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September 17, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Constellation Communications Holdings, Inc.*, DA 01-1633; File No. 181-SAT-P/LA-97(46), *et al.*

Mobile Communications Holdings, Inc., DA 01-1637; File No. 180-SAT-P/L-97(26), *et al.*

Dear Ms. Dortch:

On behalf of AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (the "Carriers"), enclosed for submission in the record of the above-referenced proceedings please find copies of the Carriers' September 4, 2002 petition to deny a series of recent applications filed by Constellation Communications Holdings, Inc. ("Constellation") and Mobile Communications Holdings, Inc. ("MCHI").[1] The petition is being submitted to ensure that the licensing dockets reflect up-to-date information regarding the viability of the licensees. The petition demonstrates that Constellation and MCHI have not met their initial milestone and thus further supports the Carriers' pending Application for Review.[2]

In accordance with the FCC's rules, copies of the instant letter and enclosure are being submitted via hand delivery to the Secretary with service on the parties to the proceedings.[3]

Respectfully submitted,

Kathryn A. Zachem
L. Andrew Tollin

Enclosure

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[1] *See Public Notice*, Rep. No. SAT-00116 (Aug. 5, 2002); Application of Constellation, File No. SAT-T/C-20020718-00114 (filed July 18, 2002); Application of MCHI, File No. SAT-T/C-20020719-00104 (filed July 18, 2002); Application of Constellation, File No. SAT-MOD-20020719-00103 (filed July 17, 2002); Application of MCHI, File No. SAT-MOD-20020719-00105 (filed July 18, 2002).

[2] *See* Application for Review of AT&T Wireless Services, Inc., Cellco Partnership d/b/a Verizon Wireless, and Cingular Wireless LLC re: DA 01-1631 through 01-1638 (filed Aug. 16, 2001) (demonstrating that applicants should not have been licensed because of existing substantial and material questions of fact concerning viability).

[3] *See* 47 C.F.R. § 1.1202(b)(1); *see also* 47 C.F.R. § 1.1208 examples.

CERTIFICATE OF SERVICE

I, Joy M. Taylor, hereby certify that copies of the foregoing letter have been served this 17th day of September, 2002, by first class United States mail, postage prepaid, on the following:

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STAMP AND RETURN

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Applications of	)	
	)	
Constellation Communications Holdings, Inc.	)	File Nos. SAT-T/C-20020718-00114; SAT-MOD-20020719-00103
	)	
Mobile Communications Holdings, Inc.	)	File Nos. SAT-T/C-20020719-00104; SAT-MOD-20020719-00105

To: The International Bureau

PETITION TO DENY

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September 4, 2002

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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Applications of	)	
	)	
Constellation Communications	)	File Nos. SAT-T/C-20020718-00114;
Holdings, Inc.	)	SAT-MOD-20020719-00103
	)	
Mobile Communications Holdings, Inc.	)	File Nos. SAT-T/C-20020719-00104;
	)	SAT-MOD-20020719-00105

To: The International Bureau

PETITION TO DENY

Pursuant to Section 25.154 of the Commission's rules, 47 C.F.R. § 25.154, AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (jointly, the "Carriers" or "Petitioners") hereby petition to deny the above-referenced applications filed by ICO Global Communications (Holdings) Limited ("ICO"), Constellation Communications Holdings, Inc. ("Constellation") and Mobile Communications Holdings, Inc. ("MCHI").[1] MCHI and

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[1] The Carriers are licensed to compete with MCHI, Constellation and ICO in the nationwide mobile telephony market. *See Seventh Annual CMRS Competition Report*, FCC 02-179, at 13, 41-42 (rel. July 3, 2002); *Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, *Report and Order*, 15 F.C.C.R. 16127, 16128-29 (2000) ("*2 GHz MSS Order*"). As such, the Carriers have standing as parties-in-interest to file this petition. *See* 47 U.S.C § 309(d); 47 C.F.R. § 25.154(a)(4); *FCC v. Sanders Brothers*, 309 U.S. 470, 476-77 (1940); *Atlantic Radio Communications*, 7 F.C.C.R. 5105, 5106 n.3 (1992); *Juarez Communications Corp.*, 56 Rad. Reg. 2d. 961, 962 (RB 1984). Moreover, the Carriers are active participants in pending proceedings examining whether to redistribute and/or reallocate non-viable MSS spectrum to advanced wireless services. *See New Advanced Wireless Services*, ET Docket No. 00-258, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 16 F.C.C.R. 16043, 16054-55 (2001) ("*3G FNPRM*"); Application for Review of AT&T Wireless Services, Inc., Cellco Partnership d/b/a Verizon Wireless, and Cingular Wireless LLC re: DA 01-1631 through 01-1638 (filed Aug. 16, 2001) ("Application for Review"); Petition for Reconsideration of the Cellular Telecommunications & Internet Association
(continued on next page)

Constellation seek to transfer their unbuilt 2 GHz MSS licenses to ICO and to modify the technical specifications set out in their authorizations to conform to ICO's system.[2] For the reasons set forth below, Petitioners have established a *prima facie* case that grant of the applications would be inconsistent with established rules and case law and the public interest.[3] Accordingly, the applications should be denied.

INTRODUCTION AND SUMMARY

The subject applications cannot be granted because doing so would violate the rules and policies established in the Commission's *2 GHz MSS Order*, as well as the conditions in the 2 GHz MSS licenses themselves. That order, released in August 2000, established the rules for a

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("CTIA") in ET Docket Nos. 00-258, 95-18 and IB Docket No. 99-81 (filed Oct. 15, 2001). Accordingly, the Carriers would be adversely affected by a grant of these applications, which would impede their access to a significant portion of this needed spectrum. *See AmericaTel Corporation*, 9 F.C.C.R. 3993, 3995 (1994) (citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)).

[2] *See Public Notice*, Rep. No. SAT-00116 (Aug. 5, 2002); Application of Constellation, File No. SAT-T/C-20020718-00114 (filed July 18, 2002) ("Constellation Transfer Application"); Application of MCHI, File No. SAT-T/C-20020719-00104 (filed July 18, 2002) ("MCHI Transfer Application"); Application of Constellation, File No. SAT-MOD-20020719-00103 (filed July 17, 2002) ("Constellation Modification Application"); Application of MCHI, File No. SAT-MOD-20020719-00105 (filed July 18, 2002) ("MCHI Modification Application"). Concurrently with these applications, MCHI filed an application seeking the *pro forma* assignment of its license to ESBH, Inc., a wholly-owned subsidiary of MCHI. *See* Application of MCHI, File No. SAT-ASG-20020719-00106 (filed July 18, 2002).

