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

In re Applications of	)	
	)	
CONSTELLATION COMMUNICATIONS, INC.	)	File Nos. 9-SAT-LA-95
	)	10-SAT-AMEND-95
	)	
LORAL/QUALCOMM PARTNERSHIP, L.P.	)	File Nos. 13-SAT-LA-95
	)	14-SAT-AMEND-95
	)	
MOTOROLA SATELLITE COMMUNICATIONS, INC.	)	File Nos. 15-SAT-LA-95
	)	16-SAT-AMEND-95
	)	
TRW INC.	)	File Nos. 17-SAT-LA-95
	)	18-SAT-AMEND-95
	)	
For Authority to Construct, Launch, and Operate a Low-Earth Orbit Mobile Satellite System in the 1610-1626.5 MHz and 2483.5-2500 MHz Bands	)	

CONSOLIDATED REPLY

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January 13, 1995

SUMMARY

The January 3, 1995 Oppositions of Constellation Communications, Inc., Loral/Qualcomm Partnership, L.P., Motorola Satellite Communications, Inc., and TRW Inc. fail to address serious deficiencies in the applicants' financial and legal showings. While the failure of each applicant to meet the Commission's financial test requires deferral of its application, there are additional legal deficiencies, bearing in some cases on the applicants' character qualifications, that require dismissal or denial of the application.

None of the three public company applicants --- Motorola, TRW, or LQP --- has met the Commission's financial standard which requires applicants who seek to qualify on the basis of internal assets to prove: (1) reliance on internal funding to cover the costs of construction, launch and first-year operation; (2) a commitment that the company is prepared to expend the necessary funds; and (3) sufficient current assets and operating income to cover the requisite costs. Although Motorola, LQP, and TRW have submitted adequate balance sheets, they have failed to meet the two additional rule requirements.

Each has publicly disavowed an intention to rely on internal funding, first through SEC disclosures or company press releases, and now in their Oppositions. TRW, for example, states that the question of whether it will rely upon internal funding "need not be answered." Where a company seeks to qualify on the basis of internal assets, a prerequisite is that the company will rely on internal funds even if only to cover a shortfall. Obviously, a company's financial plans may change and there is no guarantee that fund-raising will ultimately proceed as described in an application. However, the Commission's financial standard and associated information

requirements presume a good faith obligation on the applicant's part to apprise the Commission of its financial plan. The Commission certainly did not intend to invite deception.

Nor have the public company applicants provided evidence of the commitment that is required to meet the requisite standard. None of the companies has made a bona fide commitment to fund the proposed system from internal assets. In their Oppositions, each of these three applicants concedes that it intends to go to the marketplace for funding. They characterize as "overly strict" MCHI's insistence on candid disclosure of an applicant's financial plans and on a meaningful commitment of internal funds if that route is selected. Far from being overly strict, financial reality and Commission interpretation require no less. Indeed, the public company applicants have failed to explain how the "paper" showing they advocate can be considered a "strict" test. Nor do they explain how a balance sheet, supported only by an ambiguous, pro forma letter purporting to express commitment, can be considered "exactly equivalent" (in the Commission's own words) to the showing of irrevocably committed external financing that other companies must make.

LQP, Motorola, and TRW seek to excuse the admitted inconsistencies in their financial disclosures to the FCC and other public statements (to the SEC and in company press releases) by arguing that the mere submission of a balance sheet by a large company is sufficient, regardless of the company's financial plans. This is hardly the case. Even assuming that a large balance sheet facilitates fund-raising, the financeability of a project will ultimately depend on the company's willingness to commit its assets to the project and the strength of its business plan. Where evidence has been introduced questioning the applicant's internal funding commitment -- including the applicant's own public statements to the contrary in SEC disclosures and/or in

company press releases -- then the burden rests on the applicant to demonstrate that it is committed to providing financial support for the project (even if only to cover a shortfall). If it is unable to do so, it must introduce evidence of external funding that is committed to the project. None of the three public companies has met this standard.

