

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

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DEC 27 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re Application of - )  
)  
CONSTELLATION )  
COMMUNICATIONS, INC. )  
)  
For Authority to Construct )  
Launch and Operate a Low- )  
Earth Orbit Satellite System )  
in the 1.6/2.4 GHz Frequency Bands )  
\_\_\_\_\_ )

File Nos. ~~159-SAT-AMEND-96~~  
17-DSS-P-91(48)  
CSS-91-013  
9-SAT-LA-95  
10-SAT-AMEND-95

PETITION TO DISMISS OR DENY

L/Q Licensee, Inc. (LQL), by its undersigned attorneys, hereby petitions to dismiss or deny the amended application of Constellation Communications, Inc., for authority to construct, launch and operate a low-earth orbit Mobile-Satellite Service (MSS) system in the 1.6/2.4 GHz bands. LQL holds the license to construct, launch and operate the Globalstar™ low-earth orbit MSS Above 1 GHz system.<sup>1</sup> Both LQL and Constellation propose to use Code Division Multiple Access technology, and so, under the Commission's band-sharing plan for this service, if Constellation's application were granted, LQL would be required to share frequencies and coordinate system operations with Constellation.<sup>2</sup>

<sup>1</sup> See Loral/Qualcomm Partnership, L.P., 10 FCC Rcd 2333 (Int'l Bur. 1995), aff'd, FCC 96-279 (released June 27, 1996); L/Q Licensee, Inc., DA 96-1924 (released Nov. 19, 1996).

<sup>2</sup> See Amendment of 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 FCC Rcd 5936, 5954-56 (1994) ("Big LEO Rules Order").

Accordingly, LQL has a substantial interest in any Commission action on Constellation's amended application.

### BACKGROUND

Constellation is one of the six original applicants for the MSS Above 1 GHz service.<sup>3</sup> In 1994, the Commission adopted rules for this service and procedures for consideration of applications in the first processing round.<sup>4</sup> Among the eligibility rules was a "strict financial requirement" patterned on the standard for the Domestic Fixed-Satellite Service.<sup>5</sup> The Commission reasoned 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. . . . [G]ranted an under-financed space station applicant a license may preclude an applicant that possesses the necessary financial resources from implementing its plans, and consequently service to the public may be delayed.<sup>6</sup>

Pursuant to procedures adopted in the Big LEO Rules Order, Constellation filed an amendment to its application on November 16, 1994,<sup>7</sup> in which it

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<sup>3</sup> See Satellite System Application of Constellation Communications, Inc. (dated June 3, 1991) (File Nos. 17-DSS-P-91(48) and CSS-91-013).

<sup>4</sup> Big LEO Rules Order, 9 FCC Rcd at 5936.

<sup>5</sup> See id. at 5949-51; see also Domestic-Fixed Satellite Service, 58 RR 2d 1267 (1985), recon. denied, 61 RR 2d 992 (1986) ("DOMSAT").

<sup>6</sup> Big LEO Rules Order, 9 FCC Rcd at 5950 (footnotes omitted).

<sup>7</sup> See Amendment and Application for Launch Authorization and License (dated Nov. 16, 1994) (File Nos. 9-SAT-LA-95 and 10-SAT-AMEND-95) ("Constellation 1994 Amendment").

attempted to demonstrate that it had satisfied the MSS Above 1 GHz financial standard. Constellation's documentation rested on its claim that two of its shareholders, Bell Atlantic Corporation and E-Systems, Inc.,<sup>8</sup> were committed to provide the funds necessary to cover the projected costs of its system.<sup>9</sup>

LQL and other applicants petitioned to deny Constellation's application, arguing that the letters from Bell Atlantic and E-Systems did not demonstrate the type of financial commitment necessary to satisfy Section 25.140(d) of the Commission's Rules. The International Bureau undertook a detailed analysis of the two letters, and found that Constellation was not financially qualified.<sup>10</sup> However, the Bureau did not deny Constellation's application outright; it deferred a final decision on the application and gave Constellation a full year to submit additional materials sufficient to demonstrate its financial qualifications.<sup>11</sup>

Constellation filed a petition for reconsideration of this decision, claiming that the Bureau had improperly evaluated the deficiencies in its alleged commitment letters against the language found sufficient in an earlier DOMSAT

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<sup>8</sup> Constellation's 1994 amendment included a letter from Telecomunicacoes Brasileiras S.A.--Telebras which indicated that Telebras had entered into a Memorandum of Understanding with Constellation and Bell Atlantic. *Id.* at Ex. 4. The International Bureau found that this letter did not reflect a fully negotiated agreement, and Constellation did not appear to be relying on it. Constellation Communications, Inc., 10 FCC Rcd 2258, 2259 n.8 (Int'l Bur. 1995). There is no information in Constellation's 1996 amendment to modify this finding.

<sup>9</sup> See Constellation 1994 Amendment, at 4 n.11 & Ex. 4

<sup>10</sup> Constellation Communications, 10 FCC Rcd at 2258.

