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December 6, 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' (i) September 25, 2002 "Reply to Opposition to Petition to Deny" and (ii) October 31, 2002 "Response to 'Surreply.'" Both pleadings relate to a series of pending applications filed by Constellation Communications Holdings, Inc. ("Constellation") and Mobile Communications Holdings, Inc. ("MCHI"),[1] and are being submitted to ensure that the licensing dockets reflect up-to-date information regarding the viability of the licensees. The pleadings continue to demonstrate that Constellation and MCHI have not met their initial milestone and thus further support the Carriers' pending Application for Review.[2]

In accordance with the FCC's rules, copies of the instant letter and enclosures 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
Craig E. Gilmore

Enclosures

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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 Marie Taylor, hereby certify that copies of the foregoing letter have been served this 6th day of December, 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

REPLY TO OPPOSITION TO PETITION TO DENY

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September 25, 2002

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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

REPLY TO OPPOSITION TO PETITION TO DENY

Pursuant to Section 25.154(d) of the Commission's rules, 47 C.F.R. § 25.154(d), AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (jointly, the "Carriers") hereby reply to the joint opposition ("Joint Opposition") of Constellation Communications Holdings, Inc. ("Constellation"), Mobile Communications Holdings, Inc. ("MCHI"), and ICO Global Communications (Holdings) Limited ("ICO" or together with Constellation and MCHI, the "Applicants").

INTRODUCTION AND SUMMARY

The Applicants' entire pleading attempts an end run around numerous, settled FCC rules and precedent. They assert that the leased capacity ("sharing") arrangements struck with ICO demonstrate that MCHI and Constellation "have commenced construction"[1] of their 2 GHz MSS

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[1] Joint Opposition to Petition to Deny of Constellation Communications Holdings, Inc., Mobile Communications Holdings, Inc., and ICO Global Communications (Holdings) Limited at 22 (Joint Opposition).

systems and that they will "independently commence services on a timely basis."[2] They claim that the sharing arrangements thus satisfy the initial 2 GHz MSS milestone requirement.

The Applicants ignore the fact that they are using the sharing agreements merely as a bridge to satisfy the first milestone and preserve their licenses while they await Commission approval of the transfer of their MSS spectrum to ICO.[3] In so doing, they gloss over the significance of the MSS milestones -- that each licensee must enter into a non-contingent satellite manufacturing contract within one year of license grant and eventually fully construct and operate its system as a condition of its license. They also cast aside the anti-trafficking rule as if it were not codified. This strategy, if successful, would provide ICO with 21 MHz of spectrum in the 2 GHz band, even though the Commission has already decided that no single MSS licensee should be assigned more than 7 MHz of spectrum prior to offering service. Moreover, grant of the applications would effectively prejudge pending proceedings involving 2 GHz MSS licensee qualifications, what to do with abandoned spectrum, whether to eliminate the anti-trafficking rule and strengthen milestones, and whether to permit spectrum aggregation prior to operations.

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[2] *Id.* at 20.

[3] *See Public Notice,* Rep. No. SAT-00116 (Aug. 5, 2002); Application of Constellation, File No. SAT-MOD-20020719-00103 (filed July, 17, 2002) ("Constellation Modification Application") at Pleading Attach., p. 2 n.2 ("This sharing arrangement will terminate if the Commission approves the concurrently filed application for the transfer of control . . . to ICO Global."); Application of Mobile Communications Holdings, Inc., File No. SAT-MOD-20020719-00105 (filed July 18, 2002) ("MCHI Modification Application") at Attach. Appl. Mod. p. 2 n.2 (same); 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").

The Applicants' own arguments make it plain that the Commission could not grant their applications without contradicting and violating its satellite rules and precedent. The Carriers urge the Commission to deny the applications for the following reasons:[4]

- Contrary to the Applicants' argument, the sharing arrangements do not satisfy the first milestone requirement for the following reasons:
  - -- The Commission provided ample notice that it would strictly enforce milestones and would consider licenses null and void where the milestones were not satisfied.
  - -- MCHI and Constellation have abandoned their 2 GHz MSS system plans and rely only on a sharing/transfer plan which clearly fails to meet the non-contingent satellite manufacturing contract requirement.
  - -- Commission precedent does not support the proposition that sharing can satisfy construction milestone requirements. In fact, case law demonstrates that sharing arrangements are no substitute for meeting construction milestone requirements.
  - -- Waivers or extensions are not justified where MCHI and Constellation plan to sell their bare licenses to ICO and essentially exit the marketplace.

- Second, although Applicants allege that there are no material questions of fact that would warrant a designation for hearing, neither the Commission nor the International Bureau has ever resolved the outstanding questions of fact as to the Applicants' viability. Case law dictates that these issues be addressed prior to consideration of the transfer applications.

