

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

In the Matter of)
)
Mobile Communications Holdings, Inc.)
)
Application for Authority to Construct,)
Launch and Operate a Non-Geostationary)
Satellite System to Provide Mobile)
Satellite Service in the 1.6/2.4 GHz)
Bands)

File Nos. 11-SAT-LA-95
12-SAT-AMEND-95

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Satellite and Radiocommunication Division
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REPLY OF AMSC SUBSIDIARY CORPORATION

AMSC Subsidiary Corporation ("AMSC"), pursuant to Section 25.154(d) of the Commission's Rules, hereby urges the Commission to find that Mobile Communications Holdings, Inc. ("MCHI") is not qualified to construct, launch, and operate its proposed Mobile Satellite Service ("MSS") system. MCHI has not demonstrated in either its November 16, 1994 amendment or its supplemental filing that it has obtained the commitment to financing of its satellite project that is required by the Commission's new rules. In order to ensure adherence to the Commission's rules and fairness to the other applicants, the Commission should deny a license to MCHI at this time.

Background

Pursuant to the Commission's Rules, applicants were required to file conforming legal and technical amendments to their applications by November 16, 1994 and were given the option of submitting evidence of their financial qualifications either by November 16, 1994

or January 31, 1996.^{1/} The financial qualifications standard requires each applicant to show that immediately upon grant of its license it can pay for construction, launch and operation of its MSS system for one year after launch of the first satellite. Report and Order, at ¶¶ 32, 38, 41.^{2/}

In its application, MCHI estimated that the cost of constructing and launching its proposed satellites and operating its satellite system for one year after the launch of its first satellite would be \$564 million.^{3/} To demonstrate its ability to finance this undertaking, MCHI initially submitted several letters from shareholders with very limited current investments in MCHI, potential investors, and potential creditors. As detailed in AMSC's Petition to Defer Processing of the MCHI application, these letters failed to meet the Commission's requirements. The letters from small shareholders failed to make the kind of commitment required by the Commission's rules, including failing to indicate the amount of

^{1/} Licensing Policies and Procedures, Satellite Communications, Report and Order ("Report and Order"), CC Docket No. 92-166, FCC 94-261, 59 Fed. Reg. 53294 (October 21, 1994), at ¶ 2. The Commission's rules are not clear as to what procedures apply to the submission of financial qualifications information after the first deadline and prior to the second deadline.

^{2/} See also, 1985 Domestic Fixed-Satellite Order, 101 FCC 2d 223 (1985), at ¶ 11. The Report and Order incorporates the financial qualification standards as adopted in the 1985 Domestic Fixed-Satellite Order, with a more rigorous requirement, adopted at MCHI's urging, that applicants relying on internal financing secure a management commitment that is functionally equivalent to the irrevocable commitment required from external lenders. See Report and Order, at ¶ 35.

^{3/} Letter to Scott Harris, Chief, International Communications Bureau, Federal Communications Commission, from MCHI (November 18, 1994). Cost estimates do not include ground segment.

any support that they might be willing to offer.^{4/} Other parties also analyzed MCHI's financial showing and found it to be inadequate to meet the Commission's requirements.^{5/}

In its Consolidated Opposition (January 3, 1995) (the "MCHI Opposition"), MCHI submits a new balance sheet for itself and several letters from new entities (again, small shareholders and potential creditors) that it claims are committed to the financing of its venture,^{6/} as well as several letters that purport to be clarifications of letters submitted

^{4/} In total, the holdings of all the shareholders submitting letters amount to no more than 20% of the equity ownership of MCHI.

^{5/} See "Consolidated Comments" of Constellation Communications, Inc. (December 22, 1994); "Petition to Deny" of Loral/Qualcomm Partnership, L.P. (December 22, 1994); "Consolidated Comments and Petition to Defer and/or Deny" of Motorola Satellite Communications, Inc. (December 22, 1994); "Petition to Deny" of TRW Inc. (December 22, 1994).

