

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of Secretary

Application of)
)
THE BOEING COMPANY)
)
For Modification of Authority For Use)
of the 1990-2025/2165-2200 MHz and)
Associated Frequency Bands for a)
Mobile-Satellite System)

File No. SAT-MOD-20020726-00113

Int'l Bureau

AUG 1 2 2003

Front Office

To: ~~The Commission~~
Satellite Division

**OPPOSITION OF
THE BOEING COMPANY**

Received

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SUMMARY

ICO's Application for Review provides no substantive basis for challenging the decision of the International Bureau and the Office of Engineering and Technology (hereinafter "the Bureau") to grant Boeing's application to modify its 2 GHz MSS network in order to employ a geostationary ("GSO") satellite. ICO's pleading is also full of procedural errors and demonstrates a complete disregard for the Commission's rules.

ICO is incorrect in claiming that Commission precedent does not permit the modification of a satellite network license in order to convert from a non-geostationary ("NGSO") constellation to a GSO network, or vice-versa. Multiple Commission decisions, including one released recently on June 21, 2003, clearly permit such modifications.

ICO also provides no basis for arguing that the Commission should bar GSO-based 2 GHz MSS networks from operating in the United States in globally allocated 2 GHz MSS spectrum. The Commission considered and rejected such a prohibition when it adopted service rules for 2 GHz MSS networks. ICO's request constitutes a grossly untimely Petition for Reconsideration of the Commission's decision. Even if changed circumstances warrant a reexamination of the issue (which they do not), it would be highly inappropriate to consider a change in the Commission's rules as a part of an individual license modification proceeding in which only two of the 2 GHz MSS licensees are parties.

ICO is also incorrect in claiming that the grant of Boeing's modification application is inconsistent with the Commission's spectrum allocation policies for the 2 GHz MSS service. The Commission expressly refrained from dictating whether 2 GHz MSS licensees must construct GSO or NGSO networks. Instead, the Commission decided to authorize both types of

networks in order to promote the goal of permitting them to compete in the marketplace to provide users with the best combination of services and prices, and designed the spectrum assignment and licensing process in a way that ensured that each licensee's choice of satellite network had no impact on the capabilities of the other licensees in the band.

Finally, ICO has no basis for arguing that the Bureau improperly limited its analysis of the public interest benefits of Boeing's modification application. ICO acknowledges that the Bureau relied in part on the Commission's policy that permitting satellite licensees to modify networks promotes the public interest by permitting licensees to employ the latest technology and services. ICO fails to acknowledge, however, that the Bureau relied on other public interest factors as well, which were discussed in the Bureau's order.

In addition to the substantive deficiencies, ICO's Application for Review should be dismissed because of its numerous procedural deficiencies. ICO has not satisfied any of the requisite steps for filing an Application for Review with the Commission. First, ICO cannot claim that it made a reasonable or legitimate attempt to participate in this proceeding before the Bureau. Second, ICO fails to explain why it was not possible to participate in the earlier stages of the proceeding. Third, regardless of whether ICO participated in this proceeding before the Bureau, ICO fails to demonstrate that it is aggrieved in any way by the Bureau's decision. Fourth, ICO raises numerous issues in its Application for Review without first having provided the Bureau with an opportunity to pass on them.

If ICO was legitimately aggrieved by the Bureau's decision, its appropriate recourse would have been to file a Petition for Reconsideration with the Bureau. As a sophisticated participant in the Commission's processes, ICO's decision to ignore the Commission's

procedural requirements must be deemed to be deliberate. The Commission should affirm the importance of its rules by dismissing ICO's Application for Review with prejudice and refusing to consider ICO's alleged concerns.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
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Application of)
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THE BOEING COMPANY) File No. SAT-MOD-20020726-00113
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To: The Commission

**OPPOSITION OF
THE BOEING COMPANY**

The Boeing Company (“Boeing”), by its attorneys, and pursuant to Section 1.115(d) of the Commission’s rules, 47 C.F.R. § 1.115(d), hereby opposes the Application for Review of the decision of the International Bureau and the Office of Engineering and Technology (hereinafter “the Bureau”) granting Boeing’s application to modify its 2 GHz MSS license filed by ICO Global Communications (Holdings) Limited (“ICO”).¹

I. INTRODUCTION

ICO provides no legitimate justification for challenging the Bureau’s decision to grant Boeing’s modification of its 2 GHz MSS network. Clear Commission precedent exists for the grant of Boeing’s modification application. The Bureau’s decision is fully supported by the public interest and is entirely consistent with the Commission’s spectrum allocation policies.

¹ See *Application of The Boeing Company*, DA 03-2073 (Int’l Bur. & OET 2003) (“*Boeing License Modification Order*”).

ICO also provides no basis for the Commission to consider prohibiting 2 GHz MSS licensees from using geostationary (“GSO”) satellite networks to access globally harmonized spectrum. It would be particularly inappropriate to consider such a change in the Commission’s rules as a part of a license modification proceeding.