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[4] As a threshold matter, the Applicants' assertion that the Carriers' lack standing because they do not occupy the same spectrum is without merit. Their own statement claims that "the Terrestrial Carriers seek to exploit the Applications solely to prevent additional wireless competition and advance their self-interests in appropriating 2 GHz MSS spectrum for their own terrestrial use." Joint Opposition at 4; *see also id.* at ii. Although the Carriers dispute the pejorative characterization, a showing that the proposed action would result in direct economic injury is all that is required. 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 Applicants' statement also recognizes that grant of the applications would preclude the immediate return of 2 GHz spectrum which is subject to pending proceedings in which the Carriers are active participants. *See* Petition to Deny at 1 n.1. 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)). The Applicants fail to address any of this case law or its progeny.

- Third, grant of either transfer application would contravene the anti-trafficking rule, and neither Applicant has justified a waiver.

- Fourth, the Commission's policies do not permit a single 2 GHz MSS licensee to aggregate additional spectrum prior to commencement of operations.

As demonstrated below, the Applicants have nothing to transfer and in any event the applications should be denied.

I. CONSTELLATION'S AND MCHI'S SHARING ARRANGEMENTS DO NOT SATISFY THE MILESTONE REQUIREMENTS

A. The Commission Provided Full Notice that Milestones Would Be Strictly Enforced and Recognized That As a Result Some Licenses Would Be Rendered Null and Void

The Applicants assert that the MCHI and Constellation agreements to purchase capacity on ICO's satellites, pending Commission approval of their license transfers, satisfy the non-contingent satellite manufacturing contract milestone. They ignore the critical importance the Commission placed on milestone compliance in the 2 GHz MSS proceeding. In deciding on the service rules, the Commission concluded that financial qualifications were not necessary because it would "*impose and strictly enforce milestone requirements [to] ensure timely construction of systems and deployment of service.*"[5] The FCC recognized that strict milestone enforcement would be "especially important" in lieu of "financial qualifications as an entry criterion,"[6] and specifically anticipated that spectrum would be "returned to the Commission as a result of

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[5] *Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 15 F.C.C.R. 16127, 16150 (2000) ("*2 GHz MSS Order*") (emphasis added).

[6] *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, 4881 (1999) ("*2 GHz MSS NPRM*").

missed milestones."[7] Indeed, the Commission went so far as to recognize that "there is a *probability*" that 2 GHz MSS spectrum would be returned "as some authorized systems [would] not [be] able to implement service."[8]

Moreover, in granting the 2 GHz MSS licenses, the International Bureau observed that MSS licensees should be given the opportunity to "succeed or fail in the market on their own merits."[9] 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.[10] The milestone regime thus serves a critical purpose, *as acknowledged by the Applicants*.[11]

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[7] *2 GHz MSS Order*, 15 F.C.C.R. at 16150.

[8] *Id.* at 16139.

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

[10] *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) (emphasis in original), *app. for review pending*; *see* 47 C.F.R. § 25.143(e)(3).

[11] The Applicants advocated strict milestone enforcement during the 2 GHz MSS proceeding. *See* Reply Comments of Mobile Communications Holdings, Inc., at 16, IB Docket No. 99-81 (July 26, 1999) (asserting that "the milestone rules are capable of accurately identifying which Applicants will be unable, for financial or other reasons, to complete their proposed 2 GHz MSS systems so that the Commission can reclaim these Applicants' spectrum assignments on a timely basis."); Comments of Constellation Communications, Inc., at 25, IB Docket No. 99-81 (June 24, 1999) (asserting that strict milestones were "a necessary element" of the 2 GHz MSS plan); Comments of ICO Services Limited, at 5, IB Docket No. 99-81 (June 24, 1999) (observing that "milestone requirements, if properly defined and enforced, may be sufficient to prevent warehousing of 2 GHz MSS spectrum by underfinanced and unqualified systems.").

Milestone enforcement "ensure[s] that licensees are proceeding with construction . . . in a timely manner" and 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."[12] The Commission, for example, has stated 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*."[13] The FCC observed recently 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."[14]

The Commission's MSS goal of using milestones to demonstrate the licensees' financial qualifications and thus, conditioning the licenses thereon, is not satisfied by the instant sharing arrangement. MCHI and Constellation have no 2 GHz MSS systems and no plans to construct such systems. Inexplicably, the Applicants contend that Constellation and MCHI have made "binding commitments" for the "construction of *their 2 GHz MSS systems*."[15] Their applications to modify their licenses to conform with ICO's system, however, demonstrate that neither intends to construct any satellites, let alone those covered by their authorizations. Instead, they propose a leased capacity arrangement as a placeholder while the Commission considers whether

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[12] *Morning Star Satellite Company*, 16 F.C.C.R. 11550, 11551 & 11553 (2001).

[13] *PanAmSat Licensee Corp.*, 16 F.C.C.R. 11539, 11544 (2001) (emphasis added).

[14] *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, 16058 (2001) ("*3G FNPRM*") (emphasis added).

