

RECEIVED

MAR 17 1995

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Received

MAR 20 1995

Satellite and Radio Communications
File Nos. 11-DSS-P-91(6) The Order

In re Application of:)
)
)
MOBILE COMMUNICATIONS)
HOLDINGS, INC.)
)
)
For Authority to Construct, Launch,)
and Operate a Low Earth Orbit Satellite)
System in the 1610-1626.5 MHz/)
2483.5-2500 MHz Bands.)
_____)

File Nos. 11-DSS-P-91(6)
18-DSS-P-91(18)
11-SAT-LA-95
12-SAT-AMEND-95

OPPOSITION TO CONSOLIDATED APPLICATION
FOR REVIEW AND REQUEST FOR CLARIFICATION

Motorola Satellite Communications, Inc. ("Motorola") hereby opposes
Mobile Communications Holdings, Inc.'s ("MCHI") Consolidated Application for Review
and Request for Clarification^{1/} of the International Bureau's Order, DA 95-132 (rel.
January 31, 1995)("MCHI Order"), in the above-captioned proceeding. Motorola is an
interested party in this proceeding having previously petitioned the Commission to deny
MCHI's Application on financial grounds,^{2/} and having been granted authority to

^{1/} See MCHI Consolidated Application for Review and Request for Clarification
(Mar. 2, 1995) ("MCHI Consolidated Application for Review"). MCHI also questions the
Bureau's findings regarding the financial qualifications of Loral/Qualcomm Partnership,
L.P. ("LQP"). See Order & Authorization, DA 95-128 (rel. Jan. 31, 1995).

^{2/} See Motorola's Consolidated Comments and Petition to Defer and/or Deny,
at 18-22 (Dec. 22, 1994).

construct, launch and operate a Big LEO mobile satellite service ("MSS") system which would compete with the one proposed by MCHI in its Application.^{3/}

MCHI's Consolidated Application for Review is procedurally defective and substantially flawed. First, the MCHI Order deferring MCHI's Application, but not denying it, is not a final action of the Bureau subject to an application for review under the Commission's Rules. Second, the Bureau correctly concluded that MCHI did not satisfy the Commission's stringent financial qualification standards. None of the management "commitment" letters submitted by MCHI exhibits a sufficient financial commitment to the Ellipsat project and, therefore, all of them were properly rejected by the Bureau in the MCHI Order. MCHI now attacks the Bureau's findings with respect to two of these letters,^{4/} and attempts to bolster its financial showing with additional correspondence from Westinghouse Electric Corporation ("Westinghouse") and Israel Aircraft Industries Ltd. ("IAI").^{5/} Rather than resolve any ambiguity, these additional letters confirm the lack of adequate management commitment by Westinghouse and IAI to the Ellipsat project.

Third, Motorola disagrees with MCHI's attempt to inundate the Commission with a stream of letters prior to the January 1996 deadline for demonstrating its financial qualifications. Now that the Bureau has concluded that MCHI is not financially qualified, MCHI must wait at least one year before obtaining another determination as to its qualification. To do otherwise would encourage a piecemeal review process that would not be an effective use of the Commission's resources, and would be contrary to the Commission's concept of a two-tiered financial eligibility rule.

^{3/} See Order and Authorization, DA 95-131 (rel. Jan. 31, 1995).

^{4/} MCHI apparently does not dispute the Bureau's adverse findings regarding the sufficiency of the rest of its financial showing. See MCHI Order at ¶¶ 15-23.

^{5/} See MCHI Consolidated Application for Review, Exhibits A & B.

I. **THE ORDER DEFERRING MCHI'S APPLICATION IS NOT A FINAL BUREAU ACTION SUBJECT TO REVIEW BY THE COMMISSION**

A threshold question for the Commission in considering an application for review is a determination of whether there has, in fact, been "final action" under delegated authority.^{6f} The International Bureau's decision to defer consideration of MCHI's Application until a later date is not a "final action," and, therefore, not subject to reconsideration or review at this time. The concept of "finality" with respect to agency action has been well defined in the courts. As the Supreme Court has stated:

[T]he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.^{7f}

There is no doubt that a final determination with respect to MCHI's Application has not been made by the International Bureau. No ultimate or essential rights or obligations have been determined in the MCHI Order, and will not be

^{6f} AT&T Co., Long Lines Department, 65 F.C.C.2d 621, 622-23 (1977)(footnotes omitted).

