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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
CONSTELLATION COMMUNICATIONS)
HOLDINGS, INC.)
)
Request for Limited Waiver and Extension)
of Time)
)
And)
)
Application for Amendment of its Pending)
Application for Modification of the)
Milestone Schedule Established for its)
Above 1 GHz Low-Earth Orbit Mobile-)
Satellite System)

File No. 17-DSS-P-91(48); CSS-91-013;
SAT-AMEND-95; 159-SAT-
AMEND-96; SAT-MOD-
20000907-00131

File No. SAT-AMD-20010829-00081

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Satellite Policy Branch
International Bureau

PETITION FOR RECONSIDERATION

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SUMMARY

In a November 8, 2002 *Memorandum Opinion and Order* (“MO&O”), the International Bureau denied Constellation’s request that certain milestones contained in the company’s authorization to provide Big LEO mobile satellite services (“MSS”) be extended or waived. The Bureau’s decision is inconsistent with the purpose underlying the milestones, and the Bureau relies on Commission precedent that is inapposite or actually supports grant of a waiver to Constellation. Constellation qualifies for an extension under Section 25.117(e) of the Commission’s Rules because the requested extension is the result of the current lack of financing in the capital markets for satellite systems, which is due to the failures of Iridium and Globalstar. This clearly is a circumstance beyond Constellation’s control, thus qualifying the company for an extension under Section 25.117(e)(1). This outcome is consistent with Commission precedent, particularly in light of the efforts and more than \$50 million Constellation has expended thus far in meeting its construction commencement milestone and in attempting to satisfy its other milestones.

An extension is also warranted under Section 25.117(e)(2) because it would serve the public interest in having additional competitive entry in the Big LEO MSS. Denial of the extension request will not advance the Commission’s policy against spectrum warehousing and will not result in additional competitive entry in the Big LEO services. To the contrary, the Bureau’s decision will limit competition in the Big LEO MSS and could ultimately provide a windfall to the two remaining Big LEO licensees, which are principally responsible for creating today’s difficult financial climate for MSS.

Even assuming, *arguendo*, that Constellation does not meet the Commission’s standard for an extension of its milestones, grant of a waiver of those milestones would be consistent with the Commission’s waiver standards. Constellation has expended significant effort and financial

resources thus far; the company is clearly not warehousing spectrum; and the public interest would be furthered by the existence of a Constellation as a viable Big LEO MSS operator. Grant of a milestone waiver for Constellation would actually speed new entry, whereas denial of the waiver could foreclose such new entry for years to come and perpetuate the existing Big LEO MSS duopoly.

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PETITION FOR RECONSIDERATION

Constellation Communications Holdings, Inc. (“Constellation”), by its attorneys, hereby requests that the International Bureau (“Bureau”) reconsider its *Memorandum Opinion and Order* (“*MO&O*”) issued on November 8, 2002, in the above-referenced proceeding.¹ The *MO&O* denied Constellation’s request that certain milestones contained in the company’s authorization to construct, launch and operate a low earth orbit mobile-satellite system above 1 GHz (“Big LEO License”) be extended or waived. As a consequence, the *MO&O* concluded that Constellation’s Big LEO License is null and void. However, the *MO&O* relies on an erroneous interpretation of Commission precedent and on precedent that is inapposite to

¹ *Memorandum Opinion and Order*, DA 02-3086 (Int’l Bur., released Nov. 8, 2002) (“*MO&O*”). In the *MO&O* the Bureau addresses a milestone extension request filed by Constellation in 2000 and an amendment to that request filed in 2001. However, the Bureau does not address an additional amendment that Constellation filed in August 2002. *See infra* note 12 and accompanying text.

Constellation's situation. For these reasons, and because reinstatement of Constellation's Big LEO License and grant of the requested extension or waiver would serve the public interest, the Bureau should reconsider the *MO&O*, reinstate Constellation's Big LEO License and grant the requested milestone extensions.