[15] Joint Opposition at 7 (emphasis added).

to grant the applications to transfer their spectrum to ICO. The sharing arrangements effectively concede that the "particular system[s] authorized"[16] to MCHI and Constellation will never be constructed, and each is "unable or unwilling to proceed with its plans."[17]

The Applicants deride the Carriers' mention of ICO's construction contract and instead claim that "the Sharing Agreement . . . is sufficient to satisfy [the] first milestone."[18] There is no basis for the Applicants' contention that a sharing arrangement is somehow equivalent to a "non-contingent satellite manufacturing contract," as required by the 2 *GHz MSS Order* and the Constellation and MCHI 2 GHz licensing orders.[19] To the contrary, all Constellation and MCHI have done is execute agreements to purchase capacity from ICO (which would expire if the transfers close). They have not, through any plausible interpretation of the milestone requirement, entered into a "satellite manufacturing contract." 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. MCHI and Constellation failed to satisfy the first milestone; thus, their licenses are null and void and their transfer applications must be denied because there is nothing to transfer.

The Applicants' request that the Commission find that MCHI and Constellation have met the initial milestone by entering into a sharing agreement with ICO is tantamount to a proposal

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[16] *Id.*

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

[18] Joint Opposition at 8.

[19] *2 GHz MSS Order*, 15 F.C.C.R. at 16177-78; *Constellation Communications Holdings, Inc.*, 16 F.C.C.R. at 13724, 13736; *Mobile Communications Holdings, Inc.*, 16 F.C.C.R. at 13794, 13805.

that the Commission change and lower the standard by which it judges milestone compliance. Even if there were a public interest basis for relaxing the enforcement regime, such matters are appropriately addressed in rulemaking proceedings, not in a transfer context *after* the milestone date has expired.[20] Nor did the Applicants seek a declaratory ruling well in advance of the expiration of their licenses. Moreover, this request is inconsistent with decisions already reached in this proceeding and with the pending rulemaking examining the appropriate disposition of the 2 GHz spectrum. In light of the Commission's clear policy on milestone compliance, the Applicants have no lawful basis to assert that their sharing arrangement complies with that policy.

B. Commission Precedent Does Not Support the Proposition that Sharing Arrangements Satisfy the Non-Contingent Contract Milestone

While ignoring MSS milestone precedent, the Applicants assert that "ample" case law demonstrates that satellite licensees "can satisfy construction requirements through the deployment of shared systems."[21] The cases identified in the Joint Opposition do not stand for that proposition. While these cases relate to satellite sharing, most do not involve satisfying milestone obligations. And, those that do address milestone compliance demonstrate that sharing arrangements are no substitute for construction milestones.

- The *GTE Spacenet Corp.* decision, for example, demonstrates that acquiring capacity on another's satellite system does not satisfy a licensee's milestone requirements.[22] The decision rejected Geostar's request that its authority to operate on the GTE Spacenet

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[20] *See Basic Media Ltd. v. FCC,* 559 F.2d 830, 833-34 (D.C. Cir. 1977).

[21] Joint Opposition at 9.

[22] *GTE Spacenet Corp.*, 2 F.C.C.R. 5312 (1987).

system should satisfy the milestone requirements imposed on the first satellite in its own system. The decision concluded that Geostar's milestone requirements remained in effect and its authorization would become null and void unless it obtained a waiver for good cause shown.

- Similarly, in the *Columbia Reconsideration Order,* the International Bureau reaffirmed that Columbia's interim authority to use capacity on a NASA system was conditioned upon the timely construction of its own system in accordance with its milestone obligations.[23]

- The *Dominion Video Satellite, Inc.* decision concluded that sharing would not satisfy the DBS due diligence construction obligations. It found that "[n]othing in the Commission's rules . . . suggests that leasing capacity on another space station licensed to another DBS operator satisfies the due diligence requirement" to construct a satellite.[24]

- The *Columbia Authorization Order* did not involve milestones.[25] Rather, the Commission granted Columbia the authority to use transponders located on a NASA satellite system which was already operational. (Columbia was required to demonstrate its financial qualifications to obtain the authorization).

- The *AMSC* decision did not involve milestones.[26] After successfully constructing and launching its satellite and providing service for two years, AMSC was granted authority to change its space station and operate on a new facility jointly with another provider.

- The *VITA I* decision did not involve milestones.[27] The case involved a licensee, Volunteers in Technical Assistance ("VITA"), that is a non-profit humanitarian aid organization committed to providing educational, health, environmental, and disaster relief communications in developing countries. The decision favorably resolved *de facto* control claims based on the unique facts of the case. (VITA was required to devote at

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[23] *Columbia Communications Corp.*, 16 F.C.C.R. 10867, 10877 (2001) ("In granting Columbia this conditional authorization, we emphasize that this authority will terminate if Columbia does not implement its follow-on satellite in accordance with its required implementation milestones.").

[24] *Dominion Video Satellite, Inc.*, 14 F.C.C.R. 8182, 8185 (1999). The decision went on to grant a waiver of the due diligence rules due to unique circumstances peculiar to the DBS context, as discussed *infra.*

[25] *Columbia Communications Corp.*, 7 F.C.C.R. 122 (1991).

[26] *AMSC Subsidiary Corp.*, 13 F.C.C.R. 12316 (1998).