[3] Official notice should be taken of the essential facts because they consist largely of matters already before the Commission, FCC rules and decisions, and filings and statements by the applicants themselves. *See, e.g., Palm Beach Cable Television Co.*, 78 F.C.C.2d 1180, 1183 (1980) (FCC can take official notice of facts and information which are a matter of public record); *Real Life Educational Foundation of Baton Rouge, Inc.*, 8 F.C.C.R. 2675, 2676 n.4 (1993) (same); *Rocky Mountain Radio Co.*, 15 F.C.C.R. 7166, 7167 (1999) (FCC can take official notice of facts which have independent support in the Commission's records); *AT&T Corporation*, FCC 02-186, at ¶ 20 (rel. June 20, 2002) (FCC can take official notice of factual issues related to its expertise or of which it has prior knowledge).

satellite-only service expected to serve rural and underserved areas. Eligibility was limited to satellite-only companies with existing applications or letters of intent on file.[4] The FCC also decided to initially provide each applicant with 7 MHz of spectrum – more than the 5 MHz found sufficient to commence operations.[5] It also decided to rely upon: (i) a series of "strictly enforced" milestones in lieu of financial qualifications to prevent spectrum warehousing, and (ii) an anti-trafficking rule to prevent new licensees from transferring bare (non-operational) licenses for commercial gain.[6] Failure to meet the milestones automatically renders an MSS license "NULL and VOID."[7]

Notwithstanding the admission of ICO, a 2 GHz MSS applicant, that a satellite-only service was not viable without terrestrial authority,[8] as well as the proliferation of MSS bankruptcies, the International Bureau (the "Bureau") granted the applications on a satellite-only basis, concluding that MSS licensees should be given the opportunity to "succeed or fail in the market on their own merits."[9] Less than a month later, however, the FCC commenced its *MSS*

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[4] *See 2 GHz MSS Order*, 15 F.C.C.R. at 16129, 16138-40.

[5] *See id.* at 16139-40.

[6] *See id.* at 16150, 16177-80, 16185-86.

[7] *E.g., Constellation Communications Holdings, Inc.*, 16 F.C.C.R. 13724, 13736 (IB/OET 2001) (emphasis in original), *app. for review pending*; *Mobile Communications Holdings, Inc.*, 16 F.C.C.R. 13794, 13805 (IB/OET 2001) (emphasis in original), *app. for review pending*; *see* 47 C.F.R. § 25.143(e)(3).

[8] *See* Letter from Lawrence H. Williams and Suzanne Hutchings, New ICO Global Communications (Holdings) Ltd., to Chairman Michael K. Powell, FCC in IB Docket No. 99-81 (March 8, 2001) ("March 8 ICO Letter").

[9] *E.g., ICO Services, Ltd.*, 16 F.C.C.R. 13762, 13774 (IB/OET 2001), *app. for review pending*.

Flex proceeding to examine whether terrestrial service (referred to by MSS proponents as an "ancillary terrestrial component" or "ATC") is necessary to "assure the commercial viability of MSS systems."[10]

At nearly the same time, the FCC denied a petition filed by the Cellular Telecommunications & Internet Association ("CTIA") to reallocate the 70 MHz spectrum allocation in its *3G FNPRM*, basing its decision on the Bureau's satellite-only marketplace rationale for granting the applications.[11] The *3G FNPRM* also sought comment on whether to permit spectrum aggregation of operational MSS systems and whether to reallocate abandoned and expansion MSS spectrum to advanced wireless services.[12] Most recently, the FCC released its *Space Station NPRM*, seeking comment on whether to eliminate the anti-trafficking rule in conjunction with strengthening its milestones.[13]

On July 17, 2002, the first milestone – the requirement to enter into a non-contingent satellite manufacturing contract – came due. Rather than demonstrating that each had executed a non-contingent contract with a manufacturer, MCHI and Constellation filed letters with the Commission stating that they had entered into agreements to purchase capacity on ICO's

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[10] *Flexibility for Delivery of Communications by Mobile Satellite Service Providers*, IB Docket No. 01-185, *Notice of Proposed Rulemaking*, 16 F.C.C.R. 15532, 15544 (2001) ("*MSS Flex*"), *recon. pending*.

[11] *See 3G FNPRM*, 16 F.C.C.R. at 16055.

[12] *See id.* at 16054-56, 16058-59.

[13] *Amendment of the Commission's Space Station Licensing Rules and Policies*, IB Docket No. 02-34, *Notice of Proposed Rulemaking and First Report and Order*, 17 F.C.C.R. 3847, 3880-86 (2002) ("*Space Station NPRM*") (pending).

satellites until their mergers were approved.[14] They alleged that ICO has met its first three milestones. Thus, MCHI and Constellation claim to have satisfied the non-contingent contract milestone by virtue of their agreements to purchase capacity on ICO's satellites.

At the same time, MCHI and Constellation filed the instant applications to transfer control of their unbuilt 7 MHz MSS licenses to ICO, and to modify their licenses to conform to ICO's technical proposal, claiming such action will serve the public interest.[15] The applications seek a waiver or extension of all milestones, should the Commission determine that the agreements to purchase capacity from ICO do not satisfy the initial non-contingent contract milestone. The applications also ask for a waiver of the anti-trafficking rule based on the FCC's proposal to eliminate it, despite the fact that the proposal has not been adopted and, in any event, is tied to strengthening the milestones.

The subject applications are not grantable and should be denied for the following reasons:

- First, neither MCHI nor Constellation has met its initial milestone requirement. Because failure to satisfy a milestone renders an MSS license null and void, neither has anything to transfer or modify.
- Second, grant of either transfer application would contravene the anti-trafficking rule, and neither applicant has justified a waiver.
- Third, there remain substantial and material questions of fact regarding the basic qualifications of MCHI and Constellation to hold satellite-only licenses. Case law requires that such questions of fact must be resolved before the Commission can consider transfer applications.

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[14] *See* Affidavit of C.J. Waylon, President and CEO of Constellation, appended to Letter from Robert A. Mazer, Counsel for Constellation, to Marlene H. Dortch, Secretary, FCC (July 29, 2002) ("Constellation Certification"); Declaration of David Castiel, President and Executive Officer of MCHI, appended to Letter from Tom W. Davidson, Counsel for MCHI, to Marlene H. Dortch, Secretary, FCC (July 29, 2002) ("MCHI Certification").

[15] *See supra* note 2.

- Fourth, spectrum aggregation by a single 2 GHz MSS licensee prior to the commencement of operations is contrary to the FCC's determinations that 7 MHz of spectrum is more than sufficient to *launch* service.

Grant of the applications is prohibited by numerous FCC rules and policies designed to protect the public interest. Moreover, none of the arguments advanced by the applicants in support of the proposed transactions, even if substantiated, provide an independent basis upon which to grant the applications.[16] To the contrary, grant of the applications will result in one licensee, ICO, obtaining 21 MHz of spectrum prior to the commencement of operations. Such an outcome would prejudge pending proceedings examining what to do with abandoned spectrum, whether to eliminate the anti-trafficking rule and strengthen the milestones, and whether to permit spectrum aggregation prior to operations. Therefore, the applications are not grantable and should be denied.

I. CONSTELLATION AND MCHI HAVE NO LICENSES TO TRANSFER OR MODIFY

A. Failure to Meet the First Milestone Has Rendered the Authorizations NULL and VOID Pursuant to Their License Conditions

The Commission stated that it will "strictly enforce milestone requirements" to "ensure timely construction of systems and deployment of service" in adopting the 2 GHz MSS licensing and service rules.[17] As noted above, milestones were also adopted in lieu of financial qualifications as a threshold requirement.[18] In fact, the Commission explicitly rejected a relaxed approach to milestone enforcement, noting that "there is no policy reason, and no basis in

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[16] *See* discussion *infra* Section IV.

[17] *2 GHz MSS Order*, 15 F.C.C.R. at 16150-51.

