RECEIVED

JUL 31 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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
For Authority to Construct, Launch and Operate the Ellipso Elliptical Orbit Satellite System in the 1.6/2.4 GHz MSS Service	) 12-SAT-AMEND-95

APPLICATION FOR REVIEW

L/Q LICENSEE, INC.

William F. Adler
Vice President &
Division Counsel
GLOBALSTAR
3200 Zanker Road
San Jose, CA 95134
(408) 473-4814

Leslie A. Taylor
Guy T. Christiansen
LESLIE TAYLOR ASSOCIATES
6800 Carlynn Court
Bethesda, MD 20817
(301) 229-9341

William D. Wallace
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

Its Attorneys

Date: July 31, 1997

<u>SUMMARY</u>

In its <u>Order and Authorization</u>, released July 1, 1997, the International Bureau found that Mobile Communications Holdings, Inc. ("MCHI") is not financially qualified to hold an MSS Above 1 GHz license. Nevertheless, it granted MCHI's application by waiving the Commission's financial qualification rule. This <u>Order</u> is unlawful and must be vacated as inconsistent with the Commission's rules and precedent as well as its established policies on satellite applications and waivers.

The Bureau found that MCHI is not financially qualified to construct, launch, and operate its proposed Big LEO system. Its decision to waive the Commission's financial qualification rule was based on the Bureau's view of certain changes in "key circumstances" discussed in the Big LEO rulemaking. The Bureau reasoned that the waiver served the public interest because it might result in increased competition in the satellite market.

This decision undermines the purpose of the Commission's financial qualification standards for satellite applicants. The Commission has adopted financial standards for satellite applicants to ensure that entities capable of proceeding with implementation of their systems are licensed. It adopted a strict financial standard for the Big LEO service, recognizing that the spectrum may not accommodate all applicants nor expansion of existing licensees or future applicants. In adopting this standard, the Commission's "paramount objective" was to secure early implementation of Big LEO satellite services by licensing those applicants which demonstrate the financial ability to proceed.

Grant of a license to an undercapitalized company is patently inconsistent with this goal. The Bureau's claim that granting a waiver to MCHI serves the public interest is also unsupported. The Bureau states that MCHI's entry might increase competition to the benefit of the public. But, according to this rationale, any applicant would be entitled to a waiver of the financial qualifications. In reality, the public interest is served by the grant of licenses to those companies which have demonstrated the ability to proceed with system implementation. No benefit to the public results from the delay or denial of service that, as the Commission has found, often accompanies underfinanced applicants.

A waiver of the Commission's Rules may be granted only when doing so would serve the public interest and would not undermine the purpose and policy objectives of the rule sought to be waived. The Order clearly conflicts with the objectives of the financial standard and the public interest. Accordingly, the waiver is unjustified, and MCHI's application should not have been granted.

Additionally, the Order must be vacated because the Bureau's action effectively changes Commission policy, and does so contrary to the Commission's rules and precedent. First, the Bureau does not have delegated authority to make its own decision as to what were the key circumstances underlying the Commission's rule and then to decide whether subsequent changes to those circumstances justify elimination of the financial rule by waiver. Even if it had authority to consider subsequent developments, then it failed to consider all relevant factors in the need for a stringent financial standard. Second, the Bureau's Order fails to follow the Commission's rules because it essentially nullifies the financial standard. Third, the Order is inconsistent with the Commission's responsibility under the Communications Act to manage spectrum in the public interest, and to license only those applicants which satisfy the relevant legal, financial, and technical qualifications.

Accordingly, for the reasons set forth in this Application for Review, the Order should be vacated with directions to dismiss MCHI's application.

TABLE OF CONTENTS

RECEIVED

JUL 31 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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
For Authority to Construct,	)	12-SAT-AMEND-95
Launch and Operate the Ellipso	)	
Elliptical Orbit Satellite System	)	
in the 1.6/2.4 GHz MSS Service	)	

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules, L/Q Licensee, Inc. (LQL), by its undersigned attorneys, hereby applies for review of the Order and Authorization ("MCHI Order") of the International Bureau in the above-captioned case, released July 1, 1997.[1] The Bureau found that MCHI is not financially qualified to hold an MSS Above 1 GHz license, but, nevertheless, granted MCHI's application by waiving the Commission's Rule (47 C.F.R. § 25.143(b)(3)) requiring MCHI to demonstrate its financial qualifications.

