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Federal Communications Commission
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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

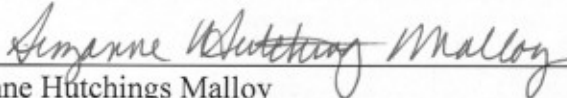
Re: ICO Satellite Services G.P.
File No. 188-SAT-LOI-97; IBFS Nos. SAT-LOI-19970926-00163 *et al.*

Dear Ms. Dortch:

Pursuant to Section 25.143(e)(3) of the Commission's rules,¹ ICO Satellite Services G.P. ("ICO") submits the enclosed certification of compliance with the fourth milestone condition of its 2 GHz mobile satellite service authorization, requiring construction and launch of two non-geostationary satellite orbit satellites by January 17, 2005. In an abundance of caution, ICO also is submitting the enclosed petition seeking a declaratory ruling affirming ICO's interpretation of the fourth milestone requirement or a waiver in the alternative.

Please direct any questions regarding this submission to the undersigned.

Very truly yours,



Suzanne Hutchings Malloy
Senior Regulatory Counsel

cc (w/ encl.): Thomas Tycz (International Bureau)
Karl Kensinger (International Bureau)
Cassandra Thomas (International Bureau)
Columbia Operations Center

¹ 47 C.F.R. § 25.143(e)(3).

CERTIFICATION

Pursuant to Section 25.121(d)(2) of the Commission's rules, I, Dennis Schmitt, certify that:

1. I am a Director of ICO Satellite Services G.P. ("ICO").
2. To the best of my knowledge, information, and belief, ICO has completed construction and launched the first two satellites in its authorized 2 GHz non-geostationary satellite orbit ("NGSO") mobile satellite service ("MSS") system.


Dennis Schmitt

Date: January 10, 2005

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

ICO Satellite Services G.P.)	File No. 188-SAT-LOI-97
)	IBFS Nos. SAT-LOI-19970926-00163;
)	SAT-AMD-20000612-00107;
Petition for Declaratory Ruling or,)	SAT-AMD-20001103-00155
Alternatively, for a Waiver)	

PETITION FOR DECLARATORY RULING OR, ALTERNATIVELY, FOR A WAIVER

Cheryl A. Tritt
Phuong N. Pham
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-1500

Its Attorneys

Date: January 10, 2005

ICO SATELLITE SERVICES G.P.

Suzanne Hutchings Malloy
Senior Regulatory Counsel
2000 Pennsylvania Avenue, NW
Suite 4400
Washington, D.C. 20006
(202) 330-4005

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

ICO Satellite Services G.P.)	File No. 188-SAT-LOI-97
)	IBFS Nos. SAT-LOI-19970926-00163 []
)	
Petition for Declaratory Ruling, or)	
Alternatively, for a Waiver)	

PETITION FOR DECLARATORY RULING OR, ALTERNATIVELY, FOR A WAIVER

ICO Satellite Services G.P. ("ICO"), pursuant to Section 1.2 of the Commission's rules,¹ requests that the Federal Communications Commission ("FCC" or "Commission") approve the attached milestone certification and rule that ICO has met the fourth milestone condition of its letter of intent ("LOI") authorization by launching two non-geostationary orbit ("NGSO") satellites in its 2 GHz mobile satellite service ("MSS") system. Alternatively, pursuant to Section 1.3 of the Commission's rules,² ICO requests a waiver of the satellite launch milestone if the Commission determines that the satellite launch milestone requires both the launch and operation of two NGSO satellites.³

¹ 47 C.F.R. § 1.2.

² *Id.* § 1.3.

³ ICO is concurrently filing an application to modify ("Modification Application") its LOI authorization to permit implementation of a geostationary satellite orbit ("GSO") system, in lieu of an NGSO system, to provide 2 GHz MSS to the United States. As discussed in the Modification Application, further work on the ICO NGSO system has been suspended as a result of events that have given rise to a dispute with the manufacturer. To ensure timely deployment of its 2 GHz MSS system, ICO has entered into a non-contingent satellite manufacturing contract with Space Systems/Loral ("Loral") to construct a 2 GHz MSS system consisting of a single GSO satellite.