[18] *See id.* at 16177.

Commission precedent, for treating a milestone commitment as a flexible, qualitative assessment of a licensee's construction progress,"[19] adding:

> [M]ilestones are obligations placed on licensees as conditions on their authority to launch and operate a satellite, *not* merely times set aside for a qualitative assessment of a licensee's progress. Columbia's license expressly provides that the license would be null and void if it failed to meet its construction commencement milestone. Thus, Columbia has no basis to maintain that its construction commencement milestone was not a "cut-off date."[20]

The Commission explained that strict enforcement of milestones prevents spectrum from being warehoused by licensees to the exclusion of entities prepared to put spectrum into use immediately.[21] Accordingly, all 2 GHz MSS licenses, including those of MCHI and Constellation, are expressly conditioned upon compliance with the milestones and "shall become NULL and VOID with no further action required on the Commission's part" if any milestone is missed.[22]

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[19] *Columbia Communications Corporation*, 15 F.C.C.R. 16496, 16503 (IB 2000).

[20] *Id.* at 16502-03 (emphasis in original).

[21] *See PanAmSat Licensee Corp.*, 16 F.C.C.R. 11534, 11537-38 (2001) (citing *National Exchange Satellite, Inc.*, 7 F.C.C.R. 1990, 1991 (CCB 1992)); *Columbia Communications Corporation*, 15 F.C.C.R. 15566, 15571 (IB 2000)); *Netsat 28 Company*, 15 F.C.C.R. 11321, 11323 (IB 2000); *MCI Communications Corporation*, 2 F.C.C.R. 233 (CCB 1987); *see also Morning Star Satellite Company*, 16 F.C.C.R. 11550, 11551 (2001) ("Milestones are designed to ensure that licensees are proceeding with construction and will launch their satellites in a timely manner and that orbit-spectrum is not being held by licensees unable or unwilling to proceed with their plans.").

[22] *E.g., Constellation Communications Holdings, Inc.*, 16 F.C.C.R. at 13736 (emphasis in original); *Mobile Communications Holdings, Inc.*, 16 F.C.C.R. at 13805 (emphasis in original); *see* 47 C.F.R. § 25.143(e)(3).

The first of the 2 GHz MSS milestones was the requirement that licensees enter a "non-contingent" satellite manufacturing contract by July 17, 2002.[23] The FCC has explained that the term non-contingent contract means that "there will be neither significant delays between the execution of the contract and the actual commencement of construction, nor conditions precedent to construction."[24] In recently affirming the revocation of a license for non-compliance with this milestone, the Commission observed that requiring licensees to execute non-contingent contracts in a timely manner enables the Commission "to determine early on if a license is being held by a licensee that is unable or unwilling to proceed with its plans."[25]

Neither Constellation nor MCHI has entered into a non-contingent contract to construct under their respective licenses and thus have nothing to transfer or modify because their authorizations are null and void.[26] Their milestone certifications state that: (i) MCHI and Constellation have entered into agreements to purchase capacity on ICO's satellite system; (ii) MCHI and Constellation have filed applications to modify their licenses to change the technical specifications to conform to those of ICO's system; and (iii) ICO has met its first three milestones.[27] As a result, MCHI and Constellation state that "[w]ith the execution of the satellite sharing arrangement[s] with ICO, [MCHI and Constellation] ha[ve] now satisfied the initial

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[23] *E.g., Constellation Communications Holdings, Inc*, 16 F.C.C.R. at 13736; *Mobile Communications Holdings, Inc.*, 16 F.C.C.R. at 13805.

[24] *Space Station NPRM*, 17 F.C.C.R. at 3882 n.142 (citations omitted).

[25] *Morning Star Satellite Company*, 16 F.C.C.R. at 11553.

[26] *See also infra* notes 71 and accompanying text.

[27] *See supra* note 14.

construction milestone contained in [their] 2 GHz authorization[s]."[28] The arrangements to purchase capacity are rendered unnecessary and terminate if the Commission approves the concurrently filed applications to transfer control of the Constellation and MCHI licenses to ICO, and are contingent in any event.[29] This does not demonstrate that MCHI and Constellation have met the milestone condition on their licenses.

As a preliminary matter, the filings are based on the faulty premise that the milestone requirements can be jointly satisfied by relying on the efforts of a third party rather than being individually met. There is no basis for this assumption. The Commission has noted the individual nature of its milestones, particularly the initial non-contingent contract milestone, stating that "[i]f a licensee does not even enter into a contract before the milestone to begin construction of *its satellite* specified in *its license*, it raises substantial doubts as to whether *the licensee* intends to or is able to proceed with *its business plan*."[30] In fact, the FCC recently recognized that "our 2 GHz MSS licensing scheme is premised on the construction of eight

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[28] *See* Constellation Certification at ¶ 5; MCHI Certification at ¶ 5.

[29] *See* Constellation Modification Application at 2 n.2; MCHI Modification Application at 2 n.2; *see also* discussion *infra* notes 43-44 and accompanying text. The applications claim that if the Commission fails to approve the proposed transfers, MCHI and Constellation will each "continue to operate its system and offer service" pursuant to the agreements with ICO to purchase capacity on ICO's satellites. Constellation Modification Application at 2 n.2; MCHI Modification Application at 2 n.2.

[30] *PanAmSat Licensee Corp.*, 16 F.C.C.R. at 11544 (emphasis added); *cf. Establishment of Rules And Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, ET Docket No. 92-28, *Report and Order*, 9 F.C.C.R. 5936, 6018 (1994) ("*Each* licensee will be required to adhere to a strict timetable for the system implementation. Failure to meet this timetable will render the authorization null and void. . . . In every case, the licensee's *individual milestone timetable* will be set and become a condition of its authorization. . . . [A]pplicants should not anticipate that their authorization will require anything less than a complete commitment of those resources necessary to execute *the full global system upon which their authorization is premised.*") (emphasis added).

separate systems, and authorizations become null and void if the *particular* system authorized is not constructed."[31] Meeting the milestones is a condition of each license and each MSS licensee must individually meet its milestones to remain qualified to hold its license.

Neither MCHI nor Constellation has presented any evidence that it has entered into a non-contingent contract to construct *its* satellites. To the contrary, the modification applications indicate just the opposite – neither intends to construct any satellites, let alone those covered by its authorization. Instead, each seeks to modify its license to conform its system to that of a third party, ICO. Because MCHI and Constellation each has admitted that its "particular system authorized" will not be constructed, each is "unable or unwilling to proceed with its plans."[32] Under the FCC's milestone criteria, their licenses automatically lapsed by operation of law. Ironically, even ICO has recognized that "2 GHz MSS operators that default on any established milestone for constructing and operating 2 GHz MSS systems will automatically lose their authorizations"[33]

Applicants cite a single Mass Media Bureau ("MMB") case, *United States Satellite Broadcasting Co.* ("*USSB*"),[34] for the proposition that a contract to purchase satellite capacity can satisfy the non-contingent contract milestone. As an initial matter, the comparison is not analogous, because *USSB* is a direct broadcast satellite ("DBS") case involving compliance with

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[31] *3G FNPRM*, 16 F.C.C.R. at 16058 (emphasis added).

[32] *See 3G FNPRM*, 16 F.C.C.R. at 16058; *Morning Star Satellite Company*, 16 F.C.C.R. at 11553.

