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BEFORE THE

Federal Communications Commission AUG 28 1997

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Application of Mobile Communications )  
Holdings, Inc. for Authority to Construct, )  
Launch and Operate an Elliptical Low Earth )  
Orbit Mobile Satellite System )  
)

Received  
File Nos. A1-DSS-P-91(6)  
18-DSS-P-91(18)  
11-SAT-LA-95  
12-SAT-AMEND-95  
158-Bureau  
Satellite Policy and  
International Bureau

To: The Commission

REPLY OF TRW INC.

TRW Inc. ("TRW"), by its attorneys and pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115 (1996), hereby replies to the Consolidated Opposition to Applications for Review ("Consolidated Opposition") filed by Mobile Communications Holdings, Inc. ("MCHI") regarding the decision of the International Bureau (the "Bureau") to grant a license to MCHI in the above-captioned proceeding.<sup>1</sup> In spite of MCHI's claims, the MCHI Order is contrary to law and to the public interest in the rapid establishment of a competitive Mobile Satellite Service Above 1 GHz ("MSS Above 1 GHz").

The Bureau's decision to waive the MSS Above 1 GHz financial qualifications standard so as to grant MCHI a license is contrary to law because it undermines the fundamental policy objective of that standard, as embodied in the Commission's rules.<sup>2</sup> The Bureau's finding and MCHI's arguments notwithstanding, that objective was not merely to thin the ranks of applicants

<sup>1</sup> See Mobile Communications Holdings, Inc. (DA 97-1367) (released July 1, 1997) ("MCHI Order").

<sup>2</sup> By MCHI's own admission, a waiver may not undermine the policy objective of the rule in question. Id. at 2 n.3. See also WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

so long as insufficient spectrum was available to accommodate then-current applicants, and provide for the expansion of their proposed satellite systems and future entry into the service.<sup>3</sup> Rather, in keeping with previously established Commission financial standards, it was the broader deterrence of warehousing and the inefficient use of valuable orbit spectrum resources.<sup>4</sup> Given MCHI's inability to satisfy the MSS Above 1 GHz financial standard, and the consequent likelihood that it will never launch its satellite system, the decision to grant it a waiver of the standard plainly undermines the standard's principal underlying objective.

Although MCHI claims that the Bureau's waiver of the MSS Above 1 GHz financial standard comported with Commission case law and regulation, it supports that claim with the curious argument that the financial standard itself is deficient. Specifically, MCHI asserts that the rationale for the financial standard was faulty from the outset (on the illegitimate grounds that no mutual exclusivity existed among then-current applicants) and, even if initially valid, has disappeared in the wake of two events cited by the Bureau: (1) the dismissal of AMSC's application for an MSS Above 1 GHz license; and (2) the allocation of spectrum for the MSS in the 1990-2025 MHz and 2165-2200 MHz bands (the "2 GHz bands").<sup>5</sup> Quite obviously, a waiver premised on the invalidity of the underlying rule's principal policy objective necessarily undermines that objective and is therefore impermissible. MCHI cannot evade this fact by

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<sup>3</sup> MCHI Opposition at 4; MCHI Order, DA 97-1367, slip op. at 11 (¶ 23).

<sup>4</sup> Application for Review of TRW Inc. (filed July 31, 1997) at 7. See also Consolidated Opposition to Applications for Review of Constellation Communications, Inc. (filed August 18, 1997) at 5, 10 n.24 ("In all cases, the Commission has consistently noted that its financial qualification rules are designed to prevent warehousing spectrum.").

<sup>5</sup> MCHI Opposition at 5-6.

suggesting that the dismissal of AMSC's application and the allocation of 2 GHz spectrum are "special" or "unique" circumstances applying to its application alone,<sup>6</sup> given that it also argues that sufficient spectrum now exists to accommodate future MSS Above 1 GHz applicants.

Elsewhere, however, MCHI is forced to concede that sufficient spectrum is *not* available to accommodate the present and future needs of currently licensed MSS Above 1 GHz systems and future applicants. It effectively admits that the need to protect GLONASS operations below 1610 MHz may, as the Bureau warns, leave insufficient spectrum to accommodate five systems in the 1.6/2.4 GHz bands.<sup>7</sup> It also acknowledges that service rules for the 2 GHz bands have not yet been adopted, and thus can offer no guarantee that any 2 GHz spectrum will actually be available to MSS Above 1 GHz systems.<sup>8</sup> Given these uncertainties, the licensing of financially unqualified parties to occupy valuable 1.6/2.4 GHz spectrum is plainly inappropriate.