I. Background

The Bureau granted Constellation's Big LEO License in 1997² to operate as one of only five licensees in the Above 1 GHz Mobile Satellite Service ("MSS"). The other Big LEO licensees are Iridium LLC ("Iridium"),³ Globalstar Telecommunications LP ("Globalstar"),⁴ TRW Inc.⁵ and Mobile Communications Holdings, Inc. ("MCHI").⁶ The *Constellation License Order* required that Constellation: (1) commence construction of its first two system satellites by July 1998 ("July 1998 Construction Commencement Milestone"); (2) commence construction of the remaining satellites by July 2000 ("System Construction Commencement Milestone"); (3) complete construction of the first two satellites by July 2001 ("Two Satellite Construction

² See *Constellation Communications, Inc.*, 12 FCC Rcd 9651 (1997) ("*Constellation License Order*"). As the *MO&O* points out, Constellation's Big LEO License was granted to Constellation Communications, Inc. See *MO&O* para. 2 n.2. The Bureau subsequently granted a request for the *pro forma* assignment of the license to CCI International N.V. ("CCIP"). See Letter to Robert Mazer from Thomas S. Tycz, dated Sept. 14, 1999 (File No. SAT-ASG-19990222-00023). The Bureau later granted a request for the *pro forma* assignment of the license to Constellation, a wholly owned subsidiary of CCII. See Letter to Robert Mazer and Albert Shuldiner from Thomas S. Tycz, dated Dec. 22, 1999 (File No. SAT-ASG-19991028-00105).

³ See *Motorola Satellite Communications, Inc.*, 10 FCC Rcd 2268 (Int'l Bur. 1995).

⁴ See *Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333 (Int'l Bur. 1995).

⁵ See *TRW Inc.*, 10 FCC Rcd 2263 (Int'l Bur. 1995).

⁶ See *Mobile Communications Holdings, Inc.*, 12 FCC Rcd 9663 (1997). There are currently applications pending with the Commission to transfer control of MCHI and Constellation to ICO Global Communications (Holdings) Limited. See File Nos.

Completion Milestone”); and (4) ensure that the system be operational by July 2003 (“System Operational Status Milestone”).⁷

Constellation early on recognized the substantial challenges that were presented by a global MSS system. Unlike the other Big LEO licensees, Constellation predicated its business plan on a phased approach to the introduction of its MSS business. In phase one, service would be established around the equator in a ring from 23° North Latitude to 23° South Latitude. This required a single equatorial ring of twelve satellites. In phase two, the number of satellites would be expanded to fifty-four to provide service on a global basis. This phased approach allowed Constellation to commence service and obtain revenue with significantly fewer satellites and capital expenditures than required for the Iridium and Globalstar systems. More importantly, it minimized the upfront business risk for its investors.⁸

With this business plan in mind, Constellation satisfied its July 1998 Construction Commencement Milestone with the execution of a contract between Constellation’s parent company, CCI International N.V. (“CCII”), and Orbital Sciences Corporation (“Orbital”) for the construction of twelve spacecraft.⁹ Under separate contracts, Orbital agreed to make substantial phased equity investments in CCII and provide vendor financing for a significant portion of the initial satellite system construction effort. CCII also entered into contracts in 1999 with

⁷ See *Constellation License Order*, 12 FCC Rcd at 9661.

⁸ As the Commission is aware, Iridium and Globalstar investors have lost billions of dollars in investments from their global MSS systems.

⁹ The Commission was notified of this fact on July 2, 1998, with the filing of an affidavit of C.J. Waylan, President and Chief Executive Officer of Constellation. This was filed as part of the annual report required by Section 25.143(e) of the Commission’s Rules, 47 C.F.R. § 25.143(e). See Letter to Magalie Roman Salas from Robert A. Mazer, dated July 2, 1998, File Nos. 159-SAT-AMEND-96, 11 SAT-LA-95, 10-SAT-AMEND-95-CSS-91-013, 17 DSS-P-91(48). Constellation also filed timely annual reports in 1999, 2000, 2001 and 2002.

Raytheon Company (“Raytheon”) and ASRC Aerospace Corporation (“ASRC”). Raytheon agreed to make an equity investment in CCII and to provide substantial vendor financing in connection with a satellite system subcontract with Orbital. ASRC agreed to become a member of the ground segment team for the system and to make a phased equity investment in CCII. As part these activities, CCII raised and expended in excess of \$50 million in support of the development of its MSS system.¹⁰

Along with the financial support CCII received from Orbital, Raytheon, ASRC and other sources, CCII recognized that additional resources were necessary in order to complete the system. To this end, CCII established a working relationship with Lehman Brothers in 1999 to explore sources of funds within the financial community. Lehman Brothers expressed support for CCII’s phased approach business plan, but cautioned that the market uncertainties created by the Iridium and ICO bankruptcies, and the operating results of Globalstar at the time, raised significant hurdles in the path of CCII’s financing efforts. CCII retained Banc of America Securities (“BAS”) in 2000 as its primary financial advisor. BAS also validated the company’s phased approach business plan, but found that investor caution had continued with respect to the Big LEO industry because of the Iridium, ICO and Globalstar problems and suggested deferring further attempts to secure additional financing until market conditions improved.