^{6/} See Letter to Moshe Keret, President of Israel Aircraft Industries Ltd. ("IAI"), from Mair Leiser, President of CLAL Industries Ltd. (January 1, 1995); Letter to David Castiel, President and CEO of MCHI, from Christian Gregoire, Head of the Telecommunications and Services Division of Banque Nationale de Paris ("BNP") and Christophe Boucher, Vice President of BNP (December 22, 1994); Letter to David Castiel, President and CEO of MCHI, from V. Kouznetsov, President of ESKOS S.A. (January 3, 1995); Letter to David Castiel, President and CEO of MCHI, from W. David Thompson, President of Spectrum Astro (December 30, 1994); Letter to David Castiel, President and CEO of MCHI, from W. David Thompson, President of Spectrum Astro (December 19, 1994); Letter to Jeff Amerine, Program Manager at Westinghouse, from Office of General Manager of IBM Credit Corporation (December 22, 1994); Letter to Jeff Amerine, Program Manager at Westinghouse, from Lawrence S. Barker, President and CEO of CSCI (November 16, 1994); and Letter to Jeff Amerine, Program Manager at Westinghouse, from Thomas D. Chambers, Manager of Networks of NTFC Capital Corporation ("NTFC") (November 15, 1994).

previously by certain parties.^{7/} MCHI claims that these letters demonstrate that it is financially qualified.

In support of its claim that it is financially qualified, MCHI compares its showing with that of the other applicants,^{8/} and submits a letter from its investment advisor, Barclays de Zoete Weld ("BZW"), in which BZW analyzes all of the financial showings made by the other Big LEO applicants and concludes that the others have failed either to make an "irrevocable financing commitment" that covers their projects' costs or to "assume any significant liability" regarding their proposed systems.^{9/}

In response to an argument that the commitment letters that MCHI submitted should be given weight only to the extent of the equity interest in MCHI of the entity making the commitment, MCHI claims that this is "frivolous" and that the letters "clearly evidence support for the entire project." MCHI Opposition, at 21, note 23.

With respect to the challenges to its external financing, MCHI claims that they are "irrelevant," apparently because MCHI did not claim that the expressions of interest met the

^{7/} See Letter to David Castiel, President and CEO of MCHI, from Chief Financial Officer of IAI (January 3, 1995); Letter to David Castiel, President and CEO of MCHI, from Philip W. Farmer, President and Chief Operating Officer of Harris Corporation (December 21, 1994); Letter to David Castiel, Chairman and CEO of MCHI, from John F. Ambruz, Managing Director of Mergers and Acquisitions of Barclays de Zoete Weld (January 2, 1995); and Letter to David Castiel, President and CEO of MCHI, from David Archer, Director of Spectrum Network Systems Limited ("Spectrum") (December 30, 1995).

^{8/} MCHI argues that repeated public statements made by TRW, LQP, and MSCI that they will rely on external financing are inconsistent with the applicants' statements to the Commission and demonstrates a lack of candor by the applicants to inform the Commission about the nature and extent of that financing. MCHI Opposition, at 20, note 21.

^{9/} Letter to David Castiel, Chairman and CEO of MCHI, from John F. Ambruz, Managing Director, Mergers and Acquisitions, BZW (January 2, 1995), at 2.

Commission's test for financial qualifications, but only submitted the materials to demonstrate a generally high level of support for MCHI's project from major corporations. MCHI Opposition, at 24.

MCHI's pleading also contains a number of appeals to the Commission to look beyond the Commission's articulated financial qualifications standards. At one point, MCHI asks the Commission to "look to the real-world indicia of financial commitment underlying the management letters" submitted by MCHI, claiming apparently that since several of the shareholders are large companies that have been involved in planning MCHI's system, they will fund its future development or their presence will insure that funding is available. MCHI Opposition, at 22. MCHI also appeals to the Commission to look at what MCHI characterizes as the "public interest" justifications for granting its application. Id. at 26. In the category of public interest justifications, MCHI recites that it was the first applicant to file in the proceeding, it is the only party to be candid about the need for both internal and external funding for its project and to provide evidence of both, and a grant to MCHI would promote small business entrepreneurship. Id. at 27, 30. Finally, MCHI argues that to deny its application and grant others would be arbitrary and capricious. In support, MCHI again points to what it calls the "serious deficiencies" in the other applications and the "overwhelming" evidence of MCHI's qualifications. Id. at 32.