[33] *See, e.g.,* Letter from Cheryl A. Tritt, Counsel to ICO, to Magalie R. Salas, Secretary, FCC in IB Docket No. 99-81, at 3 (May 25, 2001).

[34] 7 F.C.C.R. 7247 (MMB 1992).

"due diligence" deadlines.[35] While the FCC strictly enforces milestones applicable to fixed and other satellite licensees, it has applied a broader standard when evaluating DBS due diligence compliance.[36] Moreover, in *USSB*, the MMB found that the licensee was only seeking to use the capacity of another licensee in place of one of its three satellites and that it had expended "substantial effort and money to establish its DBS system," *i.e.*, had entered into a non-contingent contract to purchase capacity, had included a payment schedule, had demonstrated compliance with that schedule, and maintained its contractual commitments with respect to its remaining two satellites.[37]

Here, however, the agreements to share capacity are subject to unresolved contingencies,[38] do not appear to include defined payment schedules, do not contain evidence of payments to date, and seek to supplant the entire systems of MCHI and Constellation – not just one satellite. If anything, the *USSB* case serves to demonstrate why the MCHI and Constellation licenses are null and void.

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[35] *See, e.g., Norris Satellite Communications, Inc.*, 12 F.C.C.R. 22299, 22305 (1997) (finding compliance with DBS due diligence standards irrelevant to the inquiry of whether a fixed satellite service licensee has complied with the non-contingent contract milestone).

[36] *See, e.g., Policies and Rules for the Direct Broadcast Service*, IB Docket No. 98-21, *Report and Order*, FCC 02-110, at ¶ 44 n.166 (rel. June 13, 2002) (contrasting "the traditional DBS 'totality of the circumstances' test in determining whether licensees have met their due diligence requirement" with "the strict milestone requirements applicable to FSS licensees"); *compare R/L DBS Company, L.L.C.*, 16 F.C.C.R. 9, 13 (IB 2000) (applying a broader "totality of the circumstances" test in evaluating extensions of due diligence deadlines) *with PanAmSat Licensee Corp.*, 16 F.C.C.R. at 11537-38 (applying a more limited "circumstances beyond the control of the licensee" test in evaluating milestones extensions).

[37] *See USSB*, 7 F.C.C.R. at 7250-51.

[38] *See* discussion *infra* notes 42-43 and accompanying text.

Moreover, reliance on the construction efforts of ICO is misplaced, because it appears ICO's commitment to MSS is contingent on ATC approval. Recent reports indicate that its plans are "on hold" pending the FCC's resolution of the ATC issue in the *MSS Flex* proceeding.[39] An officer of ICO observed: "[w]e do not want to launch a satellite with a failed business plan."[40] It would thus appear that ICO's contract to complete construction of its entire authorized system is contingent upon receiving the relief it seeks in the *MSS Flex* proceeding, *i.e.*, that ICO retains the ability under its contract to elect not to complete construction of its proposed system. In fact, ICO's construction contract expressly affords it the ability to terminate the contract for convenience.[41] In affirming the recent revocation of MCHI's Big LEO satellite system license, the International Bureau made clear that "execution of a contract in which payment and performance obligations were contingent upon elective action by the licensee would not satisfy a

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[39] *See ICO Acquires Ellispo United and Constellation to Boost MSS Service*, Comms. Daily, July 22, 2002 (noting that plans for ICO's 2 GHz MSS system have been "put on hold" while the FCC considers whether to approve ATC, without which ICO has said it may have to abandon its plans), *cited in* Letter from Kathryn A. Zachem, Esq. and L. Andrew Tollin, Esq. on behalf AT&T Wireless Services, Inc., Cingular Wireless and Verizon Wireless to Marlene H. Dortch, Secretary, FCC in IB Docket No. 01-185 *et al.*, at 4 & n.11 (Aug. 15, 2002) ("August 15 Carrier Letter").

[40] Yuki Noguchi, *Iridium Finds Itself in Contractual Bind*, Wash. Post, May 23, 2002, at E5 (quoting Gerry Salemme, Senior Vice President of External Affairs for ICO), *cited in* August 15 Carrier Letter at 4 & n.11.

[41] *See* Composite Compiled Satellite Contract Between Hughes Space and Communications, International and ICO Global Communications (Operations) Limited, Art. 17.1.A (Oct. 3, 1995) ("[ICO] may, upon written notice to Hughes, at any time terminate in whole or in part the Work with respect to this Contract in accordance with the terms set forth below, and Hughes shall immediately cease Work in the manner and to the extent specified."), appended to Letter from Cheryl A. Tritt, Counsel for ICO, to Marlene H. Dortch, Secretary, FCC (Aug. 26, 2002). Petitioners note that a redacted copy of ICO's contract appeared in the FCC's public files for the first time yesterday, September 3, 2002, and thus Petitioners' review of the contract is only preliminary and further review is ongoing.

construction-commencement requirement."[42] Thus, there is a substantial and material question of fact whether ICO is unconditionally committed to MSS, and therefore reliance on ICO's efforts carries with it the ATC contingency.

In any event, the ability of MCHI and Constellation to acquire capacity on ICO satellites, which both licensees rely upon to meet their individual milestone requirements, is itself contingent upon a number of additional events yet to occur, including final payments by each licensee to ICO, the absence of any pending judicial or administrative challenge to MCHI's and Constellation's milestone certifications, and approval of modification applications by the FCC.[43] Thus, reliance on the agreements to purchase capacity on ICO satellites is, by the express terms of those agreements, contingent and will not become effective for some time. Because the agreements to purchase capacity contain unresolved contingencies, it is impossible for MCHI and Constellation to claim, under any circumstances, that *as of July 17, 2002*, they had satisfied their non-contingent contract milestone.[44]

In sum, MCHI's and Constellation's licenses have already been forfeited and thus there is nothing to transfer or modify.

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[42] *Mobile Communications Holdings, Inc.*, DA 02-1468, at ¶ 11 (IB rel. June 24, 2002).

[43] *See* Satellite System Sharing Agreement By and Between ICO Global Communications (Operations) Limited and Mobile Communications Holdings, Inc., July 12, 2002, at §§ 2.4, 2.5, 4.1, appended to MCHI Certification; Satellite System Sharing Agreement By and Between ICO Global Communications (Operations) Limited and Constellation Communications Holdings, Inc., July 16, 2002, at §§ 2.4, 2.5, 4.1, appended to Constellation Certification.

[44] *Cf. USSB*, 7 F.C.C.R. at 7250 (finding that a DBS licensee's proposal to use the capacity of another licensee's satellite in place of one of its three licensed satellites met the first milestone where the contract to purchase capacity "contained no unresolved contingencies").

B. Extension or Waiver of the First Milestone Is Not Justified

To the extent the FCC finds the agreements to purchase capacity do not satisfy the non-contingent contract milestone, each applicant requests that the Commission extend, or alternatively waive, not just the initial milestone but *all* of the milestones applicable to its 2 GHz license "for a limited period of one year."[45] As a result, full service to the public would be delayed from July 2007 to July 2008. These requests are not justified.