[27] *Volunteers in Technical Assistance*, 12 F.C.C.R. 13995 (1997).

least 50 percent of its satellite capacity for its non-commercial humanitarian purposes, among other things).

- Finally, the *VITA II* decision concluded that, after the launch of VITA's first satellite failed, a milestone extension was warranted due to circumstances beyond VITA's control.[28] The decision also resolved similar *de facto* control claims in VITA's favor. It denied, however, VITA's application to construct, launch and operate a second satellite on financial qualification grounds.[29]

The Applicants also reference the announced AT&T Wireless Services ("AWS") and Cingular plan to enter into a joint venture to serve rural highways and adjacent areas. There is no similarity between whether MCHI and Constellation have complied with the milestone requirement and this venture. The AWS-Cingular arrangement is not a stop-gap measure intended to avoid license termination as the parties await action in a pending transfer proceeding. Rather, it is a plan to expand service that has nothing to do with satisfying build-out requirements. Indeed, the initial construction requirement has been met for each license involved. Moreover, the spectrum to be held by the joint venture was awarded to carriers by auction, in contrast to the spectrum assigned to MCHI and Constellation, who obtained their licenses for free. As Congress and the Commission have often stated, a competitive bidding license regime allows the spectrum to be awarded to those entities that value it most highly and

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[28] *Volunteers in Technical Assistance*, 12 F.C.C.R. 3094 (1997).

[29] The only other case the Applicants refer to is the Mass Media Bureau case, *United States Satellite Broadcasting Co.* ("*USSB*"), 7 F.C.C.R. 7247 (MMB 1992), which the Carriers addressed in their Petition to Deny. The Applicants fail to respond to the distinctions raised by the Carriers, namely that the DBS provider USSB was only seeking to use the capacity of another licensee in place of one of its three satellites and that it had, among other things, maintained its contractual commitments with respect to its remaining two satellites. *See* Petition to Deny at 10-11. The Applicants acknowledge that DBS licensees are subject to a different (and less exacting) "totality of the circumstances" standard for milestone compliance. (They assert without substantiation that the Commission does not apply different standards to the satellite construction requirement). *See* Joint Opposition at 11-12 n.34.

will put it to its highest and best use.[30] As a result, the Commission imposes milestone requirements on satellite licensees who obtain their licenses for free but not on terrestrial carriers who acquire spectrum via auction.[31]

C. Waiver or Extension of the First Milestone is Not Justified

In the Joint Opposition, the Applicants reiterate the requests by Constellation and MCHI to waive or extend not only the initial milestone but *all* of the milestones applicable to their licenses. These requests seek a one year delay in milestone compliance. They are not justified.

The Commission may waive rules 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.[32] The Applicants provide no special circumstances, and waiver in this instance would undermine the policy objectives of the milestone regime.

The fact that 2 GHz MSS licensees such as Constellation and MCHI are "unable or unwilling" to build their systems in a timely manner is not a special circumstance.[33] Indeed, the Commission envisioned that some 2 GHz MSS systems would be authorized but never built.

Inexplicably, the Applicants continue to assert that the Commission should grant the waiver requests because they "do not seek any delay in the use of assigned spectrum or delivery

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[30] *See, e.g.*, H.R. REP. NO. 105-149, Title III, Subtitle D (June 24, 1997); *2 GHz MSS Allocation NPRM*, 10 F.C.C.R. 3230, 3233 (1995); *Second Competitive Bidding Order*, 9 F.C.C.R. 2348, 2349-50 (1994).

[31] Moreover, the governing rules for each service -- Parts 24 and 25 -- involve wholly separate regulatory regimes.

[32] *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. at 8184.

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

of service to the public."[34] This claim is flatly inconsistent with the requests for waiver or extension submitted by MCHI and Constellation. MCHI expressly petitions the Commission to "waive or alternatively, extend each of the milestones applicable to its 2 GHz license for a limited period of one year."[35] Likewise, Constellation seeks a waiver or extension "for a limited period of one year."[36] As the Carriers pointed out in their petition, this would delay delivery of service from 2007 to 2008.[37] Contrary to Applicants' claims, a waiver or extension would authorize service delay and spectrum warehousing, and thus undermine the goals of the milestone regime.

The Applicants' continued reliance on *Dominion Video Satellite, Inc.* to justify a waiver here is misplaced. That decision was based upon unique circumstances in the DBS context not present here. Dominion was already providing service by leasing capacity on another provider's "state-of-the-art" satellite and was subject to a unique and challenging DBS channel assignment. The International Bureau found that grant of its waiver would allow Dominion to expand DBS service immediately.[38] The Applicants put forth no such unique circumstances. They are not subject to a limiting channel assignment, they are not providing service, and grant would not

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[34] Joint Opposition at 21. They also argue that Constellation and MCHI seek to waive "a requirement to construct separate facilities . . . and not the milestone deadline themselves." *Id.* at 19.

[35] MCHI Modification Application at 17.

[36] Constellation Modification Application at 17.