^{7f} Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970) (citing ICC v. Atlantic Coast Line R.R., 383 U.S. 576, 602 (1966); Rochester Telephone Corp. v. United States, 307 U.S. 125, 143 (1939)); see also, Honicker v. NRC, 590 F.2d 1207, 1209 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979) (An order is final if it "imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process"); Intercity Transp. Co. v. United States, 737 F.2d 103, 106 (D.C. Cir. 1984); Capital Network System, Inc. v. FCC, 3 F.3d 1526, 1530 (D.C. Cir. 1993) ("an agency action is final if it '(1) represents a terminal, complete resolution of the case before the agency' and '(2) 'determine[s] rights or obligations, or ha[s] some legal consequence'" (citations omitted); State of Alaska v. FERC, 980 F.2d 761, 763 (D.C. Cir. 1992)(citation omitted) ("A 'final order' is one that imposes an obligation, denies a right or fixes some legal relationship, usually at the consummation of an administrative process").

determined until a final order either granting or denying MCHI's Application is issued by the Bureau. The Bureau has not dismissed or denied MCHI's Application; nor has it held that this applicant has lost its status in the current processing group.^{8/} Rather, the MCHI Order merely specifies that, in order to obtain further consideration of its Application, MCHI must submit an adequate financial showing by January 31, 1996.^{9/} If at that time, MCHI fails to demonstrate its financial qualifications, the Bureau would then be in a position to reach a definitive conclusion as to MCHI's Application.

To entertain an application for review now of the Bureau's interim Order clearly would disrupt the Commission's adjudicatory processes and waste valuable resources.^{10/} One can envision an endless stream of reconsideration requests and applications for review of the Bureau's orders with updated financial information dribbling out along the way. A far better approach would be to await a final determination by the Bureau on MCHI's Application before considering any appeals.

^{8/} MCHI Order at ¶ 24.

^{9/} Id.

^{10/} In the same way that courts are reluctant to review interim decisions by a federal agency, the Commission should not review its Bureau's interim orders. See Rochester Tel. Corp. v. U.S., 307 U.S. 125, 131 (1939) ("[E]ver since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding").

II. THE BUREAU CORRECTLY CONCLUDED THAT MCHI'S APPLICATION SHOULD BE DEFERRED BECAUSE MCHI IS NOT FINANCIALLY QUALIFIED

A. The Commission's Strict Financial Standards

In the MCHI Order, the Bureau correctly concluded that MCHI was not financially qualified and that further consideration of its Application should be deferred until January 1996.^{11/} None of the sources of financing presented by MCHI could be relied upon as sufficient evidence of financial commitment from a parent corporation.

In its Big LEO Report and Order, the Commission recognized that:

In light of the enormous costs involved in constructing and launching a satellite system, we have always considered financial ability a significant factor in determining whether an applicant is qualified to hold a license.^{12/}

Accordingly, the Commission adopted what it described as a "strict" financial requirement for the Big LEO MSS service.^{13/} Applicants relying on internal financing must provide: (a) "a balance sheet demonstrating current assets or operating income sufficient to meet the space segment costs," together with (b) "evidence of a management commitment to the project."^{14/} Although an unalterable commitment, regardless of market conditions, is not required, the management of the corporation providing the funding must commit that it is prepared to expend the necessary funds

^{11/} MCHI Order at ¶ 2.

^{12/} Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 FCC Rcd. 5936 at ¶ 26 (1994), petitions for reconsideration and clarification pending ("Big LEO Report and Order").

^{13/} Id. at ¶ 30.

^{14/} Id. at ¶¶ 31 & 35.

"absent a material change in circumstances."^{15/} Applicants relying on internal financing from "parent corporations" must make the same showing.

B. MCHI's Commitment Letters Fail To Satisfy The Commission's Strict Financial Standards

In its Consolidated Application for Review, MCHI argues that it is financially qualified by virtue of the Westinghouse and IAI letters alone.^{16/} Even with MCHI's belated clarifications, both letters fall substantially short of the Commission's standards regarding the management commitment necessary to grant a Big LEO license. As a result, the Commission properly deferred MCHI's Application until January 31, 1996.

