

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C.

In the Matter of the Application of)
)
VOLUNTEERS IN TECHNICAL)
ASSISTANCE)
)
 For Authority to Construct,)
 Launch and Operate a Non-)
 Voice, Non-Geostationary)
 Mobile-Satellite System)

File Nos. CSS-91-007(3)
 30-DSS-AMEND-94

ORDER AND AUTHORIZATION

Adopted: July 21, 1995

Released: July 21, 1995

By the Chief, International Bureau:

I. Introduction

1. By this Order, we grant authority to Volunteers in Technical Assistance ("VITA") to construct, launch, and operate a non-voice, non-geostationary ("NVNG") mobile satellite service ("MSS") system in specific frequency bands below 1 GHz. VITA is a non-profit, humanitarian aid organization that provides services to developing nations around the world. It will use its satellite to provide essential educational, health, environmental, disaster relief, and technical communication services in developing countries. VITA has also entered into an arrangement with CTA Incorporated, pursuant to which CTA will use half of VITA's satellite capacity to provide commercial service.

2. VITA filed an application to construct a two-satellite NVNG system as a part of the first processing round of the NVNG MSS system applications.¹ Starsys Global Positioning, Inc., Orbital Communications Corporation ("Orbcomm"), and dbX Corporation oppose VITA's application. They argue that VITA's financial showing is insufficient; that the proposal exhibits several technical

¹ VITA Application for Authority to Construct a Non-profit International Low-Earth Orbit Satellite System ("Application") (September 20, 1990). It amended this application in accordance with the rules adopted to govern NVNG MSS systems. See *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile Satellite Service*, 8 F.C.C. Rcd. 8450 (1993) ("NVNG Order").

problems; and that CTA's involvement with VITA is a de-facto change in ownership, and thus constitutes a major amendment which would subject VITA's application to be treated as newly filed.² In addition, Leo One USA Corporation filed an Emergency Motion and Cease and Desist Order Request seeking dismissal of VITA's application on the grounds that VITA had constructed its space station without appropriate authority and has demonstrated a lack of candor in its dealings with the Commission.³ For the reasons discussed below, we grant VITA's application in part, subject to certain conditions.

II. Background

3. Since the early 1980s, VITA has been active in the creation of technical solutions to the data communications needs of non-profit development and humanitarian organizations. In particular, VITA has helped pioneer the use of low-Earth orbiting ("LEO") satellites for these purposes. In 1988, the Commission authorized VITA to construct, launch, and operate an NVNG satellite on an experimental basis. In 1990, VITA filed an application in which it requested authority to implement its complete system, thereby becoming part of the first processing round of what would become the NVNG MSS or "Little LEO" service.

4. VITA proposes a system comprising two LEO satellites, known as VITASAT I and VITASAT II, in a near-polar orbit.⁴ VITASAT I is to operate in the 149.81 MHz - 149.9 MHz (uplink) and 400.505 MHz - 400.595 MHz (downlink) frequency bands.⁵ The system will have an operational life of three to five years.⁶ The proposed system was mutually exclusive with the two

² See 47 C.F.R. § 25.116. The three parties also now contend that a waiver of fees granted by the Office of the Managing Director [See Letter to Henry Goldberg from the Office of Managing Director (March 23, 1994)], on the grounds that VITA is a non-commercial entity, is no longer valid since 50% of VITA's spectrum capacity will be leased to CTA for commercial use. Fee issues are properly resolved by the Office of the Managing Director. Our decision here in no way prejudices any future action on this issue by the Managing Director's Office.

³ Orbcomm and Starsys filed comments in support of Leo One's motion and request. VITA opposed the "Emergency Motion and Request," and Starsys and Leo One filed Reply Comments. Additionally, the Interdepartment Radio Advisory Committee ("IRAC") of the National Telecommunications and Information Administration, on December 13, 1994, finalized frequency coordination between its operation and VITA. IRAC stated that it has no objection to the FCC resuming its processing of the VITA Amended Application as long as VITA conforms to the technical requirements set forth in the December 13 memorandum. Memo from Chairman of IRAC to FCC/IRAC Representative, December 13, 1994, which includes the Frequency Coordination Supplement.

⁴ See Application and VITA Amendment to Application for Authority to Construct a Non-profit International Low-Earth Orbit Satellite System ("Amendment"), Exhibit C at 1 (April 25, 1994).

⁵ *Id* at 11-12.

⁶ *Id* at 16-17. See also Application at 88, which estimates a five year operational life for the first generation VITASAT satellite.

other system applications filed in this processing round.⁷ In an effort to resolve this mutual exclusivity and allow all three applicants to implement their systems, the Commission convened a Negotiated Rulemaking Advisory Committee to negotiate sharing proposals and technical rules to govern this new satellite service. Prior to the first committee meeting, the applicants negotiated a Joint Sharing Agreement that would accommodate all three systems while, at the same time, leaving spectrum available for future entry.⁸ In the course of this negotiated rulemaking, the Commission, applicants, and existing users of the same and adjacent frequency bands discussed additional sharing and operational concerns and recommended technical solutions to resolve them. Subsequently, the Commission adopted service rules based on the Committee's recommendations.⁹

5. The Commission permitted the three first-round applicants to file amendments to bring their applications into compliance with our service rules. VITA filed its "conforming" amendment on April 25, 1994. VITA proposes to launch VITASAT I in July 1995.¹⁰ According to VITA, it has no scheduled date to implement VITASAT II.

