

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

DA 95-129

In re Application of)	
)	
Constellation Communications, Inc.)	File Nos. 17-DSS-P-91(48)
)	CSS-91-013
)	9-SAT-LA-95
for Authority to Construct, Launch, and Operate a)	10-SAT-AMEND-95
Low Earth Orbit Satellite System in the 1610-)	
1626.5 MHz/2483.5-2500 MHz Band)	
)	

ORDER

Adopted: January 31, 1995

Released: January 31, 1995

By the Chief, International Bureau:

I. Introduction

1. Constellation Communications, Inc. ("Constellation") has filed an application to construct, launch, and operate a low-Earth orbit ("LEO") mobile satellite system in the 1.6/2.4 GHz frequency bands ("Big LEO" service).¹ On November 16, 1994, Constellation amended its application in light of the rules and policies adopted by the Commission to govern "Big LEO" service.² By Public Notice, Report No. DS-1481 (November 21, 1994), we sought comment on Constellation's amended application. In response, Loral/Qualcomm Partnership, L.P. ("LQP"), Mobile Communications Holdings, Inc. ("MCHI"), TRW, Inc. ("TRW"), and Motorola Satellite Communications, Inc. ("Motorola"), each filed petitions to deny Constellation's application. AMSC Subsidiary Corporation ("AMSC") filed a "Petition to Defer Processing" of the

¹Constellation first filed its application on June 3, 1991. AMSC Subsidiary Corporation, MCHI and Motorola filed petitions to deny. The Communications Satellite Corporation and TRW, Inc. filed comments. Constellation filed a responsive pleading. The matters raised in those petitions and comments have, except as addressed in this Order, been separately addressed through the adoption of service rules for Big LEO systems, or have otherwise been rendered moot through amendments to Constellation's application.

²See In re Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 F.C.C. Rcd. 4936 (1994)(the "Big LEO Order").

Application, relief which Motorola also requests in the alternative.³ Constellation filed a consolidated opposition, to which AMSC, TRW, and MCHI replied.

2. In this Order, we conclude that Constellation is not financially qualified at this time, and that further consideration of its application should therefore be deferred until January of 1996. We also reject the other applicants' assertions that changes in Constellation's ownership structure and feeder link request require us to treat Constellation's application as newly filed and dismiss it rather than deferring consideration to January 1996.

3. Constellation is a Delaware Corporation. CTA Launch Services, Inc., owns 18.35% of its voting stock, and E-Systems, Inc., owns 30.7% of its voting stock. The remaining voting stock is owned by 29 entities or individuals, including Bell Atlantic, which holds an 8% interest.

4. Constellation proposes to construct a system consisting of 46 satellites. Eleven satellites would be deployed, in two launches, in circular equatorial orbit at an altitude of 2,000 kilometers. The remaining 35 operational satellites would be deployed, five per orbit, in seven circular orbits inclined 62 degrees and at an altitude of 2,000 kilometers. Each satellite would be designed with 32 spot beams, and a minimum capacity of more than 1,000 voice circuits per satellite, using Code Division Multiple Access ("CDMA") technology.

II. Discussion

A. Constellation's Qualifications at This Time

5. Financial Qualifications. In the Big LEO Order, the Commission noted that the enormous costs involved in constructing and launching a satellite system have historically made it particularly important that applicants for satellite licenses to use spectrum which is in high demand demonstrate, in advance, the financial ability to proceed with construction of their systems. It noted its repeated experience that licensees without sufficient available resources spend a significant amount of time attempting to raise necessary funding, and that those attempts often end unsuccessfully.⁴

6. The Commission observed that, "where a grant to an under-financed applicant may preclude a fully capitalized applicant from implementing its plans, and service to the public may be consequently delayed," a "stringent financial showing" is warranted.⁵ The Commission also observed that the Big LEO spectrum sharing plan it adopted did not accommodate all pending applicants, and left little or no room for expansion of existing systems or the development of

³LQP, MCHI, TRW, Motorola, and AMSC all have competing Big LEO license applications pending before us.

⁴Big LEO Order at ¶¶ 26-30.

