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

In re Application of	
MOBILE COMMUNICATIONS HOLDINGS, INC.	File Nos. 158-SAT-AMEND-96 11-DSS-P-91(6) 18-DSS-P-91-(18) 11-SAT-LA-95 12-SAT-AMEND-95
For Authority to Construct, Launch and Operate a Low-Earth Orbit Satellite System in the 1.6/2.4 GHz Frequency Bands	

REPLY TO CONSOLIDATED OPPOSITION

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SUMMARY

In its Petition to Dismiss or Deny, L/Q Licensee, Inc. (LQL), demonstrated that Mobile Communications Holdings, Inc. (MCHI), had failed to provide the Commission sufficient information to satisfy the financial qualification requirements for the MSS Above 1 GHz service. In its Consolidated Opposition, MCHI has still not responded to all the questions raised by LQL regarding MCHI's financial arrangements with Vula Communications (Pty) Limited, Tigamutiara Buanakhatulistiwa, Artoc Suez for Technical Services, and Spectrum Astro, Inc. Moreover, MCHI's attempts to clarify these financial arrangements raise additional doubts as to whether the agreements meet the Commission's requirements. Accordingly, MCHI's financial showing is not sufficient.

Apparently to avoid answering these questions, MCHI claims that it is not required to provide the Commission with the detailed terms of its financial transactions. Although the Commission has said that MCHI need not submit its business agreements, the Commission has emphasized that detailed terms of those transactions must be provided for the record. MCHI also claims that there is no obligation to demonstrate the financial capability of its financial backers. But, as LQL explained in its Petition, the Commission must evaluate the sufficiency of the financial capability of those entities who commit funding to applicants, which requires a demonstration that each has financial resources sufficient to provide the funds promised.

MCHI, in an apparent attempt to distract attention from the inadequacies of its application, claims that LQL lacks standing to petition to deny MCHI's application. This argument is wholly without merit. It is well established that, as a competitor of MCHI's system, LQL is a party-in-interest under the Communications Act of 1934, as amended, and has standing to file a petition to deny. Furthermore, the grant of a license to MCHI would have a significant and tangible impact on LQL. LQL would be required to accept electrical interference from MCHI, which may decrease the capacity available to provide LQL's service.

Finally, MCHI's request for a waiver of the financial eligibility rules cannot be granted. Under the Commission's precedent such a waiver can be granted only when doing so would serve the public interest without undermining the policy of the rule at issue. That is not the case here. Granting MCHI's application would authorize an undercapitalized system, a result which the MSS Above 1 GHz financial standard was expressly designed to prevent. MCHI argues that there is no justification for the application of a strict financial standard in this case because all applicants can be accommodated. However, the Commission has never suggested that its standards should be ignored in such a situation, rather it has stated that they must be satisfied even when an applicant is the only remaining applicant. Moreover, the availability of spectrum does not eliminate the potential for inefficient use of the frequencies and potential harm to other applicants and licensees. Grant of MCHI's waiver request would clearly be contrary to the public interest.

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REPLY TO CONSOLIDATED OPPOSITION

L/Q Licensee, Inc. (LQL), by its undersigned attorneys, hereby responds to the "Consolidated Opposition to Petitions to Dismiss or Deny" filed by Mobile Communications Holdings, Inc. (MCHI), regarding its amended application for authority to construct, launch and operate a low-earth orbit Mobile-Satellite Service (MSS) system in the 1.6/2.4 GHz bands.[1]

I. MCHI HAS NOT PROVIDED SUFFICIENT INFORMATION TO DEMONSTRATE THAT IT IS FINANCIALLY QUALIFIED.

In its Petition to Dismiss or Deny, LQL pointed out that MCHI had failed to provide sufficient information in its September 16, 1996 amendment, as supplemented on November 13, 1996, to demonstrate that its financing arrangements are irrevocable or that its alleged backers have the financial

[1] In addition to LQL, both Motorola Satellite Communications, Inc. and TRW Inc. filed petitions to dismiss or deny MCHI's application. MCHI's "Consolidated Opposition" responds to all three petitions.

capability to commit funds to MCHI's satellite system. MCHI has responded to these legal arguments with ad hominem attacks on LQL, Motorola and TRW,[2] commentary on the celebrity of its investors,[3] and reiterations of "support" from MCHI's alleged financial backers.[4] Missing from MCHI's Consolidated Opposition are answers to all the questions raised by LQL about MCHI's four principal financial arrangements.