I. BACKGROUND

ICO, through a parent company, is authorized under U.K. law to construct, launch, and operate a 12-satellite, NGSO medium earth orbit (“MEO”) 2 GHz MSS system. On July 17, 2001, ICO obtained an LOI authorization from the Commission, reserving 2 GHz spectrum for the provision of MSS in the United States.⁴ The LOI authorization sets forth the following five milestone conditions that ICO must satisfy by specified deadlines: (1) enter into a non-contingent satellite manufacturing contract by July 17, 2002; (2) complete critical design review (“CDR”) by July 17, 2003; (3) begin physical construction of all satellites by January 17, 2004; (4) complete construction and launch of the first two satellites by January 17, 2005; and (5) certify the entire system operational by July 17, 2007.

Many years before the Commission adopted this milestone schedule, ICO, through a parent company, entered into a long-term contractual relationship with Hughes Space and Communications International, Inc. (“Hughes”) in 1995, calling for Hughes to design and build 12 NGSO MEO satellites for the ICO 2 GHz MSS system, as well as to procure and manage contracts with third parties to launch those satellites. Subsequently, in October 2000, Boeing⁵ acquired Hughes’ assets, assumed Hughes’ obligations to ICO under each of the satellite and launch contracts, and thus became ICO’s satellite manufacturer and launch manager.

Pursuant to the manufacturing contract, Hughes and its successor-in-interest, Boeing, completed construction of ICO’s first two NGSO satellites, F1 and F2. The F1 satellite was launched on March 12, 2000, but was destroyed when the second stage of the launch vehicle provided by Boeing-controlled Sea-Launch malfunctioned after launch. The second ICO launch,

⁴ See *ICO Services Limited*, 16 FCC Rcd 13762 (IB/OET 2001) (“*ICO Order*”). The LOI authorization also includes authority to use feeder links in the 5150-5250/6975-7075 MHz bands. Pursuant to Commission approval granted on March 21, 2002, the LOI authorization was assigned on a *pro forma* basis from ICO Services Limited to ICO. See Letter from Fern J. Jarmulnek, International Bureau, FCC, to Cheryl A. Tritt, Counsel, ICO, File No. SAT-ASG-20020128-00015 (Mar. 21, 2002).

⁵ Boeing Satellite Systems International, Inc. and any of its affiliates are referenced herein as “Boeing.”

on June 19, 2001, successfully placed the F2 satellite in orbit. To date, ICO has invested almost \$4 billion in its 2 GHz MSS system infrastructure, \$1.2 billion of which has been invested in the last five years. In addition to the F1 and F2 satellites, six other satellites have been nearly fully assembled and tested, and significant assembly has been completed for four more satellites. ICO also has constructed 11 ground stations around the world.

As a result of this construction progress, ICO previously certified well ahead of schedule to the FCC its compliance with the first three 2 GHz MSS milestones.⁶ The International Bureau (“Bureau”) subsequently ruled that ICO met the first two milestones.⁷ The Bureau has not yet ruled on ICO’s, or any other 2 GHz MSS authorization holder’s, pending compliance certifications for the third 2 GHz MSS milestone.

Under FCC milestone requirements for the ICO NGSO system, ICO also must certify that it has met the fourth milestone requiring construction and launch of two satellites by January 17, 2005. In compliance with this requirement, ICO is submitting the attached milestone certification. ICO concludes that the language setting forth the fourth milestone requirement in its LOI authorization is unambiguous, but out of an abundance of caution seeks an FCC ruling affirming its interpretation of the fourth milestone requirement or a waiver in the alternative.