The Bureau's cavalier waiver of the Commission's financial requirements does a great disservice to LQL and other licensees who, taking the Commission at its word, invested enormous effort and expense in financing their projects. LQL

---

[1] Order and Authorization, DA 97-1367 (released July 1, 1997) ("MCHI Order"). The Bureau also granted the application of Constellation Communications, Inc. Order and Authorization, DA 97-1366 (released July 1, 1997). LQL is filing a separate Application for Review of that decision.

has actually accomplished the commitments that it made to the Commission in its 1991 application. LQL has raised millions of dollars in equity contributions from general and limited partners in Globalstar, L.P.; it successfully raised millions of additional dollars from a public stock offering; it obtained vendor financing from its suppliers; it secured a $250 million revolving line of credit from a consortium of banks; and to complete its financing, it placed $350 million in high-yield debt. In total, LQL has raised $2.3 billion for the construction and operation of the Globalstar system. That other CDMA applicants have not succeeded despite having six years to do so demonstrates irrefutably that they cannot do so and, consequently, it is not in the public interest for the Commission to license them alongside LQL and other financially-competent satellite operators.

The Commission's financial standard was designed to ensure that companies like LQL receive licenses, while those which cannot obtain financing do not. Not surprisingly, in granting the application of an admittedly unqualified applicant, the <u>MCHI Order</u> is "in conflict with statute, regulation, case precedent, [and] established Commission policy." 47 C.F.R. § 1.115(b)(2)(i). The order is also unlawful because the Bureau has acted beyond its delegated authority to grant a waiver based on policy questions which have not been resolved by the Commission. <u>See</u> <u>id.</u>, § 1.115(b)(2)(ii). Moreover, by directly contravening applicable rules and policies, the Bureau has abdicated its responsibility to act in the public interest.

For these reasons, and the additional reasons set forth below, the MCHI Order must be vacated as unlawful, with directions to dismiss MCHI's application.[2]

BACKGROUND

In considering the application of MCHI to construct, launch and operate a nongeostationary Mobile-Satellite Service ("MSS") systems in the 1.6/2.4 GHz bands ("Big LEO" systems), the Bureau was required to apply the rules adopted by the Commission in a lengthy and thorough proceeding addressing the appropriate technical, legal and financial qualifications for MSS Above 1 GHz applicants.[3] In that proceeding, as for all satellite services, the Commission adopted a threshold financial standard for applicants. Based on its experience with underfinanced applicants and their inability to proceed with construction of their proposed systems, the Commission decided to require applicants for MSS Above 1 GHz licenses to meet a strict financial qualification standard, one which the Commission recently determined should apply to all domestic and

[2] On July 28, 1997, LQL filed an Application for Review of the General Counsel's letter order (dated June 27, 1997) that MCHI had not violated the Commission's *ex parte* rules. See MCHI Order, ¶ 29. Inasmuch as the Commission's resolution of the *ex parte* issues is relevant and perhaps dispositive of MCHI's qualifications to hold a license, LQL requests the Commission to consider these two Applications for Review contemporaneously.

[3] 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 (1994) ("Big LEO Rules Order").

international fixed-satellite systems.[4] In addition, at the urging of MCHI, the Commission adopted a requirement that each applicant must demonstrate a financial commitment to its proposed system in an effort to "level the playing field" between those applicants that rely on their own balance sheets and those that rely on irrevocable third-party financing commitments to establish their financial qualifications.[5]

In reviewing MCHI's initial financial showing in January 1995, the Bureau found that, pursuant to the standard adopted for the service, MCHI had not demonstrated that it was financially qualified to hold an MSS Above 1 GHz license.[6] MCHI appealed this decision based on its theory that the Bureau had unfairly and incorrectly applied the financial standard. The Commission rejected this appeal, finding that the Bureau had acted properly in not granting licenses to those applicants which could not meet the threshold financial standard.[7]

In September 1996, MCHI filed an amended financial showing. Motorola Satellite Communications, Inc., TRW Inc. and LQL filed petitions to deny demonstrating that MCHI had again failed to establish that it met the financial standard for the service. The Bureau agreed with the petitioners that "MCHI's

---

[4] See Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 11 FCC Rcd 2429, 2434-35 (1996) ("DISCO I").

[5] See 47 C.F.R. § 25.140(c-d).

[6] Mobile Communications Holdings, Inc., 10 FCC Rcd 2274 (Int'l Bur. 1995).

[7] Constellation Communications, Inc., 11 FCC Rcd 18502, 18507-10 (1996).

financial showing [is] insufficient."[8] MCHI Order, ¶¶ 12-20. Nevertheless, after explicitly finding that MCHI had not met the Commission's financial standard, the Bureau waived the Commission's requirement. Id., ¶¶ 23-24.

