

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

FILED/ACCEPTED
JAN 11 2007
Federal Communications Commission
Office of the Secretary

In the matter of)
) File No. SAT-MOD-20061109-00137 (S2651)
New ICO Satellite Services G.P.)

REPLY OF INMARSAT GLOBAL LIMITED

Inmarsat Global Limited (“Inmarsat”) replies to the Opposition of New ICO Satellite Services G.P. (“ICO”),¹ in which ICO addresses Inmarsat’s Petition to Deny ICO’s request for an extension of time to launch its 2 GHz mobile satellite service (“MSS”) spacecraft.² ICO argues that Inmarsat does not have standing to object to ICO’s extension request, and that Inmarsat has failed to show that ICO is responsible for the delays in its MSS system deployment.

As to procedural matters, ICO is wrong about Inmarsat’s legal standing to file its Petition. Longstanding precedent establishes that Inmarsat, as a current provider of MSS in the United States, has standing under the Communications Act to file a petition to deny against ICO, an entity whom the Commission itself has identified as Inmarsat’s competitor.

As to the merits, Commission policy and precedent are clear that an entity seeking a milestone extension must establish that the circumstances giving rise to the delay are unforeseeable and beyond its control. ICO has not met that burden of proof. Because ICO has not met its evidentiary burden, under longstanding Commission policy and precedent, the Commission should deny ICO’s extension request as inconsistent with the public interest. If the

¹ New ICO Satellite Services G.P., Opposition to Petition to Deny, IB File No. SAT-MOD-20061109-00137 (filed Jan. 4, 2007) (“ICO Opposition”).

² New ICO Satellite Services G.P., Expedited Request for Milestone Extension, IB File No. SAT-MOD-20061109-00137 (filed Nov. 9, 2006) (“ICO Application”).

Commission nevertheless grants ICO's milestone extension request, Inmarsat continues to urge the Commission to condition any extension as described below and in its Petition to Deny.

I. INMARSAT HAS STANDING

In its Petition to Deny, Inmarsat explained that it has standing as a current provider of MSS with whom ICO competes.³ Indeed, the Commission itself has recently confirmed that Inmarsat and ICO are competitors in the marketplace.⁴ Longstanding precedent establishes that competitors have standing, under the Communications Act, to participate in Commission proceedings related to a competitor's authority to provide service.⁵ This tenant of administrative law has become axiomatic, such that a party "does not need to demonstrate that it will suffer a direct injury from grant' of an application where standing is based on status as a competitor in the same market."⁶ ICO's claim that Inmarsat must provide a more detailed demonstration of its legal "injury" to establish standing is thus incorrect. In any event, Inmarsat established that it is also harmed by ICO's failure to timely deploy ICO's 2 GHz MSS system, because Inmarsat is vying for the same scarce spectrum resource that is currently reserved for ICO's use.⁷

³ Petition to Deny of Inmarsat Global Limited, IB File No. SAT-MOD-20061109-00137, at 1-2 (filed Dec. 18, 2006) ("Inmarsat Petition to Deny").

⁴ *Use of Returned Spectrum in the 2 GHz Mobile Satellite Service Frequency Bands*, 20 FCC Rcd 19696, 19711, ¶¶ 33-34 (2005) ("2 GHz Order") (confirming that that ICO competes with *all* MSS operators).

⁵ *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940) ("Sanders").

⁶ *Waterman Broadcasting Corporation of Florida*, 17 FCC Rcd 15742 n.2 (2002) (rejecting applicant's assertion that competitor filing a petition to deny had failed to demonstrate direct injury) (citing *American Mobilephone, Inc.*, 10 FCC Rcd 12297, 12298, ¶ 8 (1997)).

⁷ Inmarsat Petition to Deny at 1-2. Even in cases where "standing" is an issue, the Commission's rules provide for the issues raised to be taken into account as "informal objections." 47 C.F.R. § 25.154(b).