As discussed in the concurrently filed Modification Application, events giving rise to an unresolved dispute between ICO and its NGSO system manufacturer have resulted in the temporary suspension of further work on the NGSO system. To ensure compliance with the final milestone for commencing service to U.S. customers by July 17, 2007, ICO was compelled to revise its plans to serve the U.S. market. Specifically, ICO has entered into a non-contingent

⁶ See Letter from Cheryl A. Tritt, Counsel, ICO, to Magalie Roman Salas, Secretary, FCC, at 2-3 (Oct. 15, 2001).

⁷ See FCC Public Notice, *Satellite Division Information: 2 GHz MSS Systems in Compliance with Second Milestone Requirement*, 19 FCC Rcd 5330 (2004); FCC Public Notice, *Satellite Division Information: 2 GHz MSS Systems in Compliance with First Milestone Requirement*, 18 FCC Rcd 1732 (2003).

satellite manufacturing contract with Loral that will allow ICO to implement a GSO-based 2 GHz MSS system by the final LOI milestone deadline. As demonstrated below, ICO has met the fourth milestone requirement for its currently authorized NGSO system.

II. ICO HAS SATISFIED THE SATELLITE LAUNCH MILESTONE

The satellite launch milestone, set forth in ICO's LOI authorization, requires that ICO "complete construction and launch" its first two NGSO satellites.⁸ Consistent with that requirement, ICO completed construction and launched the F1 and F2 satellites on March 12, 2000, and June 19, 2001, respectively. The destruction of the F1 satellite after launch by a second-stage launch vehicle failure, however, does not diminish the fact that ICO completed construction and launched that satellite as required under the milestone.

Neither the Commission's rules nor ICO's LOI authorization defines the term "launch." The term, however, is commonly understood in the satellite industry to refer to a specific technical event that is not dependent upon whether the satellite reaches its intended orbit. For example, the NGSO satellite manufacturing contract between ICO and Boeing defines "launch" as the "point in time when there is Intentional Ignition." "Intentional Ignition," in turn, is defined as "the intentional ignition of any first stage motor of the Launch Vehicle by the Launch Services Provider..." Similarly, "Intentional Ignition" is defined almost identically in the insurance policy covering the F1 satellite and launch. Similarly, the policy defines "launch" as "Intentional Ignition that is not followed by Terminated Ignition." Under either definition of "launch," the F1 satellite was launched, even though it ultimately was destroyed and did not reach its intended orbit. In fact, the terms of the NGSO manufacturing contract required ICO to pay full price for the launch of the F1 satellite.

The Commission also has not interpreted the term "launch" to require a *successful* launch or to encompass both the launch *and* operation of a satellite. In contrast, when the Commission in the *Space Station License Reform Order* adopted generic milestone requirements for all new

⁸ See *ICO Order*, 16 FCC Rcd ¶ 34.

satellite licensees, it explicitly imposed a milestone requiring licensees to “launch and operate” a satellite.⁹ Thus, when the Commission intends to require licensees to both launch and operate a satellite as a milestone condition, it uses specific language to convey that intent.

Moreover, no evidence suggests that the Commission’s failure to explicitly require 2 GHz MSS authorization holders to *successfully* launch or to launch *and* operate a satellite was inadvertent. Even if the material omission were inadvertent, the Commission cannot penalize ICO for its own error. Specifically, it is elementary that “due process...preclude[s] an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”¹⁰ Although courts must defer to an agency’s reasonable interpretation of its own rules, the agency “must give full notice of its interpretation” if it seeks “to use that interpretation to cut off a party’s right.”¹¹ Thus, the courts have held that the dismissal of a license application—a sanction much less severe than revocation of a license—is “a sufficiently grave sanction to trigger this duty to provide clear notice.”¹² Because the Commission has not interpreted the term “launch” to require either a successful launch or the launch and operation of a satellite, ICO should not be held to a novel interpretation of which it had no prior notice.

⁹ See *Amendment of the Commission’s Space Station Licensing Rules and Policies*, 18 FCC Rcd 10760, ¶ 174 (2003) (“*Space Station License Reform Order*”); see also 47 C.F.R. § 25.164.