A. Vula Communications (Pty) Limited. Vula has allegedly agreed to provide $350 million, payable in installments, in exchange for territorial service rights and equity in MCHI. LQL pointed out that the information provided by MCHI on this arrangement left several gaps:

- "There is no information regarding [Vula's] assets or its ability to provide this level of financing." LQL Petition, at 8.
- "MCHI has provided no information on whether the parties have agreed on the adequacy of MCHI's alleged reciprocal consideration for each installment [payment] or on whether MCHI has made the necessary arrangements to provide such consideration." Id., at 8-9.
- "[MCHI] has provided no information showing that the timing of availability of financing (based on Vula's installment payments) is consistent with its construction and launch plans, and/or that the timing of availability of financing would otherwise permit it to raise funds immediately." Id., at 9.

Rather than submitting a more complete description of the terms of its arrangement with Vula, MCHI has submitted various letters which are supposed to "clarify" Vula's commitment. For example, a letter from Vula shareholders

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[2] See MCHI Opposition, at 13 n.18, 14-17, 28.

[3] See id., at 4 n.5, 25.

[4] See id., at Exs. 1-5.

recites their "capability to ensure that Vula performs its financial obligations under the MCHI agreement."[5] But, this letter merely states the truism that shareholders can direct the company's operations. It says nothing to lead the Commission to the conclusion that Vula has entered into an irrevocable commitment. Nor does it provide any meaningful evidence of Vula's ability to make those funds available to MCHI as needed.

MCHI also provides a letter from a group identified as Vula's financial advisors, stating that they are

> familiar with the financial resources available to Vula and its shareholders and confirm that they have the capability to perform their financial obligations to MCHI. To the best of our knowledge, . . . the assets of the Vula shareholders combined are in excess of US $350 million.[6]

Although this letter comments on the financial resources "available" to Vula and on "the assets of the Vula shareholders," it does not comment on the ultimate issue relevant to this proceeding, that is, whether Vula -- the entity with which MCHI claims an agreement -- has financial resources sufficient to cover its alleged commitment. Thus, MCHI's new documents do not clarify the circumstances of the Vula commitment any more than do its previously-filed materials. There remain obvious gaps related to the Vula arrangement which must be read as impermissible contingencies.

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[5] Id., at Ex. 1-A.

[6] Id., at Ex. 1-B.

B. Tigamutiara Buanakhatulistiwa. In its Petition, LQL outlined several reasons why MCHI had not provided sufficient information to demonstrate that TMBK (and its Ukrainian backup State Design Office Yuzhnoye) has a present commitment to provide vendor financing for launch services.

- MCHI has not demonstrated that the TMBK launch facility is currently available or that the plans for the facility have been approved by the Indonesian government, as TMBK indicated was necessary. LQL Petition, at 11.

- In the event the TMBK facility is not available, "there is no evidence in the record that TMBK has a present agreement with Yuzhnoye for equivalent launch services on the same terms, or whether it could obtain these services." Id., at 12.

- "MCHI has not provided the terms demonstrating that there is an agreement on whether TMBK would accept equity in MCHI in exchange for these services, or that TMBK and MCHI have agreed on the amount and terms of a debt instrument." Id.

In response, MCHI has submitted only a letter from TMBK stating that it has assets in excess of the value of the proposed launch services -- without any further explanation of the terms of the arrangement or demonstration of a non-contingent commitment to MCHI.[7]

MCHI's efforts to clarify the TMBK agreement raise new questions regarding the irrevocable nature of the agreement. LQL pointed out that even MCHI conceded that it could not rely upon both the TMBK financing and financing from Arianespace for launch services. LQL Petition, at 13 n.32. MCHI responds to this argument by claiming that "both commitments are valid and

[7] See id., at Ex. 3.