ICO misconstrues Commission precedent when it argues that Inmarsat does not have “competitor” standing because *ICO* has not yet commenced service. The case *ICO* cites, *Sevier Valley*, stands for the proposition that an entity who is a “mere applicant,” and who is not currently participating in the marketplace, may not have standing to file a petition to deny in certain circumstances.⁸ Inmarsat’s situation is readily distinguishable: Inmarsat has been serving the United States for over two decades. Inmarsat’s standing, as a current service provider, to participate in Commission proceedings regarding new entrants in the satellite services marketplace is well-established.⁹

II. ICO FAILS TO ESTABLISH THAT CONSTRUCTION DELAYS ARE OUTSIDE ITS CONTROL

Commission policy requires a licensee to demonstrate that the need for a milestone extension is due to unforeseeable circumstances beyond its control.¹⁰ Thus, the burden of proof is *ICO*’s. *ICO* again fails to meet this burden.¹¹

In its Petition to Deny, Inmarsat established that *ICO* amended its spacecraft contract four times over the six-month period immediately after the Commission granted *ICO* its GSO spacecraft authorization. Inmarsat also established that those contract amendments related to, among other things, the use of ground-based beam forming (GBBF) technology on *ICO*’s spacecraft. Inmarsat established several other critical facts that *ICO* does not dispute:

⁸ *Sevier Valley Broadcasting, Inc.*, 10 FCC Rcd 9795, 9796, ¶ 6 (1995).

⁹ *See, e.g., Sanders*, 309 U.S. at 471, 476-477 (finding that a current competitor has standing to participate in a proceeding contemplating authorization of a new competitor).

¹⁰ *See, e.g., Space Station Licensing Reform*, 18 FCC Rcd 10760, 10826, 10882, ¶¶ 170, 333 (2003).

¹¹ *See, e.g., ICO Satellite G.P.*, 20 FCC Rcd 9796, 9804, ¶ 25 n.39 (2005) (“*ICO 2005 Modification Order*”) (rejecting *ICO*’s claims that it could not go forward with its NGSO system due to alleged “unforeseeable ‘contractual difficulties,’” finding that “*ICO* has not explained in sufficient detail what the nature of the contractual problem is or how the problem arose to support a finding that the problem was either unforeseeable or beyond *ICO*’s control.”).

- ICO’s contract amendments resulted in an *entirely new document* that details the satellite-specific hardware and satellite-based functions that support the current GBBF design: Attachment C, “GBBF-Unique Components and Functions on Board the Satellite.”¹²
- ICO’s amendments substantially altered essential terms and conditions of its contract, and resulted in *at least 111 new references* to GBBF that were not present before in those terms and conditions.¹³
- In contrast to the “relatively simple bent-pipe design,” using mostly “legacy” components on which the Commission relied in granting ICO its GSO authorization, ICO now describes its satellite as one of the largest constructed to date, with “the first two-way implementation of the innovative [GBBF] technology,” “using designs never before utilized.”¹⁴
- ICO’s extension request relies on the need for “better performing” components on the spacecraft to support GBBF, and delays associated with those “improved” components are the reason the spacecraft cannot be completed in time.¹⁵
- The Commission does not have on file a copy of ICO’s current satellite contract, as amended to date.¹⁶

These facts highlight ICO’s failure to satisfy its burden of proof to justify its milestone extension. ICO must demonstrate that the spacecraft under construction is the same as

¹² Inmarsat Petition to Deny at 7-8.

¹³ *Id.*

¹⁴ *Id.* at 7 (quoting ICO Application, Exhibit 1 at 1, 2-6).

¹⁵ Oscillators that are “integral to the implementation” of “innovative GBBF technology” will “likely cause delivery delay.” ICO Application, Exhibit 1 at 3. While ICO also identifies manufacturing issues with capacitors and composite waveguides, ICO indicates that issues with those components are not expected to delay delivery of the spacecraft. *Id.*

¹⁶ ICO admits that it has not filed the third and fourth amendments to that contract. ICO Opposition at 7-8. While ICO indicates that it has filed the first and second amendments, it did so under a request for confidentiality, and those documents are not publicly available, even in redacted form. ICO indicates that those documents were filed along with a “reverse FOIA” confidentiality request. *Id.* at 8 n.22. Inmarsat has not been able to locate those filings, either at the Commission, or through the assistance of the FCCFilings.com service.

ICO is wrong when it argues that its first amendment did not need to be timely filed. 47 C.F.R. § Section 1.65 provides for applications to be updated until grant of an application is final, and no longer subject to reconsideration or appeal before the agency or a court, and regardless whether reconsideration occurs at the Bureau or full Commission level. *Cf.* ICO Opposition at 7 n.21.

the one for which it previously contracted, in order for the Commission to conclude that the current delay arises entirely from “unforeseeable circumstances” beyond ICO’s control. The four amendments to ICO’s contract raise serious questions that must be examined, particularly when coupled with the evolution of ICO’s spacecraft from (i) a “relatively simple bent pipe design” in which “most of the components are ‘legacy’ equipment that has been used or developed for previous projects,”¹⁷ to (ii) the current, “first of its kind,” largest-ever spacecraft design.¹⁸ At a minimum, the Commission must require ICO to submit its current contract for review, so that the Commission can compare the design that it relied on in granting ICO’s GSO authorization, with ICO’s current satellite design. This information is necessary to determine if ICO has satisfied its burden of proof to demonstrate that its design changes were attributable to the type of unforeseen circumstances that might justify a milestone extension under Commission precedent.