I. THE BUREAU'S GRANT OF A WAIVER OF THE MSS ABOVE 1 GHZ FINANCIAL STANDARD IS UNLAWFUL.

A waiver of the Commission's Rules may be granted only when doing so would serve the public interest and would not undermine the purpose and policy objectives of the rule sought to be waived.[9] Thus, a waiver must be premised on facts demonstrating "special circumstances [which] warrant a deviation from the general rule and such deviation will serve the public interest."[10] According to this standard, the grant of a waiver in the MCHI Order is unlawful because it cannot be justified under the Commission's rules, policies and legal precedent.

---

[8] Although it correctly found MCHI's total financial commitments insufficient, the Bureau erred in counting the Arianespace and SNS funds toward MCHI's financial capability. MCHI Order, ¶ 20. The Arianespace vendor financing is admittedly an alternative commitment, see id., and, therefore, contingent, contrary to Section 25.140(d)(2)(iv). Any commitment from SNS must be limited to the equivalent of its 1% ownership interest in MCHI. See id., ¶ 16; Constellation Communications, Inc., 10 FCC Rcd 2258, 2260 (Int'l Bur. 1995).

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

[10] Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

A. The Grant of a Waiver to MCHI Undermines the Purpose of the Financial Qualification Standard.

The Commission has, on numerous occasions, acknowledged that the purpose of adopting financial standards for space station applicants is to ensure that those entities capable of proceeding immediately with construction, launch and operation of their systems are granted licenses.[11] The Commission articulated this very rationale when it adopted the strict financial qualification standard for MSS Above 1 GHz applicants:

> As we indicated in the Notice, our experience with the satellite industry has proven that arranging financing for any space station system, even one significantly less costly than a Big LEO system, is extremely difficult, even after a construction permit has been granted. Consequently, adopting a lesser financial standard . . . could tie up spectrum for years, contrary to the public interest.[12]

The Commission decided that the strict financial standard was required, noting that all pending Big LEO applications could not be granted and that there was unlikely to be spectrum available at 1.6/2.4 GHz for expansion of existing systems or future entry. Therefore, "granting an under-financed space station applicant a license may preclude an applicant that possesses the necessary financial resources

---

[11] See, e.g., DISCO I, 11 FCC Rcd at 2435; Non-Voice, Non-Geostationary Mobile-Satellite Service, 8 FCC Rcd 6330, 6333-34 (1993); Radiodetermination Satellite Service, 104 FCC 2d 650, 663-64 (1986); Licensing Space Stations in the Domestic Fixed-Satellite Service, 58 RR 2d 1267, 1270-71 (1985).

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

from implementing its plans, and consequently service to the public may be delayed."[13]

The importance of applying the financial qualification standard to award licenses for 1.6/2.4 GHz spectrum resources has been repeatedly emphasized by the Commission since adoption of the rule. For example, when it affirmed the Bureau's decision not to find MCHI financially qualified based on its initial showing, the Commission explained that:

> the enormous costs involved in constructing and launching a satellite system have historically made it particularly important that applicants for satellite licenses to use spectrum which is in high demand demonstrate, in advance, the financial ability to proceed with construction of their systems. We noted our repeated experience that licensees without sufficient available resources spend a significant amount of time attempting to raise necessary funding, and that those attempts often end unsuccessfully.[14]

The Commission explicitly recognized that "companies without adequate financing are unlikely to complete the steps necessary to provide Big LEO mobile satellite service to the public."[15] More recently, in defending the financial standard for MSS Above 1 GHz applicants in a judicial appeal brought by MCHI, the Commission reiterated that the "'threshold qualification requirements . . . are

---

[13] Id.

[14] Constellation Communications, Inc., 11 FCC Rcd at 18506.

[15] Id. at 18510.

designed to ensure that those awarded licenses can expeditiously implement state-of-the-art systems that further the public interest.'"[16]

The Bureau's decision to waive the rule for MCHI is patently inconsistent with the Commission's staunchly-defended policy. Granting a waiver of the financial standard undermines the articulated purpose of having the rule, that is, to ensure that applicants without the necessary financial capability are not awarded spectrum resources. The Bureau specifically found that MCHI was unable to demonstrate the financial ability required by the Commission's threshold qualification standard for this service. MCHI Order, ¶ 20. Thus, grant of MCHI's application contradicts the Commission's satellite application policies by placing a license in the hands of a company which has not shown the financial ability to proceed with its proposal. In thus contradicting this policy, the order also conflicts with the Commission's policy on waivers because a waiver cannot be used simply to accomplish exactly what a rule precludes.[17]

The U.S. Court of Appeals for the District of Columbia Circuit has recognized that a waiver of the financial standard in these circumstances cannot lawfully be granted. In Columbia Communications Corp. v. FCC,[18] the petitioner

---

[16] Brief of Respondents, at 9-10, in Mobile Communications Holdings, Inc. v. FCC, No. 94-1695 (D.C. Cir.) (filed May 19, 1997) ("FCC Brief"), quoting Big LEO Rules Order, 9 FCC Rcd at 5944; see also Letter from Reed E. Hundt to The Honorable John Conyers, Jr., at 1 (July 15, 1996) ("grant to an underfinanced applicant may preclude a fully capitalized applicant from implementing its plans and may therefore delay service to the public").