MCHI has the ability to select the launch provider (and financial package) that best meets the requirements of the ELLIPSO project in its first and subsequent phases."[8] If, as this claim suggests, MCHI can cancel either arrangement with impunity when it is ready to make launch decisions, then surely neither one can be considered irrevocable and contingent only on MCHI receiving a license. Alternatively, neither can be deemed a fully negotiated agreement because the provider has not confirmed that the terms available now would be available when MCHI is ready to decide on launch services.

C. Artoc Suez for Technical Services. LQL's Petition noted gaps in the alleged commitment from Artoc which go to the heart of its compliance with the Commission's requirements in Section 25.140(d):

- "MCHI has not provided the 'detailed terms' of the Artoc agreement in order for the Commission to evaluate the facts underlying the agreement. . . ." LQL Petition, at 13-14.
- MCHI has not explained "what MCHI has to accomplish in order to obtain the Artoc financing and the timing thereof. . . ." Id., at 14.
- MCHI has not explained the phrase in the Artoc letter which indicates that under certain circumstances Artoc would be "free from fulfillment of this obligation." Id., at 14-15.

In its Consolidated Opposition, MCHI has attached a declaration from Abdel Hamid Helmy of Artoc, which outlines certain terms of the Artoc arrangement.[9] Included in Mr. Helmy's declaration is a statement that Artoc would provide

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[8] Id., at 11 n.16.

[9] Id., at Ex. 2.

funding in four installments, but he does not explain what obligations are imposed on MCHI to ensure payment at each installment. This gap remains significant in light of the previously-submitted documentation which indicated that MCHI must establish proof of viability of its system for the Artoc arrangement.[10]

D. Spectrum Astro, Inc. The gaps in the description of the alleged commitment from SAI were substantial:

- MCHI has not demonstrated how there is an "obligation of SAI to build the satellites" or an "obligation on MCHI to pay anything unless the satellites are built." LQL Petition, at 15.
- "MCHI has not revealed whether and when it must pay [the $50 million difference between the cost of its satellites and the SAI financing] in order to obtain the satellites." Id., at 16.
- "MCHI has not demonstrated that there is an agreement on whether SAI would accept equity in MCHI in exchange for these services, or that SAI and MCHI have agreed on all terms of a debt instrument." Id.

MCHI has submitted the declaration of David Thompson, president of SAI, which provides more details on the financing arrangement and the debt instrument to be provided by MCHI. This declaration confirms that the purchase price is $256 million, but does not explain whether the $50 million difference

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[10] See MCHI Supplement, at Attachment 3 (dated Nov. 13, 1996) (letter from Shawki & Co.). MCHI claims that this letter "was submitted as objective evidence of Artoc's financial capability, and is relevant only on this limited point." MCHI Opposition, at 10 n.14. However, the letter is in the record and clearly states two conditions on Artoc meeting its obligations to the project, i.e., "once the project has been granted the necessary regulatory approvals and is proven viable." As the Bureau noted regarding a prior letter, "[h]aving found it necessary to add words of equivocation, neither [the drafter] nor [applicant] can reasonably complain if we take them seriously." Constellation Communications, Inc., 10 FCC Rcd 2258, 2260 (Int'l Bur. 1995).

between the purchase price ($256 million) and the amount of vendor financing ($206 million) must be paid as a condition to obtain the financing. This defect precludes a finding that this agreement is non-contingent.[11]

The declaration raises another question. MCHI has submitted a letter from the President of Interacoes Urantia-Cajai, Ltda., reporting on an alleged agreement to provide backup funding for SAI.[12] The need for this financial reinforcement resolves against MCHI the question whether SAI is capable of providing the financing attributed to it. The information provided by Mr. Thompson suggests that SAI alone does not have the financial capability to provide $206 million in financing.[13] As to the Interacoes' backup financing, it must be noted that the principal asset (mineral rights) used to verify Interacoes' financial capability is identified in the documents submitted by MCHI as the property of the company's president, not Interacoes itself.[14] Accordingly, there is yet another question whether the Interacoes-SAI arrangement is sufficient to backup SAI. These questions preclude finding the SAI commitment sufficient.

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[11] See 47 C.F.R. § 25.140(d)(2)(iv) (financing arrangements contingent on additional performance by either party "such as . . . raising additional financing" do not satisfy requirements of standard).