1. Applicants Have Not Demonstrated Circumstances Beyond Their Control To Support an Extension

The Commission has established a specific milestone extension standard, providing additional time "only in the case of extraordinary circumstances beyond the control of the licensee."[46] The FCC has found, for example, that the decision to seek a license modification is a business decision within the control of the licensee, and thus is not a "circumstance beyond its control" that would justify a milestone extension.[47] The Commission has also made clear that

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[45] Constellation Modification Application at 17; MCHI Modification Application at 17.

[46] *Columbia Communications Corporation*, 15 F.C.C.R. at 16497; *see, e.g.*, *PanAmSat Licensee Corp.*, 16 F.C.C.R. at 11537-38; *National Exchange Satellite, Inc.*, 7 F.C.C.R. at 1991; *MCI Communications Corporation*, 2 F.C.C.R. at 233; *see also* 47 C.F.R. § 25.117(e)(1).

[47] *See Loral Space & Communications Corporation*, 16 F.C.C.R. 11044, 11047 (IB 2001); *GE American Communications, Inc.*, 16 F.C.C.R. 11038, 11041 (IB 2001); *PanAmSat Licensee Corp.*, 15 F.C.C.R. 18720, 18723 (IB 2000), *aff'd*, 16 F.C.C.R. 11534 (2001); *Columbia Communications Corporation*, 15 F.C.C.R. at 16496-97; *Columbia Communications Corporation*, 15 F.C.C.R. at 15571-72; *Advanced Communications Corporation*, 10 F.C.C.R. 13337, 13340-41 (IB 1995). The Commission has explained that extending milestones on the basis of modification applications would allow licensees to extend their nonperformance indefinitely by repeatedly modifying their proposals. *Loral Space*, 16 F.C.C.R. at 11047 (citing *Advanced Communications*, 10 F.C.C.R. at 13341).

milestone extensions cannot be justified by delays due to mergers,[48] and has repeatedly denied milestone extension requests where "construction of the satellite either had not begun or was not continuing, thus raising questions regarding the licensee's intention to proceed."[49]

The parties here offer *no explanation* as to what circumstances beyond their control led them to seek an extension, not just of the initial milestone, but *all* of their milestones.[50] Indeed, the applications fail to mention the Commission's standard for assessing milestone extensions requests. Because it is clear that mergers and modifications are circumstances within the control of the licensees, there is no basis upon which to grant an extension.

MCHI and Constellation, like all 2 GHz MSS licensees, are well aware that their licenses become null and void if they fail to meet a milestone, and that milestones have been strictly enforced. In fact, MCHI recently lost its Big LEO license because it did not make a binding commitment for full construction of its entire satellite constellation.[51] Nevertheless, neither MCHI nor Constellation asked for a declaratory ruling or otherwise sought Commission approval or clarification regarding whether an agreement to purchase capacity on ICO's system would satisfy the initial milestone prior to the July 17, 2002 milestone deadline.[52] Instead, they filed

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[48] *PanAmSat Licensee Corp.*, 16 F.C.C.R. at 11538; *MCI Communications Corporation*, 2 F.C.C.R. at 234; *Columbia Communications Corporation*, 15 F.C.C.R. at 15571 n.35; *Columbia Communications Corporation*, 15 F.C.C.R. at 16500-01.

[49] *GE American Communications, Inc.*, 16 F.C.C.R. at 11042 (citing *AMSC Subsidiary Corporation*, 8 F.C.C.R. 4040, 4042 (1993)).

[50] *Cf.* Constellation Modification Application at 17-19; MCHI Modification Application at 17-19.

[51] *See Mobile Communications Holdings, Inc.*, 16 F.C.C.R. 11766 (IB 2001), *aff'd*, DA 02-1468 (IB rel. June 24, 2002).

[52] *See Morning Star Satellite Company LLC*, 16 F.C.C.R. at 11554.

modification applications containing requests for extension or waiver of the milestone *on the milestone deadline or one day thereafter.* Such inaction only lends further support to the fact that MCHI and Constellation are unwilling or unable to proceed with construction,[53] and have forfeited their authorizations.

2. Applicants Have Not Cleared the "High Hurdle" for Seeking a Waiver

The applicants ignored the standard for seeking a milestone extension and provide no special circumstances to justify a waiver of *all* their milestones. Rules may be waived only for good cause upon a showing of special circumstances if the relief requested would not undermine the policy objective of the rule and would otherwise serve the public interest.[54] The D.C. Circuit has made clear that "an applicant for waiver faces a high hurdle even at the starting gate," and therefore "it must 'plead with particularity the facts and circumstances'" which warrant a waiver.[55]

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[53] *See PanAmSat Licensee Corp.*, 16 F.C.C.R. at 11544-45 ("PanAmSat claims that there is no basis for assuming that either its merger or its modification applications were motivated by an intent to avoid compliance with its milestones. PanAmSat overstates its case. . . . PanAmSat did not file its ISL modification until 10 days before its construction commencement deadline. While the timing of PanAmSat's modification request does not show conclusively that there was no legitimate business purpose for its ISL request, the timing of the request does raise a legitimate question about whether it filed its modification application at least in part to delay compliance with its construction commencement deadline.").

[54] *See* 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *Dominion Video Satellite, Inc.*, 14 F.C.C.R. 8182, 8185 (IB 1999).

[55] *WAIT Radio*, 418 F.2d at 1157 (quoting *Rio Grande Family Radio Fellowship Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *see also Columbia Communications Corporation*, 15 F.C.C.R. at 16504 (explaining that "[w]e have waived construction commencement milestones only in rare instances").

In support of a waiver, the applicants state that the agreement with ICO will ensure that their spectrum will be "fully used" in a timely manner.[56] This statement glosses over the fact that one of the central purposes of the 2 GHz MSS milestones is to ensure that each licensee proceeds to construct its own system. Absent such efforts, its authorization lapses.[57] Again, the milestone requirement was adopted as a substitute for threshold financial qualifications specific to each applicant. Moreover, the FCC has asked whether to strengthen these requirements. The applicants fail to address how a waiver would not frustrate this qualification to retain their licenses.

The applicants also state that "[b]ecause the ICO system is well-ahead of schedule, there is simply no evidence of an intent to warehouse spectrum."[58] However, the question is not whether *ICO* has sought to undermine the purpose of the rule by warehousing spectrum, but whether *MCHI* and *Constellation* have done so. Both have made no effort to commence construction of their own systems in the year since they received their licenses. Rather, days before the milestone deadline, each entered into a temporary contingent agreement to purchase capacity from ICO until the applications to transfer their licenses to ICO for cash and stock are

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[56] *See* Constellation Modification Application at 17-18; MCHI Modification Application at 17-18.

[57] *See* discussion *supra* notes 30-31 and accompanying text; *Morning Star Satellite Company*, 16 F.C.C.R. 11550, at ¶ 7; *see also EchoStar Satellite Corporation*, DA 02-1534, at ¶ 7 (rel. Jul. 1, 2002) ("The policy objective of the milestone requirement is to ensure that unused spectrum is reassigned as quickly as possible . . . when there are substantial doubts as to whether the licensee intends to or is unable to proceed with its business plan. . . . Holding otherwise would undermine our requirement that all licensees enter into non-contingent construction contracts and our ultimate policy objective of allowing scarce orbit/spectrum resources to be held only by those licensees fully committed to providing service to the public.").