6. On November 16, 1994, the cut-off date for filing second round NVNG applications, VITA filed an "amendment" to its system proposal. This amendment proposed a third satellite and requested authority to operate it in the 148-150.05, 137-138, and 400.15-401 MHz bands. On April 10, 1995, VITA also filed a further amendment related to its November 16 amendment designed to make corrections to and modifications of its technical proposal.

III. Discussion

A. Applications.

7. Initially, we must determine which of VITA's pending applications and amendments are ripe for consideration. Because the November 1994 amendment proposes a new satellite that is to operate on frequencies different from those proposed for VITA's first two satellites, this amendment is a "major" amendment under the Commission's rules.¹¹ For this reason, treating VITA's November 1994 amendment as part of its 1990 first-round application require us to treat VITA's

⁷ Starsys and Orbcomm also filed NVNG proposals. VITA's application was not mutually exclusive with either Orbcomm's or Starsys' proposal individually, but could not initially co-exist with both systems. The Commission had already awarded VITA a pioneer's preference for its work in developing and demonstrating the utility of a LEO system using VHF frequencies for civilian communications purposes. See 8 F.C.C. Rcd. 1812, 1817 (1993).

⁸ Jointly Filed Supplemental Comments of Orbcomm, VITA, and Starsys ("Joint Sharing Agreement") (August 7, 1992).

⁹ *NVNG Order*, 8 F.C.C. Rcd. 8450 (1993). See also *Report of the Below 1 GHz LEO Negotiated Rulemaking Committee*, 7 F.C.C. Rcd. 2370 (1992).

¹⁰ See Office of Commercial Space Transportation License Number: LLS 94 - 032, Licensing Order No. LLS 94-032A (Issued October 7, 1994), Licensing Order No. LLS-032C (Issued June 27, 1995).

¹¹ See 47 C.F.R. § 25.116.

entire first-round application as newly filed, as of November 1994. In that case, VITA's application would be ineligible for consideration as part of the first NVNG processing group, the application cut-off date for which was September 21, 1990.

8. The November 1994 amendment protects VITA's right to request expansion frequencies in the second processing round and enhances, but does not alter, VITA's first-round system proposal. We therefore decline to consider VITA's November 1994 amendment in conjunction with its first-round application. Instead, we will act today on VITA's first-round application and April 1994 amendment. The November 1994 and subsequent amendments will be addressed separately in connection with the second processing round for NVNG MSS applications.¹²

B. Financial Qualifications.

9. Section 25.142(a)(4) of the Commission's Rules sets forth the financial qualifications that NVNG MSS applicants must satisfy prior to grant of a license.¹³ Specifically, an applicant must demonstrate that it has current assets or non-contingent financing sufficient to meet construction, launch, and first-year operating costs for the first two space stations of its proposed system. Failure to make such a showing will result in the dismissal of the application.¹⁴ When adopting this rule, however, the Commission observed that VITA could seek a waiver -- at which time we would consider whether the size of its system and the noncommercial nature of its operations would justify granting that request.¹⁵

10. VITA estimates its construction, launch, and first-year operating costs for the two satellites in its system are \$5.4 million. VITA contends that it is financially qualified to implement one satellite and requests a waiver of the "two satellite" financial showing requirement. It submits a balance sheet showing current assets of \$1.4 million.¹⁶ It also submits a copy of its contract with CTA, under which CTA will construct, launch, and provide certain operational services for VITASAT I in return for commercial use of 50% of the satellite's capacity. In addition, the arrangement provides that CTA *may* provide the same services with respect to VITASAT II, at CTA's

¹² See Public Notice, Report No. DS-1484 (November 25, 1994). See also Public Notice, Report No. SPB-8 (May 10, 1995).

¹³ 47 C.F.R. § 25.142(a)(4). Section 25.142(a)(4) incorporates, as part of its financial qualification requirements, sections 25.140(c),(d) and (e), which specify the financial information that must be submitted.

¹⁴ The purpose of both our financial and technical requirements for the NVNG service is to ensure that we grant licenses only to those who can expeditiously implement systems that will serve the public interest, convenience, and necessity.

¹⁵ See NVNG Order, 8 F.C.C. Rcd. 8450, 8451-52 (1993).

¹⁶ See VITA's "Amendment" at Attachment 3 balance sheet, and the "Consolidated Reply" at 10 and the attached May 1994 Balance Sheet (July 12, 1994).

option. VITA finally asserts that it could not rely on conventional financing methods given the enormous costs of implementing a satellite system.¹⁷

11. Starsys, Orbcomm, and dbX allege that this showing does not satisfy our financial requirements. They observe that VITA's showing only addresses one satellite, not the two required by our rules. They also assert that VITA's showing does not include a demonstration that CTA has the financial resources to meet its obligation. Finally, Orbcomm and Starsys assert that waiver of our financial requirements is not justified because 50% of the satellite will be used for commercial purposes.