[17] Big Island Broadcasting Co., 68 RR 2d 1318, 1320 (1991).

[18] 832 F.2d 189, 192-93 (D.C. Cir. 1987).

sought to reverse a decision of the Commission refusing to grant a waiver of the same financial qualification rule which MCHI was required to meet. The court rejected this argument, explaining that the requested waiver "does no more than challenge financial requirements -- and the FCC's determination of the public interest, underlying those requirements."[19] Grant of the waiver would require the Commission "to change the Commission's policy, notwithstanding that '[t]he very essence of waiver is the assumed validity of the [agency's] general rule.'"[20] The Bureau's decision falls squarely within this prohibition.

It is well-settled that the Commission "may not act out of unbridled discretion or whim in granting waivers any more than in any other aspect of its regulatory functions."[21] The fact that the Bureau has granted a waiver that is inconsistent with the policy reasons for adoption of the rule and with the standard for waivers confirms that its action amounts to nothing more than an ad hoc approach which must be rejected as unlawful.[22]

---

[19] Id., at 193.

[20] Id., quoting WAIT Radio v. FCC, 418 F.2d at 1158.

[21] WAIT Radio v. FCC, 418 F.2d at 1159.

[22] Northeast Cellular Tel. Co. v. FCC, 897 F.2d at 1167.

B. The Bureau's Order Abrogates, Rather Than Waives, the Commission's Financial Qualification Rule.

The financial standard adopted by the Commission for MSS Above 1 GHz includes the requirement that, for applicants relying on internal financing, the "management of the corporation providing the funding must commit that absent a material change in circumstances, it is prepared to expend the necessary funds."[23] Applicants relying on third-party financing are required to demonstrate that they have entered into an irrevocable commitment, i.e., "financing that has been approved and does not rest on contingencies which require action by either party to the loan or equity investment."[24] The "management commitment," like third-party financing, thus has the effect of making applicants provide evidence of a financial stake in implementing the system. In the MCHI Order, the Bureau simply ignored the Commission's "management commitment" policy. Since the Bureau did not take into account this aspect of the rule, it is impossible for the Bureau to have lawfully determined that grant of a waiver would not undermine the objectives of the rule.[25]

---

[23] Big LEO Rules Order, 9 FCC Rcd at 5952.

[24] Id. at 5950.

[25] The Bureau's failure to address the "management commitment" is particularly striking because it was MCHI that requested that the "management commitment" requirement be included in the Big LEO rules. Big LEO Rules Order, 9 FCC Rcd at 5952. Furthermore, it was on this very point that MCHI challenged the financial qualifications of LQL. See MCHI's Consolidated Petition to Deny, at 10-13, 19-23 (filed Dec. 22, 1994). By requiring some MSS Above 1 GHz applicants to provide a management commitment but not others, the Bureau has used a double standard contrary to the principle that "an agency must

C. The Bureau's Asserted Rationale Fails to Justify the Waiver.

The Bureau held that two factors justify the grant of a waiver to MCHI: (1) "As a result of the dismissal of AMSC's application there is no longer any mutual exclusivity between pending Big LEO applications," and (2) "As a result of the Commission's allocation of additional spectrum to MSS at [2 GHz][26] . . . unassigned spectrum with equivalent propagation characteristics is now available, either for new systems or for expansion of existing systems." MCHI Order, ¶ 24. Neither of these factors are special circumstances which can justify the waiver.

First, the Commission's overriding objective in implementing the financial requirements is to "mak[e] Big LEO service available to the public as quickly as possible."[27] Moreover, as the Commission recently reaffirmed, "in the exercise of its statutory authority to 'prescribe the qualifications of station operators,' . . . the Commission 'has always considered financial ability [to be] a significant factor in determining whether an applicant is qualified to hold a license.'"[28] The Commission has thus emphasized that the adoption of the strict financial standard

---

provide adequate explanation before it treats similarly situated parties differently." Petroleum Communications, Inc. v. FCC, 22 F.3d 1164 (D.C. Cir. 1994).

[26] Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, FCC 97-93 (released Mar. 14, 1997).

[27] FCC Brief, at 16. The Commission stated in the Big LEO Rules Order that its "paramount objective" was to "secur[e] early implementation of [Big LEO] satellite services." 9 FCC Rcd at 5952.