<sup>11</sup> See *id.* at 2260-61; Big LEO Rules Order, 9 FCC Rcd at 5952-54.

case.<sup>12</sup> The full Commission considered this petition and found no error in the Bureau's analysis of Constellation's financial information.<sup>13</sup>

After being granted two extensions of time for filing supplemental financial information, Constellation submitted an amendment to its application on September 16, 1996.<sup>14</sup> Constellation's 1996 amendment adds no new information to the financial documentation which it submitted in its 1994 amendment. Accordingly, as discussed below, Constellation's application to construct, launch and operate an MSS Above 1 GHz system must now be dismissed or denied.

I. CONSTELLATION HAS FAILED TO DEMONSTRATE COMPLIANCE WITH THE BIG LEO FINANCIAL STANDARD.

Pursuant to the Commission's financial standard for MSS Above 1 GHz, an applicant must demonstrate its current financial ability to meet "the estimated costs of the construction and launch of all proposed space stations in the system and the estimated operating expenses for one year after the launch of the initial space station."<sup>15</sup> Applicants, such as Constellation, which rely on financing from

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<sup>12</sup> See Petition for Reconsideration of Constellation Communications, Inc., at 7 (filed Mar. 2, 1995); cf. National Exchange Satellite, Inc., 3 FCC Rcd 6992 (1988).

<sup>13</sup> Constellation Communications, Inc., FCC 96-279, ¶¶ 15-16 (released June 27, 1996).

<sup>14</sup> Amendment to Application of Constellation Communications, Inc. (dated Sept. 16, 1996) (File No. 159-SAT-AMEND-96) ("Constellation 1996 Amendment"). The amendment was placed on Public Notice on November 27, 1996. See Report No. SPB-69 (Nov. 27, 1996).

<sup>15</sup> 47 C.F.R. § 25.143(b)(3).

corporate parents must demonstrate current assets and operating income sufficient to cover system costs.<sup>16</sup> In addition, such applicants must submit "evidence of a commitment to the proposed satellite program" from the management of each corporate parent upon whom it is relying for financial resources.<sup>17</sup> Financing arrangements contingent on further performance by either party will not satisfy these requirements.<sup>18</sup>

A. Constellation's September 16, 1996 Amendment Provides No Financial Information Justifying Grant of an MSS License.

Constellation has provided no new financial information in its 1996 amendment and states that it "continues to believe that its existing application material demonstrated it was financially qualified as of November 16, 1994."<sup>19</sup> Apparently, by this statement, Constellation is continuing to rely solely upon the letters from Bell Atlantic and E-Systems filed with its 1994 amendment.

The International Bureau analyzed the Bell Atlantic and E-Systems letters in great detail when originally filed. It found each letter inadequate to

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<sup>16</sup> Big LEO Rules Order, 9 FCC Rcd at 5950.

<sup>17</sup> 47 C.F.R. § 25.140(d)(1).

<sup>18</sup> 47 C.F.R. § 25.140(d)(2)(iv); see Advanced Business Communications, Inc., 100 FCC 2d 525, 541 (1985) ("The Commission has consistently held that when a financial commitment is dependent on a contingency, the burden is on the applicant to establish its ability to satisfy that contingency.").

<sup>19</sup> Constellation 1996 Amendment, at 2.

demonstrate the commitment required by Section 25.140(d).<sup>20</sup> This decision was affirmed by the Commission.<sup>21</sup> Constellation has not modified or supplemented the financial documents already evaluated, and rejected, by the Bureau. Accordingly, the decision on the adequacy of Constellation's financial documentation remains the law of this case.<sup>22</sup> "[T]he *same issue* presented a second time in the *same case* in the *same court* should lead to the *same result*."<sup>23</sup> Therefore, at this time, the Commission should dismiss or deny Constellation's application based on its failure to demonstrate that it is financially qualified to hold an MSS Above 1 GHz license.

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<sup>20</sup> See Constellation Communications, 10 FCC Rcd at 2259-60. The Bureau found that the Bell Atlantic letter was inadequate under the Big LEO financial standard, and that E-Systems had not made any definite commitment of financing to the project.

<sup>21</sup> Constellation Communications, Inc., FCC 96-279, at ¶¶ 15-16.

<sup>22</sup> The Commission has acknowledged adherence to the law of the case doctrine. See, e.g., Bennett Gilbert Gaines, 8 FCC Rcd 1405, 1409 (Rev. Bd. 1993) ("We agree that where there has been a thorough consideration of a particular question in a designation order (HDO), the ALJ and Review Board are expected to follow the HDO's judgment as the law of the case."); see also Scripps Howard Broadcasting Company, 10 FCC Rcd 5461, 5465 n.8 (ALJ 1995).

<sup>23</sup> LaShawn v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996). See generally Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 739 (D.C. Cir.) (law of the case doctrine refers to "a family of rules embodying the general concept that a court . . . should not re-open questions decided (*i.e.*, established as the law of the case) by that court or a higher one in earlier phases"), cert. denied, 116 S. Ct 180 (1995).

