

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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Federal Communications Commission
Office of Secretary

In the Matter of)	
)	
ICO Satellite Services, G.P.)	
)	
Application for Modification of Authority For Use of the 2 GHz Bands to Provide Mobile Satellite System)	File No. SAT-MOD-20050110-00004
)	
Petition for Declaratory Ruling, or Alternatively, for a Waiver)	File No. SAT-PDR-20050110-00024
)	

**COMMENTS OF
THE BOEING COMPANY**

The Boeing Company ("Boeing"), by its attorneys, and pursuant to Section 25.154(a) of the Commission's rules, 47 C.F.R. § 25.154(a), hereby submits the following comments on the above-captioned application and petition of ICO Satellite Services, G.P. ("ICO").¹ Boeing is filing these comments to correct certain misstatements by ICO regarding ICO's prior contractual relationship with Boeing's subsidiary, Boeing Satellite Systems International, Inc. ("BSS").

I. ICO'S APPLICATION AND PETITION CONTAIN MISSTATEMENTS OF FACT REGARDING ICO'S PRIOR CONTRACTUAL RELATIONSHIP WITH BSS

BSS was the manufacturer for ICO's 2 GHz Mobile Satellite System ("MSS") until January 29, 2004, when ICO sent BSS a notice terminating the satellite contract for ICO's convenience. A copy of ICO's notice is attached.

¹ See Public Notice, *Policy Branch Information, Satellite Space Applications Accepted for Filing*, Report No. SAT-00269, at 1 (Feb. 4, 2005).

On April 28, 2004, ICO paid BSS the termination liability associated with ICO's termination of the contract for its convenience. On May 3, 2004, ICO and BSS entered into a satellite storage contract and ICO's uncompleted satellites are now in storage.

On July 23, 2004, ICO delivered to BSS a "dispute notice" claiming a right to arbitration under the previously-terminated contract. BSS responded by filing a Complaint for Declaratory Judgment with the Superior Court for the State of California, in which BSS is seeking a judicial ruling that, *inter alia*, ICO's termination of the contract for its convenience invalidated the arbitration clause and extinguished all rights, obligations and disputes of the parties under the contract. ICO filed an answer and a cross-complaint.²

In ICO's application and petition which are the subject of these comments, ICO misrepresents and essentially reverses the order of the above-described events. ICO claims that it "invoked the dispute resolution process"³ with BSS to resolve "construction-related difficulties and other events beyond ICO's control."⁴ ICO also claims that it "worked diligently to resolve

² See ICO Global Communications (Operations) Limited's Answer to Complaint, *Boeing Satellite Systems International, Inc. v. ICO Global Communications (Operations) Limited*, Cal. Super. Ct. Case No. BC 320115 (Sept. 16, 2004) ("*ICO Answer*"); ICO Global Communications (Operations) Limited's Cross-Complaint for: 1. Breach of Contract; 2. Economic Duress; 3. Negligent or Fraudulent Misrepresentation; 4. Misappropriation of Trade Secrets; 5. Breach of Covenant of Good Faith and Fair Dealing; 6. Declaratory Relief for Invalid Liquidated Damages; 7. Unfair Competition; 8. Declaratory Relief Regarding Arbitration and Confidentiality, *Boeing Satellite Systems International, Inc. v. ICO Global Communications (Operations) Limited*, Cal. Super. Ct. Case No. BC 320115 (Sept. 16, 2004) ("*ICO Cross-Complaint*")

³ *ICO Satellite Services, G.P., Application for Modification of Authority For Use of the 2 GHz Bands to Provide Mobile Satellite System*, FCC File No. SAT-MOD-20050110-00004, at 3 (Jan. 10, 2005) ("*ICO Application*").

⁴ *ICO Satellite Services, G.P., Petition for Declaratory Ruling, or Alternatively, for a Waiver*, FCC File No. SAT-PDR-20050110-00024, at 8 (Jan. 10, 2005) ("*ICO Petition*"); see also *ICO Application* at 3 (claiming that "[i]n an attempt to resolve this dispute, ICO early last year invoked the dispute resolution process" with BSS).

the disputed issues with its satellite manufacturer,”⁵ but that it “unexpectedly has reached a contractual impasse”⁶ with BSS involving “unforeseeable contractual obstacles that are beyond its control.”⁷ As a consequence, ICO further claims that, “[d]espite its efforts to resolve contract performance and related issues with the manufacturer and to proceed with construction, ICO could not reasonably avoid suspension of further work on its [non-geostationary satellite orbit (“NGSO”)] system.”⁸

As detailed above, at the time ICO terminated the satellite contract for its convenience, there were no disputed issues, contractual obstacles or construction-related difficulties between ICO and BSS. There was also no contractual impasse or suspension of work on the satellites. ICO terminated the satellite contract on January 29, 2004, six months *prior* to invoking “the dispute resolution process.” Contrary to ICO’s claims, its unilateral decision to terminate the contract for its convenience was neither unexpected, unforeseeable, nor beyond ICO’s control.

⁵ *ICO Application* at 3.

⁶ *Id.* at 6; *see also id.* at 3 (claiming that “ICO has reached a contractual impasse with its NGSO satellite manufacturer . . . that preclude further progress on its NGSO system for the immediate future”).

⁷ *Id.* at 21; *see also ICO Petition* at 8 (claiming that “the circumstances preventing ICO from achieving full compliance with its remaining milestones were unforeseeable and beyond ICO’s control”).

