

BEFORE THE

DUPLICATE

Federal Communications Commission

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WASHINGTON, D.C. 20554

OCT 16 1996

In the Matter of)
Application of Mobile Communications Holdings, Inc. for Authority to Construct, Launch and Operate the ELLIPSO Elliptical Low Earth Orbit Mobile Satellite System in the 1.6/2.4 GHz Bands)

File Nos. 11-DSS-P-91(6) 18-DSS-P-91(18) 11-SAT-LA-95 12-SAT-AMEND-95

FEDERAL COMMUNICATIONS COMMISSION OFFICE OF SECRETARY

Received

OCT 21 1996

REPLY TO OPPOSITION OF MCHI

Satellite Policy Branch International Bureau

TRW Inc. ("TRW"), by its attorneys, hereby replies to the opposition of Mobile Communications Holdings, Inc. ("MCHI") to TRW's motion to postpone acceptance for filing of a recent amendment to MCHI's satellite system application in the above-captioned proceeding. In its Opposition, MCHI offers the Commission no valid basis for accepting MCHI's September 16, 1996 Amendment (the "MCHI Amendment") for filing until the Commission has resolved the issues raised by MCHI's request for confidential treatment of certain business agreements that it filed in secrecy simultaneously with the MCHI Amendment. In particular, the Commission must determine whether MCHI is required to file its business agreements with the Commission as part of that amendment. Indeed, the Commission cannot expect parties to comment

1 Although MCHI styled its response to the TRW Motion as a "Reply to Partial Oppositions," that response is, in fact, an opposition to the TRW Motion under Section 1.45(a) of the Commission's rules. TRW is therefore entitled to reply to MCHI's Opposition pursuant to Section 1.45(b) of the Commission's rules. Nevertheless, and only to the extent that it may be necessary, TRW hereby respectfully requests leave to file the instant response to the MCHI "Reply" pursuant to Section 1.45(c) of the Commission's rules.

2 Request for Confidential Treatment of Sensitive Commercial Information; Request for Issuance of a Protective Order (filed September 16, 1996) ("MCHI Request").

meaningfully on an applicant's proffer of a financial qualifications showing without being privy to the contents of the showing.

As TRW explains below, the Commission must review MCHI's supposed business agreements in order to determine MCHI's financial qualifications to be an MSS Above 1 GHz licensee. It also has authority to require MCHI to file its business agreements. Public review of, and comment on, the contents of applications for radio station licenses is implicit in the Commission's decisionmaking process regarding such applications as set forth in the Communications Act of 1934, as amended (the "Act"). Should the Commission nevertheless find that MCHI's business agreements merit protection from general public scrutiny, TRW once again requests that those agreements be made available for inspection by the MSS Above 1 GHz licensees and applicants pursuant to a protective order.

I. MCHI Has Given The Commission No Legitimate Reason For Accepting The MCHI Amendment For Filing Until It Has Resolved The Issues Raised By The MCHI Request.

In the MCHI Opposition, MCHI fails even to acknowledge TRW's primary concern in proposing a delay in the issuance of a Public Notice accepting the MCHI Amendment for filing. Because MCHI has asked the Commission to confirm that it need not file the business agreements which it submitted with the MCHI Amendment, the contents of MCHI's proffered demonstration of its financial qualifications to be an MSS Above 1 GHz licensee remain unknown to TRW and other interested parties.³ These parties also do not know whether they will ever be permitted to review a significant portion of that demonstration. Until the Commission

³ See TRW Motion at 5.

rules on the MCHI Request, therefore, the preparation of meaningful comments on the MCHI Amendment is impossible, and the acceptance of the MCHI Amendment for filing would not contribute in any way to a resolution of the underlying issues.⁴