For these reasons, Constellation filed a request in 2000 asking that the Two Satellite Construction Completion Milestone be extended to July 2001, the System Construction Completion Milestone be extended to July 2002 and the System Operational Status Milestone be

¹⁰ See Letter of Robert A. Mazer to Marlene H. Dortch, dated Oct. 15, 2002, File No. SAT-T/C-20020718-00114 (with attached information responding to inquiry from the Satellite Division). This includes the development of Constellation’s Big LEO and 2 GHz systems.

extended to July 2004.¹¹ Because market conditions had not improved, Constellation amended its extension request in 2002, asking that the Two Satellite Construction Completion Milestone be extended to July 2004, the System Construction Completion Milestone be extended to July 2005 and the System Operational Status Milestone be extended to July 2006.¹² There have been no oppositions filed to any of Constellation's requests, and they remain unopposed.

On November 8, 2002, the Bureau issued the *MO&O* denying Constellation's extension request.¹³ The Bureau noted that "milestone extensions are granted only when the delay in implementation is due to circumstances beyond the control of the licensee or when there are unique and overriding public interest concerns that justify an extension."¹⁴ According to the Bureau, Constellation has not met this standard because "failure to attract investors, an uncertain business situation, or an unfavorable business climate in general have never been an adequate

¹¹ See Constellation Communications Holdings, Inc., Request for Limited Waiver and Extension of Time, File No. SAT-MOD-20000907-00131 (filed Aug. 9, 2000). The Commission placed this request on public notice, see Public Notice, Rep. No. SAT-00055 (Sept. 28, 2000), and no comments were filed in response, *MO&O* para. 4. Constellation amended its extension request in 2001 and asked that the Two Satellite Construction Completion Milestone be extended to July 2002, the System Construction Completion Milestone be extended to July 2003 and the System Operational Status Milestone be extended to July 2005. See Constellation Communications Holdings, Inc., Request for Modification of Request for Limited Waiver and Extension of Time, File No. SAT-AMD-20010829-00081 (filed Aug. 29, 2001). The Commission placed this request on public notice, see Public Notice, Rep. No. SAT-00085 (Sept. 19, 2001), and MCHI filed comments supporting Constellation's amended application, *MO&O* para. 4 & n.15.

¹² See Constellation Communications Holdings, Inc., Request for Modification of Request for Limited Waiver and Extension of Time, File No. SAT-AMD-20020828-00160 (filed Aug. 27, 2002). The Commission placed this request on public notice, see Public Notice, Rep. No. SAT-00121 (Sept. 13, 2002), and no comments were filed in response. The Bureau does not cite or discuss this August 2002 amendment in the *MO&O*.

¹³ The *MO&O* addresses the filings Constellation made requesting milestone extensions in 2000 (File No. SAT-MOD-20000907-00131) and 2001 (File No. SAT-AMD-20010829-00081), but it does not mention the filing made in 2002 (File No. SAT-AMD-20020828-00160). See *MO&O* para. 4.

¹⁴ *Id.* para. 7 (footnotes omitted).

excuse for failure to meet a construction timetable.”¹⁵ The Bureau also attempts in the *MO&O* to distinguish prior cases involving extensions of deadlines from Constellation’s situation.

As discussed more fully below, the Bureau’s decision to deny Constellation’s extension request is inconsistent with the purpose underlying the milestones. Specifically, denial of the request will not advance the Commission’s policy against spectrum warehousing and will not result in additional competitive entry in the Big LEO services. To the contrary, the decision in the *MO&O* will result in a delay of new Big LEO competition and could ultimately reward only the two remaining Big LEO licensees, which are principally responsible for creating today’s difficult financial climate for MSS. The cases the Bureau cites are either inapposite to Constellation’s situation or support a result contrary to that reached in the *MO&O*. Moreover, even if Constellation does not meet the Commission’s standard for an extension of its milestones, grant of a waiver of those milestones would be consistent with Commission precedent and serve the public interest.

