

COPY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED - FCC

JUN 23 2005

Received

JUN 28 2005

Federal Communication Commission
Bureau / Office

In the Matter of)
ICO Satellite Services G.P.)
Application for Modification of 2 GHz)
LOI Authorization)

Policy Branch
International Bureau
IBFS No. SAT-MOD-20050110-00004

To: The International Bureau

PETITION FOR PARTIAL RECONSIDERATION

ICO Satellite Services G.P. ("ICO") submits this petition for partial reconsideration of the memorandum opinion and order by the International Bureau ("Bureau") in the above-captioned proceeding.¹ Specifically, ICO seeks reconsideration of the Bureau decision to require ICO to post a bond in the amount of \$1.5 million. The application of the bond requirement to ICO is not authorized by any Federal Communications Commission ("FCC" or "Commission") rule or policy. Additionally, subjecting ICO, but not other 2 GHz mobile satellite service ("MSS") licensees,² to the bond requirement harms competition and the public interest by placing ICO at a severe competitive disadvantage. Accordingly, the Bureau immediately should set aside its decision to require ICO to post a bond. Alternatively, the Bureau should waive the bond requirement as it applies to ICO.

¹ See *ICO Satellite Services G.P.*, DA 05-1504 (IB May 24, 2005) ("*Modification Order*").

² For ease of reference, the terms "licenses" and "licensees," with respect to 2 GHz MSS, will refer to FCC authorizations to provide 2 GHz MSS and the parties that hold those authorizations, regardless of whether the authorization is a U.S. satellite license or a letter of intent ("LOI") authorization granting a reservation of spectrum to a foreign-licensed satellite system.

I. BACKGROUND

On July 17, 2001, the Bureau granted ICO a letter of intent (“LOI”) authorization reserving spectrum in the 2 GHz frequency band for the provision of MSS in the United States.³

On May 24, 2005, the Bureau granted ICO’s application to modify its 2 GHz MSS LOI authorization by substituting a geostationary satellite orbit (“GSO”) system for a non-geostationary satellite orbit (“NGSO”) system to serve the U.S. market.⁴ The Bureau also required ICO to post a bond “pursuant to the procedures set forth in Public Notice, DA 03-2602, 18 FCC Rcd 16283 (2003), by June 24, 2005.”⁵

The bond filing procedure set forth in the public notice cited in the *Modification Order* was based upon the FCC rules adopted in the Satellite Reform rulemaking requiring satellite licensees to post a bond as a condition of their licenses.⁶ These rules became effective on October 27, 2003,⁷ and were subsequently revised to provide for reduced bond amounts.⁸

³ See *ICO Services Limited*, 16 FCC Rcd 13762 (IB/OET 2001). Pursuant to Commission approval granted on March 21, 2002, the LOI authorization was assigned on a *pro forma* basis from ICO Services Limited to ICO. See Letter from Fern J. Jarmulnek, International Bureau, FCC, to Cheryl A. Tritt, Counsel, ICO, File No. SAT-ASG-20020128-00015 (Mar. 21, 2002).

⁴ See *Modification Order* ¶ 1.

⁵ *Id.* ¶ 40. The Bureau initially required ICO to post a bond in the amount of \$3 million, but later reduced the amount by 50 percent in view of ICO’s compliance with the contract execution and critical design review milestones. See FCC Public Notice, Policy Branch Information, DA 05-1545 (May 27, 2005). As required, ICO concurrently is submitting a bond in the amount of \$1.5 million. If this petition is granted, ICO requests permission to cancel the bond in its entirety.

⁶ See FCC Public Notice, *International Bureau Explains Procedure for Filing Bonds Pursuant to New Satellite Licensing Procedure*, 18 FCC Rcd 16283, 16283 (2003).