In addition to providing no substantive basis for the Commission’s review of the Bureau’s decision, ICO’s pleading is replete with procedural errors and demonstrates remarkable disregard for the Commission’s rules and process. Boeing addresses each of ICO’s procedural errors below. Boeing, however, first addresses the complete absence of any substantive basis for ICO’s Application for Review of the Bureau’s decision.

II. CLEAR COMMISSION PRECEDENT EXISTS FOR MODIFYING BOEING’S SATELLITE LICENSE TO SHIFT FROM A NGSO TO A GSO NETWORK

ICO’s primary argument is that, by permitting Boeing to convert from a NGSO to a GSO satellite network, the Bureau issued a new satellite license to Boeing, rather than modifying Boeing’s existing license.² The entire basis for ICO’s argument is a recent decision by the Commission addressing the appropriate filing fee that should be paid by Sirius Satellite Radio, Inc. for the modification of its satellite network license to convert from a GSO to a NGSO network.³ Fortunately, the Commission’s decision in the *Sirius* case clearly and unequivocally resolves the issue raised by ICO.

At issue in the *Sirius* case was whether Sirius should pay the application filing fee applicable for a modification of a GSO network, or for a new NGSO network. Sirius argued that

² *Application for Review of ICO Global Communications (Holdings) Limited*, FCC File No. SAT-MOD-20020726-00113, at 3-5 (July 24, 2003) (“*ICO Application for Review*”).

³ See *Sirius Satellite Radio, Inc.*, 18 FCC Rcd 12551 (2003) (“*Sirius Order*”).

it should pay the lower fee for the modification of a GSO network because the Commission was modifying Sirius' satellite license, which, at the time, authorized the launch of GSO satellites.

In rejecting Sirius' request for a lower fee, the Commission explained that its filing fee schedule is not necessarily based on whether a license is modified, but on the type of physical network being constructed by the licensee and the amount of work that is likely to be required of FCC staff in approving such a network.⁴ Based on this approach, the Commission observed that Sirius's application

did not "modify" either the GSO system previously approved or a previously approved NGSO system (as contemplated under the statutory fee provisions governing modification of these two types of satellite systems), but asked the Commission to approve an entirely new NGSO system, wholly different in its technical and operational aspects.⁵

Prior to making this observation, however, the Commission expressly agreed with Sirius that the Bureau had appropriately modified Sirius' existing satellite license and had not issued Sirius a new license, stating:

In 1997 the Commission granted Sirius a license to construct, launch, and operate an SDARS system consisting of two geostationary satellites. Sirius' assertion that the Bureau only granted a modification of that license is technically correct under Section 309 of the Act.⁶

⁴ See *id.*, ¶¶ 11 & 11 n.6. The Commission observed that this approach ensures that all licensees that build the same type of satellite network pay the same fee. See *id.*, ¶ 11.

⁵ *Id.*, ¶ 10.

⁶ *Id.*

Based on these observations, the Commission concluded that, although it was modifying Sirius' satellite network license, Sirius' decision to construct a NGSO network, rather than a GSO network, necessitated that Sirius pay the filing fee for a new NGSO network.⁷

ICO's Application for Review misrepresents the substance of the Commission's decision in the Sirius case by selectively quoting the Commission's observation that Sirius was building "an entirely new NGSO system," without acknowledging the Commission's more relevant conclusion that the Bureau properly "granted a modification of [Sirius'] license," rather than granting a new license.⁸ Therefore, contrary to ICO's claim, the *Sirius* decision clearly stands for the proposition that the Commission will permit the modification of a satellite network license in order to substitute a different type of satellite constellation, including NGSO to GSO or vice-versa.

ICO also argues that the Bureau erred in granting Boeing's modification application without first initiating an additional 2 GHz MSS processing round.⁹ In making this argument, ICO appears to be attempting to draw a distinction between major and minor modification applications, apparently arguing that a "major" modification must be subject to a new processing

⁷ For this same reason, the International Bureau appropriately required Boeing to pay the \$93,375 application filing fee for a new GSO satellite when it filed its application to modify its 2 GHz MSS system to employ a GSO satellite rather than a NGSO constellation.

⁸ See *ICO Application for Review* at 4 (quoting *Sirius Order*, ¶ 10).

⁹ See *id.* at 5.

round. ICO's subsidiary, Teledesic, made this same argument in the Commission's Satellite Licensing Reform proceeding.¹⁰ The Commission corrected Teledesic, explaining

According to Teledesic, "current law" distinguishes between major and minor modifications based on whether the modification increases or decreases the likelihood of interference. Teledesic is mistaken. Section 25.117(d) does not distinguish between major and minor modifications for space station licenses.¹¹

In any event, Boeing's modification of its 2 GHz MSS network will result in no additional interference to other 2 GHz MSS licensees. Boeing designed its GSO network to be able to operate in the same service link spectrum as its NGSO network, ensuring that no harmful interference will result to other 2 GHz MSS operators such as ICO. The Bureau was therefore completely justified in granting Boeing's application.