⁵Big LEO Order at ¶ 26.

future mobile satellite systems in the United States. For these reasons, the Commission determined that a strict financial requirement was warranted for the Big LEO service, and adopted a rule requiring that Big LEO applicants demonstrate committed internal or external financing sufficient to meet their systems' construction, launch, and first-year operating costs.⁶

7. Consequently, the financial qualification rules adopted for the Big LEO service require applicants for space stations to demonstrate that they, or their corporate parents, have current assets (cash, inventory, and accounts receivable) and operating income sufficient to cover the costs of construction and launch of the system's space segment, and of operating for one year following the launch of the first satellite. The Commission also requires that applicants submit evidence of a management commitment, from the applicant or its parent corporation(s), as appropriate, to expend the necessary funds. Alternatively, applicants relying on external financing, such as bank loans, must demonstrate that such financing is "irrevocably committed," i.e., that it has been approved and does not rest on contingencies which require action by either party to the transaction.⁷

8. Constellation estimates that its costs to build and launch the 46 satellites in its system, and to operate the system for one year after the launch of the first satellite, are approximately \$1.721 billion. It relies on Bell Atlantic and E-Systems for financing. It submits a copy of Bell Atlantic's 1993 Annual Report, showing current assets of approximately \$3.8 billion and operating income of approximately \$2.8 billion. It also submits a copy of E-Systems' 1993 Annual Report, showing current assets of \$750 million and operating income of \$180 million.⁸

9. Constellation also submits evidence of Bell Atlantic's and E-Systems' "management commitments." With respect to Bell Atlantic, Constellation submits a letter from Brian Oliver, Bell Atlantic's Vice-President, Corporate Development, in which Mr. Oliver indicates that Bell Atlantic has completed an "initial review" of Constellation's application and business plan for satellite system construction and operation, and that it is Bell Atlantic's "intent to provide financial support for that satellite project" Mr. Oliver further states: "Actual [Bell Atlantic]

⁶Big LEO Order at ¶¶ 30-32.

⁷These requirements, and the documentation necessary to establish they have been met, are outlined in greater detail at 47 C.F.R. § 25.140(c) and (d). See also 47 C.F.R. § 25.143(b)(3); Big LEO Order at ¶ 35.

⁸Although it also submits information concerning the financial resources of Telecomunicações Brasileiras S.A. ("TELEBRÁS"), and indicates that it has entered into a "strategic relationship" with TELEBRÁS, Constellation does not appear to be relying on that relationship to meet the Commission's financial qualifications requirements. Constellation indicates, for example, that TELEBRÁS is not yet an equity partner in its venture; it simply intends to make future equity investments. In any event, the TELEBRÁS documentation is insufficient to demonstrate Constellation's financial qualifications, in that, among other things, the agreements do not appear to be fully negotiated. See 47 C.F.R. § 25.140(d)(2).

financial commitments would be subject to negotiation of satisfactory agreements; and our customary internal business approval procedures, including, if applicable, approval by the Board of Directors." With respect to E-Systems, Constellation submits a letter from Peter A. Marino, E-Systems' Senior Vice President, indicating that E-Systems has reviewed Constellation's application and business plan for satellite system construction and operation, and intends to "provide the necessary financial support" for that satellite project.

10. The other Big LEO applicants argue that Constellation is not financially qualified. They argue that the "management commitments" on which Constellation relies fail to meet Commission standards, because, among other things, the Bell Atlantic letter appears to be contingent on further corporate review and approval by the Board of Directors. They also argue that, even if E-Systems' commitment is deemed sufficient, its resources are inadequate, by themselves, to meet projected costs.⁹ TRW observes that, even if Bell Atlantic and E-Systems were to contribute to construction costs proportionally to their equity shares in Constellation, those contributions would leave Constellation with more than a \$1 billion shortfall in funds. TRW also observes that no other Constellation shareholders have indicated their commitment to finance the venture.

11. Constellation, in response, argues that the letters it submitted were generally modeled on letters previously found acceptable by the Commission, and specifically on the letter found to establish financial qualifications in National Exchange Satellite, Inc., 3 F.C.C. Rcd. 6992, 6993 n.5 (1988). Constellation also points to another case, Contel ASC, 3 F.C.C. Rcd. 6982 (1988), in which an applicant was found financially qualified. Constellation argues that the potential need for Bell Atlantic Board of Directors' approval does not vitiate Bell Atlantic's commitment. It argues that the Commission has expressly rejected Board of Directors' approval of management commitments as a necessary element of financial showings. It also argues that the reference to Board approval in the Bell Atlantic letter was merely meant to document Bell Atlantic's normal corporate approval process.