[37] *See* Petition to Deny at 14.

[38] *Dominion Video Satellite, Inc.*, 14 F.C.C.R. at 8185-87; *see also Columbia Communications Corporation*, 15 F.C.C.R. at 16504 (emphasizing Dominion's unique circumstances that led to a waiver).

introduce a new service "immediately" – in fact they seek a delay in delivery of service by one year. Equally important, strict milestone enforcement will enable the return of the spectrum as the Commission envisioned in the *2 GHz MSS Order* and, more recently, in the *3G FNPRM.*

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."[39] A waiver or extension of the milestone is not justified where MCHI and Constellation plan to sell to ICO their bare licenses – in effect, their rights to operate on 14 MHz of 2 GHz spectrum – and exit the MSS marketplace if the Commission grants their pending license transfer applications.

With regard to the extension request, the Applicants do not dispute the exacting standard imposed by the Commission, providing additional time "only in the case of extraordinary circumstances beyond the control of the licensee."[40] Nor do they deny Commission precedent finding that milestone extensions cannot be justified by delays due to mergers.[41] Nor do they offer an explanation why circumstances beyond their control led them to seek an extension, not just of the initial milestones, but all the milestones. They merely state that MCHI and Constellation have expended resources that would justify an extension.[42] 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.

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

[40] *Columbia Communications Corporation*, 15 F.C.C.R. 16496, 16497 (2000).

[41] *PanAmSat Licensee Corp.*, 16 F.C.C.R. at 11538.

[42] *See* Joint Opposition at 22.

On September 4, 2002, the International Bureau issued the *Motorola and Teledesic* decision denying petitions to waive or extend the non-contingent construction milestone requirement. The decision emphasized that the parties failed to apprise the bureau "in a diligent manner" of the problems related to compliance, and that they must accept the consequences.[43] As noted above, neither MCHI nor Constellation asked for a declaratory ruling or otherwise sought clarification whether sharing would satisfy the initial milestone in advance of the July 17, 2002 deadline. Instead, they filed applications on the milestone deadline or the day thereafter. Such inaction lends further support to the fact that MCHI and Constellation are unwilling to proceed with their business plan and have forfeited their authorizations.

II. THE ANTI-TRAFFICKING RULE PROHIBITS THE PROPOSED TRANSFERS OF CONTROL

Notwithstanding the Applicants' curious claim that the anti-trafficking rule does not apply to the proposed transfers, a grant of the applications would ignore a straightforward violation of the rule.[44] In the 2 GHz MSS proceeding, the Commission expressly stated 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.[45] More recently, the Commission explained that the rule is based on two concerns: (i) an entity might obtain a license without any intention

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[43] *Motorola, Inc. and Teledesic, LLC*, DA 02-2146, ¶ 21(IB rel. Sept. 4, 2002); *see also Morning Star Satellite Company, L.L.C.*, 16 F.C.C.R. 11554 ("when satellite licensees do not pursue procedural avenues available to them to address concerns surrounding their authorizations, but rather wait until their authorizations are null and void due to their failure to act, their inaction ensures the result that the milestone concept is designed to prevent").

[44] 47 C.F.R. § 25.143(g)(1).

[45] *2 GHz MSS NPRM*, 14 F.C.C.R. at 4887 (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).

to build facilities but only to resell the bare license for profit; and (ii) if the licensee does not construct facilities and sells the bare license, that spectrum has not been put to use.[46]

There is no evidence that MCHI or Constellation had any intent to build their systems once they obtained their licenses in 2001. Although they make claims regarding investment in satellite research and development, there is no record as to the efforts MCHI and Constellation undertook in the last year to build their 2 GHz MSS systems. Now they seek to transfer their non-operational, unbuilt licenses to ICO "in exchange for payment of cash and shares of stock of ICO."[47] This is exactly what the rule was designed to prevent.

The Applicants claim that MCHI and Constellation are exempt from the rule because the proposed transfers of control are part of larger transactions involving significant assets that do not result in any for-profit sale. Given their refusal to insert into the public record any documentation regarding asset valuation or consideration, substantial questions exist regarding the true value of the non-license assets and whether the licenses are "incidental" to the transaction[48] -- or whether MCHI and Constellation are primarily seeking to transfer bare licenses.

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[46] *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, 3884 (2002) ("*Space Station NPRM*").

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

[48] *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.").

The Applicants assert, for example, that MCHI and Constellation will transfer MSS intellectual property and proprietary business and technical plans that relate in part to their 2 GHz MSS systems. In the sole case upon which the Applicants rely, the International Bureau observed that the transfer at issue did not involve a bare license but included intellectual property of value because a satellite was under construction and the buyer was committed to completing construction and launching the satellite as the seller designed it.[49] Here, the value of the non-license assets is subject to substantial question given that MCHI and Constellation propose to abandon their system designs and fold their spectrum into ICO's MSS system. As a result of these open issues, the Applicants have failed to demonstrate that the license transfers are part of larger transactions that involve other valuable assets and do not result in a profit.