II. Constellation Meets the Standard for Granting Milestone Extensions

Under Section 25.117(e) of the Commission’s Rules, milestone extensions will be granted where: (1) “additional time is required due to unforeseeable circumstances beyond the applicant’s control”;¹⁶ or (2) “there are unique and overriding public interest concerns that justify an extension.”¹⁷ As described below, Constellation clearly qualifies for an extension under both of these criteria.

¹⁵ *Id.* (footnote omitted).

¹⁶ 47 C.F.R. § 25.117(e)(1).

¹⁷ 47 C.F.R. § 25.117(e)(2).

A. Constellation Requires Additional Time Due to Unforeseeable Circumstances Beyond Its Control

As Constellation described in its extension requests, the company has been unable to raise the necessary financing for its system due to the poor state of the financial markets in the United States and abroad for satellite operators. The lack of receptivity in the financial markets to investment in Big LEO systems is predominantly the result of the bankruptcies of Iridium and Globalstar.¹⁸ The Commission is well aware of the market conditions that currently afflict the telecommunications industry overall and satellite operators in particular. Earlier this year Chairman Powell declared the telecommunications industry to be in a state of “utter crisis.”¹⁹ The Commission specifically has acknowledged the inability of satellite operators to raise funding from capital markets by granting extensions to New Skies Satellites, N.V. (an Intelsat spin-off) and Inmarsat Ventures Ltd. (an Inmarsat spin-off) to conduct initial public offerings (“IPOs”) required under the Open-Market Reorganization for the Betterment of International Telecommunications (“ORBIT”) Act.²⁰ Moreover, Congress recently passed an extension of the

¹⁸ See, e.g., Constellation 2002 Amendment Request at 3.

¹⁹ Yochi J. Dreazen, *FCC’s Powell Says Telecom “Crisis” May Allow a Bell to Buy WorldCom*, WALL ST. J., July 15, 2002, at A1.

²⁰ See *Inmarsat Ventures Ltd.*, 16 FCC Rcd 13494 (2001); *New Skies Satellites, N.V.*, 15 FCC Rcd 11934 (2000). In these cases the FCC noted the “volatility and decline of U.S. and international capital markets since February 1, 2001,” and observed that “the performance of technology and satellite sectors has been particularly negative” *Inmarsat*, 16 FCC Rcd at 13500. In the *MO&O*, however, the Bureau claims that these decisions do not support a milestone extension for Constellation because “no explicit market condition exception exists for the Commission’s milestone rules, and the Commission has already found that milestone extensions based on market conditions are not in the public interest.” *MO&O* para. 9. As discussed below in this Part II, however, in one of the cases the Bureau cites regarding milestone extensions based on market conditions not being in the public interest, the Bureau actually *granted* a milestone extension. See *infra* notes 27-28 and accompanying text. That case therefore supports the grant of an extension to Constellation. See *id.*

ORBIT Act's IPO deadlines.²¹ If companies such as Intelsat and Inmarsat cannot successfully implement an IPO, it is hard to imagine how a company in Constellation's situation can raise capital through either debt or equity financing.

As a practical matter, there is nothing further from a licensee's ability to control than the macroeconomic climate. No single licensee nor group of licensees, nor the satellite industry, nor the entire telecommunications industry for that matter, can influence the nature and development of the capital markets. These markets are influenced by a number of factors, including stock market performance, productivity, consumer and capital spending, employment and inflation. The Commission has already recognized that the public markets are unavailable for ongoing businesses such as Intelsat, New Skies and Inmarsat. The problems faced by these companies are directly applicable to companies such as Constellation. This is because Intelsat, New Skies and Inmarsat will now have to access private equity market to obtain additional capital. These companies that already produce revenue will swallow significant amounts of private equity available for satellite ventures, leaving little for emerging companies such as Constellation. Once the public markets begin to reemerge, private equity funds will once again be available for earlier state businesses.

