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June 6, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Consolidated Application for Review and Request for Clarification Mobile Communications Holdings, Inc. (File Nos. 11-DSS-P-91(6), 18-DSS-P-91(18), 11-SAT-LA-95, 12-SAT-AMEND-95) and Loral/Qualcomm Partnership, L.P. (File Nos. 19-DSS-P-91 (48), CSS-91-014, 21-SAT-MISC-95)

Dear Mr. Caton:

This letter, on behalf of Mobile Communications Holdings, Inc. ("MCHI"), briefly responds to the May 16, 1996 letter from William D. Wallace, Esq., counsel to L/Q Licensee, Inc. ("LQL"), a wholly-owned subsidiary of Loral/QUALCOMM Partnership, L.P. and an opponent of MCHI's application for a license in the low-earth orbit mobile satellite service ("Big LEO" service). The LQL letter, like the "Motion to Strike Unauthorized Pleading" filed by TRW Inc. and the letter submitted by counsel to Motorola Satellite Communications, is directed towards the April 24, 1996 letter from the Small Business Administration (SBA) to Chairman Reed Hundt objecting to the exceedingly high evidentiary threshold and inequitable financial standard imposed on smaller Big LEO applicants such as MCHI. While most of LQL's arguments have been addressed by MCHI in previous filings, including its May 20, 1996 Opposition to TRW's Motion to Strike, LQL does make several factual mischaracterizations which require separate treatment here.[1/]

1. In its attempt to discredit the SBA letter, LQL claims that MCHI is not a small business "for the Commission's purposes in this proceeding." LQL rests this surprising contention on

[1/] The LQL letter was received by MCHI counsel after submission of the Opposition and therefore could not be addressed in that pleading.

conclusory (but erroneous) language in the Commission's Report and Order which established rules governing the Big LEO service. 59 Fed. Reg. 53294, 53306 (Oct. 21, 1994) (the "Big LEO Order") ("No one disputes TRW's assertion that none of the applicants qualifies as small, minority-owned or women-owned."). The Commission's error in adopting the self-serving assertion of one of MCHI's competitors -- the assertion *was* disputed and MCHI *does* qualify as a small business -- is an issue in the pending appellate proceedings concerning the Big LEO Order.[2/] MCHI made repeated assertions in the administrative record of the Big LEO proceeding that it qualifies as a small, entrepreneurial business.[3/] Thus, LQL's suggestion that MCHI has somehow been definitively -- and indisputably -- found not to be a small business is simply not a fair representation of the record or these proceedings.[4/]

While the propriety of the Big LEO financial standard, and its discriminatory impact upon smaller applicants, will be considered in the appellate proceedings,[5/] the International Bureau's licensing decision (not the Big LEO Order) is currently before the Commission on review. In this context, MCHI's small business status has been raised for the purpose of establishing that the Bureau erroneously applied the financial standard without reference to important national policies favoring telecommunications ownership opportunities and regulatory fairness for small business as most recently reflected in the 1996 Telecommunications Act and the Small Business Regulatory Enforcement Fairness Act of 1996.[6/] As MCHI previously pointed out in its February 15, 1996 Notice of Supplemental

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[2/] *See* MCHI's Emergency Motion for Stay Pending Review, at 2-3 (D.C. Cir. filed Nov. 8, 1994):

> The auction rules for this service, however, are flawed. They violate the statutory mandate of Section 309(j) of the Communications Act of 1934. . . which requires that licenses be disseminated among a diverse range of applicants, including small businesses. Contrary to this mandate, the Commission erroneously concluded that small business consideration was unnecessary because none of the applicants qualifies as a small business.

[3/] *See, e.g.*, Comments of Ellipsat Corporation in CC Docket No. 92-166, at 14-15 (May 5, 1994).

[4/] LQL also cites a brief filed by the Commission's Office of the General Counsel in the appellate proceedings concerning the Big LEO Order as authority for the notion that the Commission has "recognized" that MCHI is not a small business. As flawed as this proposition is in its own right, the litigation position of agency counsel with respect to the views of the agency, or the continuing vitality of those views, is not an authoritative substitute for the considered expression of the agency itself. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *City of Kansas City, Mo., v. HUD*, 923 F.2d 188, 192 (D.C. Cir. 1991).

[5/] *See* Seventh Status Report and Notice of Intent to Reopen Proceedings, Mobile Communications Holdings, Inc. v. Federal Communications Commission, No. 94-1695 (D.C. Cir. filed May 13, 1996).

[6/] *See also* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses,

Authority, "the application of the Commission's financial standards in the case of a particular small enterprise must be informed by the financial context in which smaller businesses operate."

Not only did the Bureau fail to consider MCHI's financial showing in light of the small business context, but, as MCHI and the SBA have pointed out, MCHI was subjected to a far more rigorous application of the standard than were its giant corporate competitors including LQL. It is for this reason that MCHI also sought Commission review and reversal of the Bureau's grant of a license to LQL on the grounds that the Commission staff arbitrarily and capriciously ignored evidence in the record that Loral was not committed to expend the necessary funds, including an equivocal management letter and, more seriously, contemporaneous statements in Loral's SEC filings --- made under penalty of criminal sanction --- that the company was committed to invest only $107 million in the project.

