

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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MAR 17 1995

MAR 15 1995

In re Applications of:

CONSTELLATION COMMUNICATIONS,
INC.

TRW INC.

For Authority to Construct,
Launch, and Operate
Low Earth Orbit Satellite
Systems in the 1610-1626.5 MHz
and 2483.5-2500 MHz Bands

San Francisco, California
Office of the Secretary

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

File Nos. 17-DSS-P-91(48)

CSS-91-013

9-SAT-LA-95

10-SAT-AMEND-95

20-DSS-P-91(12)

CSS-91-015

17-SAT-LA-95

18-SAT-AMEND-95

To: Chief, International Bureau

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

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SUMMARY

On March 2, 1995, Constellation petitioned the Bureau seeking reversal of the Bureau's order declaring that Constellation is not financially qualified to provide Big LEO service and deferring Constellation's Big LEO application. AMSC and Motorola both petitioned the Bureau seeking to place restrictions on the Bureau's order granting TRW's Big LEO license. AMSC requested the Bureau to condition TRW's license on the outcome of the Commission's rulemaking proceeding in CC Docket No. 92-166, establishing rules for the Big LEO service. Motorola requests that the Commission condition TRW's authorization on the potential loss of 3.1 MHz of spectrum and certain implementation milestones. The Bureau should deny these petitions.

The basis for Constellation's Petition for Reconsideration is its assertion that the Bureau found Bell Atlantic and E-Systems to be corporate parents of Constellation such that Constellation could demonstrate its financial requirements under Section 25.140(d)(1) of the Commission's rules. Constellation's assertion is incorrect. In fact, the Bureau found that Bell Atlantic, for example, did not have the same commonality of interest as Constellation. Moreover, the

Bureau correctly ruled that the letters of financial support provided to Constellation by Bell Atlantic and E-Systems did not meet the Commission's explicit requirements under Section 25.140(d)(1) and the Commission's Report and Order in CC Docket No. 92-166. In addition, the Bureau correctly found that late-filed declarations provided by Constellation in an effort to bolster its insufficient financial showing do not support its position. Accordingly, the Bureau should deny Constellation's petition.

The Bureau should also deny AMSC's and Motorola's petitions. Both of these petitions actually seek reconsideration of the decisions made by the Commission in its CC Docket No. 92-166 rulemaking proceeding rather than the bases for the Bureau's grant of TRW's application. The appropriate vehicle for the relief sought by AMSC and Motorola is in the rulemaking. In addition, Motorola seeks to condition TRW's license on potential loss of spectrum and implementation milestones -- the first, an issue that the Commission has properly ruled should be decided in a future proceeding, if and when the issue becomes ripe, and the second, a matter that must await the issuance of final authority following the assignment of specific feeder link spectrum to TRW.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: Chief, International Bureau

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

TRW Inc. ("TRW"), by its attorneys, hereby opposes the petitions for reconsideration and/or clarification filed in the above-captioned licensing proceedings by Constellation Communications, Inc. ("Constellation"), AMSC Subsidiary Corporation ("AMSC"), and Motorola Satellite Communications, Inc. ("Motorola") on March 2, 1995. Constellation requests that the International Bureau ("Bureau") reverse its determination that Constellation is not financially qualified to provide mobile

satellite services in the 1610-1626.5/2483.5-2500 MHz frequency bands ("MSS" or "Big LEO"), and its deferral of Constellation's Big LEO application subject to Constellation "submitting a showing demonstrating its financial qualifications no later than January 31, 1996." Constellation Communications, Inc., DA 95-129, slip op. at ¶¶ 17, 26 (released January 31, 1995) ("Constellation Order").

AMSC and Motorola both seek reconsideration of the Bureau's Order and Authorization granting TRW the license requested in the above-captioned proceeding. See TRW Inc., DA 95-130, slip op. at ¶¶ 23-30 (released January 31, 1995), erratum, DA 95-371 (released February 28, 1995) ("TRW Order"). Specifically, AMSC requests that the Bureau clarify that grant of TRW's license is conditioned on the outcome of the Commission's rulemaking proceeding in CC Docket No. 92-166, which established rules for MSS systems operating in the 1.6/2.4 GHz band.^{1/} AMSC alleges that the Commission's Big LEO Order and the Bureau's TRW Order "discriminate" against applicants who elected to defer their financial qualifications showing. Similarly, Motorola

^{1/} See 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 FCC Rcd 5936 (1994) ("Big LEO Order").

requests that the Bureau expressly condition TRW's license on the potential loss of 3.1 MHz of spectrum between 1618.25 and 1621.35 MHz, a decision which the Commission ultimately decided to defer. See Big LEO Order, 9 FCC Rcd at 5960. Second, Motorola requests that the Bureau expressly subject TRW's authorization to certain implementation milestones. For the reasons expressed herein, the Bureau should deny these petitions for reconsideration and/or clarification.

