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January 6, 2003

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The Portals  
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Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: **EXPARTE**

Constellation Communications Holdings, Inc., File Nos. SAT-MOD-20020719-00103, SAT-T/C-20020718-00114, 181-SAT-LOA-97(46) *et al.*;  
Mobile Communications Holdings, Inc., File Nos. SAT-MOD-20020719-00105, SAT-T/C-20020719-00104, 180-SAT-P/L097(26) *et al.*;  
IB Docket No. 01-185; ET Docket No. 00-258

Dear Ms. Dortch:

Constellation Communications Holdings, Inc. ("CCHI"), Mobile Communications Holdings, Inc. ("MCHI"), and ICO Global Communications (Holdings) Limited ("ICO") urge the Commission to reject the latest attempt by AT&T Wireless Services, Inc., Cingular Wireless LLC, and Verizon Wireless (collectively, the "Terrestrial Carriers") to distort the record in the above-referenced proceedings and misstate relevant Commission precedent. On December 27, 2002, the Terrestrial Carriers filed an *ex parte* letter in response to *ex parte* filings by ICO on December 18, 2002 and December 20, 2002 in the above-referenced proceedings.<sup>1</sup> They charge that ICO "seriously mischaracterize[d] the case law" and claim that Commission precedent demonstrates that the Commission "expressly rejects proposals to use sharing arrangements to satisfy milestone compliance."<sup>2</sup> These careless and patently false charges are supported by nothing more than charts containing inaccurate, cursory legal analyses that omit or distort material facts and findings of the relevant case law.

<sup>1</sup> See Letter from Cheryl A. Tritt, Counsel to ICO, to Marlene H. Dortch, Secretary, FCC (Dec. 18, 2002); Letter from Suzanne Hutchings, ICO, to Marlene H. Dortch, Secretary, FCC (Dec. 20, 2002)

<sup>2</sup> See Letter from Kathryn A. Zachem & L. Andrew Tollin, Counsel to the Terrestrial Carriers, to Marlene H. Dortch, Secretary, FCC, at 1 (Dec. 27, 2002) ("December 27 Letter").

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Notably, the Terrestrial Carriers incorrectly state that *USSB*,<sup>3</sup> *VITA I*,<sup>4</sup> and *VITA II*<sup>5</sup> did not “involve milestones”<sup>6</sup> or “address whether a sharing arrangement satisfied the non-contingent contract milestone.” The express language of those decisions, however, flatly contradicts the Terrestrial Carriers’ claims. Those cases involved the same non-contingent contract milestone that the Commission has imposed on CCHI and MCHI, and the Commission in those cases consistently applied the same standard to determine compliance with the non-contingent contract milestone that it applied for other satellite licensees.

For example, in *USSB*, the Commission interpreted *USSB*’s first due diligence milestone to require “a contract, signed by both parties, which contains no unresolved contingencies which could preclude substantial construction of the satellites.”<sup>8</sup> This first due diligence milestone is no different from the non-contingent contract milestone imposed on 2 GHz mobile satellite service (“MSS”) and other satellite licensees.’ The Commission expressly found that *USSB*’s sharing agreement with Hughes “complies with the first component of the due diligence requirement.”<sup>9</sup> In the face of this express ruling, the Terrestrial Carriers’ unabashed contention that *USSB* did not address any milestone issue defies logic.

Moreover, the Terrestrial Carriers’ suggestion that the Commission applied a more lenient “totality of the circumstances” standard in *USSB*<sup>11</sup> is immaterial because that standard

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<sup>3</sup> *United States Satellite Broadcasting Co., Inc. and Hughes Comm. Galaxy, Inc.*, 7 FCC Rcd 7247 (MMB 1992)(“*USSB*”).

<sup>4</sup> *Volunteers in Technical Assistance*, 12 FCC Rcd 13995 (1997) (“*VITA I*”).

<sup>5</sup> *Volunteers in Technical Assistance*, 12 FCC Rcd 3094 (IB 1997) (“*VITA II*”).

<sup>6</sup> December 27 Letter, Attachment (*FCC Decisions on Satellite Sharing Arrangements Do Not Support the Claim That Sharing Satisfies Milestones*) at 1.

<sup>7</sup> See Terrestrial Carriers Response to Surreply at 5 (Oct. 31, 2002).

<sup>8</sup> *USSB*, 7 FCC Rcd at 7250 ¶ 19 (quoting *Tempo Enterprises, Inc.*, 1 FCC Rcd 20, 21 (1986)).