2. Beyond inviting the Commission to perpetuate its previous error, and so expose this decision to judicial review, LQL's argument seems grounded in some notion that MCHI's proper status in these proceedings is a function of what MCHI *says*, as opposed to what MCHI *is*. Such a proposition has no place in these proceedings. Although MCHI did in fact claim small business status in proceedings before the Commission, the Commission had not established a specific definition of small business it would use in the Big LEO proceedings. Nor did it require any of the parties to make a definitive showing of small business status in those proceedings. Thus, MCHI has made its claim of small business status in terms of the Commission's default definition of small business for competitive bidding generally (which was based on the existing SBA definition of small business), rather than a service-specific definition as the Commission has established in other proceedings.[7] MCHI clearly made its claim of small business status as best as it could, given the Commission's default definition and the established SBA standard to which the Commission defers (except where it has concluded that the capital requirements of a particular service require a more expansive definition.)[8]

It is significant that the SBA Letter assumes MCHI's status as a small business. The SBA's judgment in this regard is entitled to great weight, given the agency's responsibilities

Notice of Inquiry, GN Docket No. 96-113, FCC No. 96-216, released May 21, 1996.

[7] *See* Petitioner's Reply to the Opposition of the Federal Communications Commission to Petitioner's Emergency Motion for Stay Pending Review, at 3-5 (D.C. Cir. filed Nov. 15, 1994).

[8] *See, e.g.*, 47 C.F.R. § 24.709(a) (defines "entrepreneur" as a company with gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million.)

under the Regulatory Flexibility Act and the Small Business Act as well as the FCC's own deference to the SBA definition of small business.

The proper characterization of an applicant as a small business is not a function of whether that applicant uses the proper "magic" words, but rather it is a function of the attributes of that applicant that are readily perceived by the Commission. Indeed, the order of the International Bureau that is the subject of MCHI's pending Application for Review essentially faults MCHI for not being big enough. Similarly, the views of another of MCHI's competitors opposing MCHI's application, Motorola Satellite Communications, are premised on the notion that MCHI is a smaller firm, and, by virtue of that fact, in Motorola's opinion is unable to satisfy the financial standard for Big LEO systems.[9/]

3. In its letter, LQL argues that MCHI's prior agreement with Rostelcom and Globalstar's subsequent agreement with the same carrier, are "completely irrelevant" to MCHI's financial qualifications. Again, LQL mischaracterizes the facts. MCHI alerted the Commission to this recent business development for the sole purpose of demonstrating the competitive impact of the International Bureau's decision to defer MCHI's license application. This development dramatically proves MCHI's contention, namely, that the Bureau's erroneous decision has placed MCHI at a competitive disadvantage relative to its giant competitors, who are free to pursue investors (including MCHI's) with the benefit of a license in hand and a year and a half headstart. The Rostelcom development also demonstrates that in January 1995--before any of the Big LEOs were licensed--MCHI was able to compete effectively in the global marketplace against its larger competitors when assured of a level playing field.

4. LQL's second, third, and fourth points -- that a small business can enter the Big LEO market through avenues short of ownership, that a financial standard effectively blocking small business ownership of a Big LEO system is based on "sound public policy," and that it is not inequitable to require different representations for the financing mechanisms on which a smaller business must rely -- have already been made by other large corporate competitors opposing MCHI's application. We have fully responded to such arguments earlier.[10/] Suffice it to say here that all three of these arguments proceed from assumptions that are fundamentally inconsistent with Congress' direction to the Commission to "eliminate market entry barriers for entrepreneurs and other small businesses in the provision and ***ownership*** of telecommunications services." Telecommunications Act of 1996, Pub. L. No. 104-104, § 257(a), 110 Stat. 56 (1996) (emphasis added). The suggestion that MCHI should be content

[9/] *See* Letter of Philip L. Malet, Counsel for Motorola Satellite Communications, Inc. to Mr. William Caton, Acting Secretary, Federal Communications Commission (May 8, 1996).

[10/] *See* Opposition of MCHI to TRW's Motion to Strike Unauthorized Pleading, at 5 n.3 (filed May 20, 1996).

merely to lease or resell satellite capacity, presumably from its competitors, is unacceptable from a commercial standpoint and contravenes explicit national policy favoring diversity of telecommunications ownership.

5. LQL's last point is to simply repeat its view that "MCHI has not made the required financial showing." Of course, this self-interested statement is hotly disputed as a matter of fact -- MCHI has met the financial standard -- and as a matter of law -- the financial standard is not consistent with Congress' mandate to the Commission. In this last point LQL appears to also fault MCHI for having the temerity to seek the Commission's review of the International Bureau's decision, suggesting that MCHI should have simply complied with an order it views as factually and legally wrong, rather than exercising its right to challenge that order before the Commission. Simply to describe this suggestion is to reveal its total lack of merit.

* * *

In sum, nothing in the LQL letter undermines the conclusion that the Commission should grant MCHI's appeal of the International Bureau's decision and that MCHI is entitled to a Big LEO license, on any of the several bases that have been suggested by MCHI.[11/]

Sincerely,

Jill Abeshouse Stern

Jill Abeshouse Stern
Robert Cynkar

Counsel to Mobile
Communications Holdings, Inc.

[11/] Indeed, in the Telecommunications Act of 1996 Congress provided the Commission with yet another instrument by which it could harmonize the Congressional policy to open telecommunications markets to entrepreneurs and other small businesses with whatever specific financial standards the Commission feels are uniquely necessary in the context of Big LEO service. New Section 10 of the Communications Act authorizes the Commission to forbear from enforcing any regulation where such forbearance will "enhance competition." Telecommunications Act of 1996, § 401.

cc: Chairman Reed E. Hundt*
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Commissioner Rachelle B. Chong*
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*By hand delivery