B. Constellation Cannot Submit Additional Documents at This Time.

Constellation claims to be "in the advanced stages of several substantial take or pay contracts" which "represent a commitment to purchase approximately \$1.5 billion of Constellation service."<sup>24</sup> It also seeks additional time to cure any defects if "the FCC continues to believe that Constellation is not financially qualified."<sup>25</sup> Constellation has known for nearly two years that its current financial documentation is deficient. The time for filing supplements to that information expired on September 16, 1996. Accordingly, the Commission must reject Constellation's request for additional time and preclude the filing of any additional documentation.<sup>26</sup>

C. Constellation Cannot Eliminate the Costs of its Spare Satellites from its Total System Costs.

Constellation attempts to change one substantive parameter in its 1996 amendment which may have an impact on its financial qualifications. It claims that it is entitled to eliminate the cost of spare satellites from its cost projections,

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<sup>24</sup> Constellation 1996 Amendment, at 2.

<sup>25</sup> Id. at 2 n.4.

<sup>26</sup> See Rainbow Satellite, Inc., 1985 FCC LEXIS 3884, at ¶ 7 n.13 (1985) (refusing to consider submission of letter explaining financial agreement filed six months after date applicant was required to demonstrate financial qualifications).

based on guidelines established by the Commission.<sup>27</sup> However, Constellation is attempting to misapply the Commission's policy.

The Commission did suggest that an applicant could design its system to meet the minimum Big LEO coverage requirements in order to lower costs.<sup>28</sup> But, it also has stated clearly that each applicant for an MSS Above 1 GHz system must "demonstrate the [financial] ability to build and launch all satellites for which it has applied, which includes those satellites necessary to fulfill our service requirements, and to operate its system for one year after launch of the first satellite in its constellation."<sup>29</sup> Constellation has applied for a system which includes 46 operational satellites and eight in-orbit spare satellites.<sup>30</sup> Therefore, pursuant to the Commission's rules, its spare satellites must be included in the cost projection for the system.<sup>31</sup>

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<sup>27</sup> Constellation 1996 Amendment, at 1.

<sup>28</sup> See Big LEO Rules Order, 9 FCC Rcd at 5952.

<sup>29</sup> Id.

<sup>30</sup> See Constellation 1994 Amendment, at 15.

<sup>31</sup> See Rainbow Satellite, Inc., 1985 FCC LEXIS 3884, at ¶ 16. Rainbow argued that it should not be required to arrange financing for its on-ground spare, because "the deferral of ground spare construction does not involve the tying up of orbital locations." Id. at n.29. The Commission rejected that argument on the ground that Rainbow's Authorization Order was conditioned upon it arranging financing for its entire system. The rules and policies for Big LEO systems have the same effect.



II. CONSTELLATION IS NOT ENTITLED TO A WAIVER OF THE BIG LEO FINANCIAL STANDARD.

Apparently recognizing that its financial showing is not adequate, Constellation requests a waiver of the Big LEO financial standard in its 1996 amendment.<sup>32</sup> However, under well-established precedent, this request cannot be granted. A waiver of a rule may be granted when such action would serve the public interest and would not undermine the policy of the rule sought to be waived.<sup>33</sup> That is not the case here.

The express policy for adoption of the Big LEO financial standard was to preclude assignment of MSS frequencies to undercapitalized applicants because, based on the Commission's experience, such applicants are unable to proceed with construction and launch of their proposed systems.<sup>34</sup> In its amendment, Constellation has failed to demonstrate that it has any commitments to finance construction and launch of its system. Thus, granting a waiver to Constellation would undermine the policy of the rule. Based on the Commission's explicit findings in the Big LEO Rules Order, it would not serve the public interest to allow Constellation to hold the frequencies. Accordingly, Constellation's request for a waiver of the Big LEO financial standard must be denied.

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<sup>32</sup> Constellation 1996 Amendment, at 2 n.4.

<sup>33</sup> See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>34</sup> Big LEO Rules Order, 9 FCC Rcd at 5950.

III. CONCLUSION

For the reasons set forth above, Constellation's application for a Big LEO satellite system cannot be granted consistent with the rules and policies for the MSS Above 1 GHz service, and should now be dismissed or denied.

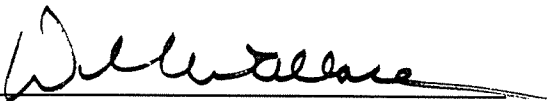
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CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 27th day of December 1996, caused copies of the foregoing Petition to Dismiss or Deny to be delivered via hand delivery (indicated with \*) or by U.S. mail, postage prepaid, to the following:

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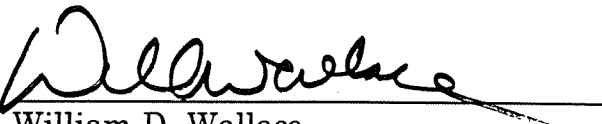
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