<sup>9</sup> 2 GHz MSS licensees are required under their first milestones to “enter into a non-contingent satellite manufacturing contract for the system within one year of authorization.” *The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 15 FCC Rcd 16127, 16177 ¶ 106 (2000). See also *Application of Constellation Communications Holdings, Inc.*, 16 FCC Rcd 13724, 13736 ¶ 30 (IB 2001); *Application of Mobile Communications Holdings, Inc.*, 16 FCC Rcd 13794, 13805 ¶ 30 (IB 2001).

<sup>10</sup> *USSB*, 7 FCC Rcd at 7251 ¶ 21

<sup>11</sup> See December 27 Letter, Attachment (*FCC Satellite Sharing Cases Do Not Support a Finding of MCHI/Constellation Milestone Compliance*) at 1.

## MORRISON & FOERSTER LLP

Ms. Marlene H. Dortch  
January 6, 2003  
Page Three

was applied only in determining whether the Commission should *extend* the milestone for *commencement of operations*.<sup>12</sup> It was not applied to the threshold issue of whether the sharing agreement complies with the first milestone requiring a non-contingent construction contract. In fact, nothing in *USSB* suggests that the Commission applied a more lenient standard when it determined that *USSB*'s sharing agreement qualified as a non-contingent construction contract.

Like *USSB*, the Commission in *VITA II* could not have been any more explicit when it approved *VITA*'s sharing arrangement with Final Analysis ("FAI") 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."<sup>13</sup> It 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."<sup>14</sup> Significantly, the Commission viewed *VITA*'s sharing agreement as just like other "construction and launch services agreements [that] have contingencies that may result in the termination of the agreement."<sup>15</sup> It thus rejected an opponent's argument that the sharing agreement contained "open contingencies" in violation of the milestone requirements.<sup>16</sup>

The full Commission also addressed milestone issues in *VITA I* when it affirmed the international Bureau's prior decision to impose milestones requiring *VITA* to complete construction and launch of its shared satellite." By both authorizing those milestones and approving *VITA*'s sharing arrangement, the Commission thus acknowledged that the sharing arrangement was fully consistent with *VITA*'s milestone obligations. Although the Terrestrial Carriers attempt to distinguish *VITA I* and *VITA II* by arguing that neither case involved the "strict enforcement" standard applicable to 2 GHz MSS licensees, nothing in those decisions remotely suggests that the Commission failed to apply a "strict enforcement" standard. In fact, the Commission in *VITA II* stressed that it "intend[s] to hold *VITA* responsible for complying with the milestone requirements contained in its license." This declaration reveals no intent to waver from strictly enforcing *VITA*'s milestone requirements.

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<sup>12</sup> See *USSB*, 7 FCC Rcd at 1249 ¶ 15.

<sup>13</sup> *VITA II*, 12 FCC Rcd at 3107 ¶ 41.

<sup>14</sup> *Id.* at 3108 ¶ 42.

<sup>15</sup> *Id.* at 3108 ¶ 43.

<sup>16</sup> *Id.*

<sup>17</sup> See *VITA I*, 12 FCC Rcd at 13998 ¶ 7

<sup>18</sup> *VITA II*, 12 FCC Rcd at 310X ¶ 42. The Terrestrial Carriers also attempt to distinguish *VITA I* and *VITA II* by noting that *VITA* was a non-profit, humanitarian aid organization and that the shared

# MORRISON & FOERSTER LLP

Ms. Marlene H. Dortch  
January 6, 2003  
Page Four

While failing to refute the applicability of Commission precedent authorizing satellite sharing arrangements, the Terrestrial Carriers also fail to identify any case where the Commission found a sharing arrangement similar to those at issue here to be inconsistent with a licensee's milestone obligations. The Terrestrial Carriers argue that the Commission's decisions in *ACC*,<sup>19</sup> *DVSI*,<sup>20</sup> *Columbia Order*,<sup>21</sup> and *GTE Spacenet*<sup>22</sup> "establish the principle that a licensee cannot rely on interim or stopgap measures,"<sup>23</sup> but fail to explain how the sharing arrangements in those cases are similar for milestone purposes to the sharing arrangements proposed here.<sup>24</sup> In

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satellites in both cases were not launched successfully. *See* December 27 Letter, Attachment (*FCC Decisions on Satellite Sharing Arrangements Do Not Support the Claim That Sharing Satisfies Milestones*) at 1, Attachment (*FCC Satellite Sharing Cases Do Not Support a Finding of MCHI/Constellation Milestone Compliance*) at 1-2. These facts, however, were irrelevant to the Commission's approval of VITA's sharing arrangements and establishment of milestone requirements in both cases. VITA's status as a non-profit organization was relevant only to the Commission's decision to waive the financial qualifications requirement, and not to its decision to approve the sharing arrangements in both cases. *See VITAI*, 12 FCC Rcd at 13999-14000, 14002-03 ¶¶ 14-16, 24; *VITA II*, 12 FCC Rcd at 3108 ¶¶ 42-43. Moreover, it is senseless to suggest that *VITAI* and *VITA II* have no precedential effect merely because the authorized sharing arrangements in both cases were not successfully implemented because of launch failures. The FCC's rationale for approving those arrangements did not hinge upon their ultimate success.