12. VITASAT I is scheduled to be launched imminently.¹⁸ Consequently, it would be superfluous for us, at this time, to examine additional information relating to VITA's financial ability to construct and launch VITASAT I. On this basis, we find VITA has demonstrated the financial ability to implement one satellite – VITASAT I.

13. As noted, however, our rules require NVNG applicants to demonstrate financial qualifications for two satellites before any authorization may be issued.¹⁹ VITA acknowledges that it has not met our "two satellite" qualification standard, but asks us to waive that standard here. Among other things, VITA points out that, because its proposed system comprises only two satellites, our standard effectively requires VITA to finance 100% of its system up front. By contrast, applying a "two-satellite" standard to other NVNG applicants may require those applicants to finance less than 10% of their larger systems.

14. We will waive our "two-satellite" requirement here. Given VITA's non-commercial status, it generally operates on a "pay-as-you-go" basis. We therefore find it reasonable for VITA to have explored other financing alternatives, such as the one it ultimately entered into with CTA. The Commission has been sensitive to the unique financial position of non-commercial organizations, and

¹⁷ See "Amendment" Exhibit B at 3. It states that "the nature of VITA's funding mechanisms make it impractical for it to show the kind of long-term commitments that one might show through long-term debt instruments or equity investments."

¹⁸ The Office of Commercial Space Transportation has issued a launch authorization to Lockheed Launch Vehicle 1 which lists VITASAT I as its payload. See Office of Commercial Space Transportation License Order No. LLS 94-032C, "Order Amending License No. LLS 94-032 by Extending Lockheed Missiles and Space Company, Inc's Authorization to Conduct Commercial Space Launch Activities" (June 27, 1995). This authorization extends the expiration of License No. LLS 94-032 to October 15, 1995 and authorizes the launch of Lockheed Launch Vehicle 1 transporting the Vitalcom (GEMStar) payload to low earth orbit. Specifically, VITASAT I is scheduled for a July 18, 1995 launch from the Vandenberg Air Force Base. See also "30 RANS/DOS WESTERN RANGE SCHEDULING, VANDENBERG, AFB, CA DSN 276-8825" (June 26, 1995), which charts the Lockheed Launch Vehicle 1 as scheduled for a July 18, 1995 launch of "GEMStar" (VITASAT I). That launch has been delayed and is now rescheduled for July 25, 1995.

¹⁹ See 47 C.F.R. § 25.142(a)(4).

has adjusted its licensing processes accordingly.²⁰ Given the significant public interest benefits to be derived from VITA's non-commercial services, the fact that 50% of the satellite's capacity will be used to provide humanitarian services, and VITA contemplated only a two-satellite system, we find a waiver of the "two satellite" showing is justified in this case.

15. Nevertheless, because neither VITA nor CTA has demonstrated a commitment to construction of VITASAT II, we will not issue VITA a license for a two-satellite system at this time. According to VITA's amendment, VITASAT II *may* be implemented at "CTA's option." To ensure that an applicant does not tie up spectrum while it decides whether to proceed with its program, the Commission requires all satellite applicants to file a "concrete proposal" for each space station that includes a description of facilities and services, launch arrangements, a detailed schedule of investment costs and operating costs, dates by which construction will be commenced and completed, and launch and service dates.²¹ Commission policy against "warehousing" applies equally to commercial and non-commercial enterprises. VITA may not hold spectrum to the exclusion of others while it decides whether to go forward with VITASAT II. Nevertheless, because the Commission suggested in the NVNG Order that it would consider granting a waiver to VITA but did not address the parameters of such a waiver, we grant VITA some additional time in which to demonstrate its commitment to a second satellite. Accordingly, we provide VITA 90 days from the release of this order to submit a statement demonstrating that, absent a material change in circumstances, it is prepared to build and launch VITASAT II. This statement must contain all information required under Section 25.114 of the Commission's rules, including milestone and payment schedules. If that showing is adequate, we will modify VITA's license for one satellite to include authority to implement a second satellite. If the showing is not adequate, VITA's authorization will remain unchanged and we will not permit VITA to add a second satellite later as a part of the first NVNG processing round.

16. Therefore, we find VITA is financially qualified to hold a license for VITASAT I. We limit the license term to five-years -- the maximum expected lifetime of the satellite. If VITA wishes to construct, launch and operate a second generation satellite after VITASAT I's license expires, it, of course, may file an application to do so as prescribed by our rules.²² Additionally, to ensure that VITA adheres to its scheduled launch commitment, which is a significant factor in our decision to waive portions of our financial rules, we will require VITA to complete construction and launch of VITASAT I by October 31 and November 30, 1995, respectively. Failure to adhere to this condition will render the license null and void.²³

²⁰ See *Alabama Citizens for Responsive Public TV, Inc.*, 69 F.C.C. 2d 1061, 1072-74 (1978). See also 47 C.F.R. § 90.725.

²¹ See 47 C.F.R. § 25.114. See also *Filing of Applications for New Space Stations in the Domestic Fixed-Satellite Service*, 54 R.R.2d 565 (1983).

²² See 47 § 25.120(e).

²³ Any attempt to extend these milestones will require a substantial burden on the part of VITA, demonstrating that a change is warranted.