The Bureau concluded that the letters submitted by MCHI "do not establish management commitments to expend the funds necessary to construct, launch, and operate the space segment of MCHI's proposed system."^{17/} Specifically, the letter from Westinghouse to MCHI merely indicated general "support" for MCHI's Application and only commits "to continue the support of the team's efforts to move forward to completion of an operating system."^{18/} The Bureau correctly found that since "Westinghouse does not indicate how much financing it has committed or to what extent it plans to support 'the team' financially," Westinghouse has not made a financial commitment to expend the necessary funds.^{19/} Westinghouse's latest letter, merely confirms the tentative nature of its "commitment." This letter merely states that

^{15/} Id. at ¶ 35.

^{16/} See MCHI Consolidated Application for Review at 10.

^{17/} MCHI Order, at ¶ 11.

^{18/} Letter from M.F. Borkowski to Dr. David Castiel (Nov. 15, 1994).

^{19/} MCHI Order, at ¶ 12.

Westinghouse is considering a "future equity relationship with MCHI" and is "prepared to have its equity investment expended to fund a portion of the launch, construction and first year operational costs of MCHI's project."^{20/} These statements do little to respond to the Commission's concerns regarding Westinghouse's management commitment to MCHI.

The Bureau also properly found that the IAI letter did not evidence any commitment to fund all or part of MCHI's satellite project.^{21/} This letter merely indicates that the company is "prepared to support MCHI's efforts to raise the necessary funds."^{22/} Clearly, this is not a commitment at all, but rather an indication of interest in the project. Although IAI now alleges that it is a full partner and equity holder in MCHI and that it has the "intent of providing support for the successful achievement of the Ellipso project. . . ," it is still not clear exactly how much financial "support" IAI would be willing to give to MCHI.^{23/} Without such specificity, neither the Bureau nor the Commission can rely upon this so-called financial commitment.

III. CLARIFICATION IS NOT NEEDED AS TO WHEN FUTURE FINANCIAL SHOWINGS BY DEFERRED APPLICANTS WILL BE PROCESSED BY THE BUREAU

Apparently recognizing the weakness of its financial showing, MCHI has requested that the Commission clarify that all deferred applicants "have until January

^{20/} MCHI Consolidated Application for Review at Exhibit A (emphasis added).

^{21/} MCHI Order, at ¶¶ 13-14, 22 n.21.

^{22/} Letter from Shmuel Peretz to Dr. David Castiel (Nov. 8, 1994). In any event, since MCHI has not submitted to the Commission the balance sheet or other financial statements of IAI indicating current assets or operating income, this letter is irrelevant.

^{23/} See MCHI Consolidated Application for Review, at Ex. B.

31, 1996 to file amended applications and will have such amended applications processed as and when they are filed or on a first-come basis."^{24/} Motorola disagrees with this interpretation. The Commission should only consider new financial showings by deferred applicants after January 31, 1996.

In the Big LEO Report and Order, the Commission stated that it would "allow applicants who cannot meet [the] financial qualifications requirement. . . an additional period of time to establish their qualifications. Specifically, we will allow. . . them until January 31, 1996 . . . to demonstrate compliance. . . ." ^{25/} MCHI interprets the use of the word "until" to mean that "one has an opportunity that begins upon announcement and terminates with the passing of the deadline, unless otherwise specified."^{26/}

The Commission, however, stated that it was adopting a "two-tiered eligibility rule."^{27/} Such a rule clearly implies that the Commission intended applicants either to make the required financial showing by November 16, 1994, or by January 31, 1996, with Commission consideration following each deadline, but not in between. Any other interpretation could result in the Commission being faced with a constant stream of renewed requests by deferred applicants as to their financial qualifications. With each piece of paper or clarifying letter submitted, the Commission would be forced to mobilize its resources to engage in a piecemeal review process. This is likely to be

^{24/} Id. at 14.

^{25/} Big LEO Report and Order, at ¶ 40.

^{26/} See MCHI Consolidated Application for Review, at 14.

^{27/} Big LEO Report and Order, at ¶ 41.

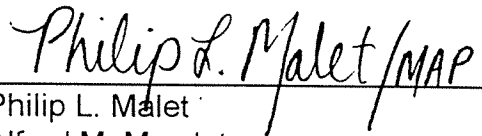
followed by additional submissions and requests for review by the same applicant. In the interest of administrative convenience and effective use of its resources, the Commission should reject MCHI's request for clarification.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny MCHI's Consolidated Application for Review and Request for Clarification.

