

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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;
18-DSS-P-91;
11-SAT-LA-95;
12-SAT-AMEND-95

Received

FEB 20 1996

Satellite Policy Branch
International Bureau

**NOTICE OF SUPPLEMENTAL AUTHORITY
IN SUPPORT OF CONSOLIDATED APPLICATION FOR REVIEW
AND REQUEST FOR CLARIFICATION**

Mobile Communications Holdings, Inc. ("MCHI"), by its attorneys, submits this notice of supplemental authorities in support of its March 2, 1995 Consolidated Application for Review and Request for Clarification ("Application for Review"). In the Application for Review, MCHI sought review and reversal by the Commission of the January 31, 1995 International Bureau decision to defer consideration until January 31, 1996 of MCHI's above-captioned application for authority to construct, launch and operate an above 1 GHz low-Earth orbiting satellite system ("Big LEO").

On January 31, 1995, the International Bureau deferred MCHI's application and found that MCHI "had not demonstrated that it is financially qualified at this time under the Commission's rules and policies."^{1/} In MCHI's Application for Review, we established that

^{1/} See Mobile Communications Holdings, Inc., 10 F.C.C. Rcd. 2274 (Int'l Bur. 1995).

MCHI's financial arrangements did in fact satisfy the Commission's rules and policies governing financial qualifications, when properly applied. On January 18, 1996, MCHI filed an Emergency Amendment to its Application for Review underscoring the inequity of requiring MCHI to meet the January 31, 1996 deadline for demonstration of financial qualifications without the benefit of further guidance and clarification from the Commission on MCHI's prior financial showings. The Emergency Amendment highlighted the dilemma faced by MCHI: in order to meet the January 31 deadline, MCHI would have to reconfigure its current financial arrangements with investors while firmly believing that its prior financial showing met the Commission's financial requirements. An extension of the filing deadline, pending release of an order disposing of MCHI's Application for Review, was granted by the Commission on January 25, 1996.²¹

The purpose of this filing is to call the Commission's attention to a reaffirmed expression of relevant national policy. The recently enacted Telecommunications Act of 1996 Pub. L. No. 104-104, 110 Stat. 56 (signed Feb. 8, 1996) ("the 1996 Act") illuminates once again one of the central flaws in the decision of the International Bureau: the Bureau arbitrarily truncated the policies that informed its application of the Commission's rules to MCHI, focusing only on the Commission's understandable concern that Big LEO applicants be sufficiently capitalized, while ignoring the equally significant, and long-standing, policy that ready access to new technologies

²¹ Memorandum Opinion and Order, DA 96-76, released January 26, 1996.

is to be ensured "by disseminating licenses among a wide variety of applicants, including small businesses." 47 U.S.C. § 309(j)(3)(8).^{3/}

In the Telecommunications Act of 1996, signed by the President, Congress reiterated and amplified this policy direction to the Commission, putting the Commission on a pro-active course to eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services." The 1996 Act, § 257(a).^{4/} Congress then went on to emphasize the national policy that is to animate the Commission's judgments:

(b) NATIONAL POLICY. -- In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

The 1996 Act, § 257(b).

Thus, the Commission's judgment concerning the financial qualifications of any applicant cannot be at war with its mandate to eliminate market entry barriers for entrepreneurs and other small businesses such as MCHI. Rather, the application of the Commission's financial

^{3/} See also Small Business Credit and Business Opportunity Act of 1992, Pub.L. No. 102-366, § 331 (a)(3), 106 Stat. 1007, in which Congress made specific findings with respect to the difficulties faced by small business concerns in obtaining access to capital and the need to give priority to "legislation and regulations that enhance the viability of small business concerns."