12. We agree that National Exchange sheds much light on this case, for a review of the management commitment in that case serves to accentuate the small but significant modifications made by Bell Atlantic here. The letter in National Exchange was from the Vice Chairman of Burlington Northern, Inc., a corporate parent of the applicant, and stated:

The attached financial statements show Burlington Northern, Inc. (BNI) assets of \$10.7

⁹Several applicants also note that any Bell Atlantic commitment to Constellation implicates the line-of-business restrictions of the Modified Final Judgment ("MFJ"), a consent decree to which Bell Atlantic is a party. See American Telephone and Telegraph Co., 552 F. Supp. 131, 227 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). In light of our conclusion that Bell Atlantic's financial commitment does not meet Commission standards on other grounds, we need not address whether the potential need for Bell Atlantic to seek or obtain a waiver of the MFJ represents the type of contingency that renders its commitment insufficient to demonstrate Constellation's financial qualifications.

billion and stockholders' equity of \$3.5 billion. In addition, BNI has credit lines of \$1.35 billion. Annual funds from operations exceeded \$1.2 billion for 1986. These available funds are well in excess of the \$563.2 million required over six years for the National Exchange satellite program.

BNI has reviewed National Exchange's FCC application and its business plans for satellite system construction and operation. BNI intends to provide the necessary financial support for that satellite project and other National Exchange projects subject to normal business reviews of market conditions and each project's progress to assure acceptable levels of risk and return.

13. The Bell Atlantic letter differs from the National Exchange letter in several material respects.¹⁰ First, the Bell Atlantic letter indicates that only "an initial review" of Constellation's application and business plan has been completed. On its face, this indicates that Bell Atlantic's commitment is far from "irrevocable" and is more preliminary than in National Exchange, where the corporate parent had completed its review of the application and business plan. Second, Bell Atlantic pledges "to provide financial support" -- in an unspecified amount -- whereas the parent in National Exchange set forth the anticipated cost of the system and pledged "to provide the necessary financial support" (emphasis added). Third, Bell Atlantic appends a caveat not included in the National Exchange letter: "Actual . . . financial commitments would be subject to negotiation of satisfactory agreements." This language makes sense only if the letter itself is not an "[a]ctual financial commitment[]," and it introduces the type of contingency -- successful completion of further negotiations and the completion of further agreements -- that evidences a financing commitment in only an early stage of development. Finally, the Bell Atlantic letter is explicitly conditioned on Board of Directors approval, "if applicable." The National Exchange letter included no similar conditions, and in fact was submitted by the Vice Chairman of the parent's Board of Directors.¹¹

¹⁰The letter states, in pertinent part, that Bell Atlantic Corporation (BAC):

has completed an initial review of [Constellation's] FCC application and its business plans for satellite system construction and operation. It is BAC's intent to provide financial support for that satellite project subject to normal business reviews of market conditions and the project's progress to assure acceptable levels of risk and return.

Actual BAC financial commitments would be subject to negotiation of satisfactory agreements; and our customary internal business approval procedures, including, if applicable, approval by the Board of Directors.

¹¹Compare National Exchange, Inc., 103 F.C.C.2d 836 (1985)(debt and equity financing subject to approval by the investor's Board does not meet Commission requirements). Such approval is analogous to the types of contingencies, such as approval by a bank's lending committee, that we have not accepted from domestic fixed-satellite applicants, who are subject to virtually the same financial standard as Big LEO applicants. Although Constellation

14. Constellation correctly argues that there is no "magic language" to demonstrate financial qualifications. The problem, however, is not that the Bell Atlantic letter failed to reproduce the National Exchange letter verbatim. The problem is that Bell Atlantic clearly started with the National Exchange language but modified it in ways that, without exception, introduce contingencies or limitations into language that had contained none. While the Big LEO Order "does not require an unalterable commitment that funds will be expended regardless of market conditions," it does require a commitment "that absent a material change in circumstances, [management] is prepared to expend the necessary funds."¹² Bell Atlantic's departures from the language in the National Exchange letter indicate that Bell Atlantic's corporate approval process has not proceeded to this point. Having found it necessary to add words of equivocation, neither Bell Atlantic nor Constellation can reasonably complain if we take them seriously.