In its Opposition, ICO asserts that its contract amendments are not the cause of its manufacturing delay because the confidential technical exhibits to the January 10, 2005 version of its contract (which are not publicly available even in redacted form) included three passing references to “GBBF.”¹⁹ These assertions are not sufficient to justify a milestone extension. A simple example explains why.

Suppose that (i) a licensee originally contracted for a spacecraft using spot beam technology, (ii) the spacecraft was planned to utilize fixed spot beams, and (iii) the Commission, in granting an authorization, and establishing license milestones, relied on that design. Now suppose that (i) the licensee voluntarily modified its design to incorporate *steerable* spot beams

¹⁷ *ICO 2005 Modification Order*, 20 FCC Rcd at 9803, ¶ 24.

¹⁸ ICO Application, Exhibit 1 at 1-2, 6.

¹⁹ ICO Opposition at 6 & n.18.

(instead of fixed spot beams), (ii) the modified design required better performing components on the spacecraft, and (iii) installing those components would delay the manufacturing process. Certainly, a response that the design originally called for “spot beams” would be no answer to concerns that the licensee appeared to be the cause of its own manufacturing delay. Yet when faced with a demonstration that its voluntary contract amendments relate to the very GBBF technology which ICO now blames for its manufacturing delay, all ICO says is that it had planned to use some form of that technology from the beginning. But ICO never demonstrates, or even asserts, that its GBBF design has remained constant, or that no changes related to GBBF have had any impact on its manufacturing schedule.

Thus, the current version of ICO’s manufacturing contract is not only relevant, but is *essential* for purposes of assessing whether ICO’s voluntary choices have given rise to its manufacturing delay.²⁰ This includes the third amendment, and the fourth amendment as incorporated in the November 29, 2005 amended and restated agreement.²¹

III. CASE LAW DOES NOT SUPPORT ICO’S REQUEST

In its Petition to Deny, Inmarsat explained that Commission policy, as established in a number of decisions denying milestone extensions, does not allow a licensee to extend

²⁰ Compare *id.* at 9 (asserting that current GBBF-related issues on board the spacecraft are irrelevant).

²¹ The Petition to Deny highlighted that ICO already had missed at least five of its contract milestones and notified the Commission of these missed milestones pursuant to its authorization. Inmarsat Petition to Deny at 4 & n.15. Since Inmarsat filed the Petition to Deny, ICO has notified the Commission of yet another missed contract milestone. See Letter from Suzanne Hutchings Malloy, ICO, to Marlene H. Dortch, FCC, File No. SAT-MOD-20050110-00004 (filed Dec. 26, 2006). This time, ICO notified the Commission that it will complete “contract milestone 32” *five months* after scheduled completion. *Id.*

milestones based on changes in its contracted-for system design.²² As the Commission has recently observed:

We do not extend milestones merely to allow a licensee to incorporate a new technology into its satellite design. Otherwise, we would create a loophole in our milestone policy, allowing licensees to extend their milestones indefinitely by filing modification applications.²³

ICO claims that this policy is irrelevant because ICO is not seeking authority to modify its spacecraft design at the same time as it seeks a milestone extension.²⁴ ICO's assertion—that technology changes are relevant only if the changes require a license modification—would turn the Commission's milestone policy on its head. That interpretation would allow licensees repeatedly to push back system implementation to accommodate technology “upgrades,” simply by blaming the need for more time on their manufacturers.

ICO also is wrong that the Commission's *Intelsat* decision²⁵ supports the relief that ICO seeks. First and foremost, *Intelsat* involved a replacement satellite, and, therefore, the Commission was not faced with any concerns regarding the warehousing of orbital resources or delaying service to the public.²⁶ In this case, the valuable 2 GHz spectrum resources set aside for

²² See Inmarsat Petition to Deny at 5-6.

²³ *PanAmSat Licensee Corp.*, 16 FCC Rcd 11534, 11541, ¶ 21 (2001); *NetSat 28 Company L.L.C.*, 19 FCC Rcd 17722, 17726 ¶ 10 (2004) (“Extending milestones on this basis would allow licensees to extend indefinitely their nonperformance by repeated modification of their proposals which could in turn facilitate warehousing of scarce orbital resources or, at a minimum, delay service to the public.”).