III. NO REASON EXISTS TO RESTRICT THE SPECTRUM ASSIGNMENT RIGHTS OF 2 GHz MSS NETWORKS USING GSO SATELLITES, PARTICULARLY AS PART OF AN INDIVIDUAL LICENSE MODIFICATION PROCEEDING

ICO further argues that, in granting Boeing's modification application, the Bureau should have prohibited Boeing "*and other GSO proponents*" from operating GSO-based 2 GHz MSS networks in globally harmonized 2 GHz MSS spectrum.¹² Although ICO fails to acknowledge this fact, the Commission addressed this specific issue when it adopted service rules for 2 GHz MSS networks and concluded that it would be inappropriate to restrict GSO-based 2 GHz MSS

¹⁰ See *Amendment of the Commission's Space Station Licensing Rules and Policies 2000 Biennial Regulatory Review -- Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations*, Notice of Proposed Rulemaking and First Report and Order, FCC 02-45 (Feb. 28, 2002).

¹¹ *Id.*, ¶ 143 n.321 (*internal citations omitted*).

¹² See *ICO Application for Review* at 7 (*emphasis added*).

networks to non-globally allocated 2 GHz MSS spectrum.¹³ ICO's request to revisit this issue constitutes an extremely delinquent Petition for Reconsideration of the Commission's decision and should be dismissed as grossly untimely under the Commission's rules.

Even if changed circumstances warrant a reexamination of this issue, the appropriate recourse for ICO would be to file a Petition for Rulemaking.¹⁴ Changed circumstances, however, do not warrant reexamination of the issue. As ICO acknowledges, when the Commission previously declined to restrict the spectrum assignment rights of GSO-based 2 GHz MSS networks, there were five NGSO systems and one hybrid NGSO/GSO system vying for access to 20 MHz of globally allocated uplink spectrum.¹⁵ Given the large number of NGSO systems, a significant possibility existed that at least some of them would be forced to operate in non-globally allocated 2 GHz MSS spectrum. Today, however, only one NGSO system – ICO – is vying for access to 10 MHz of globally allocated uplink spectrum, twice as much spectrum as ICO is authorized to use.¹⁶ Thus, more than enough globally allocated 2 GHz MSS uplink spectrum exists to accommodate ICO's needs and no reason exists to restrict the spectrum assignment rights of other 2 GHz MSS licensees.

¹³ See *Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, FCC 00-302, ¶¶ 13-15 (Aug. 25, 2000) (“2 GHz MSS Service Rules Order”).

¹⁴ If the Commission were to consider the issue as a part of Boeing's license modification application, rather than pursuant to a Petition for Rulemaking, the Commission would be adjudicating unfairly the rights of other GSO-based 2 GHz MSS licensees – such as Celsat – even though they are not parties to this proceeding.

¹⁵ See *ICO Application for Review* at 5.

¹⁶ See *id.*

Furthermore, ICO – as the first to launch a 2 GHz MSS satellite – already identified its “Selected Spectrum Assignment” in the 2 GHz MSS band¹⁷ and appears eligible to update its selection following the Commission’s decisions to reallocate 30 MHz of 2 GHz MSS spectrum and increase each licensee’s spectrum assignment to 5 MHz of paired spectrum.¹⁸ ICO can therefore identify no legitimate concern about the possibility that other 2 GHz MSS licensees may preclude ICO from gaining access to its legitimate share of globally harmonized 2 GHz MSS spectrum.

In any event, as Boeing made clear in its modification application, Boeing’s decision to convert from a NGSO constellation to a GSO satellite does not signal a retreat from Boeing’s plans to develop a global MSS network.¹⁹ Market experience suggests that the best way to provide globally available MSS services is through the use of a GSO satellite network. For example, the only global MSS network that has enjoyed uninterrupted success in the marketplace is Inmarsat, which operates using GSO satellites. The Commission should therefore refrain from

¹⁷ See *Letter of Cheryl A. Tritt, Counsel to ICO Satellite Services G.P. to Marlene H. Dortch, Secretary, FCC, File No. 188-SAT-LOI-97; IBFS Nos. SAT-LOI-19970926-00163; SAT-AMD-20000612-00107; SAT-AMD-20001103-00155 (October 15, 2002) (2 GHz MSS Selected Assignment Notification).*

¹⁸ See *ICO Satellite Services, G.P., Letter of Intent to Provide Mobile Satellite Service in the 2 GHz MSS band, DA 03-2077 (June 24, 2003) (increasing ICO’s spectrum assignment and inviting ICO to identify a new Selected Spectrum Assignment as soon as practicable after the release of the order); Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, et. al, FCC 02-47, ¶ 33 (Feb. 10, 2003) (“2 GHz MSS Reallocation Order”)* (acknowledging the need for ICO to identify a new Selected Spectrum Assignment following the Commission’s decisions to reallocate 30 MHz of 2 GHz MSS spectrum and increase the spectrum assigned to each 2 GHz MSS licensee).

¹⁹ See *Application of The Boeing Company For Modification of Authority For Use of the 1990-2025/2165-2200 MHz and Associated Frequency Bands for a Mobile-Satellite System, FCC File No. SAT-MOD-20020726-00113 at 4 (July 17, 2003) (“Boeing Modification Application”).*

restricting the spectrum assignment rights of 2 GHz MSS licensees, particularly those like Boeing which are improving their planned systems to enhance the viability and cost-effectiveness of their MSS service offers.