Respectfully submitted,

**MOTOROLA SATELLITE
COMMUNICATIONS, INC.**

Philip L. Malet

Alfred M. Mamlet
Pantelis Michalopoulos
Marc A. Paul
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

Its Attorneys

Michael D. Kennedy
Vice President and Director
Regulatory Relations
Barry Lambergman
Manager, Satellite
Regulatory Affairs
MOTOROLA INC.
Suite 400
1350 I Street, N.W.
Washington, DC 20005
(202) 371-6900

Dated: March 17, 1995

CERTIFICATE OF SERVICE

I, Marc A. Paul, hereby certify that the foregoing **Motorola's Opposition to MCHI's Consolidated Application For Review And Request For Clarification** was served, via first class mail (except where indicated), postage prepaid, this 17th day of March, 1995, on the following:

- * Chairman Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

- * Commissioner James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

- * Commissioner Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

- * Commissioner Andrew C. Barrett
Federal Communications Commission
Room 826
1919 M Street, N.W.
Washington, DC 20554

- * Commissioner Susan B. Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

* Via Hand Delivery

- * Scott Blake Harris, Chief
Office of the Bureau Chief
International Bureau
Federal Communications Commission
Room 800, Stop Code 0800
2000 M Street, N.W.
Washington, DC 20554

- * Karl Kensinger
Legal Advisor
Federal Communications Commission
Room 800, Stop Code 0800
2000 M Street, N.W.
Washington, DC 20554

- * William E. Kennard, Esq.
General Counsel
Federal Communications Commission
Room 614B
1919 M Street, N.W.
Washington, DC 20554

- * Karen Brinkman
Special Assistant
Office of the Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

- * Thomas S. Tycz, Chief
Satellite & Radiocommunications Division
International Bureau
Federal Communications Commission
Room 800, Stop Code 0800B
2000 M Street, N.W.
Washington, DC 20554

- * Cecily C. Holiday, Deputy Chief
Satellite & Radiocommunications Division
International Bureau
Federal Communications Commission
Room 800, Stop Code 0800B
2000 M Street, N.W.
Washington, DC 20554

- * Fern J. Jarmulnek, Chief
Satellite Radio Branch
International Bureau
Federal Communications Commission
Room 800, Stop Code 0800B
2000 M Street, N.W.
Washington, DC 20554

- * Bruce D. Jacobs, Esq.
Glenn S. Richards, Esq.
Fisher, Wayland, Cooper, Leader & Zaragoza, L.L.P.
Suite 400
2001 Pennsylvania Avenue, N.W.
Washington, DC 20006

- * Lon C. Levin
Vice President and Regulatory Counsel
AMSC Subsidiary Corporation
10802 Park Ridge Boulevard
Reston, VA 22091

- * Norman P. Leventhal
Raul R. Rodriguez
Stephen D. Baruch
Leventhal, Senter & Lerman
Suite 600
2000 K Street, N.W.
Washington, DC 20006-1809

* John T. Scott, III
William D. Wallace
Stephen M. Byers
10th Floor North
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

* Robert A. Mazer
Rosenman & Colin
Suite 200
1300 19th Street, N.W.
Washington, DC 20036

* Jill Stern, Esq.
Shaw, Pittman, Potts & Trowbridge
2nd Floor
2300 N Street, N.W.
Washington, DC 20037

Leslie Taylor
Leslie Taylor Associates
6800 Carlynn Court
Bethesda, MD 20817-4302

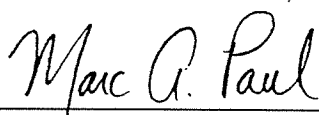
Dale Gallimore
Counsel
Loral Qualcomm
Suite 101
7375 Executive Place
Seabrook, MD 20706

Gerald Hellman, Vice President
Policy & International Programs
Mobile Communications Holdings, Inc.
1120 19th Street, N.W.
Washington, DC 20036

Gary Epstein
John P. Janka
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Washington, DC 20036

Walter H. Sonnenfeldt
4904 Ertter Drive
Rockville, MD 20852

John S. Hannon
Nancy J. Thompson
COMSAT Mobile Communications
22300 COMSAT Drive
Clarksburg, MD 20871



Marc A. Paul