[12] MCHI Opposition, at Ex. 4-A-1. The letter refers to Interacoes' "irrevocable commitment to join with Spectrum Astro, Inc. to provide the financing of up to $206 million in support of Spectrum Astro, Inc."

[13] See id., ¶ 2.

[14] See id., at Ex. 4-A-2.

E. Section 25.140(d). Section 25.140(d) places the burden squarely on the applicant to provide the Commission with sufficiently "detailed terms of the transaction"[15] to allow the Commission to make a determination that any external financing agreements represent "irrevocable" commitments. MCHI has opted not to provide this level of detail and, consequently, its financial showing cannot be found adequate for the reasons set forth in LQL's Petition and this Reply.

MCHI attempts to defend the insufficiency of the record by claiming, on the one hand, that no obligation to provide detailed terms exists and, on the other hand, that it is simply being treated unfairly by petitioners. With regard to the requirements of Section 25.140(d), MCHI apparently believes that it is somehow relieved from complying with this rule because the Bureau decided that Section 25.140 does not require the submission of actual business agreements.[16] While the Bureau did not require submission of agreements, it also did not relieve applicants from providing the detailed terms of their agreements. Indeed, the Bureau warned:

> the agreements may contain information relevant to our determination of whether MCHI meets the Commission's financial standards. For example, to the extent MCHI considers these documents "letters of commitment" from creditors or is relying on the contracts to demonstrate the detailed terms of the transactions . . . and to the extent this information is not separately and fully reflected

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[15] 47 C.F.R. § 25.140(d)(2)(i).

[16] See MCHI Opposition, at 15.

in MCHI's filing, their withdrawal may adversely impact the adequacy of MCHI's showing.[17]

MCHI is, of course, already familiar with its obligation under the MSS Above 1 GHz financial standard;[18] despite the Bureau's warnings, it has chosen to evade the requirements rather than to comply with them.

MCHI also attempts to circumvent the critical question whether its alleged backers have the financial capability to provide a commitment.[19] Again, MCHI distorts the Commission's requirements. The Commission does not simply accept assertions of financial capability from those entities who commit funding to applicants. Rather, the Commission requires each lender or financial backer to demonstrate that its financial resources are sufficient to enable it to provide the funds promised.[20] In this case, MCHI has failed to provide adequate demonstration of the ability of all its backers to provide the money allegedly committed. This alone is reason to deny MCHI's application.

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[17] Letter from Donald H. Gips to Jill Abeshouse Stern, at 2 (dated Oct. 29, 1996).

[18] See Mobile Communications Holdings, Inc., 10 FCC Rcd 2274 (Int'l Bur. 1995), aff'd Constellation Communications, Inc., 3 CR 703 (released June 27, 1996).

[19] See MCHI Opposition, at 6 ("the Commission's Big LEO rules do not explicitly impose a specific evidentiary showing with respect to the financial capability of an external investor").

[20] See Echostar Satellite Corporation, DA 96-1943, ¶ 12 (released November 21, 1996) (requiring Echostar to submit "an independent market valuation" of an investor's shares offered as financing for the system "showing that the shares' value is sufficient to cover its proposed system costs").

MCHI attempts to deflect attention from its inability to meet the Commission's requirements by casting aspersions at the petitioners. MCHI claims that petitioners' objections are simply efforts to obtain access to MCHI's confidential business agreements.[21] These accusations are plainly absurd. LQL seeks only to demonstrate that MCHI has failed to meet the licensing standard that LQL, Motorola and TRW have met.[22]

MCHI also argues that the documents already submitted should be deemed somehow sufficient because both petitioners and the Commission must give "great weight" to signed statements from its financial backers.[23] MCHI claims that it is "insulted" by its competitors' unwillingness to accept these letters at face value as evidence of irrevocable agreements.[24] But, just two years ago, MCHI argued that the management letters submitted by LQL's parent in support of its financial showing should not be taken at face value.[25] As MCHI well knows, the Commission must evaluate the sufficiency of the evidence, not the validity of the signatures or the integrity of the signatory.

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[21] See MCHI Opposition, at 14-16.

[22] In fact, MCHI claims that it "remains willing to make its business agreements available for inspection with appropriate safeguards to ensure confidentiality, if the Commission so directs." Id., at 6 n.7; see also id. at 17.