IV. THE BUREAU’S GRANT OF BOEING’S MODIFICATION APPLICATION IS FULLY CONSISTENT WITH THE COMMISSION’S 2 GHz MSS SPECTRUM ALLOCATION POLICIES

ICO claims that the Bureau’s grant of Boeing’s modification application is inconsistent with the Commission’s spectrum allocation policies for the 2 GHz MSS service. Specifically, ICO claims that the Commission adopted a band plan and service rules “based on the assumption that at least several NGSO systems would be licensed to provide global services.”²⁰

In reality, the Commission expressly refrained from imposing any restrictions on the number of GSO and NGSO networks that would operate in the 2 GHz MSS band, observing that “[e]ach type of system has technical advantages and disadvantages.”²¹ Instead, the Commission decided to authorize both NGSO and GSO networks, affirming the Commission’s goal of providing “an opportunity for both types of systems to compete in the marketplace to provide users with the best combination of services and prices.”²² The Commission also designed its spectrum assignment and licensing process for 2 GHz MSS licensees in a way that ensured that each licensee’s choice of satellite network design had no impact on the capabilities of the other 2 GHz MSS licensees operating in the band.

²⁰ *ICO Application for Review* at 5.

²¹ *2 GHz MSS Service Rules Order*, ¶ 13.

²² *See id.*

Since the Commission issued its order, the number of licensees building NGSO networks has declined significantly. This reduction is due primarily to the fact that several NGSO licensees were unsuccessful in satisfying their initial milestone requirement, further placing into question whether the marketplace can support multiple NGSO-based 2 GHz MSS networks.

If ICO wants to respond to these changes in the marketplace by asking the Commission to revise its rules regarding the types of satellites that are permitted to operate in the 2 GHz MSS band, then ICO must do so by filing a Petition for Rulemaking, rather than as a part of an Application for Review of Boeing's modification application. As ICO acknowledges, any such change in the Commission's rules would impact not only Boeing, but also other 2 GHz MSS licensees, such as Iridium.²³ It would clearly be inappropriate for the Commission to revise the requirements for Iridium's satellite network as a part of a license modification proceeding to which Iridium is not a party.

In any event, no need exists to require any of the remaining 2 GHz MSS licensees to commit to construct NGSO networks. As expressly stated in Boeing's request to modify its license, Boeing has not abandoned its goal of expanding its 2 GHz MSS network to provide global MSS services. Furthermore, ICO apparently still plans to launch a global NGSO-based 2 GHz MSS network. Therefore, the Commission's goal of making MSS services seamlessly available throughout the world will still be realized and no changes in the Commission's rules are warranted.

²³ See *ICO Application for Review* at 5.

V. THE BUREAU WAS CORRECT IN CONCLUDING THAT THE PUBLIC INTEREST WOULD BE SERVED BY THE GRANT OF BOEING'S MODIFICATION APPLICATION

ICO also objects to the Bureau's grant of Boeing's application, arguing that the Bureau improperly limited its analysis of the public interest benefits of Boeing's modification application.²⁴ ICO acknowledges that the Bureau relied in part on the Commission's policy of generally granting satellite network modification applications "[i]n recognition of the length of time it takes to construct a satellite system, the rapid pace of technological change, and the goal of promoting more efficient use of the radio spectrum."²⁵ ICO, however, failed to acknowledge that the Bureau relied on other factors as well.

For example, the Bureau expressly referenced many of the public interest factors that Boeing raised in its application for modification. These include the weak economy and the disruptive events of 2001, which dictated that it would be more prudent for Boeing to construct its global MSS network on an incremental basis using GSO satellites.²⁶ The Bureau also acknowledged Boeing's acquisition of its Boeing Satellite Systems subsidiary from Hughes Electronics Corp., which advanced substantially Boeing's expertise in the design and construction of GSO MSS networks.²⁷

ICO further argues that the public interest benefits that will result from the construction of Boeing's GSO-based MSS network will not be as significant as the benefits that might have

²⁴ *See id.* at 5-6.

²⁵ *Boeing License Modification Order*, ¶ 7.

²⁶ *See id.*, ¶ 2.

²⁷ *See id.*

resulted from the construction of Boeing's NGSO-based MSS network.²⁸ ICO's argument assumes, of course, that Boeing would have built its NGSO network in the current economy. As Boeing indicated above in Section III, it is highly questionable whether the marketplace would support multiple new commercial NGSO-based MSS networks.

Finally, ICO incorrectly argues that Boeing has been granted a milestone extension for its 2 GHz MSS network.²⁹ Although the Commission has seen fit to adopt slightly different milestone schedules for GSO and NGSO-based satellite network in its service rules for 2 GHz MSS networks,³⁰ the end result of those schedules is identical: Boeing will still be required to provide services to consumers by the same milestone deadline. Further, in light of the fact that Boeing has already satisfied the first two of its milestone requirements, ICO's concerns are groundless.