Finally, the Applicants have not demonstrated any special circumstances that would warrant a waiver of the anti-trafficking rule. They assert that waiver of the rule "would permit MCHI and Constellation to access spectrum authorized under their licenses and provide service within the existing milestone timeframe."[50] A waiver of the rule, however, would allow MCHI and Constellation to sell their bare licenses and exit the marketplace. The Applicants also note that a waiver is warranted because the Commission is considering the possibility of eliminating the rule in the *Space Station NPRM*. They completely ignore that the proposal is tied to strengthening the milestones.[51] Equally important, waiver of the anti-trafficking rule here would

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[49] *See NetSat 28 Company, L.L.C.*, 16 F.C.C.R. 14471, 14477-78 (2001).

[50] Joint Opposition at 28.

[51] *See Space Station NPRM*, 17 F.C.C.R. at 3886 ("[W]e request comment on whether the Commission should repeal its anti-trafficking rules with respect to satellite licenses issued under the strictly enforced milestone requirements we propose above.").

undermine the Commission's expectation that 2 GHz MSS spectrum would be returned to the Commission to decide how best to redistribute this valuable resource.

III. THE APPLICANTS ARE NOT CORRECT IN THEIR ASSERTION THAT THE FCC INTENDED NO LIMITS ON SPECTRUM AGGREGATION BY A SINGLE LICENSEE PRIOR TO COMMENCING OPERATIONS

The Applicants take the position that the Commission intended no restriction on the ability of a single licensee to aggregate MSS spectrum prior to the commencement of operations. That, however, is not what present Commission policy says. The 2 GHz MSS licensing scheme awarded 7 MHz of spectrum to each licensee, recognizing that 5 MHz "is sufficient for commencement of service."[52] 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."[53] As noted above, the Commission also 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."[54] The Applicants' position, taken to its logical conclusion, would allow an MSS licensee to aggregate 70 MHz of spectrum prior to construction. To the contrary, the Commission's decision, taken to its logical conclusion, would result in all 2 GHz MSS spectrum reverting to the Commission if none of the eight systems is constructed.

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[52] *2 GHz MSS Order*, 15 F.C.C.R. at 16138.

[53] *3G FNPRM*, 16 F.C.C.R. at 16058 (emphasis added).

[54] *Id.*

The Applicants contend that the *2 GHz MSS Order* permits licensees to acquire "expansion" spectrum for service to underserved areas, whether or not they are operational.[55] They fail to acknowledge, however, that this policy was limited to a discrete amount of spectrum set-aside and available to *all* licensees, provided they make a showing that "they will offer MSS capacity directed at providing service to consumers in unserved areas."[56] The Commission opted for this approach to ensure that all licensees, and not just the first in operation, would have an opportunity to obtain access to the expansion spectrum. In no way did the concept of expansion spectrum suggest that one licensee could acquire others *prior to* operations.

The Applicants also assert that they can transfer licenses because the Commission allowed licensees to "aggregate Selected Assignments by reaching agreement for sharing of those assignments among themselves."[57] Rather than providing for license transfers, however, this policy allows operators of separate systems to share spectrum. For example, the Commission observed that several CDMA operators could agree to design their independent systems to overlap their spectrum use. The Commission noted that "[i]n order to be able to aggregate spectrum, system proponents capable of sharing may want to coordinate launch of the first satellites *in each system* to coordinate the selection of Selected Assignments."[58] The Commission also addressed use of other licensees' spectrum by adopting a secondary usage policy. Again, however, the policy and its rationale apply only *after* licensees have constructed

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[55] *See* Joint Opposition at 30.

[56] *2 GHz MSS Order*, 15 F.C.C.R. at 16416.

[57] *Id.* at 16141 (*cited in* Joint Opposition at 30).

[58] *Id.* at 16141 n.91 (emphasis added).

and initiated operations. Applicants wrongly attempt to bootstrap that policy to fit their situation. Acceding to their argument would in fact undermine the Commission's cardinal goal that these licensees build and launch their systems. In no way did the Commission contemplate one licensee aggregating 21 MHz of spectrum prior to construction and launch.

IV. OUTSTANDING SUBSTANTIAL AND MATERIAL ISSUES OF FACT MUST BE RESOLVED BEFORE THE TRANSFERS CAN BE REVIEWED

In the event that the Commission does not find the licenses null and void, there are outstanding substantial and material questions of fact concerning the viability of MSS applicants which, if resolved pursuant to Section 309 of the Communications Act, will require rescission of the Constellation and MCHI licenses. The Applicants do not dispute that where there are outstanding basic qualification issues regarding a transferor or assignor, no public interest finding concerning the transfer application can be made. Instead, they merely state that the Carriers "fail to allege any material questions of fact that would warrant a designation of a hearing."[59] Although these issues were presented prior to grant of the 2 GHz MSS licenses, the International Bureau did not resolve the viability issue. Contrary to the Applicants' claims, these substantial and material issues of fact – which have only been heightened by recent events – have never been resolved.