^{4/} Attached as Exhibit A.

standards in the case of a particular small enterprise must be informed by the financial context in which smaller businesses operate. Obviously, if the Commission applies its financial standards relying on premises that can only be realized in the financial world of large corporations --- indeed in the case of the Big LEOs only giant corporations --- entrepreneurial enterprises, far from having easier entry, would in effect be barred from delivering the new and innovative telecommunications services of Big LEO and enlivening the competitive market.^{5/}

The conclusion of the International Bureau that MCHI has not demonstrated that it is financially qualified should be reversed because that conclusion proceeds in part^{6/} from precisely such a failure to incorporate into its application of the Commission's financial standards the congressional policy that the Commission promote the diversity of enterprises licensed for Big LEO service. *See also Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 447 (D.C. Cir. 1991)

^{5/} See, e.g., Letter from Trevor Nash, Director, Barclays de Zoete Wedd Limited to William A. Caton, Secretary, Federal Communications Commission, May 3, 1994, CC Docket No. 92-166.

^{6/} As we have pointed out in our Application for Review, the decision of the International Bureau is also vulnerable because it is based on an erroneous characterization of the financial commitments of MCHI to the Big LEO project. *See* Application for Review at 9-13. Indeed, the error of the Bureau is compounded by the fact that in relying on this completely mistaken portrayal of the evidence of MCHI's financial qualifications, it made critical factual findings on matters most assuredly in genuine dispute without having any hearing, a clear violation of 47 U.S.C. § 309(e). At the same time, the Bureau granted the application of the Loral/Qualcomm Partnership, L.P., whose financial qualifications were disputed by evidence produced by several other applicants and contradicted by their SEC filings. *See* Application for Review at 5-9; *see also Weyburn Broadcasting Ltd. Prtnrs. v. FCC*, 984 F.2d 1220, 1229-1231 (D.C. Cir. 1993). It can fairly be claimed that MCHI's filing was subjected to a much more critical reading than those of its giant corporate competitors.

("Any financial eligibility requirement imposed upon license applicants must bear some reasonable relationship to true financial fitness.").⁷¹

Moreover, the inherent inconsistency between the International Bureau's action and the clear policy of Congress sweeps much broader than the immediate interests of MCHI. After all, the "provision" of any "telecommunication services," as the Commission is well aware, is a major undertaking, drawing high technology products and involving vendors from a variety of sectors of the economy. Entrepreneurial enterprises like MCHI, by virtue of being the "new kids on the block," are not limited to well-established relationships with potential suppliers, but reach deeper into the economy to involve new entities in this market -- encouraging the kind of broad "diversity" and "vigorous economic competition," stimulating American firms and employment, that Congress had in mind. *See* The 1996 Act, § 257(b).

For example, in this case, at the time of the Bureau's decision, MCHI was negotiating with an Alabama company, SCI, to manufacture the handset for MCHI's proposed Big LEO service (in cooperation with Westinghouse of Baltimore, Maryland), which would be a new product line for SCI, a manufacturer of consumer electronics and high technology products. If the Bureau's decision is affirmed by the Commission, however, and MCHI is forced to reconfigure its current financial arrangements, MCHI will have to turn to offshore vendors who

⁷¹ MCHI has challenged the Commission's financial standards for Big LEO service in the United States Court of Appeals for the District of Columbia. *MCHI v. FCC*, No. 94-1696 (D.C. Cir. filed Nov. 8, 1994). That appeal is currently being held in abeyance pending resolution of this matter. Obviously, should the Commission conclude that the International Bureau misapplied those standards, that proceeding in the Court of Appeals would be rendered moot.

are also in a position to participate in financing this project. Clearly, such a result --- which could harm U.S. companies to the benefit of foreign competitors --- is far afield from Congress' intentions.^{8/}

And a Commission decision causing such a result by affirming the Bureau here would serve absolutely no public purpose. There is nothing before the Commission that suggests that concerns for adequate capitalization of Big LEO candidates and a duty to promote the entry of new, entrepreneurial ventures by small businesses are inherently at odds.^{9/} Even if there were, and the Commission concluded that the International Bureau had correctly applied its financial standards to MCHI, the clear policy of Congress that the Commission open the market's doors to

^{8/} Another U.S. company, Westinghouse Electric Corporation, has recognized the opportunity ELLIPSO™ presents for employment of U.S. workers. Westinghouse previously indicated that ELLIPSO™ ground network development will employ as many as 300-500 highly skilled engineers and technicians. Comments of Westinghouse Electric Corporation, CC Docket No. 92-166, at 5 (March 5, 1994). *See also* Comments of Harris Corporation, CC Docket No. 92-166, at 7 (March 5, 1994) ("the ELLIPSO™ program will mean 150-200 jobs that might otherwise be threatened by defense cuts.") These potential benefits to U.S. high technology industry (and the American public) will be lost if MCHI is forced to award the contracts to offshore companies for the sole purpose of meeting an agency-imposed financial standard, not for purely business reasons.