The only reason offered by MCHI for having the Commission accept the MCHI Amendment prior to resolution of the issues raised by the MCHI Request is that, "in November 1994, the Commission did not postpone issuance of a public notice accepting the Big LEO amendments for filing until it ruled on MCHI's request for confidentiality [regarding certain financial documents]."⁵ MCHI ignores the fact, however, that the amendments filed by MSS Above 1 GHz applicants in November 1994 were not directed solely at meeting the MSS Above 1 GHz financial qualifications standard. Rather, they were intended to conform the applicants' system proposals more generally to all the rules — financial, technical and legal — established by the Commission in October of that year for the MSS Above 1 GHz. Thus, the acceptance of those amendments for filing allowed other parties to comment on the non-financial aspects of the amendments while the Commission resolved MCHI's confidentiality request. In contrast, the MCHI Amendment consists almost exclusively of a demonstration of MCHI's purported

⁴ MCHI's proposal that the Commission process the MCHI Amendment without issuing a Public Notice is unacceptable. See MCHI Opposition at n.3. The public must be provided an opportunity to comment on MCHI's attempted demonstration of its financial qualifications, just as the public was provided an opportunity to comment on the financial qualifications of TRW and the other MSS Above 1 GHz system applicants in 1994. MCHI's previous failure to meet the Commission's MSS Above 1 GHz financial qualifications standard and its pending court appeal regarding that standard are more than adequate justification for the Commission to treat the MCHI Amendment as a major amendment pursuant to Section 25.116(b)(4) of the Commission's rules.

⁵ MCHI Opposition at 9.

compliance with the MSS Above 1 GHz financial qualifications standard. Under these circumstances, commencing the pleading cycle for the MCHI Amendment before the contents of MCHI's financial demonstration are established would be pointless.⁶

II. There Is No Merit To MCHI's Attempts To Withhold Its Business Agreements From Commission Or Public Scrutiny.

A. The Commission Has Ample Authority And Justification To Require MCHI To File Its Business Agreements.

In spite of MCHI's claims that the Commission's rules do not require it to submit the business agreements underlying the MCHI Amendment, the Commission has broad authority and good reason to apply such a requirement to MCHI. As TRW has observed, Section 25.143 of the rules requires each applicant for a space station system authorization in the MSS Above 1 GHz to demonstrate, "on the basis of documentation contained in its application," that it is financially

⁶ The MCHI Opposition is rife with claims that TRW and the other parties opposing the MCHI Request are merely attempting to impede the processing of the MCHI Amendment by means of "procedural delay." *See, e.g.*, MCHI Request at 2, n.4, 7, n.14, 9. For the record, TRW notes that it was MCHI that created the current controversy surrounding the MCHI Amendment by requesting confidential treatment for the documents underlying that amendment. TRW and the other MSS Above 1 GHz licensees previously indulged MCHI by meeting with its representatives and International Bureau staff on July 3, 1996 to discuss the scope of the MSS Above 1 GHz financial qualification requirements. At that meeting, the Bureau staff addressed the very issues on which MCHI later claimed to need guidance in its eleventh-hour "Request for Small Entity Guidance Pursuant to Section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996" (filed August 16, 1996). Although the Bureau summarily rejected that petition, MCHI has now resurrected the selfsame issues in the MCHI Request. TRW also notes that, on August 15, 1996, MCHI sought and was later granted a three-week extension of time in which to submit its financial qualifications demonstration — and this, on the heels of the Commission's deferral of action on MCHI's application for almost two years in order to allow MCHI to bring its application into compliance with the FCC's rules.

qualified to construct, launch and operate for one year all space stations in its proposed satellite system.⁷ As MCHI concedes, the documentation required of an applicant seeking to demonstrate that it is so qualified on the basis of external sources of funds is described only generally in the rules by means of a series of non-exclusive examples.⁸ The rules therefore give the Commission discretion to request what supporting materials it needs in order to verify an applicant's financial qualifications showing.

