

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

DUPLICATE

In the Matter of)
)
Constellation Communications, Inc.)
)
Application for Authority to Construct,)
Launch and Operate a Non-Geostationary)
Satellite System to Provide Mobile)
Satellite Service in the 1.6/2.4 GHz)
Bands)

File Nos. 9-SAT-LA-95
10-SAT-AMEND-95

JAN 18 1995

Satellite and Radiocommunication Division
Satellite Policy Branch

REPLY OF AMSC SUBSIDIARY CORPORATION

AMSC Subsidiary Corporation ("AMSC"), pursuant to Section 25.154(d) of the Commission's Rules, hereby urges the Commission to find that Constellation Communications, Inc. ("CCI") is not qualified to construct, launch, and operate its proposed Mobile Satellite Service ("MSS") system. CCI has not demonstrated either in its November 16, 1994 amendment or its subsequent filings that it has obtained the financial commitment for its satellite project that is required by the Commission's rules. In order to ensure adherence to the Commission's rules and fairness to the other applicants, the Commission should deny a license to CCI at this time.

Background

Pursuant to the Commission's Rules, applicants were required to file conforming legal and technical amendments to their applications by November 16, 1994 and were given the option of submitting evidence of their financial qualifications either by November 16, 1994

or by January 31, 1996.^{1/} The financial qualifications standard requires each applicant to show that immediately upon grant of its license it can pay for construction, launch, and operation of its MSS system for one year after launch of the first satellite. Report and Order, at ¶¶ 32, 38, 41.^{2/}

In its application, CCI estimated that the cost of constructing and launching its proposed satellites and operating its satellite system for one year after the launch of its first satellite would be \$1.721 billion. To demonstrate its ability to finance this undertaking, CCI relied on letters from Bell Atlantic Corporation ("BAC") (an 8% shareholder), E-Systems, Inc. ("E-Systems") (a 31% shareholder), and Telecommunicacoes Brasileiras S.A. ("Telebras") a potential joint venture partner.

In its Petition to Defer Processing of the CCI application, AMSC challenged whether an 8% shareholder could be considered a parent corporation and demonstrated that, even if BAC were considered to be a parent corporation of CCI, the BAC letter did not pass the Commission's test for a management commitment by a parent corporation. Among its infirmities are its representations that BAC had made only an "initial review" of CCI's application and that any "actual commitment" would have to await further review and

^{1/} Licensing Policies and Procedures, Satellite Communications, Report and Order ("Report and Order"), CC Docket No. 92-166, 9 FCC Rcd 5936 (1994), at ¶ 2. The Commission's rules are not clear as to what procedures apply to the submission of financial qualifications information prior to the second deadline.

^{2/} See also, 1985 Domestic Fixed-Satellite Order, 101 FCC 2d 223 (1985), at ¶ 11. The Report and Order incorporates the financial qualifications standards adopted in the 1985 Domestic Fixed-Satellite Order, with a more rigorous requirement that applicants relying on internal financing secure a management commitment that is functionally equivalent to the irrevocable commitment required from external lenders. See Report and Order, at ¶ 35.

possible board approval. AMSC also noted that BAC is barred as a Regional Bell Operating Company ("RBOC") from investing in CCI as a provider of interexchange service.

AMSC demonstrated that the letter from E-Systems is deficient because (i) the letter does not specify the amount of any support that E-Systems might provide to CCI and (ii) even if E-Systems were committed to fund the entire project, E-Systems' current assets and operating income are less than half of what CCI requires to be financially qualified. The letter from Telebras was clearly not the kind of irrevocable commitment required for external funding to meet the Commission's test.^{3/}

In its Opposition, CCI continues to claim that it has met the Commission's financial qualifications standard. CCI claims that the Commission's standard for reviewing the financial qualifications of applicants in this proceeding is no different than the Commission's standard in past domestic fixed-satellite ("domsat") proceedings. CCI Opposition, at 15, 16. CCI defends its attributing "parent" status to BAC and E-Systems on the grounds that the Commission has approved domsat applications in which a parent owned less than all of the outstanding shares of an applicant and that all of the applicants in this proceeding anticipate having widely dispersed ownership, with no single corporation having majority ownership.