C. Technical Qualifications.

17. Orbcomm and Starsys have raised various technical objections to the VITA application.²⁴ Most of these objections have been rendered moot by conditions placed on VITA's operations, imposed as a result of the coordination with IRAC. Other objections are more appropriately considered in connection with the licensing of VITA's earth stations. Still, other issues, such as the tracking, telemetry & command (TT&C) frequencies VITA proposes to use, have been adequately clarified in VITA's application, amendment, and pleadings. Furthermore, to the extent results of the IRAC coordination do not address the issue, the parties' allegations that VITA's system is spectrum-inefficient are inconsistent with the Commission's determination in the NVNG Order,²⁵ which declares that we will not impose an efficiency standard on NVNG systems at this time. Therefore, having reviewed the VITA application, as amended, we find it has all necessary and relevant technical information required by our Rules, and that its proposed operations conform to the technical standards governing the NVNG MSS.

D. Legal Qualifications.

1. De Facto Control of the Applicant

18. Starsys, Orbcomm, and dbX assert that VITA's financing arrangements have transferred de facto control to CTA. As a consequence, they argue, VITA has effected a major amendment under our Rules, and consequently, its application should be treated as a newly filed application since the change occurred after the cut-off date. The commenters argue that a de facto change in ownership has occurred because CTA will construct, launch, and own VITASAT I, will provide TT&C and perform day-to-day operations, will control 50% of the capacity for commercial purposes, has assumed responsibility for filing fees, will obtain launch insurance, will be responsible for billing, collection, and accounting, and will have the unilateral right to decide whether to finance the second satellite in VITA's system. The commenters also note that VITA's limited financial contributions indicate that CTA is in de facto control of the venture.

19. Starsys observes that the Commission set out six indicia of de facto control in Intermountain Microwave,²⁶ specifically:

- a. Does the licensee have unfettered use of all facilities and equipment?
- b. Who controls daily operations?
- c. Who determines and carries out policy decisions, including preparing and filing applications with the Commission?
- d. Who is in charge of employment, supervision, and dismissal of personnel?

²⁴ VITA also raises the concern that Orbcomm's Dynamic Channel Activity Assignment System will not adequately protect VITA from interference. This concern was raised in VITA's Petition for Reconsideration of Orbcomm's license and has been addressed separately. See Memorandum Opinion and Order on Reconsideration, FCC 95-135 (Released June 2, 1995); See also Order and Authorization, 9 F.C.C. Rcd. 6476 (1994).

²⁵ 8 F.C.C. Rcd. 8450, 8456 (1993).

²⁶ 24 Rad. Reg. (P&F) 983 (1963).

- e. Who is in charge of the payment of financing obligations, including expenses arising out of operating?
- f. Who receives money and profits from the operation of facilities?

Starsys contends that each of the listed areas of responsibility, except for the third point, lies primarily or solely with CTA. Starsys also argues that CTA is the party that would be in control of VITASAT I under the standard adopted in Domestic Fixed-Satellite Transponder Sales.²⁷ In that Order, the Commission indicated that control of the spacecraft lies with the entity that is responsible for ensuring that its operation is consistent with Commission rules and regulations, by virtue of its control over maintenance of altitude and position, electrical power, and all other TT&C responsibilities.

20. VITA argues that it retains de facto control. Specifically, it asserts that this is a financing arrangement with CTA, not a transfer of control. The arrangement provides that VITA will provide satellite transponder capacity to CTA in exchange for CTA constructing, procuring, insuring, and providing TT&C services for the satellite. VITA further contends that such an arrangement is standard industry practice. It states that satellite operators rely on a combination of vendor financing, debt and equity financing, and selling or leasing of satellite capacity to finance their systems. It points out that domestic satellite licensees frequently engage in sale and leaseback transactions. VITA notes that the contract with CTA was negotiated on an arms-length basis and argues that its agreement with CTA ensures it will satisfy its responsibilities as a licensee. VITA also asserts that it establishes the technical specifications of the satellite, directs the operation and use of signals, and determines the specifications for TT&C. It states that any significant changes in space station configuration can only be performed under its direction and supervision.

21. VITA alternatively contends that even if this were a major amendment, it would be exempt from the cut-off rules. It notes that if there is a substantial change in ownership, which is classified as a major amendment, a two-part test is used to determine whether the major amendment should be exempt from the cut-off rules. VITA asserts it satisfies both elements. The first element considers whether the transaction has a legitimate business purpose. The second element considers whether the change is in the public interest. VITA states that in Satellite CD Radio,²⁸ the Commission held that one such "legitimate business purpose" is "to provide continuing financing to allow the company to pursue its application."

22. The Commission evaluates questions of de facto control on a case-by-case basis, by examining the facts and circumstances in a particular case, as well as a wide range of factors developed in individual cases over the years.²⁹ In this case, there are a number of Intermountain Microwave indicia that CTA will substantially influence the operations of VITASAT I. However, no single Intermountain criterion is dispositive, and based on the totality of circumstances we conclude

²⁷ *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C. 2d 1238, 1252 (1982), *aff'd sub nom. World Communications, Inc. v. FCC*, 735 F.2d 1465 (1984).