^{9/} Far from exhibiting any inability to provide the kind of facilities needed for Big LEO service, entrepreneurial ventures like MCHI in fact can creatively provide lower cost telecommunications services in many markets not adequately served by larger entities. Establishing such services in remote regions of developing countries is one example. *See, e.g.,* Letter of the Honorable Z. Pallo Jordan, Minister for Posts, Telecommunications and Broadcasting, Republic of South Africa, to Mr. Mark Headbush, Executive Chairman, Afritel Telecom Pty Ltd. (Feb. 1, 1996) (congratulating Mr. Headbush on the joint venture established between MCHI and Afritel Telecom "to provid[e] low cost telecommunications to the underserved remote parts of our country") [attached as Exhibit B].

enterprises like MCHI would provide a principled basis for waiving those standards as to MCHI. *See WAIT Radio v. FCC*, 418 F. 2d 1153, 1157, 1159 (D.C. Cir. 1969) ("a general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest".) *See also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("The FCC has authority to waive its rules if there is good cause to do so.")^{10/}

Moreover, the current licensees, all very large corporations, would hardly be harmed by this application of Congressional policy. They now enjoy over a year's headstart as a consequence of the International Bureau's decisions on January 31, 1995. Rather than relying for financing on the "commitment" of their balance sheets, they all are trying to raise money on financial markets and elsewhere --- just as in the case of MCHI. Of course, these giant companies are doing so with FCC licenses in hand and without the constraints of strict deadlines.

For the above stated reasons, MCHI submits this Notice of Supplemental Authority in Support of its Consolidated Application for Review and Request for Clarification. In light of the further amplification by Congress of the Commission's obligations to promote small and

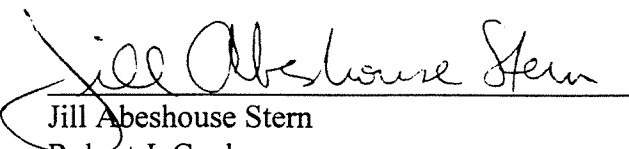
^{10/} *See also* Commission Rule 1.3 ("The provisions of this chapter may be ... waived for good cause shown, in whole or in part, at any time by the Commission.")

entrepreneurial enterprises, MCHI renews its requests that the Commission reverse the decision of the International Bureau deferring consideration of MCHI's application, and instead, grant MCHI's application for a Big LEO license.

Respectfully submitted,

MOBILE COMMUNICATIONS
HOLDINGS, INC.

By:


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Robert J. Cynkar

Edmund D. Daniels

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Its Attorneys

February 15, 1996

EXHIBIT A

"(d) COMPATIBILITY.—Whenever the requirements of subsections (b) and (c) are not readily achievable, such a manufacturer or provider shall ensure that the equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable.

"(e) GUIDELINES.—Within 18 months after the date of enactment of the Telecommunications Act of 1996, the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission. The Board shall review and update the guidelines periodically.

"(f) NO ADDITIONAL PRIVATE RIGHTS AUTHORIZED.—Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

"SEC. 356. COORDINATION FOR INTERCONNECTIVITY.

"(a) PURPOSE.—It is the purpose of this section—

"(1) to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications service through—

"(A) coordinated public telecommunications network planning and design by telecommunications carriers and other providers of telecommunications service; and

"(B) public telecommunications network interconnectivity, and interconnectivity of devices with such networks used to provide telecommunications service; and

"(2) to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.