²⁴ ICO Opposition at 8. Inmarsat does not doubt that ICO's original satellite design contemplated use of capacitors, waveguides, and oscillators. See *id.* at 6-7. But that assertion begs the question whether ICO changed the specifications for those components or the performance requirements of the spacecraft in a manner that has led to the current delay. Only an examination of the contract amendments that *have not* been filed with the Commission can resolve that question.

²⁵ *Intelsat LLC*, 19 FCC Rcd 5266 (2004) (“*Intelsat*”).

²⁶ *Id.* at 5266-5267, ¶¶ 2, 4.

ICO will continue to lie fallow until ICO actually launches and commences service (or the Commission authorizes another operator to do so).²⁷ Moreover, in *Intelsat*, the Commission was provided evidence that Intelsat's launch provider had actually scheduled a new launch window that would allow the licensee to deploy on a time schedule consistent with the extension request.²⁸ In contrast, ICO's launch provider offers no indication when it may be able to launch ICO's spacecraft, even assuming that ICO is able to complete construction by the fall of this year.²⁹

IV. REQUESTED RELIEF

For the foregoing reasons, and those provided in its Petition to Deny, Inmarsat reiterates its request that the Commission require ICO to (i) file complete copies of each and every amendment to its spacecraft construction contract, and (ii) demonstrate that a technology choice, or another circumstance within ICO's control, is not the cause of ICO's missing its upcoming milestone. Access to a complete, current copy of ICO's construction contract is essential to determining that ICO is not responsible for the delays underlying its milestone extension. In the absence of a convincing demonstration that ICO's milestone non-compliance is due to circumstances beyond ICO's control, the Commission should deny ICO's request for an extension of time. It would not serve the public interest to allow ICO to continue to delay the implementation of its system based on voluntary design changes.


²⁷ ICO also asserts that an extension is warranted because other MSS competitors likely are not in a position to provide 2 GHz MSS on the schedule that ICO proposes for its milestone extension. ICO Opposition at 10. That "head start" rationale cannot justify an extension or waiver of ICO's milestone, because that type of circumstance is not unique and would exist in virtually every case where an entity who has a spacecraft under construction seeks milestone relief. The purpose of milestones is to hold a licensee to a timely deployment schedule, regardless whether someone else is ready to launch on the same schedule.

²⁸ *Intelsat*, 19 FCC Rcd at 5268, ¶ 7.

²⁹ Inmarsat Petition to Deny at 11 & n.35.

In any event, and in light of ICO's history of delay, if the Commission ultimately grants ICO a milestone extension, the Commission should (i) clarify that ICO will receive no further extensions of its license milestones beyond the current request; and (ii) make clear that neither ICO's previous delays nor any future delays in building or launching its spacecraft would provide the basis for waiving or modifying any ATC gating criteria in ICO's case. There is nothing unprecedented, unfair, or unduly burdensome with the Commission indicating that this is the last extension it intends to provide ICO, or that the Commission intends to strictly enforce its ATC gating criteria.³⁰ Contrary to ICO's protestations, such conditions would ensure the continued effectiveness of the Commission's milestone and ATC rules and policies.

Respectfully submitted,



Diane J. Cornell
Vice President, Government Affairs
INMARSAT, INC.
1101 Connecticut Avenue NW
Suite 1200
Washington, DC 20036
Telephone: (202) 248-5155

John P. Vanka
Jeffrey A. Marks
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
Telephone: (202) 637-2200

Counsel for Inmarsat Global Limited

January 11, 2007

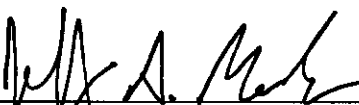
³⁰ Cf. ICO Opposition at 11-12.

CERTIFICATE OF SERVICE

I, Jeffrey A. Marks, hereby certify that on this 11th day of January, 2007, I caused to be served a true copy of the foregoing by first class mail, postage prepaid, upon the following:

Cheryl A. Tritt
Morrison & Foerster LLP
2000 Pennsylvania Ave., NW
Suite 5500
Washington DC 20006
(202) 887-1500

Suzanne Hutchings Malloy
ICO Global Communications
815 Connecticut Avenue, NW
Suite 610
Washington, DC 20006
(202) 330-4005



Jeffrey A. Marks