In the *MO&O*, the Bureau does not refute the information Constellation has provided in its extension requests concerning market conditions and the inability of satellite operators to raise the funding to complete their systems. Indeed, nothing in the *MO&O* indicates that the Bureau believes Constellation's situation to be attributable to factors within Constellation's control. Nevertheless, the Bureau states that a "failure to attract investors, an uncertain business

²¹ SATELLITE WK., Sept. 16, 2002. "In comments on Senate floor, Senate commerce Committee Chmn. Hollings (D-S.C.) said 'uncontrollable external events' such as WorldCom bankruptcy had created environment that was 'extremely unsupportive' of IPO at this time." SATELLITE WK., Aug. 5, 2002.

situation, or an unfavorable business climate in general have never been an adequate excuse for failure to meet a construction timetable.”²² In support of this proposition, the Bureau cites three cases: *United States Satellite Broadcasting Co.* (“USSB”),²³ *EchoStar Satellite Corp.* (“EchoStar”)²⁴ and *Advanced Communications Corp.* (“Advanced”).²⁵ These cases, however, do not support a denial of Constellation’s milestone extension request.²⁶

In *USSB*, the Commission *granted* an extension to USSB and Dominion Video Satellite, Inc. due in part to market conditions that hindered the ability of these operators to obtain financing for their direct broadcast satellite (“DBS”) systems and because of the nascent technology involved with these systems and the associated businesses. The Commission

²² *MO&O* para. 8.

²³ 3 FCC Rcd 6858 (1988).

²⁴ 17 FCC Rcd 8831 (Int’l Bur. 2002).

²⁵ 10 FCC Rcd 13337 (Int’l Bur. 1995).

²⁶ The Bureau also cites five other cases in which it has denied milestone extension requests because the delay at issue was not deemed to be outside the licensee’s control under Section 25.117(e)(1). See *MO&O* para. 7 n.20. These include *Intelsat LLC*, 17 FCC Rcd 2391 (Int’l Bur. 2002), *Columbia Communications Corp.*, 15 FCC Rcd 16496 (Int’l Bur. 2000), *National Exch. Satellite, Inc.*, 7 FCC Rcd 1990 (Comm. Car. Bur. 1992) (“*Nexsat*”), *Hughes R and Galaxy A-R Domestic Fixed-Satellites*, 5 FCC Rcd 3423 (Comm. Car. Bur. 1990), and *MCI Communications Corp.*, 2 FCC Rcd 233 (Comm. Car. Bur. 1987). However, none of these cases supports the denial of Constellation’s extension request. In *Intelsat* the Bureau *granted* a milestone extension request due to the licensee’s need to correct technical problems. In *Columbia* the Bureau denied an extension request for a licensee that, unlike Constellation, had already been granted one extension, had nevertheless failed to satisfy its construction commencement milestone and had itself caused the delay due to merger negotiations. In *Nexsat* the Bureau denied an extension request for a licensee that, unlike Constellation, had already been granted one extension, had nevertheless failed to satisfy its construction commencement milestone and had itself caused the delay by failing to make decisions about which technology to use. In *Hughes* the Bureau *granted* an extension for reasons that were not beyond the licensee’s control but that otherwise satisfied the public interest (conforming C- and Ku-band launch milestones for a hybrid satellite). And in *MCI* the Bureau denied an extension request the licensee had sought as part of its decision to acquire the prior licensee — a circumstance that, unlike current market conditions for licensees such as Constellation, was not beyond the licensee’s control.

acknowledged that the negative publicity surrounding earlier DBS failures “may have cooled the ardor of potential investors,”²⁷ pointed out that USSB and Dominion had in fact been working on their systems and, for those reasons, concluded that the Commission’s construction deadlines “proved to be inappropriate during this initial period of DBS development.”²⁸ In the *MO&O*, however, the Bureau denies Constellation’s extension request despite poor market conditions outside of the company’s control and the efforts that Constellation has undertaken thus far in complying with its construction commencement milestone, obtaining financing from and entering into relationships with manufacturers and making significant efforts to secure financing in an environment where it has proven impossible to do so. The Bureau also fails to recognize the significant progress Constellation has achieved in the actual development of its system. Moreover, as in *USSB*, Constellation’s system involves a new technology and a service that, like DBS, has suffered from the failures of its initial market entrants. Under these circumstances, *USSB* actually *supports* an extension of Constellation’s milestones rather than the denial for which the Bureau cites it.