"(b) COMMISSION FUNCTIONS.—In carrying out the purposes of this section, the Commission—

"(1) shall establish procedures for Commission oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service; and

"(2) may participate, in a manner consistent with its authority and practice prior to the date of enactment of this section, in the development by appropriate industry standards-setting organizations of public telecommunications network interconnectivity standards that promote access to—

"(A) public telecommunications networks used to provide telecommunications service;

"(B) network capabilities and services by individuals with disabilities; and

"(C) information services by subscribers of rural telephone companies.

"(c) COMMISSION'S AUTHORITY.—Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996.

"(d) DEFINITION.—As used in this section, the term 'public telecommunications network interconnectivity' means the ability of two or more public telecommunications networks used to provide telecommunications service to communicate and exchange information without degeneration, and to interact in concert with one another.

"SEC. 357. MARKET ENTRY BARRIERS PROCEEDING.

"(a) ELIMINATION OF BARRIERS.—Within 15 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

"(b) NATIONAL POLICY.—In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

"(c) PERIODIC REVIEW.—Every 3 years following the completion of the proceeding required by subsection (a), the Commission shall review and report to Congress on—

"(1) any regulations prescribed to eliminate barriers within its jurisdiction that are identified under subsection (a) and that can be prescribed consistent with the public interest, convenience, and necessity; and

"(2) the statutory barriers identified under subsection (a) that the Commission recommends be eliminated, consistent with the public interest, convenience, and necessity.

"SEC. 358. ILLEGAL CHANGES IN SUBSCRIBER CARRIER SELECTIONS.

"(a) PROHIBITION.—No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.

"(b) LIABILITY FOR CHARGES.—Any telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation, in accordance with such procedures as the Commission may prescribe. The remedies provided by this subsection are in addition to any other remedies available by law.

"SEC. 269. INFRASTRUCTURE SHARING.

"(a) REGULATIONS REQUIRED.—The Commission shall prescribe, within one year after the date of enactment of the Telecommunications Act of 1996, regulations that require incumbent local exchange carriers (as defined in section 251(h)) to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and func-

TELECOMMUNICATIONS ACT OF 1996

JANUARY 31, 1996. Ordered to be printed

Mr. BLILEY, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) **SHORT TITLE.**—This Act may be cited as the “Telecommunications Act of 1996”.

(b) **REFERENCES.**—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title; references.

Sec. 2. Table of contents.

Sec. 3. Definitions.

Conference agreement

The conference agreement adopts the Senate provision with minor modifications as a new section 256 of the Communications Act.

NEW SECTION 257—MARKET ENTRY BARRIERS PROCEEDING

Senate bill

No provision.

House amendment

Section 250 requires the Commission to adopt rules that identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications and information services. The Commission must review these rules and report to Congress every three years on how it might prescribe or eliminate rules to promote the purposes of this section.

Conference agreement

The conference agreement adopts the House provisions with minor modifications as a new section 257 of the Communications Act.

NEW SECTION 258—ILLEGAL CHANGES IN SUBSCRIBER CARRIER SELECTIONS

Senate bill

No provision.

House amendment

Section 251 requires the Commission to adopt rules to prevent illegal changes in subscriber selections, a practice known as "slamming." The Commission has adopted rules to address problems in the long distance industry of unauthorized changes of a consumer's long distance carrier. The House provision is designed to extend the protections of the current rule to local exchange carriers as well.

Conference agreement

The conferees adopt the House provision as a new section 258 of the Communications Act. It is the understanding of the conferees that in addition to requiring that the carrier violating the Commission's procedures must reimburse the original carrier for forgone revenues, the Commission's rules should also provide that consumers are made whole. Specifically, the Commission's rules should require that carriers guilty of "slamming" should be held liable for premiums, including travel bonuses, that would otherwise have been earned by telephone subscribers but were not earned due to the violation of the Commission's rules under this section.