While Motorola, TRW, and LQP purport to insist on a "strict" domsat standard, the interpretation they advocate is far from strict and provides no assurance either that funds have been committed or that the requisite funding can be raised. It is no excuse to argue, as LQP does, that truthful disclosure of financial plans is not required by the FCC (as if the contrary is justified!) Nor can Motorola's ambiguous management letter -- which makes no reference to the indisputable fact that Iridium, Inc. will fund the system (not Motorola!) and which excludes launch costs (despite Motorola's surprising argument in the Opposition that "construction" means "launch") -- be deemed sufficient. TRW implicitly acknowledges (consistent with prior public statements that only up to 15% of the system will be funded by TRW) that its management letter has no probative value when it states that the question of whether TRW will rely upon internal funding "has nothing to do with the applicable standard and... need not be answered."

Constellation's application must be dismissed for the unreported major ownership changes that have occurred. Contrary to Constellation's claims, the evidence suggests that more than 50% of the company's stock is now in new hands. Constellation's failure to provide any additional details about its ownership structure in the Opposition or to answer the bona fide questions that have been raised suggests that it, in fact, has something to hide. While there is sufficient undisputed evidence to conclude that an unreported transfer of control has occurred and that the transfer was not incidental to a larger, unrelated transaction, at a minimum, the

application should be designated for a hearing to determine the relevant facts relating to Constellation's ownership.

Apart from the ownership change (which requires denial of Constellation's application), its management letters are legally defective and do not meet the requisite test of financial qualifications. Constellation has failed to address the key issue of Bell Atlantic's legal incapacity to invest in Constellation, in addition to the non-committal language of both the Bell Atlantic and E-Systems letters which express only a general intent to provide support. Unfortunately, Constellation's application must be deferred even if the Commission should decide to overlook the major unreported ownership changes that have occurred.

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CONSOLIDATED REPLY

Mobile Communications Holdings, Inc. ("MCHI"), by its attorneys and pursuant to Commission Rule 1.45, submits this Consolidated Reply to the January 3, 1995 Oppositions with respect to MCHI's December 22, 1994 "Consolidated Petition to Deny" the above-captioned applications.[1/] In their Oppositions, Constellation, LQP, Motorola, and TRW have failed to assuage or even address issues with respect to the lack of candor and deficient financial and legal

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1/ See "Opposition" of Constellation Communications, Inc. ("Constellation"); "Consolidated Opposition to Petition to Deny and Reply Comments of TRW Inc."; "Consolidated Opposition and Reply Comments" of Motorola Satellite Communications Inc. ("Motorola"); "Consolidated Response to Petitions and Comments" of Loral/Qualcomm Partnership, L.P. ("LQP").

showings that characterize these applications. For reasons detailed fully in MCHI's Consolidated Petition and below, these deficiencies require denial, deferral, or designation of the applications for hearing as appropriate.

I. COMMISSION ACTION REQUESTED

The Commission must defer the applications of LQP, Motorola, TRW, and Constellation, as amended on November 16, 1994, for failure to demonstrate financial qualifications. Nothing in the Oppositions submitted January 3, 1995 alters this conclusion. In fact, the Oppositions confirm that all four companies have (1) failed to make a bona fide commitment of internal funding to their respective satellite systems; and (2) failed to submit evidence of committed external funds that corrects this deficiency. Character issues have also been raised by the conduct of the three publicly owned applicants, who have been less than candid with the Commission as to their financial plans, and by Constellation's violation of the Commission's cut-off rules and Rule 1.65 reporting obligations based on the major unreported ownership changes that have occurred. This misconduct requires denial of the four applications.[2/]

[2/] At a minimum, a hearing must be conducted, under Section 309 of the Communications Act, where a substantial and material question of fact has been raised. In making this initial determination, the Commission must proceed "on the assumption that the specific facts set forth [in the petition] are true." Citizens for Jazz on WRVR v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1985). See also Astroline Com. Co. Ltd. Partnership v. FCC, 857 F.2d 1556, 1561 (D.C. Cir. 1988). As the Court of Appeals has explained the standard, the Commission must hold an evidentiary hearing to "look into the existence of a fire when it is shown a good deal of smoke" not only "when it is shown the existence of a fire." Id. at 1562.