The Commission cannot responsibly accept on faith MCHI's claims that it has met the MSS Above 1 GHz financial qualifications standard; it plainly must review the business agreements that form the basis for MCHI's assertions. MCHI previously acknowledged as much by filing such agreements — without challenging the Commission's authority to require that they be filed — as part of its ultimately unsuccessful financial qualifications showing in November 1994. It is only now, apparently fearful of a second and presumably final rejection of its financial qualifications demonstration, that MCHI seeks to shield its business agreements from Commission scrutiny.

B. The Commission Should Not Entertain MCHI's Arguments That It Is Not Subject To The MSS Above 1 GHz Financial Qualifications Standard.

MCHI's attempt to use the instant proceeding to campaign once again against the Commission's financial qualifications standard for the MSS Above 1 GHz is inappropriate. The Commission has long since rejected MCHI's challenges to the MSS Above 1 GHz rules, and

⁷ TRW Motion at 6 (quoting 47 C.F.R. § 25.143(b)(3)).

⁸ See MCHI Opposition at 4; 47 C.F.R. §§ 25.140(d)(2)(i),(ii),(iii).

MCHI has taken its complaints regarding those rules to the United States Court of Appeals for the District of Columbia Circuit.⁹ Unless and until that court reverses or vacates the Commission's decisions establishing the financial rules, MCHI's application will remain subject to the same MSS Above 1 GHz financial qualifications standard that TRW and the other MSS Above 1 GHz licensees had to meet.

Nevertheless, TRW finds itself compelled to respond to MCHI's false assertion that the rationale for application of a strict financial standard to the MSS Above 1 GHz has somehow evaporated with the apparent failure by AMSC to prosecute its application for a system in that service.¹⁰ That rationale was not, as MCHI suggests, based on the existence of mutual exclusivity among the MSS Above 1 GHz applicants. Rather, the Commission imposed on the MSS Above 1 GHz a financial standard identical to the one it established for the domestic Fixed Satellite Service ("FSS") in order to maximize the prospects for the efficient use of the valuable and limited spectrum resource. As the Commission stated at the time:

The proposed Big LEO systems will cost between \$97 million and \$2 billion to implement. These are, by far, the most expensive satellite systems to date. 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 than the domestic fixed-satellite standard . . . could tie up spectrum for years . . . contrary to the public interest.¹¹

⁹ Mobile Communications Holdings, Inc. v. FCC, No. 94-1695 (D.C. Cir. filed November 8, 1996).

¹⁰ See MCHI Opposition at 2, n.15.

¹¹ 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

(continued...)

The prospective elimination of mutual exclusivity among the remaining MSS Above 1 GHz applicants does nothing to alleviate these valid concerns.

The warehousing of scarce spectrum by parties without the financial ability to construct, launch and operate their proposed satellite systems directly affects the rights of other parties that are prepared immediately to make use of the subject bands. In the case of the MSS Above 1 GHz, warehousing by MCHI of the bands designated for use by CDMA systems could result in system operators making capacity-robbing interference allowances for a satellite system that may never be built. The making of such allowances also would complicate intersystem coordination. These results would lead to an inefficient use of the spectrum resource, even if all of the spectrum designated for use by CDMA systems would be used to some extent by such systems.

MCHI's ongoing efforts to evade the Commission's strict financial qualifications standard at this late date are a powerful indicator that MCHI cannot satisfy that standard. It is therefore all the more important that the Commission require MCHI to file the business agreements underlying the MCHI Amendment and examine those agreements in detail.

¹¹(...continued)

Bands, 9 FCC Rcd 5936, 5949-50 (1994) (citations omitted). In support of its determination, the Commission cited numerous examples of satellite system licenses that had been declared null and void for failure of the licensees to begin implementation of their proposed systems within the required time period. See id. at n.35 (citing, inter alia, National Exchange Satellite, Inc., 7 FCC Rcd 1990 (Com. Car. Bur. 1992); Rainbow Satellite, Inc., Mimeo No. 2584 (Com. Car. Bur., released February 14, 1985); United States Satellite Systems, Inc., Mimeo No. 2583 (Com. Car. Bur., released February 14, 1985)).

