January 8, 2004

By Hand Delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: **EX PARTE**
Constellation Communications Holdings, Inc., File Nos. SAT-MOD-2002719-00103, SAT-T/C-20020718-00114, 181-SAT-LOA-97(46) *et al.*; Mobile Communications Holdings, Inc., SAT-MOD-20020719-00105, SAT-T/C-20020719-00104, 180-SAT-PL097(26) *et al.*

Dear Ms. Dortch:

On January 7, 2004, ICO Global Communications (Holding) Ltd. ("ICO"), represented by Cheryl Tritt and Phuong Pham of Morrison & Foerster LLP, and the undersigned, conducted a teleconference with Paul Margie, legal adviser to Commissioner Michael Copps, to discuss the above-referenced proceedings. ICO discussed Commission precedent supporting approval of satellite sharing agreements for milestone purposes, as well as judicial precedent requiring the Commission to provide clear and full notice of its interpretation of the milestone requirements. ICO also discussed the relevance of the International Bureau order approving the milestone compliance of KaStarCom. World Satellite LLC at 18 FCC Rcd 22337 (IB 2003), and reiterated its request that the Commission resolve the pending applications for review in the above-referenced proceedings in a fair and non-discriminatory manner. At Mr. Margie's request, ICO subsequently provided a summary of the legal precedent supporting satellite sharing agreements and requiring clear notice of milestone requirements.

In accordance with Section 1.1206(b) of the Commission's rules, an original and three copies of this letter are being filed.

Very truly yours,

Suzanne Hutchings

cc: Paul Margie
Bryan Tramont
Sheryl Wilkerson
Jennifer Manner
Samuel Feder
Barry Ohlson

No. of Copies rec'd 0+4
List ABCDE

2000 Pennsylvania Ave., NW
Suite 4400
Washington, DC 20006

202 887 6956 phone
202 778 1654 fax
web: www.ico.com

dc-368023

LEGAL PRECEDENT SUPPORTING SATELLITE SHARING AGREEMENTS AND FCC OBLIGATION TO PROVIDE CLEAR NOTICE OF LICENSE REQUIREMENTS

- **The International Bureau ("Bureau") arbitrarily and capriciously rejected the CCHI/MCHI/ICO sharing agreements in direct conflict with FCC precedent.** ***In a number of cases, the FCC treated similar sharing agreements as manufacturing contracts for milestone purposes.***

  (1) ***United States Satellite Broadcasting Co., Inc. and Hughes Comm. Galaxy, Inc.*****, 7 FCC Rcd 7247 (MMB 1992) ("*****USSB*****")**

  -- The FCC approved for milestone purposes a contract allowing USSB, a direct broadcast satellite ("DBS") permittee, to purchase capacity on a satellite to be constructed under a separate agreement to which the permittee was not a party.

  -- The Commission expressly concluded that the capacity purchase agreement "complies with the first component of the due diligence requirement." *Id.* at 7251 ¶ 21. The first DBS due diligence milestone at issue in *USSB* is exactly the same as CCHI's and MCHI's first milestone requiring execution of a non-contingent manufacturing contract.

  -- The Commission's approval of the capacity purchase agreement was not based on USSB's prior milestone compliance, but rather on the determination that the payment and milestone schedules specified in the contract, along with the parties' compliance with those schedules, demonstrated "a financial commitment to the construction of the satellite" and constituted "meaningful levels of advancement in the satellite construction process." *Id.* at 7250-51 ¶ 21.

  -- Although USSB initially met its first due diligence milestone by executing a separate construction contract, that contract eventually was terminated and replaced by the capacity purchase agreement. As a result, USSB was required to demonstrate that its sharing agreement satisfied the non-contingent contract milestone. In finding that the capacity purchase agreement satisfied the non-contingent contract milestone, the Commission did not consider additional facts such as USSB's prior construction efforts. The Commission considered these circumstances only in deciding whether to grant USSB an *extension* of the milestone deadlines. *Id.* at 7250 ¶¶ 17-18.

  (2) ***Volunteers in Technical Assistance*****, 12 FCC Rcd 13995 (1997) ("*****VITA/CTA*****")**

-- The FCC approved a satellite sharing agreement between Volunteers in Technical Assistance ("VITA"), a mobile satellite service ("MSS") licensee, and CTA Inc. ("CTA"). It also affirmed the Bureau's imposition of specific milestones requiring completion of construction and launch of VITA's shared satellite. *See VITA/CTA*, 12 FCC Rcd at 13997, 14000 ¶¶ 7, 16.