II. MOTOROLA, LQP, AND TRW HAVE FAILED TO CORRECT THEIR DEFICIENT FINANCIAL SHOWINGS AND MUST BE DEFERRED

A. The Commission Should Not Allow The Public Company Applicants To Redefine The Applicable Financial Standard

Commission Rule 25.140(d)(1) allows satellite applicants to demonstrate financial qualifications by providing evidence that the company (1) is relying on internal funding to cover the estimated construction, launch and first-year operation costs; (2) has sufficient current assets and operating income to cover the costs; and (3) is committed to expend the necessary funds. Although the rule thus requires reliance, assets, and commitment, the three public company applicants, Motorola, LQP, and TRW, have refused to meet two of these three conditions, arguing instead that they need show only that the company has sufficient assets. This interpretation is contrary to the plain meaning of the rule. The Commission must not allow the public company applicants to redefine the standard as they attempt to do in their Oppositions.

In their respective Oppositions, LQP, Motorola, and TRW admit that MCHI has accurately characterized their respective financial plans, i.e., that all three companies intend to go to the marketplace for funding. Each of the three companies concedes that it has no intention whatsoever of funding the proposed system from internal assets and that it is not required to prove that the company is relying on internal funding. TRW contends, for example, that the question of whether it is relying on internal funds "need not be answered."[3/] In their Oppositions, the three companies take the position that their intentions, public statements, and actions within the financial community are irrelevant. To the contrary, they argue that the Commission need look no farther than the applicant's balance sheet together with management letters which make ambiguous statements regarding commitment. Under this novel

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3/ TRW Consolidated Opposition at 8.

interpretation of Rule 25.140, a large, publicly-owned company need only submit a balance sheet to qualify, even if the company has no intention of funding the system from internal assets and declines to commit the requisite funds (even if necessary to fund a shortfall and even allowing for changes in market condition.) [4/]

This interpretation is contrary to financial reality and Commission precedent. The only financial institution to participate in this proceeding, Barclays de Zoete Wedd Limited ("BZW"), has provided its expert opinion that "given the high projected costs of some of the competing Big LEO systems," these costs are "too large to be supported by the balance sheet of any single applicant." MCHI Consolidated Opposition, January 3, 1995, at Exh. 4. The magnitude of the investment required just for the space segment of several of the Big LEO systems, which range from $3.759 billion for Motorola, to $1.554 billion for LQP, and $1.884 billion for TRW,[5/] distinguishes this proceeding from the typical domestic or international satellite proceeding where it might be feasible to rely on the applicant's internal assets for funding purposes. In this case, however, none of the three applicants claims that the system will be funded internally and

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[4/] See, e.g., TRW Opposition at 9 ("whether TRW spends its own money, uses financing from joint ventures or strategic partners, or borrows from financial institutions, is irrelevant to this standard.") See also Motorola Consolidated Opposition at 5 ("the Commission's rules specifically provide that applicants can fully meet the financial qualification standard by demonstrating sufficient internal assets even if the applicant intends to use external financing.") LQP justifies its inadequate showing by noting the parallel actions of other applicants. LQP Consolidated Response at 7, n.6 ("both Motorola and TRW also relied upon a commitment from management of their parent corporations for their financial showings, and, at the same time, are stating publicly that they plan to raise funds for their respective projects through the financial markets.")

[5/] None of these figures, of course, includes the equally substantial cost of the associated ground segment.

MCHI has shown, through objective evidence, that none of the companies is, in fact, relying on internal assets.

Nor can the interpretation offered by Motorola, LQP, and TRW be reconciled with the language of Rule 25.140(d)(1). This rule allows an applicant to demonstrate current financial ability on the basis of sufficient current assets that are committed to the project. That this is the clear meaning of Rule 25.140(d)(1) is confirmed by the rule itself. Rule 25.140(d)(1) requires "evidence of a commitment to the proposed satellite program by management of the corporate parent upon whom [the applicant] is relying for financial resources." The phrase "relying upon financial resources" presumes a good faith expectation that the parent or applicant will, in fact, fund the project. Thus, contrary to the wishful thinking of Motorola, LQP, and TRW, submission of a balance sheet (even one which reflects an appropriately sizable amount of assets) is relevant evidence only if (1) the applicant relies on internal assets to demonstrate financial qualifications, even if only on a fall-back basis; and (2) those funds are committed to the project. This is the meaning of "exactly equivalent" which the FCC has assured the D.C. Circuit is characteristic of the two means of demonstrating financial qualification: reliance on internal assets or outside debt and equity funding.[6/] Where the applicant purporting to rely on internal