¹⁰ See *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

¹¹ *Id.* at 4.

¹² *Id.* at 3; see also *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 619, 628 (D.C. Cir. 2000) (vacating denial of license renewal application because FCC rule was not “ascertainably certain” and could not be applied against applicant); *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (“The less forgiving the FCC’s acceptability standard, the more precise its requirements must be.”); *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968) (“when the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration”).

III. THE FCC ALTERNATIVELY SHOULD WAIVE THE SATELLITE LAUNCH MILESTONE

If the Commission determines that the satellite launch milestone requires ICO to successfully launch and operate two NGSO satellites, clear Commission precedent exists for waiving the milestone, particularly in view of ICO's nearly \$4 billion investment in its MSS system and its compliance with the milestone requirements to date. ICO's milestone compliance includes the launch of two satellites and near completion of the manufacture of six additional satellites, as well as its continued commitment to implement a 2 GHz MSS system by the original final milestone deadline of July 17, 2007.

The Commission may waive its rules upon a showing of "good cause."¹³ Waiver is appropriate if (1) special circumstances warrant a deviation from the general rule, and (2) the deviation better serves the public interest than strict adherence to the rule.¹⁴ Circumstances warranting a waiver include "considerations of hardship, equity, or more effective implementation of overall policy."¹⁵ The Commission may waive a rule in a particular case if the relief requested would not undermine the policy objective of the rule and otherwise would serve the public interest.¹⁶

Special circumstances warrant a waiver of the satellite launch milestone in this particular case. Having invested almost \$4 billion in its 2 GHz MSS system infrastructure, ICO is the only 2 GHz MSS authorization holder to have completed construction and launch of two satellites. ICO also has constructed 11 ground stations, and the remaining satellites in the NGSO system either have been assembled or are in advanced stages of assembly. To cancel the authorization of a company that has made such concrete progress toward the construction of its MSS system

¹³ 47 C.F.R. § 1.3.

¹⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

¹⁵ *WAIT Radio*, 418 F.2d at 1159.

¹⁶ *Id.* at 1157.

would be grossly inequitable. Moreover, to cancel the authorization of the only 2 GHz MSS authorization holder that has completed the system components discussed above would not serve the public interest.

Under similar circumstances, the Commission has granted milestone waivers to satellite licensees that made substantial progress toward completing their systems. Notably, in *Astrolink*, the Bureau found that a Ka-band fixed satellite service licensee had not met its construction contract milestone because its construction contract had been terminated prior to the milestone deadline.¹⁷ The Bureau, however, waived the milestone because construction of the licensee's first satellite was substantially complete and the licensee was actively working to renegotiate a new construction contract.¹⁸ The Bureau found that "it would not be in the public interest to cancel the license of a company that has completed construction of over 90 percent of its spacecraft."¹⁹

Additionally, in *EarthWatch*, the Bureau on its own motion waived and modified the milestones requiring a remote sensing satellite licensee to complete construction and launch of one of its two satellites.²⁰ The Bureau found that the licensee had commenced construction of both satellites and that "there is no basis for questioning whether EarthWatch intends to proceed with its remote-sensing satellite system."²¹ Thus, the Bureau concluded that grant of a waiver "would not be contrary to the Commission's warehousing policy."²²

¹⁷ See *Astrolink Int'l LLC*, 17 FCC Rcd 11267, ¶ 5 (IB 2002) ("*Astrolink*").

¹⁸ *Id.* ¶ 6.

¹⁹ *Id.*

²⁰ See *EarthWatch Inc.*, 15 FCC Rcd 13594, ¶ 9 (IB 2000) ("*EarthWatch*").

²¹ *Id.* ¶ 10.