-- FCC approval of the sharing agreement was not premised on any prior compliance by VITA with the non-contingent contract milestone. The Bureau issued a license to VITA at the same time that it approved the VITA/CTA sharing agreement. Therefore, it was unnecessary for the Bureau to include in VITA's license a milestone condition requiring execution of a non-contingent contract. The Bureau's imposition of milestones requiring completion of construction and launch of the shared satellite reflects the FCC's view that the VITA/CTA sharing agreement qualifies as a manufacturing contract and is consistent with the milestone requirements.

(3) ***Volunteers in Technical Assistance*, 12 FCC Rcd 3094 (IB 1997) ("*VITA/FAI*")**

-- Following the unsuccessful launch of the VITA/CTA shared satellite, VITA executed a second sharing agreement with another party, Final Analysis, Inc. ("FAI"). The Bureau approved the VITA/FAI sharing agreement and rejected an opponent's argument that the sharing arrangement did not satisfy "either the letter or the spirit of the construction and launch milestones." *Id.* at 3107 ¶ 41.

-- The Bureau acknowledged that the sharing arrangement was fully consistent with VITA's milestone obligations by stating: "While the agreement with FAI will permit VITA to implement its communications payload on FAI's experimental satellite, VITA, as licensee on the VITA payload, must comply with the milestone schedule required under VITA's license." *Id.* at 3108 ¶ 42.

-- The Bureau's approval of the VITA/FAI sharing agreement for milestone purposes was based on its examination of the terms of the contract, *not* on VITA's prior compliance with the non-contingent contract milestone. *Id.* at 3108 ¶ 43. It thus viewed the VITA/FAI sharing agreement as just like other "construction and launch services agreements [that] have contingencies that may result in the termination of the agreement." *Id.* Moreover, it rejected an opponent's argument that the sharing agreement contained "open contingencies" in violation of the milestone requirements. *Id.*

- **Under well-established judicial precedent, the FCC must provide full notice of its interpretation of a rule if it seeks to use that interpretation to cut off a party's rights.** ***More severe sanctions such as license cancellation require even more precise and complete notice.***

  (1) ***Satellite Broadcasting Co. v. FCC*, 824 F2d 1 (D.C. Cir. 1987)**

  -- The court held that the FCC failed to give full notice of its interpretation of certain application filing rules and vacated the FCC's dismissal of various license applications for failure to comply with filing requirements for which the application did not receive adequate notice: "Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Id.* at 3.

  -- The court found that the dismissal of a license application—a sanction much less severe than revocation of a license—is "a sufficiently grave sanction to trigger this duty to provide clear notice." *Id.*

  -- Although courts must defer to an agency's reasonable interpretation of its own rules, the agency "must give full notice of its interpretation" if it seeks "to use that interpretation to cut off a party's right." *Id.* at 4.

  (2) ***Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000)**

  -- The court vacated the FCC's denial of a license renewal application because the FCC rule was not "ascertainably certain" and therefore could not be applied against the applicant. *Id.* at 619, 628.

  (3) ***Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985)**

  -- "The less forgiving the FCC's acceptability standard, the more precise its requirements must be." *Id.* at 875. "The FCC cannot reasonably expect applications to be letter-perfect when, as here, its instructions for those applications are incomplete, ambiguous or improperly promulgated." *Id.*

  (4) ***Radio Athens, Inc. v. FCC*, 401 F.2d 398 (D.C. Cir. 1968)**

  -- "If the Commission wished to adopt a strict cut-off policy, it should have taken into account that it was dealing with a matter

where full and explicit notice is the heart of administrative fairness....When the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration." *Id.* at 404.

- **The Bureau provided no prior notice of milestone requirements that formed the basis for its arbitrary and capricious license cancellation.**

  -- No FCC rule or policy prohibits licensees from executing sharing agreements for milestone purposes. In fact, the CCHI/MCHI/ICO sharing agreements are fully consistent with Commission precedent.

  -- The Bureau for the first time interpreted the non-contingent contract milestone to require an assessment of the sufficiency of payments made under a contract and the sufficiency of liability or remedies provisions in the event of a party's breach. In view of the lack of any clear standard for determining the sufficiency of commitments made under a contract, the Bureau's novel interpretation of the non-contingent contract requirement was not "ascertainably certain" so as to give CCHI and MCHI fair notice of that interpretation.