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[6/] See Opposition of the Federal Communications Commission to Petitioner's Emergency Motion for a Stay Pending Review at 14, Mobile Communications Holdings, Inc. v. Federal Communications Commission, No. 94-1695 (D.C. Cir. Nov. 14, 1994). The Commission stated as follows:

> The Commission has gone to great lengths to require that all applicants make an irrevocable commitment to fund their propsed systems. Applicants relying on internal financing must "commit that . . . [they are] prepared to spend the necessary funds" to construct the system. Final Order p. 32. That is exactly equivalent to the irrevocable financing required for companies who require external

(Footnote continued on next page.)

assets fails to meet all three conditions, it must qualify under Rule 25.140(d)(2), regardless of the size of its balance sheet.

TRW and LQP argue correctly that Commission rules do not require that sufficient funds be set aside or ear marked for the project. See, e.g., TRW Consolidated Opposition at 6. MCHI has never suggested otherwise. Rather, as MCHI contended in its Consolidated Petition, an "exactly equivalent" standard requires, at a minimum, that an applicant be forthright about its financial plan and that it evidence a level of commitment to the project that is "exactly equivalent" to the commitment required by companies relying on external funding. As the Commission has stated, "consistent with our approach to credit arrangements provided by outside sources, management of the corporation providing the funding must commit that absent a material charge in circumstances, it is prepared to expend the necessary funds."[7/]

Although TRW criticizes MCHI for seeking to impose an "overly strict standard," [8/] MCHI understood the standard to be far more serious and "real" than apparently interpreted by the other companies. MCHI negotiated and submitted external commitments in addition to internal funding. While the management letters submitted by MCHI, including those from Israel Aircraft Industries, Harris, Westinghouse, and others, standing alone evidence the availability of

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6/ (Footnote continued from previous page.)

financing to fund a satellite system.

Id. (emphasis supplied)

7/ Licensing Policies and Procedures, Satellite Communications, 59 Fed. Reg. 53294, 53299 (Oct. 21, 1994).

8/ TRW Consolidated Opposition at i.

internal funding well in excess of the amount required,[9/] MCHI has shown that sufficient external funding is also committed to the project. Moreover, MCHI is the only applicant to provide any evidence of the project's financeability through evidence of external funds committed to the project and the opinion of a highly-respected international investment bank.[10/] None of the other companies has done as much, even though claiming to be able to raise billions of dollars solely on the basis of their balance sheets.[11/]

Even assuming that a substantial balance sheet facilitates fund-raising, this is true only if the company is willing to put its assets "on the line." No matter how large the company, the ability to raise money is based on the intrinsic value of the business plan and the company's own commitment to the project. A presumption of financeability does not exist merely on the basis of the applicant's existing assets, particularly where the applicant has publicly disclaimed any intention to commit its internal assets to the project or to sharply limit that commitment to a fraction of the total. Where the facts demonstrate that there is no commitment of internal funds, then the burden necessarily shifts to the party relying on a balance sheet test to demonstrate that the internal funds will be available (even if only to cover a shortfall) or that the project can be financed externally. MCHI has demonstrated through the applicants' public statements, to the SEC and in company press releases, and through the expert opinion of a world-renowned investment bank (Barclays de Zoete Wedd Limited), that no such commitment or reliance on internal assets exists in this case. LQP, Motorola, and TRW subsequently admitted, in their

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9/ See, e.g., MCHI Consolidated Opposition at Exh. 2.

10/ Id., at Exh. 4.

11/ It is noteworthy that, despite the alleged power of their balance sheets, Motorola, LQP and TRW are either unable or unwilling to submit supporting letters from their respective financial advisors or institutions.

respective Commission filings, that no such commitment has been made. The Commission cannot overlook this evidence and the factual questions that it raises about the qualifications of these three applicants.