Discussion

Despite MCHI's spirited attempt to inflate its financial ability into something that will pass muster under the Commission's rules, the only "overwhelming" evidence that it presents is that MCHI continues to have nowhere near the financial support required by the Commission to be considered minimally qualified. This is the case even if the Commission

were to consider MCHI's late-filed and inadmissible supplemental filings. As to MCHI's attempts to deflect the Commission's attention from its lack of financial qualifications, these efforts should be seen for what they are, essentially irrelevant to the Commission's task at the moment, which is to sort those applicants that meet its standards from those that do not.

The letters submitted by various small shareholders in MCHI continue to fail the Commission's test. Any objective reading of the letters that have been submitted by such investors as Westinghouse Corporation, Israel Aircraft Industries,^{10/} and Harris Corporation fails to reveal that these entities are committed to contribute the hundreds of millions of dollars that are required to construct, launch, and operate MCHI's system. MCHI claims that the letters show support for the "entire project," but it does not cite to specific language to that effect, and we cannot find any to support MCHI's claims.

It would have been a simple matter for MCHI to have responded to this issue by submitting clarifying letters from these major corporations declaring in straightforward terms that they were committed to funding specific amounts of the project or the "entire project" if that were actually the case. MCHI's failure to submit that evidence, particularly given its general lack of reticence to supplement the record, undercuts its claim that these entities have the requisite level of support for the MCHI project.^{11/}

^{10/} MCHI continues to duck the issue of IAI's current assets, citing to the magnitude of IAI's sales volume and then referring to its "assets/sales" as though they were synonymous. The fact remains that, based on the Commission's rules, which require the submission of a complete balance sheet, there is no evidence in the record as to the ability of IAI to fund a commitment to MCHI.

^{11/} MCHI's new submissions have their own infirmities. For instance, the letter from Spectrum fails to demonstrate what ability Spectrum has to fund a commitment. The Consolidated Opposition contains the balance sheet of Savage Resources Limited, an "affiliate" of Spectrum, but none for Spectrum itself and no commitment by Savage.

(continued...)

Similarly, the support from vendors that MCHI claims to have available is not demonstrated with the level of detail that is required under the Commission's rules. Those rules require that the financing must be final and non-contingent and that the terms must be described. In no case is it apparent from the letters submitted by MCHI that these requirements have been satisfied.

It also should be clear that MCHI, having failed to establish its financial qualifications on November 16, may not now claim credit for whatever new financial support is contained in the bundle of new material that it submitted after the deadline.^{12/} This includes MCHI's revised balance sheet, the supplemental letters from IAI, Harris Corporation, and Spectrum, and other letters from entities that were not even mentioned in the November 16 filing.^{13/}

As discussed above, MCHI also asks the Commission to look beyond its specific financial qualifications showing and grant its application based on new criteria that MCHI

^{11/}(...continued)

In short, whatever the commitment of Spectrum, there is no properly submitted, reliable evidence that it is able to supply the funding.

^{12/} See Central Florida Communications Group, Inc., MM Docket No. 90-633, 8 FCC Rcd 4128, 4129, 4130 (Rev. Bd. 1993), aff'd FCC 94-338 (January 6, 1995) (a broadcast applicant that failed to demonstrate its financial qualifications at the time it filed its application would not be permitted to rely on a bank letter subsequently obtained).

^{13/} MCHI submits letters from IBM Credit Corporation, CSCI, and NTFC regarding alleged funding of its ground control station. But, as MCHI admits, these alleged commitments are irrelevant to the financial showing MCHI must now make. Financing for ground control stations is not part of the financing that must be shown under the Report and Order.