[28] FCC Brief, at 20, quoting Big LEO Rules Order, 9 FCC Rcd at 5948.

for MSS Above 1 GHz was not based solely on the existence of mutual exclusivity among the pending applicants. In fact, the Commission has opposed MCHI's claim that the decision to adopt a strict financial requirement was based wholly on the lack of sufficient spectrum to accommodate all six applicants in the first Big LEO processing round. Rather, the Commission adopted the strict financial standard for MSS Above 1 GHz based on its experience with undercapitalized applicants not implementing their systems, its desire to avoid inefficient use of scarce spectrum resources, and its finding that the available 1.6/2.4 GHz spectrum did not accommodate all pending applicants and left no spectrum available for expansion of existing systems or the development of future systems.[29] It is flatly inconsistent with these pronouncements for the Bureau to waive the rule based on its own view of the relevance of mutual exclusivity.[30]

Moreover, the Bureau's reasoning on this issue has already been implicitly rejected by the Commission. When the Commission adopted the financial standard for the MSS Above 1 GHz, it specifically contemplated that not all of the pending applicants would necessarily be able to establish their financial qualifications, and consequently, that there might ultimately be more slots

---

[29] See FCC Brief, at 19-20, 24.

[30] The Bureau cannot rely on grant of waivers of the applicable financial standard for other satellite applicants to support the grant of a waiver to MCHI. See MCHI Order, ¶ 23 n.23. A waiver is, by definition, appropriate only where specialized circumstances support not applying the specific rule. See Northeast Cellular Tel. Co. v. FCC, 897 F.2d at 1166.

available than applicants in the first processing round.[31] Nevertheless, the Commission did not at any point announce or even imply a rule or policy stating that, after one or more first-round applicants were no longer in contention, the financial standard would be eliminated. Rather, the Commission adopted a standard to be applied consistently to all applicants.

Second, the fact that the Commission has adopted an allocation for MSS at 2 GHz does not render irrelevant the financial standard for Big LEO applicants. The Bureau has obviously relied on its own determination that this spectrum will be available for new Big LEO systems and for expansion of existing Big LEO systems. At this date, however, the Commission has not established eligibility and service rules for the 2 GHz band. Therefore, the Bureau cannot state with any certainty whether the spectrum addresses the concern recognized in the Big LEO rulemaking.

The Bureau also suggested that imposing implementation milestones would provide adequate protection against the Commission's concern for spectrum warehousing by underfinanced systems. MCHI Order, ¶ 26. However, the Commission has explicitly rejected milestones as a substitute for application of the MSS Above 1 GHz financial standard. When it adopted the Big LEO rules, it pointed out that revocation of license for failure to meet a milestone "takes

[31] See Big LEO Rules Order, 9 FCC Rcd at 5953.

considerable time and can delay qualified entities from implementing systems and providing service to the public."[32]

The Bureau's "key circumstances" cannot be deemed "special circumstances" justifying a waiver. Rather, the Bureau has set its own, unprecedented waiver standard to award a license to an otherwise unqualified applicant. Under the Bureau's theory, if the Commission's threshold qualifications serve to eliminate or deter enough applicants,[33] then those very same qualifications would be abandoned with respect to the surviving applicants. The decisional criterion is nothing more than persistence in prosecuting an application. This is not a waiver, but rather elimination of a rule, and fails to constitute the "special circumstances" warranting deviation from the general rule.[34]

D. Grant of the Waiver Is Inconsistent With the Public Interest.

As the Bureau recognized, waivers of Commission's Rules are appropriate only when they "serve the public interest." MCHI Order, ¶ 23. In this case, the Bureau defended the grant of a waiver to MCHI, reasoning that "[e]ntry by MCHI could serve the Commission's goal of fostering developments affording consumers the widest feasible range of choices in service available at the earliest possible date." Id., ¶ 25 (emphasis added). The Bureau speculated that because MCHI's

---

[32] Id. at 5950.

[33] It must be reiterated that the only rationale for granting MCHI's and Constellation's applications was AMSC's decision not to prosecute its application.

[34] See Northeast Cellular Tel. Co. v. FCC, 897 F.2d at 1166.

proposed system features a substantially different design, "[a]ffording MCHI a chance to carry out its proposal might therefore result in significant enhancement of commercial competition, to the benefit of consumers."[35] Id. (emphasis added).