⁷ See *Amendment of the Commission’s Space Station Licensing Rules and Policies*, 18 FCC Rcd 10760, ¶ 351 (2003) (“*Satellite Licensing Reform Order*”), summarized in 68 Fed. Reg. 51499 (Aug. 27, 2003), as corrected by 68 Fed. Reg. 59127 (Oct. 14, 2003).

⁸ *Amendment of the Commission’s Space Station Licensing Rules and Policies*, 19 FCC Rcd 12637, ¶ 1 (2004) (“*Satellite Licensing Reform Reconsideration Order*”).

II. THE BOND REQUIREMENT DOES NOT APPLY TO A MODIFICATION OF AN EXISTING 2 GHz MSS LICENSE

The Commission adopted the bond requirement long after ICO obtained its 2 GHz MSS LOI authorization and did not contemplate extending the requirement to ICO and other pre-existing licensees. Both the plain text of the FCC rules requiring the posting of bonds and the underlying decisions adopting these rules demonstrate that the Commission intended to impose the bond requirement only on *new* satellite licenses, not *modifications* of *existing* licenses. Specifically, Section 25.165 of the FCC rules provides that “[f]or all satellite *licenses issued after September 20, 2004* [*i.e.*, the effective date of the bond requirement, as modified on reconsideration], other than DBS licenses, DARS licenses, and replacement satellite licenses as defined in paragraph (e), the licensee is required to post a bond within 30 days of the grant of its license.”⁹ Similarly, Section 25.137(d) provides that “non-U.S.-licensed satellite operators filing letters of intent ... to access the U.S. market must demonstrate that the non-U.S.-licensed space station has complied with all applicable Commission requirements ... including but not limited to the following: For non-U.S.-licensed satellites that are not in orbit and operating, a bond must be posted.”¹⁰ The plain text of these rules does not evidence any intent to extend the bond requirement to modifications of licenses granted prior to the effective date of the rules.

In fact, when the Commission adopted the bond requirement, it expressly stated that it “will apply this bond requirement to *new satellite licensees only*.”¹¹ The Commission further emphasized that “licensees will *not* be required to post a bond for *licenses they have been*

⁹ 47 C.F.R. § 25.165 (emphasis added).

¹⁰ *Id.* § 25.137(d).

¹¹ *Satellite Licensing Reform Order* ¶ 167 (emphasis added).

granted in the past.”¹² Subsequently, on reconsideration, the Commission reiterated that “the bond requirement applies to all licenses granted after the requirement took effect, regardless of when the application for each of those licenses was filed.”¹³ At no time did the Commission suggest that the bond requirement would be extended to modifications of pre-existing licenses.¹⁴ Consequently, because ICO obtained its 2 GHz MSS LOI authorization long before the Commission adopted the bond requirement, the Bureau is not authorized under the FCC rules to require ICO to post a bond as a condition of its modified authorization.

III. REQUIRING ICO, BUT NOT OTHER 2 GHz MSS LICENSEES, TO POST A BOND IS UNFAIRLY DISCRIMINATORY

Even assuming that the bond requirement applies to modifications of pre-existing licenses, requiring ICO to post a bond is unfairly discriminatory because the Commission has not imposed the same requirement on other 2 GHz MSS licensees. For example, last year, the Commission granted TMI’s application for a modification of its 2 GHz MSS LOI authorization to reflect a change in orbital location.¹⁵ The Commission did not require TMI to post a bond, even though the order granting the modification application was issued on June 29, 2004 – after

¹² *Id.* ¶ 283 (emphasis added).

¹³ *Satellite Licensing Reform Reconsideration Order* ¶ 72 (emphasis added).