VI. ICO HAS NO STANDING TO OBJECT TO THE BUREAU'S DECISION TO GRANT BOEING'S APPLICATION MORE THAN A YEAR AFTER THE APPLICATION WAS FILED

In addition to the substantive deficiencies, ICO's Application for Review should be dismissed for other reasons as well. The Commission's rules require a party filing an Application for Review in a proceeding in which it has not previously participated to state

with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier

²⁸ See *ICO Application for Review* at 6.

²⁹ See *id.* at 6-7.

³⁰ See *2 GHz MSS Service Rules Order*, ¶ 160 (establishing the milestone schedules for different types of 2 GHz MSS satellite networks).

stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed.³¹

Even if a party has previously participated in a proceeding, the Commission's rules require that party to demonstrate in its Application for Review that it is "aggrieved" by the action taken.³²

ICO fails to satisfy any of these requirements. First, ICO cannot claim that it made a reasonable or legitimate attempt to participate in this proceeding before the Bureau. Second, ICO fails to explain – with particularity or otherwise – why it was not possible to participate in the earlier stages of the proceeding. Third, regardless of whether ICO participated in this proceeding before the Bureau, ICO fails to demonstrate that it is aggrieved in any way by the Bureau's decision.

No reason exists for ICO's open disregard of the Commission's procedural rules. ICO could have easily raised its objections to the Bureau's decision through a timely filed Petition for Reconsideration of the Bureau's order. The International Bureau even sent a letter to ICO suggesting this procedural approach, helpfully stating

Any party adversely affected by our June 24 decision may seek reconsideration of that action, pursuant to the Commission's rules. *See* 47 C.F.R. § 1.106. Further, our dismissal action in this letter is without prejudice to ICO's ability to seek reconsideration of the order and authorization.³³

ICO chose to ignore the Bureau's advice, however, and, rather than file a Petition for Reconsideration with the Bureau, ICO filed an Application for Review with the full Commission.

³¹ 47 C.F.R. § 1.115(a) (2002).

³² *See id.*

³³ *Letter from Thomas S. Tycz, Chief, Satellite Division, to Cheryl A. Tritt, Esq., Morrison & Foerster LLP* at 1 (July 17, 2003) (footnoted cite included in text) ("Tycz Letter") (dismissing a petition to deny filed by ICO on the same day that Boeing's modification order was granted and released).

The Commission should not permit ICO's disregard for its procedural requirements. ICO is a sophisticated participant in the Commission's processes and its decision to ignore the Commission's procedural rules must be deemed deliberate.

The Commission has repeatedly observed that

A party asking to proceed in a manner other than prescribed by our procedural rules . . . has a heavy burden of establishing that the resulting disruption of the proceeding is outweighed by compelling and urgent circumstances which could not be considered by their timely presentation in accordance with those rules.³⁴

ICO has made no attempt to satisfy this heavy burden. Instead, ICO has proceeded to flout the Commission's policies and procedures. The Commission should affirm the importance of its procedural requirements by dismissing ICO's Application for Review with prejudice and declining to consider ICO's extremely belated arguments.

A. ICO's Application for Review Is Defective Because ICO Failed to Make a Reasonable Attempt to Participate in This Proceeding Before the Bureau

Boeing's application to modify its 2 GHz MSS network was placed on public notice by the Bureau on August 1, 2002 and remained pending for more than ten months before it was granted on June 24, 2003. Prior to the date of grant, no party objected to Boeing's proposal to modify its 2 GHz MSS network.³⁵

³⁴ *Henry R. Malloy, Jr. d/b/a Rem Malloy Broadcasting et al.*, 10 FCC Rcd 503, ¶ 8 (Jan. 9, 1995); *Sound Broadcasting Co.*, 6 FCC Rcd 6903, 6903-04 P6 (1991); *Fresno FM Limited Partnership*, 5 FCC Rcd 7261, 7261 (1990); *see also Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331 P3 (1991); *George E. Cameron, Jr. Communications*, 51 RR 2d 1419, 1420 (1982); *Rocket Radio, Inc.*, 58 FCC 2d 663, 664 (1976).

³⁵ *See Boeing License Modification Order*, ¶ 5. Although Lockheed filed comments on Boeing's application, the comments only addressed Boeing's separate proposal to operate a GPS augmentation system in the GPS L1 band and expressly did not oppose Boeing's proposed modification of its 2 GHz MSS system. *See id.*

ICO did not participate at all in the proceeding until June 19, 2003, when Gerry Salemme of ICO had a telephone conversation with Anna Gomez, Deputy Chief of the International Bureau.³⁶ The telephone conversation addressed several different subjects and the discussion regarding Boeing's modification application was apparently so insignificant that ICO failed to file a required *ex parte* notice documenting the discussion until five days later on June 24, 2003, the same day that ICO appears to have concluded that it would serve ICO's interests to claim participation in the Boeing proceeding.³⁷

ICO also indicates that Gerry Salemme had similar discussions with Commission Legal Advisor, Paul Margie, and Senior Legal Advisor, Bryan Tramont, "several days prior to June 24, 2003."³⁸ In reality, the discussions took place on June 23, 2003, one day before the Bureau issued its order.³⁹ Finally, on June 24, 2003, the same day that the order now being challenged

³⁶ See *Letter of Cheryl A. Tritt, Counsel to ICO Global Communications (Holdings) Ltd. to Marlene H. Dortch, Secretary, FCC, File No. SAT-MOD-20020726-00113 (June 24, 2003) ("Gomez Discussion Ex Parte Notice")* (providing *ex parte* notice for June 19, 2003 telephone conversation with Gerry Salemme and Anna Gomez, Deputy Chief, International Bureau).