The Bureau's reasoning reflects its own uncertainty about the ability of MCHI ever to use the license granted in the order. Indeed, the principal factor on which the Commission makes a predictive judgment about whether a satellite applicant has the ability to proceed with its proposal, and thereby would serve the public interest, points toward the failure of MCHI to construct its system. The Commission recognizes that "licensees without adequate financial backing spend their time searching for money -- often unsuccessfully -- rather than building satellite systems, with the result that scarce spectrum resources stay idle while the public goes unserved."[36] Moreover, the Commission has found that "companies without adequate financing are unlikely to complete the steps necessary to provide Big LEO mobile satellite service to the public."[37]

For these reasons, the "public interest" is served in granting applications of those companies which have demonstrated the ability to proceed with their

---

[35] When the Commission proposed rules for MSS Above 1 GHz, it stated that it would not take system design into account to determine whether an applicant should be granted a license. See Notice of Proposed Rulemaking, 9 FCC Rcd 1094, 1100-01 (1994) ("Big LEO NPRM") ("we prefer to leave spacecraft design decisions to the space station licensees because the licensees are in a better position to determine how to tailor their systems to meet the particular needs of their customer base"). Therefore, the Bureau's reliance on MCHI's design is misplaced.

[36] FCC Brief, at 16; see Big LEO Rules Order, 9 FCC Rcd at 5948; Big LEO NPRM, 9 FCC Rcd at 1107-1108.

[37] Constellation Communications, Inc., 11 FCC Rcd at 18510.

proposed system. If, as here, an applicant is granted a license but cannot secure the financing necessary to proceed, or must delay construction in order to solicit funding, the consumer is disadvantaged. Thus, the grant of a license to MCHI is contrary to the Commission's applicable public interest considerations.

The Bureau also failed to weigh against the waiver specific harms to licensees and the public associated with grant of a license to an underfinanced applicant. See MCHI Order, ¶¶ 27-28. Granting licenses to applicants which are unlikely to proceed with their plans forces licensees which met the standard and are proceeding with their plans to coordinate their systems with a system that is unlikely to ever become operational. The United States will also be obligated to coordinate this "paper system" in international fora to the further detriment of the licensees prepared to provide service. And, granting applications to grossly underfinanced applicants like MCHI encourages the filing of speculative applications, which may make it more difficult for financed applicants to obtain access to spectrum.

Ultimately, the Bureau's approach nullifies the public interest test because it places the interests of a single applicant in obtaining a license before the interests of the public in having spectrum resources managed efficiently. The Bureau reasons that MCHI should be granted a license because if MCHI does enter the market, the result will be an increase in competition. Under that logic, any applicant would be eligible for a waiver of the financial qualification requirements, and grant of a license. This approach must be rejected: true competition and service are promoted by licensing applicants which demonstrate the ability to proceed. The waiver to MCHI undercuts that standard.

II. THE MCHI ORDER MUST BE VACATED BECAUSE THE BUREAU DOES NOT HAVE AUTHORITY TO CHANGE COMMISSION POLICY.

The decision to grant MCHI a waiver of the MSS Above 1 GHz financial standard represents a new policy for evaluation of space station applications generally and a significant deviation from the rules governing the processing of MSS Above 1 GHz applicants. The MCHI Order is therefore unlawful on multiple grounds.

A. The MCHI Order Is Beyond the Bureau's Delegated Authority.

The Commission's delegation of authority to the International Bureau specifically reserves to the Commission the authority to review "facts or arguments which appear to justify a change in Commission policy."[38] The Bureau violated this prohibition in granting a waiver of MSS Above 1 GHz financial standard by reviewing the legislative facts underlying the Commission's adoption of the rule and changing Commission policy. As LQL discusses here, the Bureau compounded this error by engaging in an incorrect and incomplete review of those facts.

[38] 47 C.F.R. § 0.261(b)(1)(ii).

The Bureau decided that Section 25.143(b)(3) should not be applied to the remaining two first-round Big LEO applicants because "key circumstances" underlying the Commission's adoption of the rule in the Big LEO Rules Order had changed. MCHI Order, ¶ 24. These key circumstances were a change in the number of first-round applicants and the allocation of additional MSS spectrum. However, while the number of applicants in the first Big LEO processing round and the availability of MSS spectrum were factors in the Commission's legislative decision adopting the rule, they were not the only factors considered by the Commission in its rulemaking. In fact, the Commission has recently emphasized that the adoption of the strict financial standard for MSS Above 1 GHz was based on multiple factors, including the failure of undercapitalized applicants to implement their systems, the desire to avoid inefficient use of spectrum resources, the limited availability of 1.6/2.4 GHz spectrum for pending applicants, and the lack of 1.6/2.4 GHz spectrum for expansion of existing systems or the development of future systems.[39]

The Bureau compounded its error by considering some but not all subsequent developments affecting these factors, and not recognizing that other legislative facts reaffirmed the need for Section 25.143(b)(3). For example, TRW and LQL have pointed out subsequent developments in the efforts to coordinate the licensed systems and in potential protection requirements for the Russian GLONASS system which may raise a substantial question whether the

---

[39] See FCC Brief, at 19-20, 24.