¹⁴ Although the Commission treats modification applications to change orbital architecture as new license applications for filing fee purposes, it has not done so for any other purposes. In fact, when the Bureau granted Boeing’s 2 GHz MSS modification application to change orbital architecture, it did not apply the then-existing processing procedures applicable to new license applications, but rather processed the application using the general standard for approving modification applications. *See The Boeing Co.*, 18 FCC Rcd 12317, ¶ 7 (IB/OET 2003) (“*Boeing Order*”). Additionally, when the Commission required Sirius Satellite Radio Inc. to submit a new license application fee for a modification application to change orbital location, it acknowledged the distinction between the grant of a license and the grant of a modification of a license for purposes of the Communications Act of 1932, as amended. *See Sirius Satellite Radio Inc.*, 18 FCC Rcd 12551, ¶ 10 (2003). It found that the decision to apply the new license application fee to Sirius’ modification application “is fully consistent with the language and policy of the statutory and rule provisions governing fees.” *Id.* ¶ 11. In contrast, treating a modification application to change orbital location as a new license application for bond filing purposes would not be consistent with the language and policy of the bond filing rules. As discussed above, the bond filing rules and underlying policies do not suggest any Commission intent to apply the bond requirement to modifications of pre-existing licenses.

¹⁵ *See TMI Communications and Co., L.P.*, 19 FCC Rcd 12603 (2004) (“*TMI Order*”).

the bond requirement became effective on October 27, 2003.¹⁶ The Commission's failure to impose the bond requirement in that case suggests that it did not contemplate that the requirement would apply to modifications of pre-existing authorizations. Moreover, despite the differences between ICO's and TMI's modification applications, neither the FCC rules requiring the posting of bonds nor the underlying decisions adopting these rules reveal any intent to extend the bond requirement only to certain types of modifications, but not others.¹⁷

Furthermore, the Bureau did not require Boeing to post a bond when it granted Boeing's application for a modification of its 2 GHz MSS LOI license to change from an NGSO to GSO system.¹⁸ Because Boeing's modification application was pending at the time the Commission issued the *Satellite Licensing Reform Order* adopting the bond requirement, the Bureau could have chosen to grant the application subject to a bond requirement that would be imposed when the requirement became effective. In fact, the Commission contemplated that the bond requirement would apply to applications pending at the time of its adoption of the *Satellite Licensing Reform Order*.¹⁹

By failing to require either Boeing or TMI to post a bond as a condition of their modified licenses, the Commission granted an unfair competitive advantage to those companies. Unlike ICO, both Boeing and TMI were permitted to implement their modified 2 GHz MSS proposals without the financial restrictions imposed by the bond requirement. In fact, Boeing recently

¹⁶ See *supra* note 7 and accompanying text.

¹⁷ TMI's modification application sought a change in orbital location, but did not request a reservation of spectrum for feeder link operations because TMI proposed to route all traffic through a gateway in Canada. See *TMI Order* ¶¶ 11, 53. In contrast, ICO's modification application sought a change in orbital architecture and a change in the frequencies to be reserved for feeder link operations. See *Modification Order* ¶¶ 5, 14.

¹⁸ See *The Boeing Co.* ¶¶ 36-46.

¹⁹ See *Satellite Licensing Reform Order* ¶ 275 (noting that "[t]here are several satellite license applications currently pending before the Commission" and that "we will apply the rules and procedures we adopt in this Order to pending applications").

surrendered its modified license without penalty.²⁰ To ensure that consumers receive the full benefits of 2 GHz MSS competition, the Commission must provide a level playing field for all competitors and must not impose financial restrictions that are not equally applicable to all competitors.

IV. THE BUREAU SHOULD WAIVE THE BOND REQUIREMENT

To the extent that the bond requirement applies to ICO's modified LOI authorization, ICO requests a waiver of that requirement. The Commission may waive its rules upon a showing of "good cause."²¹ Waiver is appropriate if (1) special circumstances warrant a deviation from the general rule, and (2) the deviation better serves the public interest than strict adherence to the rule.²² Circumstances warranting a waiver include "considerations of hardship, equity, or more effective implementation of overall policy."²³ The Commission may waive a rule in a particular case if the relief requested would not undermine the policy objective of the rule and otherwise would serve the public interest.²⁴

Special circumstances warrant a waiver in this particular case. Although both ICO and TMI, the two remaining 2 GHz MSS licensees, have obtained modifications of their LOI authorizations, only ICO is required to post a bond. This selective enforcement of the bond requirement places ICO at a severe competitive disadvantage by limiting its access to capital, while allowing TMI to implement its 2 GHz MSS system without the same financial restriction.