In their Oppositions filed January 3, 1995, Motorola, LQP, and TRW assume that they can unilaterally dictate the financial standard that best serves their interests. There can be no other explanation for LQP's bold statement that evidence of the company's true financial plans (i.e., to fund the Globalstar system from external debt and/or equity sources) is irrelevant to the Commission process;[12/] and for Motorola's surprising claim, among others, that the word "construction" as used in its management letter clearly means "construction and launch."[13/] Equally troublesome, Motorola has yet to demonstrate that Iridium has the funds or commitment to provide the financial resources for the project. As previously established in MCHI's Consolidated Petition (through excerpts from the Motorola-Iridium contract), Iridium, not Motorola, is contractually obligated to fund the system development. Nothing in Motorola's Opposition contradicts this fact.

In an effort to justify its conduct, LQP argues that SEC disclosure requirements and FCC financial qualification requirements are "based upon different purposes and standards." This

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12/ See LQP Consolidated Response at 8-10.

13/ See Motorola Consolidated Opposition, Declaration of Carl F. Koenemann, Executive Vice President and Chief Financial Officer of Motorola, Inc. at 2. It is noteworthy that Mr. Koenemann does **not** state that Motorola is committed to meeting the requisite costs, only that Motorola's prior language is "clear." Neither Mr. Koenemann, nor Motorola's attorneys, clarifies the peculiar formulation of the management letter (i.e., "that the parent corporation is fully committed to meeting the construction costs and operating expenses of the subsidiary") given the questions that have been raised as to the Motorola-Iridium contract under which Iridium, not Motorola, is contractually obligated to pay the costs of system construction, launch and operation.

statement, even if true, is irrelevant. MCHI did not argue the equivalence of SEC and FCC standards. MCHI demonstrated that the issue is lack of candor. LQP's financial plan as set forth in its FCC application and its claims to rely upon internal assets for funding purposes could not possibly be true, because the applicant's true financial plans and its intention to rely upon external funding were set forth in the SEC disclosures. LQP has conceded this, but seeks to excuse its lack of candor on the grounds that a true statement of its financial plans is not required by the FCC. Surely, the financial standard cannot be interpreted to allow large, publicly-held companies to manipulate Commission processes and requirements in this self-serving fashion.[14/] It cannot be true that the FCC is inviting deception.

[14/] This case is clearly distinguishable from the MMM Holdings, Inc. decision cited by LQP. MMM Holdings, Inc., 4 FCC Rcd 6838, aff'd, 4 FCC Rcd 8243 (1989). There, in the context of a corporate takeover of LIN Broadcasting by McCaw, LIN pointed to McCaw's SEC disclosures about post-acquisition indebtedness and potential losses to argue that future debt levels would affect service to the public. The SEC information was not submitted, as here, to demonstrate an inconsistency between the applicant's FCC representations (as to financing) and its SEC disclosures on the same point. Even in the MMM case, the Commission considered the service-related risk-factors noted in the SEC prospectus but concluded that these were outweighed by evidence of McCaw's service record.

In contrast, MCHI has cited the applicants' SEC disclosures (or lack of SEC disclosures) for an entirely different point, i.e., that a public company is presumed to have accurately stated its financial condition and plans to the SEC because of the severe penalties imposed for material misstatements and/or omissions; and, an inconsistency between the applicant's SEC disclosures and FCC representations on the exact same point makes a prima facie case that the applicant has not been candid with one of the two agencies. To put it another way, assuming the truthfulness of the applicants' SEC disclosures, the applicants have not met the financial standard set forth in Rule 25.140(d)(1) and must be judged under 25.140(d)(2).

It is interesting to note that under the less strict "reasonable assurance" standard applied in MMM Holdings, McCaw provided evidence that it could obtain the needed funds based on (1) $1 billion cash from a recent sale of stock to British Telecom that was earmarked for the LIN acquisition; (2) existing and new credit facilities from Morgan Guaranty; (3) public or private offerings to be managed by Morgan Stanley; and (4) a letter from Drexel Burnham stating that it could arrange $2.5 billing in financing by public or private placement of debt or equity. This far exceeds the commitment or showings made by any of the publicly held ap-

(Footnote continued on next page.)