²⁸ *Satellite CD Radio, Inc.*, 9 F.C.C. Rcd. 2569 (1994).

²⁹ See generally Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 Fed. Com. L.J. 277, 295-318 (1991).

that de facto control remains with VITA. However, we consider the influence of CTA to be substantial.

23. Under the first Intermountain factor, whether the applicant has unfettered use of all facilities and equipment, the evidence is consistent with a finding that VITA enjoys unfettered use of the satellite. There are a number of indicia of unfettered use. First, VITA's contract with CTA expressly provides that VITA is to direct the operation of the satellite, the use of the signals of the satellite, and the TT&C functions of the satellite.³⁰ In addition, the contract provides that VITA will construct and operate a network of gateway earth stations. While the contract between VITA and CTA expressly provides that VITA will lease 50% of the capacity of VITASAT I to CTA, the fact that VITA has entered into such an arrangement is itself an indication that it has full capacity to "use" the satellite. We are concerned, however, that CTA will hold legal title to VITASAT I and assume a number of proprietary responsibilities, such as the responsibility to insure against the risk of loss of the satellite. However, as indicated above, the VITA/CTA contract expressly grants to VITA a number of the fundamental responsibilities upon which we have relied in approving such agreements. Furthermore, Intermountain recognized that legal title to the physical assets of a radio station may be vested in a non-licensee.³¹

24. Under the second Intermountain factor -- who controls daily operations -- the evidence is mixed. CTA will carry out day-to-day operations of the space segment in the system, and in particular the TT&C functions. It will do so, however, under VITA's direction, and in accordance with VITA's specifications. We have no reason to suspect that VITA's ultimate power to direct TT&C and other day-to-day functions is a sham, and in fact VITA's long history of intimate involvement in NVNG technology suggests otherwise.

25. Under the third Intermountain factor -- who determines and carries out policy decisions, including preparing and filing applications with the Commission -- the evidence firmly establishes that policy decisions concerning the applicant rest with VITA. The evidence includes the sworn statement of VITA's president, Dr. Henry Norman, as well as VITA's course of conduct in prosecuting its application over a period of four years, during most of which time CTA was not in any way involved with VITA's proposed system. Furthermore, the VITA/CTA contract expressly provides for VITA's continued control of this area, including obtaining "landing rights" in foreign countries for VITA ground system components.

26. With respect to the fourth Intermountain factor -- who is in charge of employment, supervision, and dismissal of personnel -- the evidence is sparse. The opposing parties correctly observe that, under its contract with VITA, CTA will carry out a number of activities associated with the satellite that are highly labor intensive, such as manufacture, launch, ground control, billing, and accounting. The record does not indicate that VITA will have any authority to dictate employment, supervision, or dismissal of CTA personnel. We therefore conclude that VITA's authority in this area will be limited to employment, supervision, and dismissal of those personnel it employs directly.

³⁰ While the contract specifies that many of the uses of the satellite facilities directed by VITA will be carried out on a day-to-day basis by CTA, we take this fact into account under the second Intermountain factor. *See infra*.

³¹ 24 Rad. Reg. (P&F) 983 (1963).

While this limited authority should not be understated, in that it is likely to involve the key policy decision makers for the satellite as well as accounting and related functions insofar as they involve operating expenses incurred by VITA, CTA appears likely to supervise on a day-to-day basis the majority of personnel involved³² in construction, launch, and operation of the satellite space segment. We would fully expect, however, that to the extent VITA believes any specific personnel action by CTA is required in order for VITA to discharge its responsibilities as a licensee, including its policymaking and supervisory functions, CTA would honor such a request. In fact, the contract between VITA and CTA requires CTA and its customers to comply with FCC rules, regulations and policies in their use of capacity on the satellite.³³

27. Under the fifth Intermountain factor -- who is in charge of the payment of financing obligations, including expenses arising out of operating -- CTA is in charge of payment of much of the venture's financing obligations. Specifically, CTA is responsible for expenditures necessary to construct, launch, and operate VITASAT I for one year. VITA is, however, required to pay up to \$45,000 per annum in satellite operating expenses, depending on system revenues. VITA is also required to fund construction and operation of its gateway earth stations.

28. Under the sixth Intermountain factor -- who receives money and profits from the operation of facilities -- CTA is responsible for billing of paying users, for receiving payments and for preparing a quarterly statement of revenues to deliver to VITA. Revenues are applied first to operating expenses, including VITA's operating expenses associated with gateway earth stations or user terminals, and then to CTA's capital expenditures incurred in connection with the satellite and its associated TT&C and ground stations. Any remaining funds are divided evenly between VITA and CTA.

29. Taken together, the Intermountain factors do not lead us to the conclusion that de facto control of the VITASAT I satellite has transferred to CTA, although the evidence clearly establishes that CTA will play a substantial and undoubtedly influential role in the venture. We also have considered several factors in addition to the factors enumerated in Intermountain. First, the fact that VITA proposes to provide services on a non-commercial basis renders any questions concerning control under the Intermountain criteria, which were developed with purely commercial ventures in mind, less influential in our decision-making than they might be if VITA were proposing service on a commercial basis. We do not expect that applicants with non-commercial motives would seek to retain the same degree of involvement in carrying out day-to-day financial or operational activities than an applicant with market-driven motives. VITA's arrangement ensures that its fundamental concerns -- the provision of its non-commercial and humanitarian services -- will be addressed, and its reliance on CTA for the carrying out of operational details is fully consistent with that concern, even though we would expect closer involvement in such details from a profit-motivated applicant. Second, this is not the type of case in which there is any reasonable inference that the transaction was structured to avoid Commission requirements, such as ownership limits. Third, the arrangements in question are similar to the types of excess-capacity leasing arrangements which we have previously

³² See ¶ 18 *supra*.