³⁷ In doing so, ICO appears to have violated Section 1.1206(b)(2) of the Commission's rules, which requires that *ex parte* notices of oral presentations be filed with the Commission no later than the next business day following the presentation. See 47 C.F.R. § 1.1206(b)(2) (2002).

³⁸ *ICO Application for Review*, at 1 n.3.

³⁹ See *Letter of Cheryl A. Tritt, Counsel to ICO Global Communications (Holdings) Ltd. to Marlene H. Dortch, Secretary, FCC, File No. SAT-MOD-20020726-00113 (June 24, 2003)* (providing *ex parte* notice for June 23, 2003 meeting between ICO and Bryan Tramont, Senior Legal Advisor to Chairman Michael Powell); *Letter of Cheryl A. Tritt, Counsel to ICO Global Communications (Holdings) Ltd. to Marlene H. Dortch, Secretary, FCC, File No. SAT-MOD-20020726-00113 (June 24, 2003)* (providing *ex parte* notice for June 23, 2003 meeting between ICO and Paul Margie, legal advisor to Commissioner Michael Copps).

was issued, ICO filed an exceedingly belated petition to deny, which the Bureau appropriately dismissed as untimely.⁴⁰

The Commission should conclude that ICO's activities do not constitute reasonable participation in the Bureau's consideration of Boeing's application. ICO never made any written submissions to the Bureau or the Commission until the day the Bureau's order was issued. Furthermore, ICO had only one contact with the Bureau's staff prior to the issuance of the order, a brief telephone conversation, the existence of which was not appropriately documented in accordance with the Commission's *ex parte* rules.⁴¹

The Commission has long held that "an individual who has a right to participate in a proceeding before the Commission cannot delay exercising that right until after the Commission has acted and then expect to be allowed to participate by filing post-grant pleadings."⁴² As the Commission has explained

We cannot allow a party to "sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed."⁴³

In this case, ICO is attempting to evade the Commission's procedural requirements by claiming that its brief discussions with Commission officials qualify as legitimate participation.

⁴⁰ See *Tycz Letter* at 1.

⁴¹ 47 C.F.R. § 1.1206(b)(2) (2002) (requiring that *ex parte* notices of oral presentations be filed with the Commission no later than the next business day following the presentation).

⁴² *American Telephone & Telegraph Co.*, 46 FCC 2d 878, 880 (1974).

⁴³ *Teleport Communications Atlanta, Inc.*, Order on Review, 17 FCC Rcd 19859, 19869 (2002) (citing *Canyon Area Residents*, 14 FCC Rcd 8152, ¶ 7 (1999) (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941))).

The Commission should not condone ICO's attempted manipulation of its rules. Instead, the Commission should appropriately conclude that, notwithstanding ample opportunity, ICO chose not to participate in the Bureau's consideration of Boeing's application. ICO's Application for Review is therefore procedurally defective and should be dismissed without consideration.

B. ICO's Application for Review Is Defective Because ICO Does Not Provide a Reasonable Explanation for Its Failure to Participate in this Proceeding Before the Bureau

As discussed above, ICO had ten months to participate in the Bureau's consideration of Boeing's application, but plainly failed to do so. In its Application for Review, ICO has also failed to explain with particularity, "good reason why it was not possible . . . to participate in the earlier stages of the proceeding."⁴⁴

Lacking "good reason," ICO now claims that it did not participate because one of the cases that ICO cites in its Application for Review, *Sirius Satellite Radio, Inc.*, was not released until June 21, 2003.⁴⁵ If a party has a legitimate concern about an application, however, the Commission's rules require the party to raise the concern immediately, regardless of the amount of case law that exists allegedly supporting its position. Furthermore, as explained in previous sections of this Opposition, the *Sirius* decision is relevant, if at all, to only one of the arguments that ICO now raises in its Application for Review.⁴⁶ It provides no justification for ICO's failure to raise the other arguments presented by its Application for Review at an earlier date.

⁴⁴ 47 C.F.R. § 1.115(a).

⁴⁵ See *ICO Application for Review* at 2 n.4.

⁴⁶ Furthermore, as explained in Section II of this pleading, ICO is incorrect in its reliance on this case, providing even less basis for its untimely intervention.

ICO also argues that it chose to participate belatedly in this proceeding because of the Commission's recent decision to reallocate a portion of the 2 GHz MSS band to other services and Iridium's decision to convert its 2 GHz MSS network to a GSO-based constellation.⁴⁷ Of course, none of these developments explains "why it was not possible" for ICO to participate in this proceeding before the Bureau. At most, they potentially explain why ICO now finds it advantageous to inject itself in to this proceeding at this late date.