In sum, the Commission cannot allow the public company applicants to redefine the applicable financial standard, as they would do, by eliminating two of the three requirements set forth in Rule 25.140(d)(1), namely, that companies relying on internal assets must show, as a threshold matter, that they are in fact relying on internal assets and that they are committed to expending the necessary funds. None of the three applicants, Motorola, LQP, nor TRW, has met this test and their applications must, therefore, be deferred.

B. The Management Letters Submitted By The Public Company Applicants Are Wholly Inadequate

In its Consolidated Petition, MCHI proved that the management letters initially submitted by Motorola, TRW, and LQP did not evidence a commitment that the companies are prepared to expend the necessary funds, particularly when read in conjunction with the contradictory public statements each has made about its financial plans. Although supplemental letters and declarations have been provided with the Oppositions purporting to address these deficiencies, these materials do not provide any new evidence of commitment and merely underscore the lack of any real commitment. The uncorrected deficiencies include the following.

Motorola. In its ambiguously worded letter and subsequent declaration, Motorola has (a) failed to provide a management commitment to cover the estimated construction, launch and operation costs of the Iridium system or to submit evidence that external funding, which Iridium, Inc. (not Motorola) is obligated to provide, is irrevocably committed to the project; (b) failed to include a reference to launch costs in its management letter and now contends that "construction"

14/ (Footnote continued from previous page.)

plicants under the supposedly "strict" domsat standard in this proceeding.

means "construction and launch"; and (c) failed to explain adequately the relationship between Motorola (the applicant) and Iridium, Inc. and to address legitimate concerns that Iridium, Inc., which is contractually obligated to fund the entire system costs, has stepped into the applicant's shoes.

The existence of a contract with Iridium, Inc. under which Iridium, not Motorola, is obligated to pay (to Motorola!) the costs of system construction, launch and operation, makes Motorola's management letter meaningless on the issue of financial qualifications, unless Iridium is shown to have adequate funds that are committed to the project. Motorola's commitment to pay the ill-defined and potentially non-existent (construction and operation) costs of the subsidiary applicant is irrelevant. Not surprisingly, Motorola fails to address this critical issue in its submission or to commit to cover the associated launch costs, merely quoting from the oblique language of its previously submitted letter.

Loral. Although deleting the alternative language in its management letter (i.e., that Loral will assist LQP to raise the necessary funds), LQP has shown no evidence that internal Loral funds are actually committed to the Globalstar project; and while admitting that an inconsistency exists between its statements to the FCC and contradictory statements to the SEC about its financial plans, LQP attempts lamely to explain this inconsistency on the grounds that the FCC and SEC standards are "different."

The revision of the Loral management letter, to delete the second clause (i.e., that it will assist LQP to raise the necessary funds), makes LQP's conduct even more questionable. As MCHI previously pointed out, Loral has made no real world commitment of funds to the project.

To the contrary, it has expressly disclaimed any such commitment in its recently filed SEC prospectus. The contradiction between the Loral letter of "commitment" and the flat disclaimer in the SEC registration statement needs a more strenuous and artful effort at reconciliation than Loral has yet provided.

TRW. TRW has admitted publicly that the Odyssey system will not be funded from internal assets and fails, nonetheless, to show that any external funding has been committed to the project. No additional evidence of TRW's commitment is provided in the Opposition. TRW instead contends that the question of whether TRW is relying on internal funds "need not be answered."[15/]

Given undisputed evidence that the three public companies do not intend to rely on internal assets, and the absence of evidence that external funds have been committed to the respective projects, deferral of these applications is warranted. An evidentiary hearing is also required to develop disputed facts relating to the applicants' qualifications, including their character qualifications in light of the possible misrepresentations and lack of candor that have occurred.[16/]

15/ TRW Consolidated Opposition at 8. TRW criticizes LQP for failing to say that "it will spend the funds necessary to [fund] the construction, launch, and first year operations of Globalstar, if LQP does not or cannot raise the necessary funds itself." TRW Petition to Deny at 10-11. This criticism is equally applicable to the letters submitted by TRW and Motorola.

