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Federal Communications Commission
Office of Secretary

Policy Branch
International Bureau

File No. SAT-MOD-20050110-00004

File No. SAT-PDR-20050110-00024

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 Service)
)
Petition for Declaratory Ruling, or)
Alternatively, for a Waiver)

**RESPONSE OF
ICO SATELLITE SERVICES G.P.**

ICO Satellite Services G.P. ("ICO") submits this response to comments of The Boeing Company ("Boeing"), filed on March 7, 2005, regarding the above-captioned application ("Application") and petition ("Petition").

ICO notes that its Application and Petition are unopposed. Boeing is the only party that filed comments on the ICO filings, and it did not request that the Commission deny the filings, impose conditions on grant of the filings, or otherwise delay consideration of the filings. Rather, it merely requested that the Commission "take into account" certain alleged "misstatements of fact" that are at issue in an ongoing litigation matter between ICO and Boeing's subsidiary, Boeing Satellite Systems International, Inc. ("BSSI").¹ The apparent purpose of Boeing's comments is to preserve its litigation posture in court, rather than to raise any substantive objections against the Application or

¹ See Comments of Boeing at 6 (Mar. 7, 2005).

Petition. Accordingly, Boeing's comments present no obstacle to expeditious Commission action on the Application and Petition.

In any event, Boeing's claim that its filing corrects "misstatements" by ICO in its modification application is unfounded. Boeing's principal assertion that ICO mischaracterized the sequence of events leading up to its execution of a new construction contract erroneously implies that no disputes existed between the parties prior to the January 2004 termination of the ICO/BSSI contract and that ICO made no attempt to resolve these disputes prior to termination. Boeing is wrong. In fact, Boeing attached a copy of a letter from ICO to BSSI, which expressly contradicts Boeing's characterization and describes events consistent with the statements made in the Application and Petition.

Specifically, ICO asserted the following in the letter:

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.²

ICO also demonstrated in court filings that it repeatedly attempted to resolve its disputes with BSSI. Thus, ICO consistently maintained that, despite its efforts, construction-related difficulties and unresolved disputes with BSSI compelled termination of the ICO/BSSI construction contract. ICO also made clear that termination of the contract did not preclude its right to pursue all available remedies under the contract, whether through arbitration or in court.

Boeing's assertions are predicated on a misstatement of the nature of ICO's termination action and a misperception of the applicable California law. ICO terminated

BSSI's remaining performance under the contract while expressly reserving ICO's rights, an action which preserved all of ICO's rights to recover for prior breaches under California's Commercial Code section 2106(3) and settled California case law:

"Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.³

Furthermore, Boeing's claim that ICO presented facts to the Commission that were inconsistent with those presented in court quotes ICO's court filings out of context. The only example that Boeing offered was that ICO represented in a court filing that it "could not change vendors," while reporting to the Commission that it has executed a construction contract with a geostationary satellite manufacturer.⁴ ICO's court filing in fact stated that "BSSI knew that ICO could not change vendors or even move the partially constructed satellites *without substantially destroying their value and ICO's billion-plus dollar investment to that date.*"⁵ ICO's decision to switch to a geostationary satellite manufacturer did not contradict its statements to the court that BSSI was a monopoly supplier with respect to the existing non-geostationary satellite system and that ICO could not change vendors without a substantial loss in the value of its investment in that non-geostationary satellite system.

² See Letter from Brent Abrahamsen, Director, ICO Global Communications (Operations) Limited to Dennis R. Beeson, Contracts Manager, Boeing Satellite Systems International, Inc., at 1 (Jan. 29, 2004) (attached to Comments of Boeing).

³ Cal. U. Com. Code, § 2106(3); see also *B. L. Metcalf General Contractor, Inc. v. Earle Erne, Inc.*, 212 Cal. App. 2d 689, 694 (4th Dist. 1963); *Grant v. The Aerodraulics Co.*, 91 Cal. App. 2d 68, 75 (2d Dist. 1949).

⁴ See Comments of Boeing at 5.

⁵ ICO Global Communications (Operations) Limited's Cross-Complaint, Case No. BC 320115, at 30 (Cal. Super. Ct.) (filed Sept. 16, 2004) (emphasis added).

Because many of the facts leading up to and following the termination of the ICO/BSSI contract are in dispute and will be resolved in court proceedings, ICO properly avoided including in its Application and Petition unnecessary details that would improperly require the Commission to become involved in a private contractual dispute. Moreover, the details of the contract dispute with Boeing are not material or relevant to the Commission's ultimate decision to grant or to deny ICO's modification and waiver requests. Boeing's key allegation seems to be that there were no unforeseeable events beyond ICO's control leading up to its execution of a new satellite construction contract. ICO strongly disputes this characterization, but even if it were correct, it has no bearing on the merits of the Application or the Petition.

Under the Commission's well-established policy for granting satellite modification applications, modification proposals generally are found to serve the public interest "where the proposed modification presents no significant interference problems and is otherwise consistent with Commission policies."⁶ Additionally, in granting the waivers requested in the Application and the Petition, the Commission must consider (1) whether special circumstances warrant a deviation from the general rule, and (2) whether the deviation better serves the public interest than strict adherence to the rule.⁷ None of these standards requires a demonstration of unforeseeable circumstances beyond ICO's control. Consistent with the standard for granting modification applications, ICO demonstrated that its proposed modification will not present any significant interference problems and is otherwise consistent with Commission policies. Furthermore, consistent

⁶ *The Boeing Company*, 18 FCC Rcd 12317, ¶ 7 (IB & OET 2003) ("*Boeing Modification Order*"); see also *GTE Spacenet Corp.*, 5 FCC Rcd 4112 (CCB 1990); *American Satellite Co.*, 5 FCC Rcd 1186 (CCB 1990); *Teledesic LLC*, 14 FCC Rcd 2261 (IB 1999).


with the standard for granting waiver requests, ICO demonstrated substantial progress in implementing its satellite system, far exceeding that of any other 2 GHz MSS authorization holder, and its continued commitment to the timely delivery of MSS services to the public. Boeing did not dispute these facts, which are central to the Commission's deliberations.

In the absence of any substantive objections, ICO reiterates its request for expedited action on the Application and Petition.

Respectfully submitted,

ICO SATELLITE SERVICES G.P.

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


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

Its Attorneys

Date: March 22, 2005

⁷ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

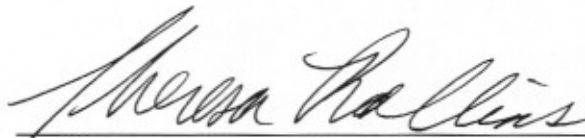
CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2005, a copy of the foregoing Response was hand-delivered and sent via electronic mail as indicated (*) to the following:

Joseph P. Markoski
Bruce A Olcott
Squire, Sanders & Dempsey LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for The Boeing Company

Cassandra Thomas*
Deputy Chief, Satellite Division
International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
Email: Cassandra.Thomas@fcc.gov

William Bell*
International Bureau
Federal Communications Commission
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
Email: William.Bell@fcc.gov



Theresa Rollins