Section 1.115(a) of the Commission's rules does not include an exception for parties that belatedly develop new business and regulatory strategies. Such an exception would eviscerate the rule by providing a justification for any late-filed pleadings, no matter how untimely.

Furthermore, ICO's proffered explanation for not participating in the Bureau's consideration of Boeing's application does not justify its failure to do so. ICO claims that the two recent developments "have exacerbated the public need to preserve a sufficient amount of globally harmonized 2 GHz MSS spectrum for NGSO systems that, unlike one-satellite GSO systems, are well-suited to provide seamless, global services."⁴⁸ At no point during the last six years, however, has the amount of globally allocated 2 GHz MSS spectrum been adequate to accommodate the needs of all of the U.S.-licensed 2 GHz MSS systems. Although the Commission recently reduced the amount of available globally harmonized 2 GHz MSS spectrum, the Commission also revoked the licenses of three 2 GHz MSS systems that were planning global services. Therefore, ICO cannot now claim to have developed a new concern about a problem that has existed throughout the 2 GHz MSS proceeding. Moreover, ICO already

⁴⁷ See *ICO Application for Review* at 2 n.4.

⁴⁸ *Id.*

selected the spectrum that it will use for its 2 GHz MSS network and is eligible to update its selection in advance of any other licensee, eliminating any concern that ICO will be unable to secure access to globally harmonized spectrum in the United States.⁴⁹

In any event, the Commission's rules do not require a party to explain why it *did not* participate in a proceeding, but rather why it "was not possible" to participate. ICO has provided no legitimate basis for its failure to participate in this proceeding before the Bureau. If ICO was legitimately aggrieved by Boeing's application, it was required to raise its concerns before the Bureau, rather than delay its participation in order to see how circumstances developed. Its Application for Review should therefore be dismissed as untimely and procedurally defective.

C. ICO's Application for Review Is Defective Because ICO Fails to Explain Adequately How It was Aggrieved by the Bureau's Decision

Regardless of whether ICO participated in this proceeding before the Bureau, ICO is required by the Commission's rules to explain why it is aggrieved by the Bureau's decision. In prior decisions enforcing this requirement, the Commission has rejected claims that are speculative and unsupported by evidence.⁵⁰

ICO claims that, as an economic competitor of Boeing in the MSS market, ICO will be directly harmed if Boeing is allowed to implement a new type of satellite system.⁵¹ ICO also claims that grant of Boeing's modification application will "exhaust spectrum that otherwise

⁴⁹ See *supra* notes 17 & 18.

⁵⁰ See *Pan American Satellite Corp.*, 60 Rad. Reg. 2d 398, ¶ 52 (1986); *Kansas State Network, Inc.*, 10 FCC 2d 378, 378 (1967); *A-C Broadcasters, et al.*, 10 FCC 2d 256, 258 n.2 (1967).

⁵¹ *ICO Application for Review*, at 2 n.4.

would be redistributed for use by other MSS systems.”⁵² Both of ICO’s claims are speculative at best and illusory at worst.

First, in claiming economic harm, ICO provides no explanation why Boeing will be better able to compete against ICO in the MSS market using a GSO, rather than a NGSO, network. A number of satellite systems already provide MSS services in the marketplace, using both GSO and NGSO constellations. ICO has failed to explain why Boeing’s decision to launch and operate a GSO-based MSS network would provide more competition for ICO than a NGSO network.

Second, ICO’s claim that Boeing’s system will exhaust spectrum that otherwise might be provided to ICO is illusory. Boeing’s GSO-based MSS network is designed to use no more service link spectrum than its previously authorized NGSO network. The Commission’s recent decision to authorize the use of additional service link spectrum by Boeing (and by every other 2 GHz MSS licensee) was unrelated to Boeing’s decision to modify its network design.

Even if Boeing’s license were to be revoked, ICO has no basis for concluding that any portion of the spectrum recovered from Boeing would be reassigned to ICO. The Commission has repeatedly stated

we have not established nor do we do so here any policy or rule regarding the use of additional abandoned spectrum that may result after future MSS milestone reviews are completed.⁵³

⁵² *Id.*

⁵³ *2 GHz MSS Reallocation Order*, ¶ 32; *see also 2 GHz MSS Service Rules Order*, ¶ 18.

Given the forgoing, ICO's claims of injury are totally lacking in merit. The Commission should therefore dismiss ICO's Application for Review with prejudice as defective and non-compliant with the Commission's rules.

VII. ICO'S APPLICATION FOR REVIEW SHOULD BE DISMISSED TO THE EXTENT THAT IT RELIES ON ARGUMENTS UPON WHICH THE BUREAU NEVER HAD AN OPPORTUNITY TO PASS

In addition to requiring that a party have "standing" to file an Application for Review, the Commission's rules state:

No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

Note: Subject to the requirements of § 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.⁵⁴

ICO provides no explanation in its Application for Review why it ignored this requirement. ICO had every opportunity to file a Petition for Reconsideration of the Bureau's decision. Indeed, the Bureau invited ICO to do so.⁵⁵ For reasons known only to ICO, it made a calculated decision to disregard the Commission's rules. The Commission should respond by dismissing ICO's Application for Review.