15. The tentativeness of Bell Atlantic's commitment is particularly significant given Bell Atlantic's relatively small equity interest in Constellation. The parent corporation in National Exchange owned a majority of stock in the applicant (60%) and could, therefore, be more readily expected to commit funds unconditionally, given its ability to control the subsequent expenditures of those funds by the subsidiary. Bell Atlantic and Constellation do not have the same commonality of interest.¹³

16. In light of the fact that we find the Bell Atlantic letter inadequate under the standards embodied in our rules and the 1988 National Exchange case, we conclude that, even assuming that E-Systems' commitment letter meets Commission standards, its financial resources are by themselves insufficient to meet Constellation's estimated costs. Furthermore, the E-Systems

correctly observes that we have not included Board of Director's approval as a mandatory portion of financial qualifications showings involving parent corporations, we think it reasonable that when management makes such approval an express condition of its company's commitment, that approval becomes a pre-condition of financing, rendering the commitment insufficient under our rules. Stated more bluntly, we cannot decline to question whether the statements of a corporate officer are adequate to commit the corporation, when those statements themselves raise the question.

¹²Big LEO Order at ¶ 35 (emphasis added).

¹³The other case relied on by Constellation, Contel ASC, involved a "commitment letter" with respect to a wholly owned subsidiary. The rules applicable in that case did not expressly require the submission of a "commitment letter" for commitments to a wholly owned subsidiary. See Licensing Space Stations in the Domestic-Fixed Satellite Service, 50 Fed. Reg. 36071 (Sept. 5, 1985). In this case, the Commission specifically required that Big LEO applicants, including wholly owned subsidiaries, submit evidence of a management commitment. See 47 C.F.R. § 25.143(b)(3). Furthermore, the Commission's ruling in Contel ASC does not reference the letter, nor in any way indicate that the commitment letter was a matter of decisional significance. Therefore, we do not believe the letter submitted in the Contel ASC case has any precedential value in this case.

letter does not indicate the extent to which E-Systems, which does not have a controlling interest in Constellation, is prepared to expend its internal funds or to use its company's assets as a vehicle for raising financing to support Constellation's system.¹⁴ Accordingly, Constellation has not demonstrated that it is financially qualified at this time.

B. Further Processing Status of Constellation's Application

17. Several of the parties opposing Constellation's application urge us to dismiss the application if we find Constellation is not financially qualified. We will not do this. In the Big LEO Order, we afforded applicants until January 31, 1996, to demonstrate financial qualifications. We cannot find that because Constellation has submitted an inadequate showing at this time, it should lose its status in this processing group. Neither the text of the Big LEO Order nor the rules adopted in it indicate any such intent, and we would expect the Commission to provide explicit notice of such a policy. Indeed, to hold otherwise would unfairly penalize applicants who, in good faith, file a system application we later find does not conform with our rules. Therefore, consistent with the Commission's stated goal in adopting the deferral mechanism -- to provide applicants with an opportunity to finalize financial arrangements over the next year -- we will defer action on Constellation's application.

18. Ownership Changes and Waiver of Cut-Off Rule. In June of 1991, when Constellation filed its original application, it reported that Microsat Launch Systems, Inc. ("Microsat") owned 39% of its voting stock, and Defense Systems, Inc. ("DSI") owned 10.1%. Pacific Communication Science, Inc. ("PCSI") owned a voting interest of less than ten percent, and a number of additional individuals and corporations held Constellation stock. In its November 16, 1994 amendment and subsequent pleadings, Constellation reports that a number of changes have occurred in its ownership structure since its application was filed. Constellation specifically notes that CTA, Inc., which was not a party to its original application, acquired DSI in June 1992; that Cirrus Logic, Inc. acquired PCSI in March 1993; and that CTA purchased Microsat in September 1993. Constellation also reports that in March 1993 and October 1994, respectively, E-Systems, Inc. and Bell Atlantic acquired new Constellation voting stock representing 31% and 8%, respectively, of Constellation's currently outstanding voting stock.