There is nothing "absurd" about TRW's observation that the Bureau failed to adhere to the Administrative Procedure Act in waiving the financial standard for MCHI.<sup>9</sup> The Bureau has no

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<sup>6</sup> Id. at 3, 13.

<sup>7</sup> See id. at 14 n.35 ("The GLONASS situation, as everyone knows, is an evolving one. It is not possible to predict what impact, if any, GLONASS will have on the Big LEO licensees at this point in time.").

<sup>8</sup> Id. at 9-10 n.24. Contrary to MCHI's claims, the Bureau has no authority to prejudge the outcome of the 2 GHz rulemaking and licensing proceedings by premising licensing decisions in the MSS Above 1 GHz on the availability of 2 GHz spectrum for MSS Above 1 GHz systems. Id. Furthermore, the fact that TRW has argued that the 2 GHz spectrum is suitable for use by MSS systems in no way contradicts its point that this spectrum is not yet available for MSS Above 1 GHz systems. See MCHI Opposition at 12.

<sup>9</sup> MCHI Opposition at 13; Application for Review of TRW Inc. (filed July 31, 1997) at 13 (citing 5 U.S.C.A. § 553).

authority to declare a Commission rule invalid by fiat; rule changes must be made through rulemaking proceedings, not through "waivers" that leave no discernible part of the rule intact.

The public interest is disserved by the grant of a license to MCHI in that, inter alia, it forces fully qualified licensees to expend time and resources to coordinate with, and modify their systems to accommodate, a system that will probably never be built. That probability is not "mere conjecture," as it has already been established by MCHI's repeated failure to satisfy the MSS Above 1 GHz financial standard.<sup>10</sup> Far from fearing competition with MCHI, TRW is concerned that accommodating MCHI's phantom system will hinder its ability to compete with real systems.

TRW challenges MCHI's claim — and the Bureau's finding — that MCHI's system technology and marketing strategy are unique in some way that is relevant to the evaluation of MCHI's application.<sup>11</sup> The Commission definitively resolved this issue in 1995, when it unequivocally denied MCHI's application for a Pioneer's Preference for its proposed system.<sup>12</sup>

Finally, TRW calls on the Commission once again to investigate MCHI's character

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<sup>10</sup> MCHI Opposition at 6. In this regard, the Commission cannot credit MCHI's claims that various parties have made or may make investments in its satellite project. Id. at 14-16. In spite of the innumerable similar claims that it made throughout its licensing proceeding, MCHI has never been able to demonstrate to the Bureau's satisfaction that such alleged financial commitments actually exist. MCHI's claims to be "moving forward" in other ways with the development of its system are equally questionable and totally noncognizable.

<sup>11</sup> Id. at 7 n.19.


<sup>12</sup> See Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands For Use by the Mobile-Satellite Service, Including Non-Geostationary Satellites, 10 FCC Rcd 3406, 3407 (1995) (affirming that MCHI's proposal was not "new and innovative," and that MCHI "did not have a significant lead over the other preference applicants [including all current MSS Above 1 GHz licensees] in activities such as concept design and verifiable relevant experiments.").

qualifications to be an MSS Above 1 GHz licensee. TRW's concern that MCHI knowingly violated the Commission's ex parte rules by soliciting impermissible contacts with decisionmaking officials is only heightened by the recent dissemination of a June 6, 1997 letter from several congressmen to Chairman Hundt, directed exclusively to the merits of the then-pending applications of MCHI and Constellation.<sup>13</sup>

For the foregoing reasons and those set forth in its Application for Review, TRW requests that the Commission review and reverse the decision of the Bureau to grant MCHI a license in the MSS Above 1 GHz at the earliest possible time.

Respectfully submitted,

TRW Inc.

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<sup>13</sup> See Reply of TRW Inc. (filed August 25, 1997) at 3-5.

**CERTIFICATE OF SERVICE**

I, Tim Jordan, do hereby certify that true and correct copies of the foregoing "Reply of TRW Inc." were mailed, first-class postage prepaid, this 28th day of August, 1997 to the following:

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