⁸ *ICO Petition* at 8; *see also id.* at 1 n.3 (claiming “further work on the ICO NGSO system has been suspended”); *id.* at 3 (stating that “events giving rise to an unresolved dispute between ICO and its NGSO system manufacturer have resulted in a temporary suspension of further work on the NGSO system”); *ICO Application* at 1 (stating that “ICO seeks this modification because of events giving rise to a dispute with its satellite manufacturer have forced the suspension of work on its NGSO system”); *id.* at 3 (claiming that “[a]s a result of these events, additional work under the manufacturing contract has been suspended”).

Prior to ICO's termination of the satellite contract, BSS was actively engaged in the construction of ICO's satellites pursuant to Amendment 25 of the contract. Amendment 25 was signed by ICO and BSS on July 25, 2003 to resolve then outstanding issues.

As the Commission is aware, the nearly eight years that had transpired since ICO first entered into a satellite manufacturing contract with Hughes Space and Communications International, Inc. ("Hughes") were not without incident.⁹ On August 27, 1999, ICO filed for bankruptcy protection. On September 5, 2000, after ICO emerged from bankruptcy, ICO and Hughes signed Amendment 7 of the contract, which established the terms for the resumption of work.

As ICO acknowledges in court filings, "after entering into Amendment 7, [ICO] directed [Hughes/BSS] to modify or delay production and launch schedules resulting in numerous amendments to the Satellite contract."¹⁰ ICO and BSS accordingly entered into Amendment 22 of the contract, which directed the parties to negotiate new terms addressing "the contract price, delivery schedules, and other issues."¹¹

The subsequent negotiations culminated in the execution of Amendment 25 of the contract. As ICO acknowledges in court filings, "[o]ne of ICO's main goals in negotiating

⁹ In October 2000, Boeing purchased Hughes Space and Communications Company, the parent company of Hughes. Hughes Space and Communications Company was renamed BSS.

¹⁰ *ICO Answer* at 4.

¹¹ *Id.* at 4-5.

Amendment 25 was to stretch out the project schedule.”¹² ICO also used Amendment 25 to negotiate a new termination liability provision.¹³

Specifically, ICO demanded and received a termination liability clause that provided “a fixed schedule of the sums ICO would owe for terminating the Satellite contract for convenience at various points in the future.”¹⁴ Under the original contract, ICO’s termination liability was determined based on the contract-related expenditures of BSS up until the point of termination.

After signing Amendment 25, BSS worked for more than six months on the construction of ICO’s satellite network. The efforts by BSS continued up until the point when ICO issued the notice of termination for its convenience to BSS.

ICO claims in court filings that it was “coerce[ed]” and “compelled” by BSS into signing Amendment 25.¹⁵ ICO also claims that it “could not change vendors” for satellite manufacturing services and that, as a consequence, BSS held “monopoly supplier status” over ICO during the negotiation process.¹⁶

By contrast, in its pending application and petition, ICO asserts that it “not only has actively worked to renegotiate a new manufacturing contract, but in fact has executed a non-

¹² *ICO Cross-Complaint* at 8.

¹³ *See id.* at 11.

¹⁴ *Id.* at 26.

¹⁵ *Id.* at 37 and 43.

¹⁶ *Id.* at 28 and 30.

contingent manufacturing contract with Loral that will allow ICO to meet the final milestone deadline of July 2007.”¹⁷

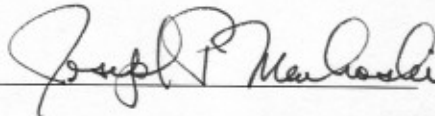
As set forth above, ICO has presented entirely different facts to the Commission and the Superior Court of California.

II. CONCLUSION

Boeing respectfully requests that the Commission take into account ICO’s misstatements of fact, detailed above, when considering the merits of ICO’s application and petition.

Respectfully submitted,

THE BOEING COMPANY

By: 

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March 7, 2005

¹⁷ *ICO Petition* at 8; *see also id.* at 3-4.

January 29, 2004

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Reference: Contract Number: ICOO/95-1002/NR, Amended and Restated Contract Amendment 25 effective as of 25 July, 2003 (the "Satellite Contract") by and between Boeing Satellite Systems International, Inc. ("Boeing") and ICO Global Communications (Operations) Limited ("ICO")

Dear Mr. Beeson:

We refer to the above mentioned Satellite Contract. Capitalized terms not otherwise defined in this letter have the meaning given in the Satellite Contract.

Pursuant to Article 17.1 of the Satellite Contract, ICO hereby terminates the remaining Work with respect to the Satellite Contract. This notice constitutes the ICO Termination Notice, an ICO Whole Termination and Termination for Convenience as those terms are used in Article 17.1 of the Satellite Contract. To the extent additional notice of termination is necessary, in accordance with Article 41.6 of the Satellite Contract, ICO hereby terminates for convenience all work under Article 41 of the Satellite Contract.

Further, ICO hereby gives notice of termination of satellite operations pursuant to Article 42 of the Satellite Contract. Termination is to be effective 45 days from the date hereof as provided in Article 42.2 of the Satellite Contract.

ICO has been compelled to take this action to mitigate its losses arising from launch and satellite failures and other events that have occurred during the course of its relationship with Boeing. This termination is effected without prejudice to, and with a full reservation of, all rights of ICO arising from such events and otherwise.

This letter is written in conjunction with the letter from ICO of even date made with respect to the Contract Number: ICOO/95-1003/YW, Amended and Restated Contract Amendment 5 (the "Launch Contract") dated effective 25 July 2003.

Sincerely,


Brent Abrahamsen, Director

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of the Boeing Company to Petition For Declaratory Ruling or, Alternatively, For a Waiver and Response to Application to Modify Letter of Intent Authorization of ICO Satellite Services G.P., was mailed this 7th day of March, 2005 by U.S. mail to the following:

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