Commission's conclusion that four CDMA systems can share the 1610-1621.35/2483.5-2500 MHz frequencies remains valid.[40] The Bureau recognized that the difficulty in coordinating four CDMA systems represented a "legitimate concern," but refused to consider it as a factor in whether granting the waiver was appropriate. MCHI Order, ¶ 27. The Bureau also recognized that requirements under consideration for protection of GLONASS could make it difficult for four CDMA licensees to share the spectrum. Rather than recognizing this as weighing against waiving the Commission's financial standard for the 1.6/2.4 GHz bands, the Bureau simply suggested that MCHI and Constellation might be required to bear the burden of any shortfall. Id., ¶ 28. (The Bureau made no effort to explain how that would be accomplished, and it is certainly not obvious.)

If fewer systems can be accommodated in the available spectrum, fewer licenses can be awarded, and the legislative concerns which led to adoption of Section 25.143(b)(3) all have heightened relevance. Even if the Bureau had the authority to review the legislative facts, then its failure to consider all relevant factors and to formulate a reasoned solution led to precisely the wrong result. Subsequent events have only ratified, rather than eliminated, the validity of the strict financial standard.

---

[40] See TRW's Petition to Deny, at 30-31 (filed Dec. 27, 1996); TRW's Supplement to Petition for Further Reconsideration (CC Docket No. 92-166) (filed Mar. 27, 1997); LQL's Letter to William F. Caton (CC Docket No. 92-166) (filed Apr. 9, 1997).

B. The Bureau Failed to Apply the Commission's Rules.

"[I]t is elementary that an agency must adhere to its own rules and regulations."[41] And, therefore, "an agency's failure to follow its own regulations is fatal to the deviant action."[42] The MCHI Order is inconsistent with these requirements of agency decisionmaking because, in waiving Section 25.143(b)(3), the Bureau has assumed the invalidity of the rule, and "[t]he very essence of waiver is the assumed validity of the [agency's] general rule."[43]

As discussed above, the Commission has recognized that there were multiple factors in the record of the rulemaking which contributed to the adoption of the MSS Above 1 GHz financial standard.[44] Thus, the number of applicants in the first processing round and the availability of spectrum for MSS Above 1 GHz licensees and future applicants were not the only factors underlying the adoption of Section 25.143(b)(3).

The Bureau deviates from the Commission's view by claiming that changes regarding two "key circumstances" would allow it to grant MCHI's waiver request "without prejudice to the objectives that the Commission sought to promote by adopting the Big LEO financial standard." MCHI Order, ¶ 24. But, to reach this

---

[41] Reuters Limited v. FCC, 781 F.2d 946, 950 (D.C. Cir. 1986).

[42] Florida Inst. of Tech. v. FCC, 952 F.2d 549, 553 (D.C. Cir. 1992) (internal citations omitted).

[43] Columbia Communications Corp. v. FCC, 832 F.2d at 193 (quoting WAIT Radio v. FCC, 418 F.2d at 1158).

[44] See FCC Brief, at 24.

conclusion, the Bureau has had to make its own decision as to what were the "key circumstances" in the Commission's rulemaking. As discussed above, the Commission has made clear that its record and policy considerations in the Big LEO rulemaking were much broader than the Bureau's discussion in the MCHI Order. Moreover, the Bureau's decision to "waive" the rule was based on the Bureau's own determination of the impact of certain factual developments on the relevance of the rule since the rule was adopted.

The Bureau has thus simply ignored considerations which were used by the Commission to adopt the rule and reached its own conclusions about what the effect of subsequent events would be on the need for applying the rule. This admitted failure to base the decision on the validity, rather than invalidity of Section 25.143(b)(3), is fatal to the MCHI Order.

C. The Bureau's Ad Hoc Approach to Licensing Is Inconsistent with the Commission's Obligations to Manage Spectrum.

The Commission has an established policy of not granting space station licenses to applicants which fail to demonstrate that they meet the applicable financial standard. For MSS Above 1 GHz, this policy was based on the Commission's experience and finding that "companies without adequate financing are unlikely to complete the steps necessary to provide Big LEO mobile satellite service to the public,"[45] and so should not receive licenses. Indeed, the

---

[45] Constellation Communications, Inc., 11 FCC Rcd at 18510; see Big LEO Rules Order, 9 FCC Rcd at 5948.