NEW SECTION 259—INFRASTRUCTURE SHARING

Senate bill

Section 106(a) of the Senate bill requires that within one year of the date of enactment, the Commission shall prescribe rules requiring local exchange carriers that were subject to Part 69 of the Commission's rules on the date of enactment to share network facilities, technology, and information with qualifying carriers. The qualifying carrier may request such sharing for the purpose of providing telecommunications services or access to information services in areas where the carrier is designated as an essential telecommunications carrier under new section 214(d). The bill does not grant immunity from the antitrust laws for activities undertaken pursuant to this section.

Section 106(b) establishes the terms and conditions of the Commission's regulations. Such regulations shall:

- (1) not require a local exchange carrier to take any action that is economically unreasonable or contrary to public interest;
- (2) permit, but not require, joint ownership of facilities among local exchange carriers and qualifying carriers;
- (3) ensure that the local exchange carrier not be treated as a common carrier for hire with respect to technology, information or facilities shared with the qualifying carrier under this section;
- (4) ensure that qualifying carriers benefit fully from sharing;
- (5) establish conditions to promote cooperation;
- (6) not require a local exchange carrier to share in areas where the local exchange carrier provides telephone exchange service or exchange access service; and
- (7) require the local exchange carrier to file with the Commission or State, any tariffs, contract or other arrangement showing the rate, terms, and conditions under which such local exchange carrier is complying with the sharing requirements of this section.

Subsection (c) requires that local exchange carriers sharing infrastructure must provide information to sharing parties about deployment of services and equipment, including software.

Subsection (d) defines those carriers eligible to request infrastructure sharing under this section.

House amendment

No provision.

Conference agreement

The conference agreement adopts the Senate provisions as a new section 259 of the Communications Act.

NEW SECTION 260—PROVISION OF TELEMESSAGING SERVICE

Senate bill

Section 311 of the Senate bill adds a new section 265 to the Communications Act, to address certain practices of the BOCs with

EXHIBIT B

4:30



Ministry for Posts, Telecommunications and Broadcasting
Isebe lee Posi, UQhagamshelwano nce Nkonzo zoSasazo
Lefapha la Diposo, thelekhomunikheisene le tirelo ya kgašo
Ministerie vir Pos-, Telekommunikasie- en Uitsaaiwese

1st February 1996.

FAX IN

Mr Mark Headbush,
Executive Chairman,
Afritel Telecom Pty Ltd.,
P.O. Box 56091,
ARCADIA 0007.

Dear Mark,

I want to express my sincere gratitude for your arranging the meeting with Mobile Communications on Monday 22nd January.

Let me also congratulate you on the occasion of your entering an agreement with Mobile Communications Holding Inc. to become exclusive Joint Venture partners and service providers for the Elipso Mobile Communications Satellite System for Africa.

Your company's commitment to providing low cost telecommunications to the underserved remote parts of our country is in complete accord with my Ministry's own.

I wish you the very best in your endeavours and would appreciate being kept abreast of progress.

With best regards,

Yours sincerely,

Z. Pallo Jordan,
Minister.

CERTIFICATE OF SERVICE

I, Felecia G. DeLoatch, do hereby certify that a true and correct copy of the foregoing document was sent by first-class mail, postage prepaid, or hand-delivered, on this 15th day of February, 1996, to the following persons:

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Washington, D.C. 20554
- * Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
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- * Commissioner Andrew C. Barrett
Federal Communications Commission
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- * Commissioner Rachelle B. Chong
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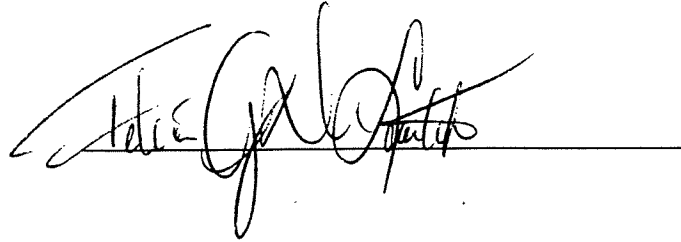
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A handwritten signature in black ink, appearing to read "John T. Scott, III", is written over a solid horizontal line. The signature is stylized and cursive.

* Hand Delivered