ICO, of course, claims that it did participate in the final days of the proceeding through three *ex parte* contacts and a belated petition to deny.⁵⁶ Only one of ICO's *ex parte* contacts involved an official in the Bureau, however, and ICO's petition to deny was clearly filed too late for the Bureau to consider its substance prior to issuing its decision.

⁵⁴ 47 C.F.R. § 1.115(c) (2002).

⁵⁵ See *Tycz Letter* at 1.

⁵⁶ See *ICO Application for Review* at 1 n.3.

Furthermore, ICO's *ex parte* contact with an International Bureau official addressed only a single issue of relevance to this proceeding, *i.e.*, whether the spectrum assignment rights of GSO-based 2 GHz MSS networks should be restricted.⁵⁷ ICO never raised any of its other purported concerns about Boeing's proposal with the Bureau prior to the date that the Bureau granted Boeing's application.

In interpreting the analogous requirement that the Commission must be given an "opportunity to pass" on an issue prior to the filing of an appeal,⁵⁸ the U.S. Court of Appeals for the District of Columbia has repeatedly concluded that this requirement is not satisfied if it is done in an insufficient manner.⁵⁹ The Court has observed that "[i]t is only through the

⁵⁷ *Gomez Discussion Ex Parte Notice* at 1.

⁵⁸ 47 U.S.C.A. § 405 (2002).

⁵⁹ *See Bartholdi Cable Co. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997) (presentation of an issue in an affidavit and in a footnote to a pleading is insufficient to flag the issue for the Commission); *Northwestern Ind. Tel. Co. v. FCC*, 824 F.2d 1205, 1210 n.8 (D.C. Cir. 1987) (appellant "pointed out" circumstances, but did not make an argument); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 739 (D.C. Cir. 1976) (the "grist" of the argument was there, but "nothing was made of it"); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (concluding that the Commission "need not sift pleadings and documents to identify" arguments that are not "stated with clarity" by a party).

In attempting to counter this consistent line of precedent, ICO cites to a case in which a party filed a letter with the Commission that included a paragraph addressing an argument that was later presented to the Court. *See MCI WorldCom v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000). In the *MCI* case, the letter was filed well in advance of the Commission's order in the proceeding. In considering whether the Commission had an opportunity to pass on the argument, the Court observed that it was a "close question" and determined that "the argument was presented – if barely – to the Commission." *Id.* In contrast to the facts of the *MCI* case, ICO made only an oral *ex parte* presentation (a telephone call) to just one Bureau official addressing just one of its arguments prior to the date that the order was issued, rather than a written presentation available to everyone. If a letter provided to the full Commission well in advance of the issuance of an order was just *barely* adequate, a single telephone call to just one Bureau official in the closing days of a proceeding clearly was not adequate.

adversarial process (or analogous circumstances) that the Commission is afforded an opportunity” to pass on an issue.⁶⁰

Applying this judicial guidance to the case at hand, there was clearly no opportunity for an adversarial process. ICO failed to bring most of its alleged concerns to anyone’s attention until it filed its petition to deny on the same day that the Bureau’s order was issued. ICO also refrained from publicly disclosing its *ex parte* contacts with the Bureau and Commission staff until the same day. As a consequence, Boeing had no opportunity to respond to ICO’s concerns, and the Bureau had no opportunity to address any issues that might have warranted consideration.

Apparently recognizing these defects, ICO baldly asks the Commission for a waiver of Section 1.115(c), without providing any justification for such a waiver.⁶¹ Instead, ICO attempts to rely inappropriately on the Commission’s recent order reviewing the challenges of various wireless interests to the Bureau’s licensing of 2 GHz MSS systems.⁶² In those cases, however, the International Bureau had the opportunity not only to pass on the issues in question, but also addressed the issues in detail.⁶³

In light of ICO’s disregard for the Bureau’s deliberations and its completely unjustified failure to comply with the Commission’s rules, the Commission should dismiss ICO’s Application for Review with prejudice and decline to address ICO’s alleged concerns.

⁶⁰ *Bartholdi Cable*, 114 F.3d at 279.

⁶¹ *See ICO Application for Review*, at 2-3 n.5.

⁶² *See The Boeing Co., et al.*, 18 FCC Rcd 1405 (2003).

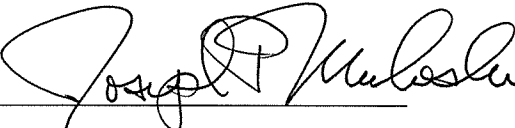
⁶³ *See id.*, ¶ 5 (discussing the Bureau’s analysis).

IV. CONCLUSION

For the reasons set forth above, the Commission should find that ICO's Application for Review is both lacking in substantive merit and procedurally defective. Accordingly, ICO's Application for Review of the Bureau's grant of Boeing's 2 GHz MSS modification application should be dismissed with prejudice.

Respectfully submitted,

THE BOEING COMPANY

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