16/ See Character Qualifications in Broadcast Licensing, 59 Rad. Reg. 2d (P & F) 801, 808 (1986). ("The essential affirmative character traits which are relevant to the Commission's statutory objectives are ... honesty and responsibility... a license grant would be in the public interest if the applicant can be expected to be honest in its dealings with the Commission.") The Commission has broadly applied these character standards to other services. See, e.g., MCI Telecommunications Corp., 64 Rad. Reg. 2d (P&F) 672, 677 (1988).

III. CONSTELLATION HAS FAILED TO ADDRESS SERIOUS DEFICIENCIES IN ITS FINANCIAL AND LEGAL QUALIFICATION SHOWINGS; ITS APPLICATION MUST THEREFORE BE DENIED

In its Opposition, Constellation has also failed to address the serious factual questions raised by MCHI and others about its legal and financial qualifications to be a Commission licensee given (1) the absence of a management commitment to expend the necessary funds to support the proposed satellite project; and (2) the major unreported ownership changes that have occurred in the applicant.

MCHI and others pointed out the inadequacy of the management letters supplied by Constellation. Nothing in Constellation's Opposition clarifies or restates the Bell Atlantic or E-Systems letters in stronger terms. While the Commission has never required a particular verbal formulation to evidence a management commitment, Bell Atlantic's and E-System's "intent to provide support" falls far short of the management commitment that is required.[17/] Surprisingly, the affidavit of E-Systems submitted with Constellation's Opposition focuses on the market conditions language, while saying nothing whatsoever about the far more troublesome language of intent.

An intention subject to approval by the Board of Directors and by the D.C. Circuit, as in Bell Atlantic's case, is far removed from language of commitment. Despite the questions that have been raised about the legality of Bell Atlantic's participation in Constellation under the Modified Final Judgment, Constellation makes passing reference to this issue in a brief footnote

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[17/] Although Constellation tries to discredit MCHI's showing, the fact is that MCHI's financial showing is far superior to that of Constellation. Compare, for example, the letter submitted by Israel Aircraft Industries on MCHI's behalf, which commits that IAI is "prepared to expend the necessary funds to support the ELLIPSO™ project" based on its confidence in the underlying business plan and IAI's already successful efforts to raise more than $200 million in funding for the program. See MCHI Consolidated Opposition at Exh. 2.

in which it concedes that the lawfulness of Bell Atlantic's participation is a matter for resolution by the courts.[18/] The Commission must hold, as a matter of law, that a company's balance sheet cannot be relied upon to demonstrate financial qualifications where the company is legally prohibited from investing in the applicant or participating in its operations. Disregarding the Bell Atlantic letter, as the Commission must, E-Systems clearly lacks sufficient assets standing alone to fund the project even if its non-committal language of intention is found acceptable.

Nor does Constellation satisfactorily address the concerns raised about its major unreported ownership changes. Constellation argues in its defense that 50.18% of the stock is held by the same group of individuals who held stock in June 1991. It is impossible to confirm the accuracy of this statement, since Constellation only discloses three shareholders and does not identify the 29 other shareholders that ostensibly hold less than 10% each of the applicant's stock. It is noteworthy that the Declaration of Bruce Kraselsky appended to the Opposition states that the 50.18% (alleged to be in the same hands as in June 1991) includes the stock held by Microsat and DSI which Constellation elsewhere concedes is owned by a new entity (CTA). Thus, while technically in the same corporate name, the underlying stock is controlled by an entirely new party. It is therefore impossible to determine the true facts with respect to Constellation's ownership without further information.[19/]

Although Constellation takes issue with MCHI's reference to the WHDH proceeding, this case indicates, as do numerous other Commission decisions, that a transfer of control or

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[18/] Constellation Opposition at 20, n.36.