[23] See id., at 16.

[24] Id.

[25] See MCHI's Consolidated Petition to Deny, at 20-22 (dated Dec. 22, 1994).

In sum, MCHI's financial showing is insufficient to meet the MSS Above 1 GHz standard, and it has done nothing to bolster its showing in its response to the petitions to deny. Therefore, its application must be dismissed or denied.

II. LQL HAS STANDING TO PETITION TO DENY MCHI'S APPLICATION.

In yet another effort to divert the Commission's attention, MCHI claims that LQL, TRW and Motorola do not have standing to petition to deny its application.[26] This argument is patently without merit. Section 309(d)(1) of the Act imparts standing to a party-in-interest asserting an "injury-in-fact" fairly traceable to the grant of the subject application.[27] LQL and the other two petitioners hold licenses to construct, launch and operate an MSS Above 1 GHz system. MCHI proposes to operate a rival system which would compete in similar markets. It is well-settled law that, as a competitor of MCHI's proposed system, LQL is a party-in-interest within the meaning of Section 309(d)(1) and has standing to file a petition to deny.[28]

Moreover, like LQL, MCHI proposes to use Code Division Multiple Access technology, and so, LQL and MCHI would be required to share frequencies and

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[26] MCHI Opposition, at 1 n.1.

[27] Conn-2 RSA Partnership, 75 RR 2d 854, 856 (1994).

[28] See Capital Cities B/Casting Corp., 5 RR 2d 69 (1965); James B. Childress, 4 RR 2d 764 (1965); see also FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940).

coordinate system operations should the Commission grant MCHI's application.[29] MCHI suggests that this coordination process somehow "negates any possibility of interference between the systems."[30] Contrary to MCHI's assertion, coordination of system operations will not eliminate electrical interference. Rather, as MCHI is well aware, CDMA coordination requires LQL to accept and manage harmful interference from any additional CDMA systems.[31]

Furthermore, the impact of each additional CDMA system is significant. During the MSS Above 1 GHz Negotiated Rule Making Committee, the CDMA applicants -- including MCHI -- produced an analysis showing that system capacity decreases in direct relation to the number of systems sharing the frequencies, as does the total capacity available to all systems.[32] Decreased capacity would affect the service which LQL can provide its customers and in turn the economics of operating the system. Grant of MCHI's application would impose on LQL a cost which is of a "direct, tangible, or substantial nature,"[33] and, therefore, provides another basis for standing to petition to deny.

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[29] 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, 9 FCC Rcd 5936, 5954-56 (1994) ("Big LEO Rules Order").

[30] MCHI Opposition, at 1 n.1.

[31] See Final Report of The Majority of the Active Participants of Informal Working Group 1 to Above 1 GHz Negotiated Rulemaking Committee, at 2-5, in Report of the MSS Above 1 GHz Negotiated Rule Making Committee (April 6, 1993).

[32] See id., at 5-11 (Table 2) & 5-23 (Table 6).

[33] See Conn-2 RSA Partnership, 75 RR 2d at 856 n.17.

III. MCHI IS NOT ENTITLED TO A WAIVER OF THE MSS ABOVE 1 GHZ FINANCIAL QUALIFICATION RULES.

Although it claims to have met the MSS Above 1 GHz financial qualification standard, MCHI asks the Commission to waive any rules necessary in the event that the Commission decides its financial showing is insufficient.[34] As LQL pointed out in its Petition,[35] MCHI is not entitled to a waiver of the MSS Above 1 GHz financial qualification rules.

It is well established that a waiver of the Commission's rules may be granted only when such action would serve the public interest and would not undermine the policy of the rule sought to be waived.[36] In this case, the express policy for adoption of the Big LEO financial standard was to preclude assignment of MSS frequencies to undercapitalized applicants because such applicants are unable to proceed with timely construction and launch of their proposed systems.[37] This policy is not served by granting an undercapitalized applicant authority to construct, launch and operate an MSS Above 1 GHz system. MCHI has had two years to perfect its financial showing. Its failure to achieve capitalization indicates, if anything, that prospective financiers do not believe that MCHI has a sound business plan that will enable it to construct and launch. This confirms

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[34] MCHI Opposition, at 24-29.