²² *Id.*

More recently, the Commission reinstated the 2 GHz MSS LOI authorization of TMI Communications and Company, Limited Partnership (“TMI”) and waived the construction contract milestone upon finding that waiver is warranted by special circumstances and would not undermine the Commission’s milestone policy.²³ The Commission found that a waiver was appropriate, even though TMI itself was not a party to the manufacturing contract.

The circumstances warranting a waiver are even more compelling in this particular case, given that ICO has completed construction *and* launched *two* satellites, and has nearly completed construction of ten additional satellites. Moreover, ICO not only has actively worked to renegotiate a new manufacturing contract, but in fact has executed a non-contingent manufacturing contract with Loral that will allow ICO to meet the final milestone deadline of July 2007. The concrete commitments made by ICO to secure implementation of its MSS system in the United States demonstrate its clear intent to proceed and to expeditiously provide service to the public.

Furthermore, the circumstances preventing ICO from achieving full compliance with its remaining milestones were unforeseeable and beyond ICO’s control. At the time it received its LOI authorization, ICO’s construction efforts were well underway—in fact, several milestones already had been completed—such that ICO fully expected to move through the final construction and testing phases well ahead of schedule. Subsequent construction-related difficulties and other events beyond ICO’s control, however, prevented ICO from proceeding with its plans. Despite its efforts to resolve contract performance and related issues with the manufacturer and to proceed with construction, ICO could not reasonably avoid suspension of further work on its NGSO system.

Grant of the requested waiver will more effectively implement the Commission’s policy objectives and better advance the public interest than strict adherence to the rules. The satellite

²³ See *TMI Communications and Co., Ltd. P’ship and TerreStar Networks Inc.*, 19 FCC Rcd 12603, ¶ 40 (2004).

launch milestone, along with the other milestone requirements, is intended “to ensure that licensees provide service to the public in a timely manner, [and] to prevent warehousing of scarce orbit and spectrum resources.”²⁴ ICO’s substantial expenditures and unparalleled construction efforts demonstrate its longstanding commitment to implement a 2 GHz MSS system in the United States, rather than any intent to warehouse orbit and spectrum resources. Because ICO remains committed to implementing its system in the United States by the original final milestone deadline of July 2007, grant of the requested waiver would enable ICO to provide service to the public in a timely manner, consistent with the policy objectives of the milestone requirements.

IV. CONCLUSION

Based on the foregoing, ICO urges the Commission to approve the attached milestone certification and rule that ICO has met the fourth milestone condition of its LOI authorization by constructing and launching two NGSO satellites. ICO alternatively requests a waiver of the

²⁴ *Space Station License Reform Order*, 18 FCC Rcd ¶ 173.

satellite launch milestone if the Commission determines that the satellite launch milestone requires both the launch and operation of two NGSO satellites.

Respectfully submitted,

ICO SATELLITE SERVICES G.P.



Suzanne Hutchings Malloy
Senior Regulatory Counsel
2000 Pennsylvania Avenue, NW
Suite 4400
Washington, D.C. 20006
(202) 330-4005

Cheryl A. Tritt
Phuong N. Pham
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-1500

Its Attorneys

Date: January 10, 2005

CERTIFICATE OF SERVICE

I, Theresa Rollins, do hereby certify that, on this 10th day of January 2005, I caused copies of the foregoing to be delivered to the following by electronic mail or U.S. First Class Mail (*) as indicated:

Thomas R. Tycz
Chief, Satellite Division
International Bureau
Federal Communications Commission
445 12th Street, SW, Room 6-A665
Washington, DC 20554

Cassandra Thomas
Deputy Chief, Satellite Division
International Bureau
Federal Communications Commission
445 12th Street, S.W., 6th Floor
Washington, DC 20554

Karl Kensinger
Associate Division Chief, Satellite Division
International Bureau
Federal Communications Commission
445 12th Street, S.W., 6th Floor
Washington, DC 20554

Columbia Operations Center*
Federal Communications Commission
9200 Farm House Lane
Columbia, MD 21046-1609



Theresa Rollins