³³ See Amendment, Attachment #1 Contract Summary and Attachment #2 Contract at 6.

recognized between non-commercial educational and commercial "wireless cable" service providers.³⁴ Although the commercial operator typically has substantial involvement in deploying and operating the radio transmitters and receiving antennas used by the non-commercial operator, the fact that the non-commercial entity retains control over the non-commercial educational programming content has been one significant factor in Commission decisions to foster such commercial/non-commercial partnerships. Similarly, in this case VITA will unquestionably retain control over the content of the 50% of VITASAT I's capacity that is dedicated to VITA's non-profit humanitarian purposes.³⁵

30. We therefore find that a de facto change in control has not occurred. However, because CTA will exercise substantial influence in the venture, we are concerned that any deviation from the particular terms of the CTA/VITA contract or VITA's statements to the Commission could give rise to a transfer of control. Therefore we condition our license grant by requiring VITA to fulfill the representations it has made with respect to its planned use of its "Little LEO" system. VITA will be required to maintain the use of 50% capacity for non-commercial and humanitarian purposes, establish the technical specifications for the satellite, direct the operation and use of signals, determine the specifications for TT&C, direct and supervise significant changes in space station configuration, and discharge its responsibility as licensee consistent with Commission rules and regulations. We emphasize that we will hold VITA fully responsible as a licensee. It is expected that any variations from these conditions shall be communicated to the Commission immediately.

31. We also note that even if the facts were interpreted to indicate a transfer of control, we would consider waiving the rule and granting a license to CTA, subject to the conditions imposed in this grant, for the following reasons. Our major concern in determining whether a "major amendment" to the applicant's ownership structure has occurred is whether the applicant has attempted to profit simply from the sale of an application. Unless there is evidence of this, we see no reason to prevent applicants from procuring partners to help finance the cost of these systems.³⁶ Regardless of whether there has been a transfer of control here, we find no intent to traffic in applications. Furthermore, VITA's long-term research and technological experimentation in this area, leading to the grant of its pioneer's preference,³⁷ and its non-profit and humanitarian mission justify a waiver.

32. We also agree with VITA that the lease to a commercial user of 50% of the satellite does not constitute a "major change" in the nature of the service. In developing the NVNG service rules,

³⁴ See *Instructional Television Fixed Service*, 94 F.C.C. 2d 1203, 1248-50 (1983).

³⁵ *Intermountain* involved no questions concerning the control of content, since the facilities involved were common carrier. See Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 47 Fed. Com. L.J. at 316.

³⁶ See *Constellation Communications, Inc.*, 10 F.C.C. Rcd. 2258 (1995).

³⁷ VITA's pioneer's preference does not, however, justify giving it special treatment in coordinating frequency usage. Furthermore, VITA, like all NVNG applicants, is still required to make a showing, demonstrating that it meets the qualifications of our financial, legal, and technical requirements.

the Commission explicitly declined to adopt a spectrum reservation for non-commercial services.³⁸ We concluded that a reservation of frequencies for non-commercial service was unwarranted because VITA would be permitted to provide its non-commercial services under the frequencies allotted to the NVNG MSS. Furthermore, our rules include no other provisions which would warrant identifying such a change as major.

2. Premature Construction Allegations

33. In October of 1994, Leo One alleged that VITA had undertaken substantial premature construction of the VITASAT I satellite,³⁹ a violation of section 319(a) of the Communications Act.⁴⁰ The relevant sequence of events is as follows: (1) VITA was first granted an experimental license to operate a LEO satellite in 1988. (2) In June 1993, VITA sought a modification of its then-existing experimental license to include a second satellite in its system. In its application, VITA indicated it intended to purchase this second satellite from the University of Surrey. It also indicated it intended to use this second satellite on an experimental basis until it could convert the experimental authorization for the second satellite into a non-experimental NVNG MSS license. (3) The June 1993 modification application was granted in August of 1993. The license did not specify from whom the satellite was to be purchased. (4) VITA did not conclude an arrangement for purchase of the satellite from the University of Surrey. It instead arranged with CTA to construct a satellite. (5) On June 20, 1994, VITA filed an application to modify its experimental authorization to specify technical parameters for the second experimental satellite identical to the technical parameters proposed for VITASAT I. (VITASAT I's parameters had been specified in the April 1994 amendment to VITA's regular NVNG MSS application.) The experimental application did not, however, disclose that CTA would manufacture the satellite. (6) VITA's request for modification of its experimental license was granted in November of 1994.