In *EchoStar*, the Satellite Division denied a request to extend EchoStar’s milestones for a second time because the company had failed to take “any concrete steps toward the construction, launch, and initiation of service” and because this failure was the result of the company’s business decision “to defer construction in favor of a full-CONUS location.”²⁹ In *Advanced*, the Bureau denied a request for a further extension of milestones because the delay giving rise to the

²⁷ *USSB*, 3 FCC Rcd at 6859.

²⁸ *Id.* at 6860. USSB’s milestones were extended again in 1992. See *United States Satellite Broadcasting Company, Inc.*, 7 FCC Rcd 7247 (Mass Media Bur. 1992).

²⁹ *EchoStar*, 17 FCC Rcd at 8834.

request was the result of the licensee's decision to modify its system design³⁰ — a business decision clearly within the company's control. Unlike EchoStar and Advanced, Constellation has not previously had its milestones extended; it has met its construction commencement milestone; and it has expended significant effort to continue developing its system. Moreover, Constellation's difficulties in moving forward are not due to a business decision the company has made — as was the case in *EchoStar* and *Advanced*. Rather, Constellation's difficulties have been the result of market conditions, of which the Commission is aware, that are completely outside of Constellation's control.

Constellation's need for an extension is clearly due to factors clearly beyond its control, and it therefore meets the test for milestone extensions set forth in Section 25.117(e)(1) of the Commission's Rules. Contrary to the *MO&O*'s assertions, grant of an extension to Constellation would be consistent with Commission precedent. The cases the Bureau cites in the *MO&O* are either inapposite or in fact support grant of an extension in this instance.

B. There Are Unique and Overriding Public Interest Concerns That Justify an Extension

Constellation also meets the test in Section 25.117(e)(2) because there are “unique and overriding public interest concerns that justify an extension.”³¹ In the *MO&O*, the Bureau emphasized the public interest need to enforce milestones because they prevent licensees from warehousing orbital resources and spectrum. According to the Bureau, “it is manifestly in the public interest to ensure that licensees proceed expeditiously in completing construction of their systems and commencing service”³² However, an overly formalistic application of

³⁰ See *Advanced*, 10 FCC Rcd at 13342-43.

³¹ 47 C.F.R. § 25.117(e)(2).

³² *MO&O* para. 5. In its discussion of the public interest considerations behind the prohibition on warehousing of spectrum and the enforcement of milestones, the Bureau

construction milestones without an independent consideration of facts and circumstances can result in situations where the underlying public interest purposes behind milestones are not served.

In the *MO&O*, the Bureau merely made a judgment that Constellation had not met its second and third milestones. It did not consider at all whether the termination of the Constellation license was consistent with the public policy goals inherent in construction milestones. Specifically, the Bureau did not address Constellation's argument that it was not warehousing spectrum or the fact that the regulatory framework for the 1.6/2.4 GHz Mobile Satellite Service is highly unlikely to provide the opportunity for future entry. In its August 8, 2000 Request for Limited Waiver and Extension of Time, Constellation demonstrated that it had been diligently pursuing the development of its 1.6/2.4 GHz MSS system. As the Commission is

cites *Norris Satellite Communications, Inc.*, 12 FCC Rcd 22299 (1997), *Astrolink Int'l LLC*, 17 FCC Rcd 11267 (Sat. Div. 2002), *Columbia Communications Corp.*, 15 FCC Rcd 15566 (Int'l Bur. 2000), *PanAmSat Licensee Corp.*, 16 FCC Rcd 11534 (2001), *Morning Star Satellite Co.*, 15 FCC Rcd 11350 (Int'l Bur. 2000) (as well as the *Advanced*, *MCI* and *Nexsat* cases discussed above). See *MO&O* para. 5 nn.16-19. While these cases may support the use of milestones in general, they do not support the cancellation of Constellation's license and denial of its milestone extension request. In *Norris* the Commission upheld the Bureau's denial of a milestone extension for a licensee that, unlike Constellation, had already had one extension and nevertheless failed to satisfy its construction commencement milestone. In *Astrolink* the Satellite Division granted a waiver of the licensee's construction commencement milestone. In *Columbia* the Bureau denied a request to "toll" a licensee's milestones during the pendency of a request to add Ku-band authority to the licensee's C-band authorization — a scenario that does not resemble Constellation's situation. In *PanAmSat* the Commission upheld the Bureau's denial of a milestone extension for a licensee that, unlike Constellation, had not satisfied its construction commencement milestone because it had decided to apply for a modification to add inter-satellite link frequencies to its license ten days before its first milestone deadline. *Morning Star* involved a licensee that, unlike Constellation, had clearly taken no steps toward construction, had not even satisfied its first milestone, had not requested an extension and had therefore provided no evidence that its failure to meet the milestones was due to circumstances beyond its control.