19. The cumulative result of these transactions is that more than 50% of Constellation's voting stock is now controlled by entities who were not owners of Constellation at the time it filed its application. However, Constellation argues that because the transactions occurred over a substantial period of time, and no one transaction represented a transfer of a controlling interest in Constellation, the changes do not constitute a transfer of control of the applicant. Constellation states that the CTA acquisitions of DSI and Microsat, and the Cirrus Logic acquisition of PCSI, were not motivated by a desire to obtain an interest in Constellation, but by a desire to acquire

¹⁴Unlike the corporate parent in National Exchange, E-Systems apparently does not view the word "necessary" as including the entire system's cost, given the inadequacy of its financial resources to meet those costs.

other lines of business. It also states that the sales of stock to E-Systems and Bell Atlantic were designed to bolster its finances.

20. The other Big LEO applicants argue that the changes in Constellation's ownership structure are so substantial as to require treating the application as newly filed and, therefore, no longer eligible for consideration in this processing group. They contend that the changes represent a fundamental change in the character of the applicant, a change reflected in both stock ownership and Constellation's Board of Directors. Several applicants argue that Constellation lacked candor or violated Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65 by not earlier reporting the transactions.

21. We recognize that some of the changes in Constellation's ownership may be "major amendments" under Section 25.116 of the Commission's Rules, 47 C.F.R. § 25.116, jeopardizing Constellation's eligibility for consideration in the current processing group. However, our overriding concern in determining whether a "major amendment" to the applicant's ownership structure has occurred is whether the applicant has attempted to profit from the sale of an application.¹⁵ Unless there is evidence of this, we see no reason to prevent applicants from procuring partners to help finance the enormous cost of these systems. Regardless of whether there has been a transfer of control here, we find no intent to traffick in applications. Consequently, even if a "major" change in Constellation's ownership has occurred, we find these ownership changes to be in the public interest pursuant to Section 25.116(c)(2), and we will not treat Constellation's application as newly filed.¹⁶

22. We next address the allegations that Constellation should have disclosed these ownership changes earlier, and that its failure to do so evidences a disqualifying lack of candor or a violation of Section 1.65 of the Commission's rules. Even assuming that Constellation's course of conduct constitutes a technical violation of Section 1.65 of the Rules, its uncontradicted statements indicate that its actions did not result from intent to deceive or mislead the Commission. Accordingly, any violations are not disqualifying. We would note, however, that

¹⁵In this regard, the Big LEO service differs from services in which multiple or cross-ownership rules may require closer review of ownership changes. Furthermore, the Big LEO applicants have each proposed to operate as private carriers. Thus, concerns about ownership changes that may violate Section 310(b) of the Communications Act are considerably diminished.

¹⁶We note in this regard that the changes in Constellation's ownership structure resulted in large part from the acquisition of its parents, DSI, PCSI, and Microsat. In the past, we have routinely authorized changes in control based on acquisition of a corporate parent with substantial lines of business apart from the applicant's proposed business. STARSYS Global Positioning, Inc., 8 F.C.C. Rcd. 1662 (Comm. Car. Bur. 1993); Airsignal International, Inc., 81 F.C.C.2d 472 (1980). Furthermore, the Bell Atlantic and E-Systems stock acquisitions are similar to those authorized in Satellite CD Radio, Inc., 9 F.C.C. Rcd. 2569 (Comm. Car. Bur. 1994).

to the extent Constellation or its parents contemplate concluding future transactions which would have the cumulative effect of changing ownership or control of more than 50% of Constellation's stock, it is expected to seek a ruling concerning our cut-off rules prior to consummating those transactions.¹⁷

23. Feeder Links. Constellation originally requested feeder links in the 5150-5216 and 6525-6541.5 MHz bands. On November 16, Constellation amended its application, requesting feeder links at 5050-5250 MHz (Earth-to-space) and 6825-7025 (space-to-Earth). Motorola argues that Constellation's amended request for feeder link frequencies constitutes a major amendment under Section 25.116 of our Rules.¹⁸ It claims that the amendment was not necessitated by the new policies and rules established in the Big LEO Order, and that it increases the potential for interference without resolving any frequency conflicts. Motorola also claims the amended request will decrease the likelihood that there will be enough spectrum available for all the qualified applicants in their desired feeder link bands, and that such requests will further delay unconditional licenses to Motorola and other system operators. Constellation replies that the feeder link spectrum amendment is a necessary consequence of the Commission's policies requiring global coverage and spectrum sharing among CDMA systems.