Commission has recognized that applicants that cannot meet the financial standard may compete in the market as resellers of satellite services.[46]

The Bureau's decision is admittedly inconsistent with this policy and was adopted without any explanation for why this policy should be changed. It is a basic tenet of administrative law that "a departure from prior policy cannot stand when the agency fails to explain the reason for the change."[47] The Bureau has not attempted to explain why any change in that policy is in the public interest, and, therefore, its action cannot stand.

Moreover, the only explanation available appears patently inconsistent with the Commission's obligations under the Communications Act. That is, the Bureau's approach suggests that space station licenses should be issued on an ad hoc basis to any pending applicant when there is unused spectrum. Such an approach suggests that the Commission's threshold qualification standards should only be applied to enough pending applicants to reduce the number to match the number of available licenses. Unless an applicant is among those whose qualifications the Bureau selects to review, the threshold qualification standards are irrelevant. Given the Commission's obligation to manage spectrum in the public interest[48] and to issue licenses for use of that spectrum only to applicants

---

[46] See Domestic Fixed-Satellite Service, 58 RR 2d at 1271.

[47] New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1110 (D.C. Cir. 1987); see also Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

[48] 47 U.S.C. § 151.

which are financially, legally and technically qualified to serve the public interest,[49] this approach and the policy underlying it must be rejected out of hand.

III. CONCLUSION

For the reasons set forth above, the Commission should grant review of the Bureau's decision, and vacate the MCHI Order with directions to dismiss MCHI's application.

Respectfully submitted,

L/Q LICENSEE, INC.

By: [signature]
William D. Wallace

CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

Its Attorneys

Of Counsel:

William F. Adler
Vice President &
Division Counsel
GLOBALSTAR
3200 Zanker Road
San Jose, CA 95134
(408) 473-4814

Leslie A. Taylor
Guy T. Christiansen
LESLIE TAYLOR ASSOCIATES
6800 Carlynn Court
Bethesda, MD 20817
(301) 229-9341

Date: July 31, 1997

1401353

---

[49] 47 U.S.C. §§ 308(b), 309(a).

<u>CERTIFICATE OF SERVICE</u>

I, William D. Wallace, hereby certify that I have on this 31st day of July, 1997, caused copies of the foregoing "Application for Review" to be delivered via hand delivery (indicated with *) or by U.S. mail, postage prepaid, to the following:

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

* Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 803
Washington, D.C. 20554

* Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

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

* William E. Kennard
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

* Peter Cowhey
Chief, International Bureau
Federal Communications Commission
2000 M Street, N.W.
Suite 800
Washington, D.C. 20554

* Ruth Milkman
Deputy Chief, International Bureau
Federal Communications Commission
2000 M Street, N.W.
Suite 800
Washington, D.C. 20554

* Karl A. Kensinger
International Bureau
Satellite Radio Branch
Federal Communications Commission
2000 M Street, N.W., Suite 800
Washington, D.C. 20554

* Thomas Tycz
Chief, Satellite & Radio
Communications Division
Federal Communications Commission
Suite 800
2000 M Street, N.W.
Washington, D.C. 20554

* Cecily C. Holiday
Deputy Chief, Satellite & Radio
Communications Division
Federal Communications Commission
2000 M Street, N.W., Suite 800
Washington, D.C. 20554

* Fern J. Jarmulnek
Chief
Satellite Policy Branch
Federal Communications Commission
2000 M Street, N.W.
Room 500
Washington, D.C. 20554

* Kathleen Campbell
International Bureau
Satellite Policy Branch
Federal Communications Commission
2000 M Street, N.W.
Suite 800
Washington, D.C. 20554

* Peter Pappas
Assistant Bureau Chief
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Suite 800
Washington, D.C. 20554

* Joel Marcus
Litigation Division
Federal Communications Commission
1919 M Street, N.W.
Room 602
Washington, D.C. 20554

* Daniel M. Armstrong
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 602
Washington, D.C. 20554

* John I. Riffer
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 610
Washington, D.C. 20554

* William Bell
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 888
Washington, D.C. 20554

* Richard M. Smith
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W.
Room 412
Washington, D.C. 20554

Norman P. Leventhal
Stephen D. Baruch
Walter P. Jacob
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006

Bruce D. Jacobs
Glenn S. Richards
Fisher Wayland Cooper
Leader & Zaragoza
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006

Philip L. Malet
Charles G. Cole
Marc A. Paul
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Jill Abeshouse Stern
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20036

Robert A. Mazer
Albert Shuldiner
Vinson & Elkins L.L.P.
1455 Pennsylvania Avenue, N.W.
Suite 700
Washington, D.C. 20004

Lon C. Levin
American Mobile Satellite Corporation
10802 Parkridge Boulevard
Reston, VA 22091

William D. Wallace

William D. Wallace