²⁰ [cite]

²¹ 47 C.F.R. § 1.3.

²² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

²³ *WAIT Radio*, 418 F.2d at 1159.

²⁴ *Id.* at 1157.

Furthermore, grant of the requested waiver will more effectively implement the Commission's policy objectives and better advance the public interest than strict adherence to the rules. The bond filing rules are intended to deter speculation and warehousing, and to ensure that "the licensee is fully committed ... to construct its satellite facilities."²⁵ ICO's substantial expenditures and unparalleled construction efforts to date demonstrate its longstanding commitment to provide 2 GHz MSS to the United States, rather than any intent to warehouse orbit and spectrum resources.

Because the Commission effectively waived the bond requirement for other 2 GHz MSS licensees, a similar waiver should be granted to ICO to ensure fair and nondiscriminatory regulatory treatment. In fact, the Commission's waiver decisions must comport with its treatment of similarly situated parties.²⁶ Moreover, any differential treatment must be supported by reasoned analysis, not mere recitation of perceived factual distinctions that have no relevance to the Commission's rules or policies.²⁷ The Commission's obligation to extend fair and nondiscriminatory treatment to all 2 GHz MSS licensees thus requires grant of ICO's waiver request.

²⁵ *Satellite Licensing Reform Order* ¶ 170.

²⁶ See *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985) ("Deference to agency authority or expertise, however, is not a license to ... treat like cases differently.") (internal quotations omitted); *Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169, 180 (D.C. Cir. 1997) (finding that FCC's interpretation of its rules was reasonable, but nonetheless vacating its decision denying applicant's request for "pioneer's preference" because of inconsistent application of the rule interpretation); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965) (ruling that FCC's refusal to explain disparate treatment of appellant and another licensee "was error").

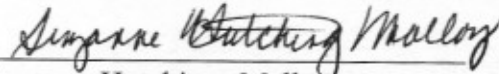
²⁷ See *Northpoint Technology, Ltd. v. FCC*, 2005 U.S. App. LEXIS 11804, *26 (D.C. Cir. June 21, 2005) (FCC's disparate regulatory treatment of two types of satellite services "is premised on an insignificant distinction"); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("We have long held that an agency must provide an adequate explanation before it treats similarly situated parties differently."); *Melody Music*, 345 F.2d at 733 (FCC must "do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences").

V. CONCLUSION

Based upon the foregoing, ICO urges the Bureau to grant this petition and eliminate or waive the requirement to post a bond as a condition of its 2 GHz MSS LOI authorization.

Respectfully submitted,

ICO SATELLITE SERVICES G.P.



Suzanne Hutchings Malloy
Senior Regulatory Counsel
2000 Pennsylvania Avenue, NW
Suite 4400
Washington, D.C. 20006

Cheryl A. Tritt
Phuong N. Pham
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006

Its Attorneys

June 23, 2005

CERTIFICATE OF SERVICE

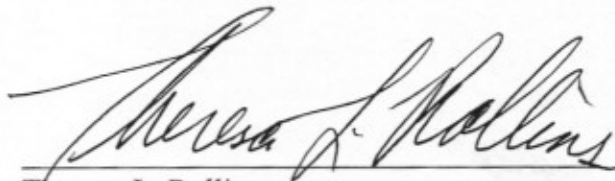
I, Theresa L. Rollins, hereby certify that a copy of the foregoing **PETITION FOR PARTIAL RECONSIDERATION** has been served this 23rd day of June 2005 by U.S. mail or by electronic mail as indicated(*) on the following:

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

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

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

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



Theresa L. Rollins