24. In the Big LEO Order, the Commission afforded applicants the opportunity to amend their applications to bring them into conformance with newly adopted requirements and policies for satellite systems. It noted, for example, that a change from a geostationary satellite system configuration to a LEO configuration to meet our satellite system design requirement, or a change in coverage patterns to conform with our satellite visibility requirements, would not affect a particular application's status in the processing group. It also indicated, however, that "a change that is not necessary to bring the application into conformance with our rules and which would increase frequency conflicts," would render the application newly filed under Section 25.116 of the Rules.¹⁹ As an example, it stated that a design change from a CDMA to a TDMA/FDMA system, which would not facilitate spectrum sharing, would be a major amendment. Such applications would be considered in a future processing group, after those applications deferred for consideration until January 1996.

25. Constellation redesigned its system to facilitate the spectrum sharing plan adopted in the Big LEO Order by increasing the number of end users that can be served simultaneously. It

¹⁷It is not our intent, however, to require a prior ruling as a result of the normal churn of stock in publicly traded corporations. See Sewell, "Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934," 43 Fed. Comm. L.J. 277, 311-312 (1991)(Gradual, long-term changes in ownership of publicly traded corporations, due to multiple small share, i.e., less than 1%, transactions, do not give rise to a transfer of control).

¹⁸47 C.F.R. § 25.116.

¹⁹Big LEO Order at ¶ 59 (Emphasis added).

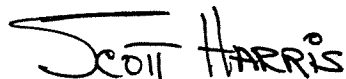
appears that Constellation's feeder link requests were a consequence of this redesign. Therefore, we do not believe the changes in Constellation's feeder link proposal should be considered major. Furthermore, even if the amendment were considered major within the meaning of Section 25.116 of the Rules, we would waive that rule in this case because (a) the modified system serves the public interest by increasing system capacity and spectrum-use-efficiency in the service links; (b) feeder link spectrum is for a use ancillary to the use of Big LEO spectrum; (c) the service is at a relatively early stage of development in which its spectrum requirements are still being addressed; and (d) any third parties who might be adversely affected by feeder link allocations will have a full opportunity to address potential interference concerns in other pending proceedings²⁰ or, in the event Constellation ultimately establishes its financial qualifications, in connection with any further amendments to or modifications of Constellation's feeder-link proposal. Accordingly, we decline to treat Constellation's application as newly filed.

III. Conclusion and Ordering Clause

26. For the reasons stated, we cannot find at this time that Constellation is financially qualified to construct, launch, and operate the Big LEO system it proposes. In light of this conclusion, we need not address Constellation's technical qualifications and we express no opinion on that issue. We reject, however, the parties' arguments that Constellation has forfeited its right to further consideration with the second portion of this processing group. Constellation will therefore have until January 1996 to firm up its financial qualifications, in accordance with the Big LEO Order.²¹

27. Accordingly, IT IS ORDERED, that application file Nos. 17-DSS-P-91(48); CSS-91-013; 9-SAT-LA-95; 10-SAT-AMEND-95, ARE DEFERRED, subject to Constellation Communications, Inc., submitting a showing demonstrating its financial qualifications no later than January 31, 1996.

FEDERAL COMMUNICATIONS COMMISSION



Scott Blake Harris
Chief, International Bureau

²⁰We note that the Commission has a number of issues related to the allocations of spectrum for Big LEO feeder links separately before it in several pending proceedings, including the 28 GHz Proceeding, (Second Notice of Proposed Rule Making in CC Docket No. 92-297), 9 F.C.C. Rcd. 1394 (1994), and Preparation for the World Radio Conference, (Notice of Inquiry in IC Docket No. 94-31), 9 F.C.C. Rcd. 2430 (1994).

²¹Big LEO Order at ¶¶ 40-41.