aware, Constellation has expended in excess of \$50 million towards the development of an its system.³³ The work pursued by Constellation includes:

- Development of initial system design
- Formation of technical team including Orbital Sciences, Raytheon, ASRC Aerospace Corporation
- Negotiation and execution of construction contract with Orbital Sciences
- Negotiation and execution of contract with Raytheon for satellite subsystems
- Negotiation and execution of ground segment contract with ASRC
- Completion of proprietary technical specification for overall system
- Completion of Preliminary Design Review
- Development of air interface
- Development of phased array antenna
- Development of high gain antenna for fixed applications
- Development and execution of a business plan, with substantial market research, focused on phased implementation of an MSS system
- Raised in excess of \$50 million in equity investment

As the above demonstrates, Constellation has not been warehousing spectrum; it has actively pursued the development of its MSS system. A mechanical application of the milestones in Constellation's license does not lead to an accurate picture of Constellation's true intent to complete its system or to an accurate evaluation of whether it is warehousing spectrum contrary to the public interest. Although the failure to meet a milestone may create a presumption of warehousing, if the underlying public interest reasons behind the milestones are to be served, the licensee must be given an opportunity to rebut this presumption. In this case, the activities and expenditures of Constellation demonstrate that it was not warehousing

³³ See *supra* note 10.

spectrum but rather that it has been diligently pursuing the development of its MSS system. A company warehousing spectrum does not sign major spacecraft contracts, complete significant technical work or expend in excess of \$50 million towards the development of its system. Nor could a company warehousing spectrum raise over \$50 million based on future potential profits. Thus, one of the Commission's principal public policy goals associated with milestone enforcement is not served by the termination of Constellation's Big LEO License.

Moreover, the Bureau's decision is highly unlikely to preserve an option for future licensees to use the spectrum now licensed to Constellation. In the order establishing the Big LEO service, the Commission determined that the 1.6/2.4 GHz band should be subject to a frequency sharing plan and that the available spectrum could only accommodate four Code Division Multiple Access ("CDMA") systems and one Time Division Multiple Access/Frequency Division Multiple Access system.³⁴ The CDMA systems (including the Constellation system) were capable of sharing use of the same frequencies. The Commission originally proposed to reassign spectrum among the remaining licensees if any of the initial licensees did not implement their systems.³⁵ Although, it chose to defer resolution of this issue,³⁶ the practicalities clearly indicate that, at the end of the day, all of the 1.6/2.4 GHz spectrum is likely to be divided up between the two remaining licensees: Globalstar and Iridium.³⁷

³⁴ See *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*, CC Docket No. 92-166, *Report and Order*, 9 FCC Rcd 5936, 5955 (1994).

³⁵ See *id.* at 5959-60.

³⁶ See *id.*

³⁷ It is highly unlikely that any new entrant will apply for a Big LEO license in the foreseeable future. This is because of the Commission's proposal to provide Globalstar and Iridium all the remaining spectrum and the current state of the financial markets puts a chill on prospective applicants.

There are currently no pending 1.6/2.4 GHz applicants, and no one opposed Constellation's extension requests. If the environment for the 1.6/2.4GHz MSS changes next week or next year as result of the authorization of auxiliary terrestrial component ("ATC") or a renewed interest by the financial markets in MSS, equity would dictate that Constellation — a pioneer in the industry that invested over \$50 million in this business, completed significant work towards system completion and actively promoted ATC at the Commission — should benefit from this changed environment, rather than a different entity that is entirely new to the market.

For the foregoing reasons, reinstatement of Constellation's Big LEO License and extension of its milestones is warranted under Section 25.117(e)(2) of the Commission's Rules.

III. Even Assuming, Arguendo, That Constellation Does Not Satisfy the Standard for Milestone Extensions, Waiver of the Milestones Is Justified

As demonstrated above, Constellation qualifies for a milestone extension request under both criteria set forth in Section 25.117(e) of the Commission's Rules. However, even assuming, *arguendo*, that Constellation does not meet these standards, it nonetheless qualifies for a waiver of its milestones in accordance with Section 1.3 of the Commission's Rules.³⁸ In *EarthWatch Incorporated*³⁹ the Satellite Division ("Division") determined that EarthWatch did not qualify for a milestone extension under Section 25.117(e) but nevertheless waived that rule and granted an extension.