I. THE BUREAU CORRECTLY CONCLUDED THAT CONSTELLATION WAS NOT FINANCIALLY QUALIFIED TO PROVIDE MSS SERVICE.

A. Bell Atlantic And E-Systems Are Not Corporate "Parents" For Purposes Of Demonstrating Constellation's Financial Qualifications.

In its Petition for Reconsideration, Constellation incorrectly asserts that the Bureau concluded that Bell Atlantic and E-Systems qualified as corporate "parents," and that Constellation was therefore eligible to demonstrate its financial requirements under the standards set forth in Section 25.140(d)(1) of the Commission's rules. See Constellation Petition at 3. Constellation has misread the Bureau's decision. This faulty premise undermines the entire thrust of Constellation's reconsideration request.

Nowhere in the Constellation Order did the Bureau state or otherwise suggest that Bell Atlantic or E-Systems was a corporate parent of Constellation.^{2/} To the contrary, the Bureau correctly observed that Bell Atlantic and E-Systems do not have sufficient equity interest in Constellation to be considered corporate parents. For example, in paragraph 15, the Bureau notes that the "tentativeness of Bell Atlantic's commitment is particularly significant given Bell Atlantic's relatively small equity interest in Constellation . . . Bell Atlantic and Constellation do not have the same commonality of interest." Constellation Order at ¶ 15 (emphasis added). Similarly, the Bureau noted that "the E-Systems 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." Id. at ¶ 16 (emphasis added). Constellation clearly is ineligible for consideration under Section 25.140(d)(1).

^{2/} TRW has maintained that Constellation's attempt to rely on Bell Atlantic and E-Systems as corporate parents is misplaced. See TRW Consolidated Reply to Oppositions, 7-8 (filed January 13, 1995).

B. The Commission Adopted An Explicit Management Commitment Standard For The MSS, Which Constellation Has Failed To Meet.

Even if the Bureau were to consider E-Systems and Bell Atlantic to be corporate parents of Constellation, rather than putative external investors, the Bureau has correctly ruled that Constellation has failed to make the financial showing required by the Commission under Section 25.140(d)(1) (see TRW Consolidated Reply to Oppositions at 8-12) -- and Constellation offers nothing new to rebut this prior finding. Simply stated, the "commitments" of these companies fall far short of the standard established in the Big LEO Order.

Contrary to Constellation's assertions, in its Big LEO Order, the Commission adopted an explicit, strict standard for the management commitment that is required from a corporation providing evidence of its financial capabilities under Section 25.140(d)(1). Big LEO Order, 9 FCC Rcd at 5952. Constellation, like all other Big LEO applicants, had an adequate opportunity to comment to the Commission regarding the establishment of the Big LEO financial qualification standards in the Big LEO rulemaking proceedings. After carefully considering comments supplied by all parties to that proceeding, including Constellation's, the Commission determined that applicants relying on internal assets

must provide evidence of a management commitment to the Big LEO project. Id. Specifically, the Commission ruled that:

management of the corporation providing the funding must commit that absent a material change in circumstances it is prepared to expend the necessary funds. Those applicants relying on financing from parent corporations must make the same showing with respect to the parent corporation's commitment.

Id. This is the standard that the Commission adopted, and there is no other.

Rather than attempt to meet this explicit standard, Constellation inexplicably chose to model its letters of financial "support" after a letter cited by the Commission in National Exchange Satellite, Inc., 3 FCC Rcd 6992, 6992 n.5 (1988) -- a previously unpublished letter demonstrating a management commitment by a parent corporation owning 60% of the applicant's stock ("National Exchange Letter"). Having chosen to use the National Exchange Letter as its own standard, Constellation now complains that the Bureau's discussion of Constellation's failure to meet the very standard that it chose to follow has somehow transformed the National Exchange Letter into a substantive rule. Constellation Petition at 7.

Constellation's attack on the Bureau's ruling regarding the National Exchange Letter is misplaced in several respects.