34. Leo One alleges that CTA must have begun construction of VITASAT I no later than the spring of 1994. Leo One also included evidence that listed VITASAT I as being scheduled for

³⁸ *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum to the Fixed Satellite Service and the Mobile-Satellite Service for Low-Earth Orbit Satellite (NVNG MSS Allocation Order)*, 8 F.C.C. Rcd. 1812, 1816 (adopting FN US323).

³⁹ Leo One "Emergency Motion to Dismiss and Impose Sanctions for Premature Construction of Satellite System" (October 26, 1994). Orbcomm and Starsys filed comments generally supporting Leo One's position.

⁴⁰ 47 U.S.C. § 319(a) (1995) (stating in part that a license cannot be issued unless a construction permit has been granted)

launch in November, and then December of 1994, on the Lockheed LLV-1 launch vehicle.⁴¹ Leo One requested an immediate "Cease and Desist" Order against VITA/CTA.⁴²

35. VITA opposed Leo One's motion⁴³ and asserted it had authority since August of 1993 under its experimental license to construct, launch, and operate a satellite on an experimental basis. Starsys and Leo One reply that construction by CTA has only been authorized since November 10, 1994, when the modification to VITA's experimental license was granted.⁴⁴ They also argue that VITA's use of its experimental license violates the Policy Statement on Experimental Satellite Applications,⁴⁵ noting that the Part 5 procedures, under which experimental licenses are granted, were not promulgated to be a substitute for the normal licensing processes. They finally argue that the authority granted in August of 1993 to construct VITA's second experimental satellite was limited to purchasing the satellite already constructed by the University of Surrey.

36. Experimental authorizations issued by the Commission, such as the experimental license issued to VITA in August 1993, include authority to construct the experimental radio station. Such authorization is intended to address the construction permit requirements of section 319 of the Act. It is uncontroverted that VITA possessed such an authorization. Therefore, any construction by VITA pursuant to its arrangement with CTA can be considered unauthorized only to the extent that it deviated from the terms of the outstanding experimental authorization. The experimental license granted to VITA in August 1993 did not include any terms concerning the identity of the vendor of VITA's satellite. Therefore, we do not view VITA's decision to use a different vendor as unauthorized construction. Additionally, the use of an experimental license by VITA that leads to the implementation of a regular NVNG MSS system and license does not violate the Commission's Policy Statement on Experimental Satellite Applications. In fact the Policy Statement notes that its purpose is to encourage "satellite investment, experimentation and innovation." VITA has not substituted its experimental authority for "the normal Commission licensing process." It has simply used its experimental phase as a stepping-stone to implementation of its non-experimental NVNG MSS system.

37. Apart from the speculative allegations of the applicants that the satellite construction undertaken for VITA by CTA was inconsistent with the explicit terms of the experimental license,

⁴¹ Leo One relies on the July 1994 and October 1994 Quarterly Launch Reports of the United States Department of Transportation, Office of Commercial Space Transportation, and various press reports. VITA also verified an intent to launch VITASAT I in its April 1994 Amendment, Exhibit C at 37.

⁴² Leo One "Request of Issuance of Immediate Cease and Desist Order" (October 26, 1994). Leo One has filed an "Application for Review" of the November 1994 grant of the modification and concurrent grant of an application for renewal of VITA's experimental license. Starsys filed comments in support of Leo One, VITA opposed the Application for Review and requested an investigation of Leo One, and Leo One filed a reply. Leo One argues that VITA lacked candor with the Commission in its Modification Application.

⁴³ VITA "Opposition and Request for Investigation" (November 9, 1994).

⁴⁴ The actual effective date for grant of the experimental license, as modified, was November 1, 1994.

⁴⁵ *Policy Statement*, 7 F.C.C. Rcd. 4586 (1992).

there is no evidence in the record that any construction was undertaken that was outside the scope of the authorization. The fact that VITASAT I was on the schedule to launch in November, and then December of 1994, does not imply VITA had performed construction outside its experimental authority, or was near to completing construction. It only demonstrates an intent to have construction completed and ready for launch. It is not conclusive evidence that VITA constructed outside its experimental authority.

3. Lack of Candor

38. Leo One asserts that VITA did not "forthrightly reveal" its substitution of the CTA satellite for the Surrey satellite or mention the involvement with CTA in its June 1994 application to modify its experimental authorization. Starsys argues that VITA's April 1994 Amendment to its NVNG application was similarly silent as to the intentions for the experimental satellite, but that such intentions should have been disclosed at that time.

39. We reject the misrepresentation and lack of candor assertions by Leo One and Starsys. VITA's June 1993 application indicated that its second experimental satellite was intended ultimately to be a part of its NVNG MSS system. While Leo One and Starsys correctly observe that VITA did not renew this statement in any explicit fashion in its subsequent filings, specifically the April 1994 Amendment to the instant application and its June 1994 application to modify its experimental authorization, it made absolutely no statement that would indicate its plans had changed in this regard. Thus, we cannot reasonably view the omission of such a statement -- which concerns matters not directly responsive to any of the explicit questions in the application form for experimental licenses -- to violate the applicant's duty of candor. Furthermore, VITA's June 1993 application to modify its experimental authorization, while somewhat terse on this point, was nonetheless sufficient to place the Commission and potentially adversely affected parties on notice that it intended first to obtain an experimental authorization and then convert the authorization for that satellite to a "full-fledged" NVNG MSS authorization. Thus, we will not revisit that grant, which has become final, at this late stage in the proceeding.