[35] See LQL Petition, at 23-24.

[36] See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[37] Big LEO Rules Order, 9 FCC Rcd at 5950.

that the rationale for the Commission's adoption of the standard should be followed rather than waived, and that there are no "circumstances which are peculiar to this situation and which distinguish it from the general run of situations to which the rule applies, and which make the rule's application in this case less appropriate."[38]

MCHI's arguments in support of a waiver are all inconsistent with the standard applied to such requests. MCHI argues that "there is no justification for applying a stringent financial standard in this case given the fact that all of the Big LEO applicants can be accommodated."[39] But, the availability of spectrum does not eliminate the potential for inefficient use of the frequencies recognized by the Commission when it adopted the financial standard.[40] Nor does the availability of spectrum relieve MCHI from establishing its financial qualifications because "[e]ven where an applicant is the sole remaining applicant, its failure to establish its financial qualifications in a timely manner is a valid consideration justifying the denial of its application."[41]

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[38] Station WTHR-TV, 47 RR 2d 1130, 1132 (1980). Indeed, the Commission recently recognized that a necessary effect of its strict financial standard is to make it difficult for entrepreneurial companies to establish such financial qualifications. Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 1 CR 1239, 1248 (1996).

[39] MCHI Opposition, at 24.

[40] See Big LEO Rules Order, 9 FCC Rcd at 5950.

[41] Bennett Gilbert Gaines, 10 FCC Rcd 681, 682 (1995). When mutual exclusivity is not at issue, the Commission still requires satellite station applicants to demonstrate their financial qualifications. See, e.g., Echostar

Even if MCHI could be "accommodated" in theory, granting a license to an undercapitalized applicant may prejudice existing and prospective MSS Above 1 GHz licensees. The Commission has recognized that "financial and equipment markets take notice of such agency actions and may alter their own actions as a result, adversely affecting prospective and existing licensees."[42]

MCHI alleges that the public interest would be served by grant of a waiver because it would "allow important international telecommunications development activities to move forward"[43] and "provide consumers with a lower cost communications alternative."[44] These claims are pure rhetoric and cannot be relied upon to demonstrate any uniqueness of MCHI's proposed system. For example, MCHI's claim that it will offer less expensive service is speculative. MCHI has apparently sold the rights to provide service to third parties and has presented no evidence of how these third parties might price services in each of their service territories.

Finally, MCHI claims that grant of its application would "provide competition in the provision of Big LEO services."[45] There will be no shortage of competition, even without MCHI's presence. Competition among Big LEOs means

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Satellite Corp., DA 96-1943 (released Nov. 21, 1996).

[42] Interactive Video and Data Service, 78 RR 2d at 1595.

[43] See MCHI Opposition, at 25.

[44] See id. at 26.

[45] Id.

that consumers have choices, and they do. Three Big LEO systems are licensed, and a fourth -- ICO Global Communications -- is anticipated. Several geostationary systems are already providing service to portable user terminals, and other systems are proposed. Contrary to MCHI's claim, competition is not served by licensing applicants which lack the financial ability to construct and launch systems. Such action has the opposite effect because, as the Commission has recognized, it hinders the efficient use of the available capacity.[46] Given MCHI's failure to obtain financial backing for its system, grant of its application would be contrary to the public interest, and, therefore, a waiver is not justified.

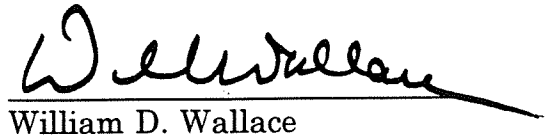
[46] See Big LEO Rules Order, 9 FCC Rcd at 5950.

IV. CONCLUSION.

For the reasons set forth in LQL's Petition and this Reply, MCHI's application for an MSS Above 1 GHz satellite system license should now be dismissed or denied.

Respectfully submitted,

L/Q LICENSEE, INC.

By: 

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CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 11th day of February, 1997, caused copies of the foregoing "Reply to Consolidated Opposition" to be delivered via hand delivery (indicated with *) or by U.S. mail, postage prepaid, to the following:

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