[58] *See* Constellation Modification Application at 17-18; MCHI Modification Application at 17-18.

approved. Under these circumstances, it is clear that neither MCHI nor Constellation "intends . . . to proceed with its business plan."[59] Thus, a waiver would undermine the purpose behind the Commission's milestones.

The applicants' reliance upon *Dominion Video Satellite, Inc.*[60] is misplaced. The Bureau's decision in that case was based upon unique circumstances and policies specific to the DBS context not present here.[61] Moreover, unlike *Dominion Video*, the parties here ultimately seek to do more than share capacity; they seek to merge. The suggestion that a waiver of unmet license conditions is warranted because it will bring service to the public faster than if the licenses automatically lapse and are relicensed has previously been rejected by the Commission in a related context.[62] Equally important, a grant of a waiver on this basis would require a waiver in virtually every case.[63]

Finally, the applications note that the Commission has encouraged MSS licensees to share their spectrum assignments, and therefore contend that agreements to sell capacity will

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[59] *Columbia Communications Corporation*, 15 F.C.C.R. at 16504.

[60] 14 F.C.C.R. 8182 (IB 1999) ("*Dominion Video*").

[61] *See Columbia Communications Corporation*, 15 F.C.C.R. at 16504 ("In the *Dominion Video Order*, . . . the Bureau waived Dominion Video's construction commencement milestone in part because the licensee was already providing service by leasing capacity on Echostar III, a 'state-of-the-art' satellite, and because of the unique channel assignment policies in the Direct Broadcast Service. This is not the case here."); *see also supra* notes 34-37 and accompanying text.

[62] *See, e.g., Interactive Video and Data Service (IVDS) Licenses*, 12 F.C.C.R. 17987, 17992 (1997), affirming 11 F.C.C.R. 5240, 5243 (WTB 1996); *Polycell Communications, Inc.*, DA 02-1471, at ¶ 6 (WTB/CWD rel. June 24, 2002); *Carl N. Davis*, 15 F.C.C.R. 1626, 1630 (WTB/PSPWD 1999).

[63] *See supra* note 61.

allow the parties "to share use of their assigned frequencies."[64] It is unclear how this relates to reasons for a milestone waiver. The Commission already allows licensees to share their spectrum assignments on a secondary basis.[65] Moreover, the sharing arrangement here is only a temporary placeholder until the transfer control of their spectrum to ICO is granted.

C. There Are Outstanding Substantial and Material Issues of Fact Which, If Ever Resolved, Will Require Rescission of the MCHI and Constellation Licenses

There are outstanding substantial and material questions of fact which if resolved pursuant to Section 309 of the Communications Act will require rescission of the Constellation and MCHI licenses, leaving nothing to sell or modify. Prior to the underlying 2 GHz MSS license grants, wireless industry representatives pointed to a spate of bankruptcies, other financial difficulties, and admissions by the applicants themselves that satellite-only service offerings were not viable.[66] The Bureau refused to resolve the viability issue.[67] The Carriers then filed an Application for Review of the license grants, again raising substantial and material questions of fact concerning the viability of MSS applicants to construct and the fact that the matter had not been resolved prior to licensing.[68]

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[64] *See* Constellation Modification Application at 19; MCHI Modification Application at 19.

[65] *See 2 GHz MSS Order*, 15 F.C.C.R. at 16138-49.

[66] *See* Letter from AT&T Wireless Services, Inc., Cingular Wireless LLC, Sprint PCS and Verizon Wireless to Michael K. Powell, Chairman, FCC, in IB Docket No. 99-81 (June 13, 2001); Petition for Rulemaking of CTIA (filed May 18, 2001), *denied*, *3G FNPRM*, 16 F.C.C.R. at 16055, *recon. pending*, Petition for Reconsideration of CTIA in ET Docket No. 00-258 (filed Oct. 15, 2001).

[67] *See, e.g., ICO Services, Ltd.*, 16 F.C.C.R. at 13774.

[68] *See* Application for Review, *supra* note 1.

The questions of fact regarding the viability of satellite-only MSS have been heightened by recent events. The applicants now readily admit that "it is a foregone conclusion that the capital markets will not finance the multiple deployment of all eight 2 GHz MSS systems."[69] They cite to news reports of the bankruptcies of Globalstar, Iridium and ICO for the proposition that investment in MSS phone services has come to a halt, and trade press articles that the "entire MSS industry" is on the verge of collapse.[70] Thus, the underlying issue of whether the original MSS license grants were properly made is in great doubt. If resolved correctly, MCHI and Constellation will have nothing to transfer. It is well-established that where there are outstanding basic qualification issues regarding a transferor or assignor, no public interest finding concerning the transfer application can be made.[71]

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[69] *See* Constellation Modification Application at 5; MCHI Modification Application at 5; Constellation Transfer Application, Exh. 2 at 5; MCHI Transfer Application, Exh. 3 at 5.

[70] *See* Constellation Modification Application at 5 & n.14; MCHI Modification Application at 5 & n.14; Constellation Transfer Application, Exh. 2 at 5 & n.16; MCHI Transfer Application, Exh. 3 at 4-5 & n.16; *see also* Letter from Tom Davidson, Esq., Akin Gump, Counsel for Globalstar's Creditors to Marlene Dortch, Secretary, FCC, IB Docket No. 01-185, Att. 1 at 1 (July 26, 2002) (admitting that without ATC authority, the future of the industry is clear: "Motient, Iridium, ICO, and Globalstar all have filed for bankruptcy. Without ATC authority, Globalstar may not be able to continue as a viable business and it will be difficult, if not impossible, for any MSS licensee to raise sufficient funds to launch a new first or second generation global MSS constellation.").

[71] *See Jefferson Radio Co., Inc. v FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) (affirming the FCC policy of not considering transfers or assignments until the Commission decides whether the assignor/transferor has forfeited its authorization); *see also, e.g., Global Crossing Ltd. and Frontier Corporation*, 14 F.C.C.R. 15911, 15915-16 (WTB/IB/CCB 1999) (citing to *Jefferson Radio* in a common carrier context and noting that it "applies to issues regarding a licensee's basic qualifications that, if proved, could result in the loss of operating authority or denial of a pending application").

II. GRANTING THE TRANSFER APPLICATIONS WOULD VIOLATE THE ANTI-TRAFFICKING RULE AND WAIVER IS NOT JUSITIFED

Any grant of the transfer applications would present a straightforward violation of the Commission's anti-trafficking rule, which prohibits the transfer of "bare" licenses for many satellite services.[72] In the 2 GHz MSS proceeding, the Commission expressly observed that the purpose of the anti-trafficking rule is to ensure that 2 GHz MSS licensees do not sell "bare," *i.e.*, non-operational, MSS licenses for commercial gain.[73] The Commission recently explained that the bases for this prohibition center on two concerns:

> the first is that an entity might obtain a license without any intention to build facilities and operate a communications service, but only in order to resell the bare license in order to make a profit. . . . The second concern is that if an entity receives a license, and then does not construct facilities and operate a communications service but merely resells the bare license, during that period of time, the frequency spectrum assigned through the license would not be put to any use, and the public would be deprived of whatever valuable service might have otherwise been provided by some other entity.[74]

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[72] 47 C.F.R. § 25.143(g)(1).