As the Commission has recognized previously, the D.C. Circuit decision in *Jefferson Radio* "mandates that issues bearing on the basic qualifications of both the seller and the buyer be resolved prior to Commission action on transfer or assignment" applications.[60] The

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[59] Joint Opposition at 18 n.54.

[60] *Roy M. Speer,* 11 F.C.C.R. 18393, 18397 (1996) (citing *Jefferson Radio Co. v FCC,* 340 F.2d 781 (D.C. Cir. 1984)).

Commission should not – indeed, it lawfully cannot -- consider the pending transfers until it decides these basic qualification issues.

CONCLUSION

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

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September 25, 2002

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OCT 31 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

RESPONSE TO "SURREPLY"

AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (jointly, the "Carriers") hereby respond to the Joint Response to Reply ("Surreply") of Constellation Communications Holdings, Inc. ("Constellation"), Mobile Communications Holdings, Inc. ("MCHI"), and ICO Global Communications (Holdings) Limited ("ICO") (jointly, the "Applicants"). The Surreply is both procedurally defective and wrong on the merits, and thus should not be considered.

The Applicants submitted their filing "[p]ursuant to Section 25.154 of the Commission's rules,"[1] but that rule section quite clearly makes no provision for the filing of a surreply and the Applicants have not sought leave to file outside the normal pleading cycle.[2] The only

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[1] Surreply at 1.

[2] *See* 47 C.F.R. § 25.154. That section provides only for the filing of: (i) a petition to deny an application within 30 days of public notice; (ii) an opposition within 10 days after the petition is filed; and (iii) a reply within 5 days after the period for filing oppositions has expired. While Applicants served their Opposition by hand, thus limiting the reply period to 5 business days, *c.f.* 47 C.F.R. § 1.4(g), (h), they served the instant Surreply by mail. *See* Joint Opposition

(continued on next page)

explanation given for the filing is the erroneous claim that the Carriers "raised new arguments" in their Reply concerning the applicability of certain cases relied on by Applicants in their modification applications.[3] In fact, these cases were relied on in the Applicants' own Opposition to "demonstrat[e] that satellite licensees can satisfy construction requirements through the deployment of shared systems."[4] The Carriers did nothing more than respond to this contention (and the cited cases) in their Reply,[5] consistent with the FCC's rules.[6] There is thus no legitimate reason for filing the Surreply – the Applicants simply want the last word, even though the rules provide otherwise.

On the merits, the Applicants attempt to show how the cases demonstrate that sharing arrangements can satisfy the milestones – something they failed to do in their Opposition (other

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to Petition to Deny (filed Sept. 18, 2002) ("Opposition"); *see also* Reply to Opposition to Petition to Deny (filed Sept. 25, 2002) ("Reply"). Service copies of the Surreply were not received by Carriers' counsel until Monday, October 28, 2002. No explanation is offered as to why the Applicants needed nearly a month to submit an unauthorized filing.

[3] *See* Surreply at 2.

[4] Opposition at 9-10. Applicants disingenuously suggest that they cited to these cases in their modification applications "for the proposition that sharing arrangements can satisfy construction milestone conditions." Surreply at 2. In fact, the cases cited in their applications were used only for the general proposition that the Commission has previously approved satellite sharing arrangements – an accurate assertion, yet irrelevant to the question of whether satellite sharing can satisfy the non-contingent contract milestone. *See* File No. SAT-MOD-20020719-00103, at 11-12 (filed July 17, 2002); File No. SAT-MOD-20020719-00105, at 11-12 (filed July 18, 2002) (collectively, "Modification Applications"). As the Carriers correctly noted in their Petition to Deny, only *United States Satellite Broadcasting Co.*, 7 F.C.C.R. 7247 (MMB 1992) ("*USSB*"), was cited for the proposition that a satellite sharing arrangement can satisfy the non-contingent contract milestone. *See* Petition to Deny at 10-11 (filed Sept. 4, 2002) ("Petition"); Modification Applications at 13. The remaining cases were not cited for that proposition until the Opposition.

[5] *See* Reply at 8-10.

[6] *See* 47 C.F.R. § 1.45(c) (replies shall address "matters raised in the oppositions").

than with respect to the *USSB* case) and their applications.[7] They first discuss *USSB*, but there can be no basis to revisit this case as it was addressed by the Carriers in their Petition and the Applicants in their Opposition.[8] They offer *no* justification for a second "bite at the apple." In any event, the Surreply ignores the fact that *USSB* is a DBS case subject to "totality of the circumstances" compliance with due diligence requirements, rather than a fixed or mobile satellite case involving strict enforcement of milestones.[9] Moreover, the case does not involve the use of sharing arrangements as a temporary bridge to prevent license cancellation for failure to meet strictly enforced milestones prior to the transfer of unbuilt licenses – the case here.