<sup>19</sup> *Advanced Communications Corp.*, 11 FCC Rcd 3399 (1995) ("ACC").

<sup>20</sup> *Dominion Video Satellite, Inc.*, 14 FCC Rcd 8182 (IB 1999) ("DVSI").

<sup>21</sup> *Columbia Communications Corp.*, 15 FCC Rcd 16496 (IB 2000) ("Columbia Order").

<sup>22</sup> *GTE Spacenet Corp.*, 2 FCC Rcd 5312 (CCB 1987) ("GTE Spacenet").

<sup>23</sup> December 27 Letter, Attachment (*FCC Cases Rejecting Milestone Compliance Are Not Distinguishable*) at 1.

<sup>24</sup> The Terrestrial Carriers dismiss without explanation the obvious differences between the proposed sharing arrangements here and those in *DVSI*, *Columbia Order*, and *GTE Spucenet*. For example, in *DVSI*, the Commission stated that "[n]othing... suggests that *leasing* capacity... satisfies this due diligence requirement." *DVSI*, 14 FCC Rcd at 8185 ¶ 7 (emphasis added). Unlike *DVSI*, *CCHI* and *MCHI* are *purchasing ownership interests* in satellite capacity. This distinction is material because in every instance where the Commission approved a sharing arrangement for milestone purposes, the sharing arrangement involved a purchase of an ownership or controlling interest in capacity, rather than a mere lease. *See USSB*, 7 FCC Rcd at 7249 ¶ 11; *VITAI*, 12 FCC Rcd at 13999 ¶ 15; *VITA II*, 12 FCC Rcd at 3103 ¶ 25; *cf. ACC*, 11 FCC Rcd at 3419 ¶ 51 (noting that, unlike *USSB*, *ACC* "would own no part of the satellites... its control over the channels is irrevocably contracted away... [or] sold outright"). Additionally, in both *Columbia Order* and *GTE Spacenet*, the Commission declined to allow the sharing arrangement to satisfy the licensee's milestones because the shared system was not subject to the same service rules applicable to the licensee's authorized system. *See Columbia Order*, 15 FCC Rcd at 16504-05 ¶ 21 ("[the shared] TDRS-6 [satellite] does not meet Commission technical requirements in place since

# MORRISON & FOERSTER LLP

Ms. Marlene H. Dortch  
January 6, 2003  
Page Five

## ORIGINAL

fact, *ACC* did not involve any sharing arrangement. The satellite licensee in that case merely sought a second extension of its milestone in order to allow it time to assign its authorization to another party or, alternatively, to implement an agreement requiring it to relinquish control of its licensed frequencies.<sup>25</sup> Unlike *ACC*, *CCHI* and *MCHI* do not require any milestone extension because they have met their first milestones through their sharing agreements with *ICO*. Therefore, the issues raised in *ACC* are completely different from those raised here.<sup>26</sup>

In any event, no factual basis supports the Terrestrial Carriers' assertion that *CCHI*'s and *MCHI*'s proposed sharing arrangements are interim measures to facilitate a transfer of control to *ICO*. Under their sharing agreements, *CCHI* and *MCHI* have made both substantial payments to *ICO* and binding, non-contingent commitments to pay the remainder of the purchase price for their satellite system channel capacity. *ICO* also made binding commitments to deliver satellite system channel capacity to *CCHI* and *MCHI* within their milestone deadlines. All the parties remain obligated to implement the sharing arrangements if the Commission does not approve the transfer of control of the *CCHI* and *MCHI* licenses to *ICO*.

Contrary to the Terrestrial Carriers' claim, *CCHI*'s and *MCHI*'s sharing agreements are distinguishable from the cases where the Commission found that a satellite licensee did not meet a non-contingent contract milestone. In all of those cases cited by the Terrestrial Carriers, either the licensee failed to execute any contract by the milestone deadline or the contract contained conditions precedent that prevented commencement of construction. The Terrestrial Carriers do not dispute this fact.<sup>27</sup> Here, *CCHI* and *MCHI* timely executed contracts that contain binding, non-contingent commitments to proceed with system implementation and no conditions precedent preventing commencement thereof and delivery of system channel capacity.