C. MCHI's Efforts To Prevent Review Of Its Full Financial Qualifications Showing By The Public And The Other Parties To This Proceeding Must Fail.

Although MCHI recites several standard types of competitive harm that could allegedly result from public disclosure of its various business agreements, it makes no effort to distinguish among those agreements or the various portions of those agreements that might contain more or less proprietary information. MCHI's generalized allegations do not satisfy the Commission's requirements for confidentiality requests.¹² Moreover, MCHI fails to take into account in any way the legitimate interests of TRW, other parties in interest in this proceeding and the public at large in reviewing the full contents of MCHI's financial qualifications demonstration so that they may place before the Commission facts which it should consider in evaluating that demonstration. As TRW has previously observed, access by parties in interest and the general public to such information is implicit in the Commission's procedures for review of radio station applications under Section 309 of the Act.¹³

¹² See TRW Motion at 8-9.

¹³ See *id.* at 5. There is no merit to MCHI's assertion that "[n]one of MCHI's competitors has offered any reason . . . why it should be allowed unconstrained access to MCHI's proprietary business agreements." MCHI Opposition at 2. It is well established that

“[t]here is no burden on a party opposing a request for confidentiality to demonstrate its need for . . . financial information, particularly when the Commission's rules require an applicant to submit such data in the first place. Furthermore, placing a burden on a party requesting disclosure is particularly unfair given that the party may not be in a position to make a showing until it knows the contents of the information it is seeking access to.”

(continued...)

If the Commission should find that MCHI's business agreements merit confidential treatment, TRW urges the Commission to issue a protective order that will grant TRW and other parties in interest adequate opportunity to review and comment on those agreements.¹⁴ TRW once again requests that the Commission use as a model the protective order issued for certain confidential information previously filed by Motorola in connection with Motorola's then-pending MSS Above 1 GHz application.¹⁵ This order was specifically designed to protect confidential information associated with an MSS Above 1 GHz application, and was supported and followed by MCHI (then Ellipsat Corporation), TRW, Loral/Qualcomm Satellite Services, Inc., Motorola and Constellation Communications, Inc. Any attempt to apply the more generic model protective order suggested by MCHI is likely to result in further litigation among the parties to this proceeding.

¹³(...continued)

AT&T Corporation, 11 FCC Rcd 2425, 2427 (Int'l Bur. 1996) (denying confidentiality requests relating to financial qualifications demonstrations by applicants for authority to establish Ka-Band satellite systems).

¹⁴ The Commission must not place MCHI's vague and unsupported doubts as to the Commission's ability to police such a protective order above the rights of the MSS Above 1 GHz licensees and applicants to review and comment on MCHI's business agreements. See MCHI Opposition at n.16. The Commission has substantial experience in the use of such orders, some of which it obtained in the MSS Above 1 GHz licensing proceedings. See infra n. 15.

¹⁵ See TRW Motion at 9-10 (citing Ellipsat Corp., 7 FCC Rcd 3594 (Chief Engineer, 1992)).

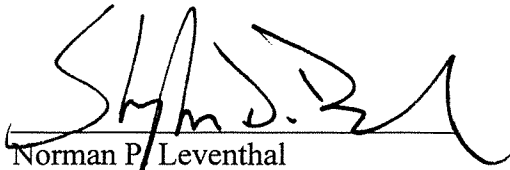
III. Conclusion

For the foregoing reasons, TRW urges the Commission to postpone acceptance for filing of the MCHI Amendment, to require MCHI to file the business agreements underlying that amendment, and to make those agreements available for inspection as requested herein.

Respectfully submitted,

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October 16, 1996

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I, Bernice Duckett, do hereby certify that true and correct copies of the foregoing "Reply to Opposition of MCHI" were mailed, first-class postage prepaid, this 16th day of October, 1996 to the following:

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