First, as Constellation itself observes, the Commission never suggested that the National Exchange Letter could be used as a useful model for meeting the management commitment required by the Commission in the Big LEO Order. Instead, the Commission provided an express standard and informed all parties relying on internal financing of what they had to show. Big LEO Order, 9 FCC Rcd at 5952. To the extent Constellation looked beyond the Big LEO Order for guidance, it was acting at its own peril.

In any event, the Bureau never held that the National Exchange Letter was, per se, an improper model; it ruled instead that Constellation's "management commitment" from Bell Atlantic compared unacceptably to the commitment National Exchange drew from its corporate parent. Indeed, the Bureau's comparison of Bell Atlantic's letter of support to the management commitment provided in the National Exchange case serves to "accentuate" the weakness of Bell Atlantic's letter. See Constellation Order, DA-95-129, slip op. at ¶ 13. The Bureau stated that "the problem is not that the Bell Atlantic letter failed to reproduce the National Exchange Letter verbatim." Id. at ¶ 14. The problem is that Bell Atlantic used language of contingency and limitation that rendered its "commitment" meaningless.

The Bureau's assessment of the unacceptability of Bell Atlantic's supposed "commitment" was entirely correct. Bell Atlantic had completed only "an initial review" of Constellation's application and business plan and was prepared only to "provide financial support" rather than the necessary financial support for the Constellation project. Constellation Order, DA 95-129, slip op. at ¶ 13. Moreover, Bell Atlantic stated that actual financial commitments would be subject to the negotiation of satisfactory agreements and board approval. In short, the Bureau properly held that, by adding words of equivocation and contingency, Bell Atlantic revealed that it had not reached a level of corporate approval necessary to commit that, absent a material change in circumstances, it is prepared to spend the funds required to construct, launch, and operate the Constellation system.

C. The Bureau Was Not Required To Consider Late-Filed Letters And Declarations That Constellation Filed With Its Opposition To Petitions To Deny.

In its ruling adopting the Big LEO service rules, the Commission required each applicant to make its financial showing by November 16, 1994. Big LEO Order, 9 FCC Rcd at 5953. Section 25.143(b)(3) of the Commission's rules required each Big LEO applicant to demonstrate its financial qualifications on the

basis of documentation contained in its application, not on documentation presented in a post cut-off response to petitions to deny. Accordingly, the Bureau was not required to consider any of Constellation's late-filed documentation. Still, it remains the case, as TRW argued in its earlier pleadings, that even if the Bureau had considered Constellation's belatedly-offered letters and declarations, the Bureau still would have been required to conclude that Constellation was not financially qualified. See TRW Consolidated Reply to Opposition at 11-12 (January 13, 1995).

**II. AMSC'S PETITION FOR RECONSIDERATION
IS INAPPROPRIATE AND SHOULD BE DENIED.**

In its Petition for Reconsideration, AMSC requests that the Bureau clarify the rights of applicants to the bands for those who have deferred their financial showing by expressly conditioning TRW's authorization on the outcome of the CC Docket No. 92-166 rulemaking proceeding.^{3/} Specifically, AMSC objects to language in the TRW Order that protects TRW's authorization

^{3/} AMSC has filed a Petition for Reconsideration of the Commission's Big LEO Order. AMSC has also filed Petitions for Reconsideration as to the authorizations granted to Motorola and Loral/QualComm Partnership, L.P. AMSC, however, did not initially oppose TRW's Amended Application (filed November 16, 1994).

from mutual exclusivity with AMSC. See TRW Order, DA 95-130, slip op. at ¶ 22. AMSC claims that language contained in the TRW Order prejudices the outcome of the rulemaking to the detriment of AMSC and that the Commission cannot discriminate against applicants making a later financial showing.^{4/}

AMSC's effort to bootstrap its status in this proceeding should be rejected out-of-hand. AMSC's decision to defer its financial showing was at its own risk; TRW and other similarly situated Big LEO licensees should not be held hostage by other applicants who failed to make the required financial showing on November 16, 1994, or who elected to defer their financial showings until a later date.