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1983"); *GTE Spacenet*, 2 FCC Rcd at 5314 ¶ 18 ("The [shared system] payload's basic characteristics differ substantially from the proposed dedicated RDSS satellites."). In every instance where the Commission approved a sharing arrangement for milestone purposes, the arrangement involved sharing a satellite system that fully complied with the service rules applicable to the licensee's authorization. *See USSB*, 7 FCC Rcd at 7249 ¶ 11; *VITA I*, 12 FCC Rcd at 13996 ¶ 3; *VITA II*, 12 FCC Rcd at 3099-3100 ¶ 15.

<sup>25</sup> *See ACC*, 11 FCC Rcd at 3405-06 ¶¶ 11-12, 14.

<sup>26</sup> The Terrestrial Carriers also incorrectly claim that the Commission declined to attribute to *ACC* "the construction progress made by the licensee of the shared satellite system." December 27 Letter, Attachment (*FCC Cases Rejecting Milestone Compliance Are Not Distinguishable*), at 1. *ACC*, however, was not involved in any sharing arrangement. Rather, it sought milestone credit for the construction progress made by Tempo Satellite, to which it proposed to assign its authorization. *See ACC*, 11 FCC Rcd at 3415 ¶ 41.

<sup>27</sup> *See* December 27 Letter, Attachment (*FCC Cases Finding Failure to Meet Non-Contingent Contract Milestone*) at 1-4.

MORRISON & FOERSTER LLP

Ms. Marlene H. Dortch  
January 6, 2003  
Page Six

ORIGINAL

In attempting to apply the non-contingent contract cases to CCHI and MCHI sharing agreements, the Terrestrial Carriers repeat their mantra that the sharing agreements (1) do not qualify as binding construction contracts, (2) are a “paper bridge” to facilitate the transfer of control to ICO, and (3) contain prohibited conditions. The non-contingent contract cases, however, offer no support for the conclusion that sharing agreements cannot qualify as binding construction contracts because none of those cases addresses that issue. Moreover, as previously stated, the CCHI and MCHI sharing agreements are not interim measures designed to facilitate a transfer of control. They are no different from other construction contracts that provide for termination upon future Commission action.<sup>28</sup>

Furthermore, although the non-contingent contract cases prohibit contractual conditions that prevent commencement of construction, the Terrestrial Carriers have not cited any provisions in the CCHI or MCHI sharing agreements that have prevented commencement of construction. It is undisputed that construction of the shared ICO system has commenced and in fact is nearing completion; CCHI and MCHI have made substantial payments to ICO under the sharing agreements; and CCHI, MCHI, and ICO remain contractually obligated to proceed with implementation of the sharing arrangement within the milestone deadlines.

Fourteen copies of this letter are being filed for inclusion in the public record, as required by Section 1.1206(b)(1) of the Commission’s rules.

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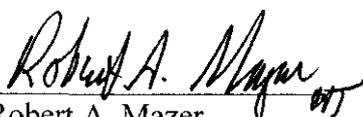
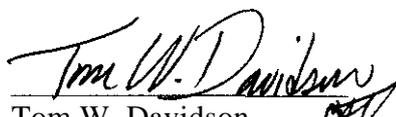
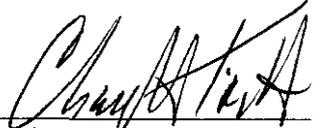
<sup>28</sup> *Columbia Order*, 15 FCC Rcd at 16500-01 ¶ 12 (construction contract may account for possibility of Commission approval of a pending transfer of control application); *PanAm.Sat Licensee Corp.*, 16 FCC Rcd 11534, 11539-40 ¶ 17 (2001) (construction contract may account for possibility of Commission assignment of spectrum for inter-satellite links that would require modification of FSS system).

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Ms. Marlene H. Dortch  
January 6, 2003  
Page Seven

Please direct any questions regarding this submission to the undersigned.

Very truly yours,

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cc: Parties on attached Certificate of Service

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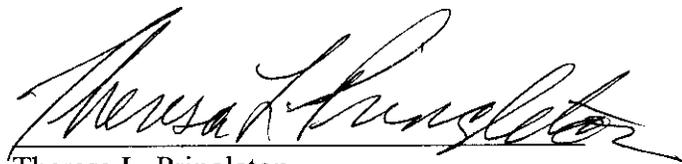
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