable service providers.

IV. CONCLUSION.

For the foregoing reasons, MCHI respectfully requests that the Commission review the International Bureau's flawed decision to nullify MCHI's MSS authorization. When it entered into its 1998 contract with Boeing, MCHI met the June 2000 construction commencement milestone more than two years ahead of schedule. The Boeing Contract has not been abrogated; instead, work under the contract has been temporarily suspended, at the mutual negotiated agreement of the parties, following the development of adverse economic circumstances beyond MCHI's control.

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43 *Big LEO Order*, 9 FCC Rcd at 5940 (¶ 3).

44 *USSB*, 3 FCC Rcd at 6860 (¶ 14) (emphasis added). *See also R/L DBS Company, LLC*, 16 FCC Rcd 9, 16 (¶ 19) (IB 2000) (granting milestone waiver to permit pursuit of "perhaps the last opportunity in the near-term for entry by a competitive provider within the DBS service . . . ").

MCHI also requests that, following reinstatement of the Ellipso authorization, the Commission direct the International Bureau to act favorably on MCHI's request, not considered in the *Recon. Order,* for waiver and deferral of the remaining milestone requirements contained in the Ellipso authorization. Grant of the requested relief will provide affirmative benefits to the public by promoting the delivery at the earliest possible date of new satellite services that have previously been found beneficial by the Commission, without any countervailing prejudice to others.

Respectfully submitted,

MOBILE COMMUNICATIONS HOLDINGS, INC.

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July 24, 2002

Its Attorneys

ATTACHMENT 1

Letter from W.R. Collopy, Vice President & Chief Financial Officer, Space and Communications Group, The Boeing Company
to the Federal Communications Commission, dated July 2, 2001

W. R. (Bill) Collopy
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July 2, 2001

Federal Communications Commission
Washington D.C. 20554

BOEING

Re: Mobile Communications Holdings, Inc. – Authorization to Construct, Launch and Operate an Elliptical Low-Earth Orbit Mobile-Satellite Service System (FCC File Nos. 11-DSS-P-91(6), 18-DSS-P-91(18), 11-SAT-LA-95, 12-SAT-AMEND-95, 158-SAT-AMEND-96; Call Sign S2111)

This letter is written in respect to the Petition for Reconsideration being filed this date by Mobile Communications Holdings, Inc. ("MCHI") concerning the International Bureau's May 31, 2001 Memorandum Opinion and Order ("*MO&O*") finding that MCHI had failed to satisfy a construction milestone requirement contained in its license. Boeing is the world leader in space programs and has made a considerable investment in Ellipso. Boeing is participating in the instant proceeding because the Bureau's *MO&O* is premised in substantial part on its interpretation of a satellite construction contract between Boeing and MCHI. This letter is offered to clarify the scope of that agreement.

Boeing and MCHI entered into a non-contingent memorandum of agreement ("MOA") in April 1998 which provided that Boeing would be the end-to-end system integrator and prime contractor for the entire Ellipso system, including all sixteen operational satellites and one ground spare. A definitive satellite construction contract between the companies was executed two months later, on June 17, 1998. This contract was immediately binding upon both parties. It provided not only for Boeing to construct two complete satellites as the initial spacecraft in the Ellipso system, but also to commence design, system definition, and design validation for the entire constellation, as contemplated by the MOA. Boeing has performed work under both portions of this contract.

From the beginning of its contractual relationship with MCHI, Boeing has been aware that MCHI has engaged in various efforts to finance its system through equity and senior debt. Boeing is also aware that, due to the general unavailability of such financing at that time, MCHI turned to its vendors and partners, including Boeing. These efforts, although promising in the Spring 1999, fell victim to the sequential bankruptcies of Iridium and ICO starting in the Summer of 1999, and the disappointing results associated with Globalstar's commencement of service shortly thereafter.

The ensuing market conditions for satellite systems in particular, as well as for telecommunications and the high tech sector generally, cast a severe pall over the continued implementation of the Ellipso system. Although the contractual relationship between Boeing and MCHI remains in place, work under the definitive satellite construction contract has been suspended at the mutual agreement of the parties.

Boeing remains interested in working with MCHI toward completion and deployment of the entire planned satellite constellation.

Respectfully submitted,

W. R. Collopy
Vice President & Chief Financial Officer
Space and Communications