^{4/} Initially, TRW observes that AMSC's continued presence in even the deferred applicant group is unwarranted. As TRW has previously noted, AMSC did not initially apply to construct a non-geostationary satellite system. Instead, it applied for authority to modify two of its proposed geostationary MSS satellites to include portions of the 1.6 GHz band. The Commission ultimately decided not to allow geostationary MSS systems to use the frequency bands. The "amended application" that AMSC filed on November 16, 1994, is an entirely new application for an entirely different service; at a minimum, the Commission should treat the filing as a major amendment. 47 C.F.R. § 25.116 (1993). Furthermore, AMSC filed its amended application simply to maintain itself in the proceeding so that it can pursue its original domestic GSO proposal through its Petition for Reconsideration. See letter from Brian D. Pemberton, President, AMSC, to William F. Caton, Secretary, FCC, dated November 16, 1994.

In its Big LEO Order, the Commission explicitly stated that applicants who chose to defer their financial qualifications would be processed separately from those who made the required showing on or before November 16, 1994. 9 FCC Rcd at 5953. Furthermore, as an applicant that has chosen to defer its financial qualification showing, AMSC has already taken advantage of a special break afforded by the Commission, which would permit AMSC to retain an advantage over potential future applicants despite the fact that its own Big LEO application is incomplete. Ordinarily, its application would have simply been dismissed. See Aeronautical Radio, Inc. v. FCC, 928 F.2d. 428, 438 (D.C. Cir. 1991). The Bureau acted completely within the scope of its authority in granting TRW's application. The Bureau applied the Commission's MSS rules as established in the Big LEO Order, and AMSC has failed to show otherwise.

Instead, AMSC attempts to raise issues that will be properly decided on the merits of its petition for reconsideration of the Big LEO Order. Therefore, AMSC's Petition for Reconsideration should be denied.

III. **MOTOROLA'S PETITION FOR CLARIFICATION
AND/OR RECONSIDERATION IS ALSO
INAPPROPRIATE AND SHOULD BE DENIED.**

In Motorola's Consolidated Petition for Clarification and/or Reconsideration, Motorola seeks to restrict TRW's authorization to require TRW to construct its system to accommodate a 3.1 MHz reduction in spectrum in the event only one CDMA licensee proceeds with construction. Second, Motorola seeks to condition authorizations on meeting milestone dates specified in the Big LEO Order. Motorola's effort to obfuscate the status of TRW's license should be rejected.

The Commission ultimately chose to defer any decision with respect to a 3.1 MHz reduction in the 1.6 GHz bands until such time as the issue becomes ripe. Big LEO Order, 9 FCC Rcd at 5960. Motorola's complaint, such as it is, is with the Big LEO Order, not with the Bureau's decisions regarding grant of the individual licenses. Motorola did not seek reconsideration of the Commission's 3.1 MHz decision in its Petition for Reconsideration of the Big LEO Order and should not be allowed to do so now in an unlawful manner. Although TRW opposed and continues to oppose Motorola's attempt to gain access to the 3.1 MHz at issue, TRW recognizes that its license may be modified by the Commission if the Commission ultimately decides that a single

CDMA provider does not need this spectrum. Accordingly, it would be entirely improper for the Bureau to condition TRW's current authorization upon potential loss of spectrum, an issue which will properly be decided in a separate proceeding if and when it becomes ripe.

Further, Motorola requests that TRW's authorization be expressly modified to provide for the milestones set forth generally by the Commission in the Big LEO Order and automatically to declare that the authorization is "null and void" if such milestones are not met.^{5/} TRW recognizes that it must meet the milestone requirements established by the Commission in the Big LEO Order, 9 FCC Rcd at 6008-9. However, such milestones do not come into force until final authorizations are issued following the specification and awarding of feeder link spectrum to each MSS licensee. If, then, the Bureau should decide to modify TRW's authorization to expressly include milestone requirements, it must treat the other Big LEO licensees, including Motorola, equally and modify their final authorizations as well.

^{5/} TRW has consistently opposed any notion that any license should be subject to a "null or void" policy. TRW Petition for Partial Reconsideration and Clarification at 20-21, CC Docket No. 92-166 (filed November 21, 1994).

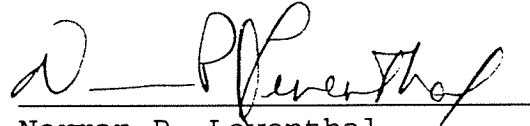
CONCLUSION

For the foregoing reasons, the Bureau should deny the Petitions for Reconsideration and/or clarification filed by Constellation, AMSC, and Motorola.

Respectfully submitted,

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I, Cristina M. Lirag, hereby certify that a true and correct copy of the foregoing "Consolidated Opposition to Petitions For Reconsideration" was mailed, first-class postage prepaid, this 15th day of March, 1995 to the following:

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