MCHI's attempts to supplement the record with entirely new letters of support highlights the need for the Commission to establish rules that will clarify the procedures that will apply to the submission of financial qualifications information after the November 16, 1994 deadline.

proposes in its Opposition. For instance, MCHI asks the Commission to create a new standard based on the mere fact that MCHI has contracts with various large corporations that have acquired small shares of MCHI's equity. The problem with this argument is two-fold. First, despite MCHI's claims to the contrary, those contractual obligations are not a "real-world indicia of financial commitment" by the management of these companies to finance a project 80% of which is owned by other entities. In the real world, it is highly unlikely that Westinghouse or Harris, for instance, would use their own funds to pay for a highly speculative project of which they each own less than two percent. Second, whatever the logic of MCHI's newly proposed standard for financial qualifications, MCHI's proposal is not the standard that the Commission adopted in its Report and Order in this proceeding. It should go without saying that it would be completely unfair and inappropriate for the Commission to change that standard now.

AMSC has the same concerns regarding MCHI's "public interest" arguments. MCHI is simply wrong to claim that any of the virtues it ascribes to itself -- being an early proponent of the use of non-geostationary satellites for MSS, submitting a financial qualifications showing that includes an inadequate showing of potential external funding, or being a "small business" -- are relevant to whether it even in theory is financially qualified to receive a license from the Commission. And, even if MCHI could show that these characteristics were to contribute theoretically to an applicant's financial qualifications, the characteristics remain as a practical matter irrelevant since they are not factors that the Commission articulated in its Report and Order as material to the issue of an applicant's financial qualifications.

MCHI also argues that the Commission may not deny MCHI a license on financial grounds while granting those of other applicants that also have serious deficiencies in their financial showings. AMSC agrees with MCHI and BZW that the financial status of all of the applicants remains highly speculative. In addition, it is clear that the Commission's financial qualifications test does not bind those providing financial support to sustain that support in the future under any circumstances. Indeed, the Commission's standard permits those providing financial support to withdraw that support in the future without any explanation as to their reason for doing so. Nonetheless, the fact remains that the financial qualifications standard that the Commission has adopted in this proceeding does rationally distinguish between those applicants that can show the present willingness of financially-able entities to make some kind of commitment to their venture and those applicants, such as MCHI, which have been unable to secure more than a collection of vague expressions of possible interest.

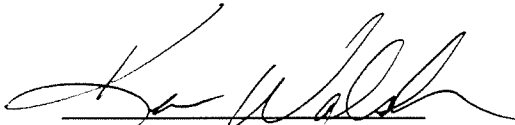
Moreover, the solution at this time to the problem of any flaws in the financial standard established by the Commission is not, as MCHI suggests, to abandon the standard altogether and grant the applications of all applicants that ask for a license. Such an action would completely destroy the integrity of the Commission's processes. Instead, the Commission should strive to preserve the integrity of the standard that the Commission has created. At the same time, the Commission also should adopt AMSC's request on reconsideration to clarify that all applicants will be treated fairly regardless of whether they meet the financial qualifications test based on their November 16, 1994 showing. AMSC Petition for Reconsideration, CC Docket No. 92-166 (November 21, 1994), at 14.

Conclusion

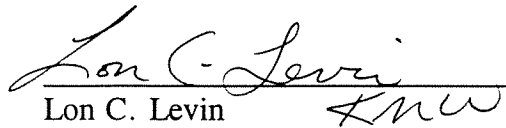
The Commission's rules in this proceeding make it imperative that it adhere strictly to its financial qualifications standards. To do otherwise would be unfair to AMSC, which took those rules at face value and accepted the Commission's invitation to defer its financial showing until more of the key spectrum issues have been resolved. AMSC therefore respectfully urges the Commission to find that MCHI is not financially qualified and to defer the processing of its application until MCHI is able to demonstrate its qualifications.

Respectfully submitted,

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January 13, 1995

CERTIFICATE OF SERVICE

I, Ana J. Ayala, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P. do hereby certify that on this 13th day of January 1995, a copy of the foregoing "Reply of AMSC Subsidiary Corporation" was sent by U.S. first class mail, postage prepaid to:

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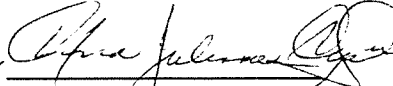
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