According to the Division, "Waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule. Circumstances that would justify a waiver include

³⁸ 47 C.F.R. § 1.3.

³⁹ 15 FCC Rcd 13594 (Sat. Div. 2000).

‘considerations of hardship, equity, or more effective implementation of overall policy.’⁴⁰ In granting the waiver in *EarthWatch*, the Division articulated a two-pronged test for the review of milestone waiver requests. First, the record must demonstrate that the applicant intends to proceed with construction, is not engaged in warehousing of spectrum and the public interest would be furthered by a grant of the waiver. Second, grant of the waiver should not preclude new entrants from entering the market in question. Constellation qualifies for a waiver under this standard.

As noted above in Part II, Constellation has demonstrated its intent to construct its system by satisfying its July 1998 Construction Commencement Milestone. Since then, additional contracts have been concluded, significant technical development of its system has commenced, further financing has been obtained, and Constellation and its advisors have undertaken efforts to obtain the financing necessary to fund the system.⁴¹ Moreover, grant of a waiver would further the public interest by allowing Constellation additional time to secure the level of funding necessary to bring its system on-line to provide competitive Big LEO services. Denial of a waiver would merely provide a windfall to Iridium and Globalstar — as an indirect result of their own failures, which caused the current market conditions in which Constellation and other companies must operate — with additional spectrum and a Big LEO duopoly that is contrary to the public interest in competitive Big LEO services. With the perpetuation of the Iridium and

⁴⁰ *Id.* at 13597 (footnotes omitted) (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990), *Comcast Corp.*, 11 FCC Rcd 9622 (1996), and *General Communications, Inc.*, 11 FCC Rcd 2535 (Int’l Bur. 1996)).

⁴¹ *See supra* Parts I and II. In *EarthWatch*, the Division noted that the determination of whether a licensee is warehousing spectrum turns on the extent to which the licensee had commenced and continued construction of its satellites. According to the Division, once a licensee had met its construction commencement milestone, the Commission “can be more certain that it will proceed with its business plan.” 15 FCC Rcd at 13598.

Globalstar duopoly, there would be no new entrants to provide competition in the Big LEO MSS industry. Indeed, only the extension or waiver of Constellation's milestones, and the resulting entry of Constellation into the market as a service provider, will result further the goal of competitive entry enunciated in *EarthWatch* and thereby serve the public interest.

In the *MO&O*, the Bureau says only that *EarthWatch* is distinguishable from Constellation's situation because EarthWatch was apparently closer to physically completing its satellite than Constellation.⁴² But drawing this distinction does not advance the criteria set out in *EarthWatch*— i.e., that a waiver be granted where the licensee is not warehousing spectrum and where new entry would not be precluded — or the public interest. Regardless of the degree to which Constellation and EarthWatch had completed construction at the time of their respective waiver requests, any new Big LEO entrant would be years behind Constellation in implementing a competitive MSS system, particularly in light of the time required for the Commission to resolve its pending proposal to assign the remaining licensees with all of the allocated spectrum and process new applications and award new licenses. The *MO&O*'s analysis and result are therefore clearly contrary to the standard enunciated in *EarthWatch*,⁴³ and a waiver is clearly justified in this instance.

IV. **Conclusion**

Because, based on the foregoing discussion, Constellation qualifies for an extension or waiver of its remaining milestones, Constellation respectfully requests that the Bureau reconsider

⁴² See *MO&O* para. 11.

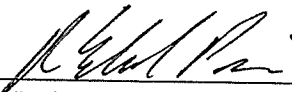
⁴³ For example, in *NetSat 28 Co.*, 16 FCC Rcd 11025 (Int'l Bur. 2001), the Bureau granted a milestone waiver to a licensee due to a prior Commission decision that had contributed to the licensee's inability to raise financing for its satellite. That waiver was granted notwithstanding the fact that the Bureau had not found the licensee to have yet satisfied its construction commencement milestone.

its decision in the *MO&O*, reinstate Constellation's Big LEO License and extend or waive the milestones as requested.

Respectfully submitted,

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