Their discussion of other cases fails to demonstrate that sharing arrangements have been found to satisfy the non-contingent contract milestone. Ironically, the Applicants now admit that three of the cases *they cited* in their opposition, *DVSI*, *GTE*, and *Columbia Reconsideration*,[10] do not support their argument, and thus attempt to distinguish the cases and show why they are *not* applicable. They describe the cases as involving "fundamentally different circumstances," making the holdings in these cases "inapplicable" to their MSS proposal.[11] Of course, this explanation begs the question – if the cases are inapplicable, why were they relied on? One can only assume the Applicants are trying to put the best spin on cases they probably wish they had

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[7] *See* Opposition at 9-10, 11; Modification Applications at 11-13.

[8] *See* Petition at 10-11, 13 n.44; Opposition at 11; *see also* Reply at 10 n.29.

[9] *See* Reply at 10 n.29; Petition at 10-11.

[10] *Dominion Video Satellite, Inc.*, 14 F.C.C.R. 8182 (IB 1999) ("*DSVI*"); *GTE Spacenet Corp.*, 2 F.C.C.R. 5312 (CCB 1987) ("*GTE*"); *Columbia Communications Corp.*, 16 F.C.C.R. 10867 (IB 2001) ("*Columbia Reconsideration*").

[11] *See* Surreply at 5-6, 7-8.

never mentioned. At the same time, the Applicants do not dispute the fact that the *DVSI* case held that "*[n]othing* in the Commission's rules . . . suggests that leasing capacity on another space station licensed to another DBS operator satisfies the due diligence requirement."[12] They also admit that the Commission "*declined* to allow Columbia's sharing arrangement to satisfy the milestones" in *Columbia Reconsideration*, and "*declined* to allow Geostar's sharing arrangement to satisfy the requirement to launch a satellite" in *GTE*.[13]

With respect to the *AMSC* and *Columbia Authorization* cases, the Applicants attempt to read-in a discussion of milestones by implication, despite the fact that both cases dealt with operating satellites, and thus there was no need for a discussion of milestones. The *AMSC* case, for example, dealt with replacing a satellite that had been launched and operated for more than two years with a satellite that would be shared.[14] Because any milestones applicable to the satellite would have already been satisfied, there was no need to discuss milestones. With regard to the *Columbia Authorization* case, the Applicants actually admit that "[i]t was unnecessary for the Commission . . . to address any milestone compliance issues because Columbia sought to use capacity on satellites that were already launched and operational."[15] Moreover, Applicants make no mention of the fact that at the time Columbia received its license, the Commission required it to demonstrate its financial qualifications, in contrast to the 2 GHz MSS rules which rely upon

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[12] *DVSI*, 14 F.C.C.R. at 8185 (emphasis added), *cited in* Reply at 9; *c.f.* Surreply at 5-6.

[13] Surreply at 7 (emphasis added).

[14] *See* Reply at 9 & n.26 (citing *AMSC Subsidiary Corp.*, 13 F.C.C.R. 12316 (IB 1998) ("*AMSC*")).

[15] Surreply at 6 (citing *Columbia Communications Corp.*, 7 F.C.C.R. 122 (1991) ("*Columbia Authorization*").

strict enforcement of milestones in lieu of financial qualifications.[16] Thus, even if milestones had been at issue, it is unclear what precedential effect the case would have given the higher standard of milestone compliance that applies here.[17]

Finally, Applicants' attempt to rely on the remaining two *VITA* cases is equally unmeritorious. Neither of the *VITA* orders addressed whether a sharing arrangement satisfied the non-contingent contract milestone.[18] This is not surprising because the original VITA authorization *did not even have a non-contingent contract milestone*, only construction completion and launch milestones.[19] In any event, VITA also had to demonstrate that it was financially qualified, and thus the *VITA* orders are of no precedential value to Applicants.[20]

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[16] *See Columbia Authorization*, 7 F.C.C.R. at 123, 124; Reply at 9 & n.25.

[17] In 2000, the Commission elected to place heightened importance on milestone compliance for 2 GHz MSS licensees. Specifically, the Commission concluded that financial qualifications for 2 GHz MSS applicants were not necessary because the FCC would "impose and strictly enforce milestone requirements [to] ensure timely construction of systems and deployment of service." *Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 15 F.C.C.R. 16127, 16150 (2000), *cited in* Reply at 4.

[18] *See Volunteers in Technical Assistance*, 12 F.C.C.R. 13995 (1997) ("*VITA I*"); *Volunteers in Technical Assistance*, 12 F.C.C.R. 3094 (IB 1997) ("*VITA II*") (collectively, the "*VITA* orders").

[19] *See Volunteers in Technical Assistance*, 11 F.C.C.R. 1358, 1372 (IB 1995) ("*VITA Authorization*").

[20] *See VITA I*, 12 F.C.C.R. at 14002-03; *VITA II*, 12 F.C.C.R. at 3100; *VITA Authorization*, 11 F.C.C.R. at 1361-63; *see also supra* n.17 and accompanying text.

CONCLUSION

Having failed to justify their unauthorized pleading on procedural or substantive grounds, it should be returned without consideration. As the Carriers demonstrated in their Petition to Deny and Reply, the applications are not grantable and must be denied.

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