[73] *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 F.C.C.R. 4843, 4887 (1999) ("*2 GHz MSS NPRM*") (noting that an anti-trafficking rule prohibits "selling bare licenses for profit," but does "permit firms to combine operations or sell *operating* facilities, including their licenses, subject to Commission approval") (emphasis added); *see also Space Station NPRM*, 17 F.C.C.R. at 3885 (equating trafficking with the sale of licenses by their holders "before they have built and operated facilities"); *id.* at 3886 (explaining that "[a]nti-trafficking rules discourage speculators and prevent unjust enrichment of individuals or companies that have no intention of building facilities and actually operating satellite systems.").

[74] *Space Station NPRM*, 17 F.C.C.R. at 3884.

Consistent with these concerns, the *2 GHz MSS Order* rejected arguments by ICO that milestones were enough to prevent speculative applications.[75] The Commission was particularly concerned about trafficking where licenses were not assigned by competitive bidding – as was the case with 2 GHz MSS.[76]

There is no evidence that MCHI or Constellation had any intent to build. Neither entered into a non-contingent satellite manufacturing contract by the date of the first milestone.[77] Now, one year after receiving their licenses for free, MCHI and Constellation seek to transfer their non-operational, unbuilt licenses to ICO "in exchange for payment of cash and shares of stock of ICO."[78] This is exactly what the rule is designed to prevent.

Applicants note that the anti-trafficking rule does not prohibit capital investments by either debt or equity financing.[79] Attempting to place itself into this exception to the rule, Constellation states that its transaction with ICO involves the acquisition of ongoing businesses with "a portfolio of licenses, proprietary technical and business plans, and other significant assets," rather than just the transfer of bare licenses.[80] This assertion is belied by its application.

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[75] *2 GHz MSS Order,* 15 F.C.C.R. at 16186.

[76] *See id.*; *see also 2 GHz MSS NPRM*, 14 F.C.C.R. at 4887 (proposing not to apply an anti-trafficking rule if competitive bidding is adopted).

[77] *See* Constellation Transfer Application, Exh. 2 at 8 (admitting that "neither ICO nor Constellation has commenced any services"); MCHI Transfer Application, Exh. 3 at 7 (admitting that "neither ICO nor MCHI has commenced any services").

[78] Constellation Transfer Application, Exh. 2 at 3; MCHI Transfer Application, Exh. 3 at 3.

[79] *See* Constellation Transfer Application, Exh. 2 at 9 (citing *2 GHz MSS Order*, 15 F.C.C.R. at 16185-86); MCHI Transfer Application, Exh. 3 at 8 (same).

[80] *See* Constellation Transfer Application, Exh. 2 at 8-9.

The Constellation application references only two significant assets: its 2 GHz MSS license and a Big LEO license in the 1.6/2.4 GHz frequencies, for which a request for extension of time to comply with its milestones is pending.[81]

For its part, MCHI's application references only its 2 GHz MSS license – as its Big LEO license has been revoked – and a series of patents.[82] The application does not demonstrate that the 2 GHz license is incidental to the sale of "other facilities," as there are none, let alone show that the sale of the license is incidental to the sale of the patents.[83] To the contrary, it appears that sale of the patents is incidental to the sale of the 2 GHz license, given the fact that nearly half of the patents are listed as "abandoned" or "pending."[84] Thus, like the Constellation application, the MCHI application principally involves the transfer of non-operational licenses to ICO for commercial gain, and is thus directly prohibited by the anti-trafficking rule.

MCHI and Constellation alternatively argue that the anti-trafficking rule should be waived, particularly "where the Commission has proposed to eliminate the rule in its entirety."[85] The rationale that a rule should be waived because the Commission might eliminate it, however,

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[81] *See* Constellation Transfer Application at 1-2 & n.3.

[82] *See* MCHI Transfer Application, Exh. 3 at 1-2, 8.

[83] *See* 47 C.F.R. § 25.143(g)(3) ("If a proposed transfer of radio facilities is incidental to a sale of other facilities or merger of interests, any showing requested under paragraph (g)(2) of this section shall include an additional exhibit which: (i) Discloses complete details as to the sale of facilities or merger of interests; (ii) Segregates clearly by an itemized accounting, the amount of consideration involved in the sale of facilities or merger of interests; and (iii) Demonstrates that the amount of consideration assignable to the facilities or business interests involved represents their fair market value at the time of the transaction.").

[84] *See* MCHI Transfer Application, App. A.

[85] *See* Constellation Transfer Application, Exh. 2 at 10; MCHI Transfer Application, Exh. 3 at 10.

does not meet the "high hurdle" necessary to show that under the circumstances *in this case*, a waiver would not undermine the policy objective of the rule and would otherwise serve the public interest.[86] The Commission has previously held that where the basis of the rule itself is at issue, reevaluation of the rule should occur through the rulemaking process and not the waiver process.[87] Finally, MCHI and Constellation ignore the fact that the Commission's proposal to eliminate the rule is predicated upon *strengthening* the milestones.[88] There is no mention how MCHI or Constellation would meet such requirements. Accordingly, waiver of the anti-trafficking rule is not justified.

III. SPECTRUM AGGREGATION BY A SINGLE 2 GHz MSS LICENSEE PRIOR TO OPERATIONS IS NOT PERMISSIBLE AND, AT A MINIMUM, THE ISSUE IS INVOLVED IN A PENDING RULEMAKING

As noted above, the FCC has stated that "our 2 GHz MSS licensing scheme is premised on the construction of eight *separate* systems, and authorizations become null and void if the *particular* system authorized is not constructed."[89] In their applications, MCHI and Constellation state that if the FCC grants the applications to transfer control to ICO, each "requests authorization to modify its license to permit it to combine its system with the ICO

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[86] *See supra* notes 54-55.

[87] *See, e.g., CBS Inc. Petition for Special Relief*, 87 F.C.C.2d 587, 593 (1981); *Telecom Services, Inc.*, 16 F.C.C.R. 18623, 18626 (WTB/PSPWD 2001); *see also UTV of San Francisco, Inc.*, 16 F.C.C.R. 14975, 14988 (2001) (making clear that a waiver is not warranted merely because reexamination of the rule is ongoing or "on the horizon") (citing *Stockholders of Renaissance Communications Corp.*, 13 F.C.C.R. 4717, 4719 (MMB 1998)).

[88] *See Space Station NPRM,* 17 F.C.C.R. at 3881-86.

[89] *See supra* note 31.

system to provide an integrated service through a single platform."[90] As an initial matter, MCHI and Constellation have no "systems" to combine with ICO – they have only bare licenses. Moreover, the ability to aggregate the spectrum holdings of multiple licensees under the control of a single licensee prior to the completion of construction and the commencement of operations is expressly contrary to the terms and conditions MCHI and Constellation accepted when they received and did not reject their licenses.[91]

The 2 GHz MSS licensing scheme adopted in the *2 GHz MSS Order* awarded 7 MHz of spectrum to each licensee, despite the fact that "our experience has demonstrated that five megahertz of spectrum assigned to one system . . . is sufficient for commencement of service."[92] In so doing, the FCC declared that to the extent additional spectrum is necessary "for expansion of systems that are *operational* and require additional spectrum," it would subsequently evaluate whether to redistribute abandoned spectrum.[93] To allow a single licensee to acquire three times

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[90] MCHI Modification Application at 2 n.2; Constellation Modification Application at 2 n.2.