[19/] Given Constellation's failure to aggregate the Microsat and DSI stock for purposes of calculation, it is possible that there may be similar relationships or affiliations between other Constellation stockholders that are relevant to the control issue.

major ownership change will be determined on the particular facts involved and that a character issue is properly raised where an unreported change of ownership occurs. See, e.g., Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert denied, 383 U.S. 967 (1966) ("the passage of control need not be legal control in a formal sense, but may consist of actual control by virtue of the special circumstances presented.") Moreover, the general principle for which WHDH was cited, i.e., that de jure control transfers when 50% of the stock passes out of the hands of the original shareholders, is unaffected by the subsequent case history. The later decision merely clarified that this general principle does not apply to a publicly held company unless there is privity between stockholders. "The case of publicly traded, widely held stock, in which the arithmetical accumulation of discretely owned shares by new stockholders exceeds 50 percent must obviously be treated differently from that of a small corporation with relatively few shares closely held." WHDH, Inc., 16 F.C.C. 2d 29, 222 (1966). [20/]

It is axiomatic that a major change may occur even where less than 50% of the stock changes hands if the facts indicate that actual control has shifted. See Lorain, supra. Even assuming arguendo that 50.18% of Constellation's stock has remained in the same hands, where two large companies, E-Systems and Bell Atlantic, have the overwhelming majority of stock and control of the Board of Directors (at least 5 out of 9 seats), it is clear that a de facto change of control, if not a de jure transfer, has occurred.[21/] Indeed, Constellation cannot have it both ways;

[20/] In WHDH, there were 1,470 stockholders and "hundreds of stock transactions," in contrast to the closely-held Constellation.

[21/] In reality, the control of E-Systems and Bell Atlantic is even greater than the five official Board seats reflects because two of the directors, Bruce Kraselsky and Ron Lepkowski, are employees subject to direction of the controlling stockholders.

it characterizes E-Systems and Bell Atlantic as "parents" elsewhere in its application,[22/] while simultaneously claiming that the companies are non-controlling for purposes of defending the ownership changes that have occurred.

Constellation also fails to provide any evidence justifying the transfer which outweighs the policies underlying the cut-off rules (and the adverse impact on the other applicants if a new entity were permitted to step into Constellation's shoes at this late date.) Nor has Constellation provided any evidence demonstrating that the stock transactions were effected for an incidental, unrelated purpose, and not for the purpose of acquiring an interest in the applicant. In this regard, it is noteworthy that when a transaction is claimed to be incidental to a sale of other facilities or merger of interests, Commission Rule 25.143(g) requires submission of an exhibit that (1) discloses complete details as to the sale of facilities or merger of interests; (2) segregates clearly by an itemized accounting the amount of consideration involved in the sale of facilities or merger of interests; and (3) demonstrates that the amount of consideration assignable to the facilities or business interests involved represents their fair market value at the time of the transaction. Not only has Constellation failed to meet these informational requirements, but, on the facts available, the transactions were clearly effected for the purpose of stepping into the applicant's shoes and not for an incidental purpose.[23/]

[22/] See Constellation Amendment at 34.

[23/] Constellation does not provide any bona fide justification for E-Systems' expanded role, merely attacking the concerns of MCHI and other parties as "ridiculous since E-Systems does not control or have any interest in taking control over Constellation." Constellation Opposition at 26, n.41. This unsupported and conclusory statement fails to address the central issue. E-Systems' intention to take control is irrelevant; the facts establish that a transfer of control has, in fact, occurred.

In short, while there is a sufficient basis for the Commission to dismiss Constellation's application for violation of the cut-off rules and Rule 1.65 obligations, if the Commission should overlook these defects, the application must still be deferred for failure to meet the financial standard.

IV. CONCLUSION

For reasons set forth above and in its Consolidated Petition to Deny, the Commission must defer the applications of Motorola, LQP, TRW and Constellation for failure to demonstrate their financial qualifications. In addition, serious questions have been raised with respect to the legal qualifications of these applicants in light of the rule violations and lack of candor that have occurred that require denial of their applications or designation for hearing as appropriate.

Respectfully submitted,

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January 13, 1995

CERTIFICATE OF SERVICE

I, Felecia G. DeLoatch do hereby certify that a true and correct copy of the foregoing document was sent by first-class mail, postage prepaid, or hand-delivered, on this 13th day of January, 1995, to the following persons:

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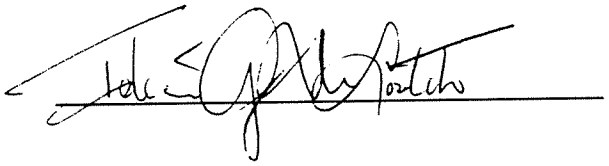

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