40. Leo One also correctly observes that VITA did not reveal its substitution of CTA for the University of Surrey as its satellite manufacturer in its June 1994 application to modify its experimental authorization. The application form for experimental licenses does include a question concerning the manufacturer of any transmitting equipment, to which VITA responded by referencing Exhibit 1 to that application. That exhibit did not address the identity of the manufacturer. However, we also note that Commission staff sought no further information on this point prior to granting the application in November 1994. Since the omission is not misleading in any way, and was as apparent in June 1994 and November 1994 as it is today, it would not be entirely fair for us to find a lack of candor now after having granted the application. Significantly, there is no indication that this omission was intentional or willful. Therefore, while VITA's Exhibit 1 was not entirely responsive, that fact alone does not raise a substantial and material question of fact concerning VITA's candor.

IV. Conclusion

41. Grant of VITA's application, as amended, will serve the public interest. Implementation of this system will provide low-cost satellite communication services for humanitarian purposes in developing countries. Furthermore, through CTA, additional commercial communication services

will be brought to U.S. consumers, and the world. Grant of this system proposal, as amended, will allow the applicant to quickly provide much-needed communication service.

42. Accordingly, upon review of VITA's amended application to implement a system to provide NVNG MSS services and related pleadings, we find that VITA is legally, financially, and technically qualified to be a Commission licensee, subject to the conditions and limitations set forth herein. We further find, pursuant to section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309, that granting, in part, of this application will serve the public interest, convenience, and necessity.

V. Ordering Clauses

43. Accordingly, IT IS ORDERED that Application File Nos. CSS-91-007(3), 30-DSS-AMEND-94 ARE GRANTED IN PART and DENIED IN PART as stated herein, and Volunteers in Technical Assistance IS AUTHORIZED to construct one NVNG mobile-satellite, in accordance with the terms, conditions, and technical specifications set forth in its application, as amended, and this Order and Authorization.

44. IT IS FURTHER ORDERED that Volunteers in Technical Assistance IS AUTHORIZED to launch and operate one low-Earth orbiting space station, operating within the 149.81-149.9 MHz (FDMA uplink) and 400.505-400.595 MHz (FDMA downlink) frequency bands, in the non-voice, non-geostationary, mobile satellite service in accordance with its application, and the relevant terms of any previous orders concerning the operation of space stations in this service.

45. IT IS FURTHER ORDERED that Volunteers in Technical Assistance shall conform to the specific restrictions and conditions requested by the Interdepartment Radio Advisory Committee of the National Telecommunications and Information Administration, in its memorandum to the Commission, dated December 13, 1994, which includes operating in accordance with the "Supplement to Application for Authority to Construct 25 April 1994" enclosed with that memorandum.

46. IT IS FURTHER ORDERED that Volunteers in Technical Assistance IS AUTHORIZED to offer space segment capacity on its satellite system on a private carriage basis.

47. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, this authorization shall become null and void in the event that the space station is not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of the authorization by the following dates:

Construction <u>Commenced</u>	Construction <u>Completed</u>	<u>Launch</u>
N/A	October 31, 1995	November 30, 1995

48. IT IS FURTHER ORDERED that the license term for the space station is five years and will commence on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and that the first transmission to or from that satellite in the authorized frequency bands has occurred.

49. IT IS FURTHER ORDERED that action on the Request by Volunteers in Technical Assistance to Operate a Second Satellite as part of its NVNG MSS System IS DEFERRED, until 90 days after the release of this Order, to permit the submission of the additional showings discussed in this Order.

50. IT IS FURTHER ORDERED that grant of this license is conditioned on VITA maintaining use of 50% capacity for humanitarian and non-commercial purposes, establishing the technical specifications for the satellite, directing the operation and use of signals, determining the specifications for TT&C, directing and supervising significant changes in space station configuration, and discharging its responsibility as licensee consistent with Commission rules and regulations. Any variations from these conditions shall be communicated to the Commission immediately.

51. IT IS FURTHER ORDERED that this authorization is subject to the completion of consultations under Article XIV of the INTELSAT Agreement and Article 8 of the Inmarsat Convention. Upon completion of these consultations, and notification by the Department of State that the United States has fulfilled its international obligations with respect to INTELSAT and Inmarsat, no further action by this Commission will be required.

52. IT IS FURTHER ORDERED that the temporary assignment of any orbital planes, or of any particular frequencies, to Volunteers in Technical Assistance is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.

53. IT IS FURTHER ORDERED that the Petitions to Deny filed by Starsys Global Positioning, Inc., Orbital Communications Corporation, and dbX Corporation ARE DENIED.

54. IT IS FURTHER ORDERED that the Emergency Motion to Dismiss and Impose Sanctions for Premature Construction of Satellite System and the Request for Issuance of Immediate Cease and Desist Order, both filed against VITA by Leo One USA Corporation, ARE DENIED.

55. Volunteers in Technical Assistance may decline this authorization, as conditioned, within 30 days from the date of release of this order and authorization. Failure to decline this authorization within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION


Scott Blake Harris
Chief, International Bureau