[91] *See* 47 U.S.C. § 316(a)(1).

[92] *2 GHz MSS Order*, 15 F.C.C.R. at 16138. The applicants fail to acknowledge this on-point decision by the Commission with respect to 2 GHz MSS. Instead, they cite to FCC statements concerning spectrum needs in the L-Band. *See* MCHI Modification Application at 5-6; Constellation Modification Application at 5-6.

[93] *2 GHZ MSS Order*, 15 F.C.C.R. at 16139 (emphasis added); *see also 2 GHz MSS NPRM*, 14 F.C.C.R. at 4861 ("We expect the 2 GHz MSS operators to have spectrum requirements that will be modest initially, but that will increase following the commencement of operations."). The issue of how to treat abandoned spectrum is currently pending in the *3G FNPRM*. *See infra* note 97 and accompanying text. Although the *2 GHz MSS Order* permitted MSS licensees to share each other's spectrum on a secondary basis, and to attain additional spectrum on a primary basis either (i) prior to licensing if not all system proponents proceeded to authorization or (ii) after licensing by meeting certain unserved area criteria, the licensing orders "[declined to] implement that portion of the Commission's *2 GHz MSS Order* that would give each system proponent access to more than 3.5 megahertz of spectrum in each direction on a
(continued on next page)

the amount of spectrum before it, or any of the parties, have completed construction and commenced operations would violate this decision, and therefore precludes a grant of the subject applications. Moreover, while the parties cite to prior ICO statements that 20 MHz of spectrum is necessary for the "long-term commercial viability of 2 GHz MSS systems,"[94] they fail to explain why the 7 MHz provided in their licenses (as well as their ability to share other licensee's spectrum on a secondary basis) is not sufficient to commence operations.[95] It should be noted that none of the parties challenged the Bureau's decision to issue 7 MHz licenses.

Subsequent to the Commission's *2 GHz MSS Order*, the Commission's *3G FNRPM* sought comment on "whether we should permit MSS operators to consolidate *operations*, such that system *operators* that reach an agreement would be able to use, for a single system, all or some portion of the spectrum assigned to their individual systems."[96] In addition to consideration of the transfer or assignment of spectrum currently in operation, the *3G FNPRM* also revisited its treatment of abandoned and expansion spectrum, asking whether to redistribute abandoned spectrum to advanced wireless terrestrial uses and whether it is necessary to retain

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primary basis." *E.g.*, *ICO Services, Ltd.*, 16 F.C.C.R. at 13765; *see 2 GHz MSS Order*, 15 F.C.C.R. at 16138-49. The licensing orders did so because "the Commission has received new proposals for use of the 2 GHz MSS bands," and therefore decided to delay designating any additional spectrum to MSS licensees to "give the Commission the opportunity to consider these proposals." *E.g., ICO Services, Ltd.*, 16 F.C.C.R. at 13765 (citing ICO ATC proposal and CTIA petition to reallocate MSS spectrum).

[94] *See* Constellation Modification Application at 5-6; MCHI Modification Application at 5-6.

[95] In other words, the applications fail to demonstrate why the parties could not wait to file applications until after the licensees become operational and *actually* need the spectrum.

[96] *3G FNPRM*, 16 F.C.C.R. at 16058 (emphasis added).

any of the expansion spectrum set aside for MSS.[97] Grant of the merger applications would prejudge the outcome of the issues raised in this pending proceeding. Action in this adjudicatory context would effectively moot the spectrum management policy questions raised in the rulemaking and would constitute unreasoned decisionmaking.

In sum, the transfer applications are not grantable because the FCC has at present decided that only 7 MHz of spectrum will be licensed to each applicant prior to launching of its service.

IV. IN ANY EVENT, THE REASONS OFFERED TO SUPPORT A GRANT ARE NOT MERITORIOUS

As shown above, grant of the applications is prohibited by numerous FCC rules and policies designed to protect the public interest. Therefore, the applications are not grantable and should be denied.

Although the applications purport to advance several reasons why the proposed transactions are in the public interest,[98] none of these reasons, even if substantiated, provides an independent basis upon which to overcome the demonstrated prohibitions to grant. For example:

- The parties claim that combining resources will expedite delivery of MSS to the public. Yet, it is clear that the proposed transferee, ICO, is not willing or able to

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[97] *See id.*, 16 F.C.C.R. at 16054-56. In response, the wireless industry has argued that "[p]ermitting a stronger licensee to buy a weaker one would artificially support the allocation of spectrum to MSS even after a licensee has concluded that its business plan lacks marketplace viability. If an MSS licensee cannot survive in the marketplace, the Commission should reallocate its frequencies to meet the demand for advanced wireless services . . . ." Comments of CTIA in ET Docket No. 00-258 at 7 (filed Oct. 22, 2001).

[98] *See* Constellation Modification Application at 7; MCHI Modification Application at 7; Constellation Transfer Application, Exh. 2 at 4; MCHI Transfer Application, Exh. 3 at 4.

provide the satellite-only service for which it was licensed.[99] Thus, grant of these applications will do nothing to expedite service to the public.

- Even if true, it is irrelevant under the Commission's public interest standard whether, as the applicants contend, the transaction will enhance "the commercial viability of the ICO system" by providing needed spectrum resources and stimulating capital investment. Commission intervention in the market to pick winners and losers would undermine rather than promote the public interest.[100]

- Finally, there is no basis for the applicants' assertions that the deployment of an integrated system would permit the achievement of "significant operational and spectral efficiencies." Grant of the subject applications is not necessary to achieve this result, because 2 GHz MSS licensees are currently permitted to enter into agreements to coordinate spectrum use by sharing each other's spectrum on a secondary basis.[101]

Accordingly, the reasons offered by applicants to support a grant are not meritorious.

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[99] *See* March 8 ICO Letter, *supra* note 8; *see also, e.g.*, Joint Reply Comments of Cingular Wireless LLC and Verizon Wireless in IB Docket No. 01-185 at 18-19 (filed Nov. 13, 2001) (citing statements by ICO and other MSS licensees and their representatives).

[100] *See Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) (finding that the Commission cannot subordinate the public interest to the interest of "equalizing competition among competitors"); *accord Western Union Telephone Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981); *see also* Michael E. Kanell, *Powell Promises FCC Won't Govern with a Heavy Hand*, Atlanta Journal and Constitution, June 6, 2001 ("We will let the market pick winners and losers and, hopefully, not government policy.") (remarks of Chairman Powell); *Abernathy Sees 'Limited' FCC Role in Wake of WorldCom Woes*, Comms. Daily, July 10, 2002 ("Our job is not to decide who the winners and the losers are . . . .") (remarks of Commissioner Abernathy); "In Defense of the Public Interest," Remarks of Commissioner Copps before the FCBA (Oct. 15, 2001) ("I share with most of you, I believe, a strong conviction that the role of government is not to pick winners and losers.").

[101] *See 2 GHz MSS Order*, 15 F.C.C.R. at 16138-49.

CONCLUSION

For the foregoing reasons, the above-mentioned applications are not grantable and must be denied.

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September 4, 2002

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I, Joy Marie Taylor, hereby certify that a copy of the foregoing Petition to Deny has been served this 4th day of September, 2002, by first class United States mail, postage prepaid, on the following:

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