^{3/} Other applicants filed similar challenges to CCI's financial qualifications. See Consolidated Petition to Deny of Mobile Communications Holdings, Inc. ("MCHI") (December 22, 1994), at 27; Consolidated Comments and Petition to Defer and/or Deny of Motorola Satellite Communications, Inc. ("MSCI") (December 22, 1994), at 14; Petition to Deny of Loral/Qualcomm Partnership, L.P. ("LQP") (December 22, 1994), at 3; and Petition to Deny of TRW Inc. ("TRW") (December 22, 1994), at 17. Three applicants also challenged CCI's request for a waiver of the cut-off rules. See Consolidated Petition to Deny of MCHI, at 23; Petition to Deny of LQP, at 9; and Petition to Deny of TRW, at 13. AMSC takes no position on the merits of these challenges other than to note that the challenges highlight AMSC's long-standing concern that the Big LEOs continue to face serious obstacles that the Commission should not underestimate in its policy making.

CCI Opposition, at 13 (citing American Satellite Company, 103 FCC 2d 542 (1985); Satellite Business Systems, 103 FCC 2d 856 (1985); and National Exchange, Inc., 3 FCC Rcd 6992 (1988)).

CCI also defends the BAC letter as sufficient to demonstrate the necessary support by BAC. In response to the tentativeness of BAC's letter, CCI's defense is that "this language merely reflects customary approval procedures." CCI Opposition, at 15. As to the admitted need for further approval by BAC's board of directors, CCI's response is that (i) the Commission, in adopting its domsat financial standards in 1985, failed to require all applicants to submit a board resolution as part of their financial showing and (ii) other applicants, according to CCI, will also need future corporate approvals for additional investments. CCI Opposition, at 14. CCI does not refute that the Modification of Final Judgement ("MFJ") may prohibit BAC from investing in CCI; instead, CCI responds to this issue by arguing that in other cases the Commission has chosen to leave such issues to the federal courts. CCI Opposition, at 20, note 36 (citing New York SMSA Limited Partnership, 58 RR 2d 525, 530 (1985); Bell Atlantic Mobile Systems of Philadelphia, Inc., 2 FCC 2d 719 (1987); and Bell Atlantic Mobile Systems of Philadelphia, Inc., 2 FCC 2d 7531 (1987)).

CCI does not contest the allegations that E-Systems has not made a commitment to contribute a specific amount to the funding of CCI's proposed system or that E-Systems alone does not have a sufficiently strong balance sheet to support CCI's application. CCI also makes no attempt to respond to claims that the letter from Telebras does not meet the Commission's test for support. Finally, CCI supplements its amendment with two additional letters from BAC and E-Systems, purporting to clarify their earlier submissions.

Discussion

Despite CCI's protests to the contrary, it is abundantly evident that CCI has not met the Commission's standard for financial qualifications in this proceeding. That test requires more of a commitment from its investors than CCI has been able to muster.

CCI misstates the financial qualifications test in this proceeding when it contends that it is simply the same test as used in prior domsat proceedings. The Commission made clear in the Report and Order in this proceeding that it is requiring a higher level of commitment for internal financing than it has required previously.^{4/}

CCI also fails to show any basis for treating BAC as a "parent" corporation. In the cases it cites in which parents held less than all of an applicant's stock, the entities involved nonetheless held at least half of the applicant's equity.^{5/} Moreover, while CCI may be correct that the parent corporations of other applicants in this proceeding have stated an intention to dilute their ownership interests in their respective ventures, at present those entities nonetheless have far more substantial interests in the respective applicants than does BAC in CCI. Further, in at least some cases these entities have made more forthright

^{4/} See Report and Order, at ¶ 35. See also, Mobile Communications Holdings, Inc. v. FCC, No. 94-1695 (D.C. Cir. 1994), Opposition of the Federal Communications Commission to Petitioner's Emergency Motion for a Stay Pending Review (November 14, 1994). In its filing with the court, the Commission states that the "management commitment" required of an applicant or its parent company is "exactly equivalent to the irrevocable financing required for companies" relying on external financing. Id. at 14.

^{5/} In American Satellite Company, 103 FCC 2d 542 (1985), there were two equal owners; in Satellite Business Systems, 103 FCC 2d 856 (1985), there were two equal partners; and in National Exchange, Inc., 3 FCC Rcd 6992 (1988), the parent corporation held a 60% interest.

commitments of corporate support than that submitted by BAC on either November 16, 1994 or January 3, 1995.

CCI's specific defense of BAC's support is particularly misplaced. The language of the initial letter and its more recent supplement consistently establish that BAC has done nothing more than express an interest in investing some unspecified amount in CCI.^{6/} BAC has not clarified the amount of its potential investment and it continues to make clear that additional internal review and approval (including approval by the board of directors) may be required before it can make any "actual" commitment. The fact that these additional approval procedures may be "customary" to early phases of a negotiation between a company such as CCI and a small shareholder that is considering increasing its investment does not make them any less debilitating to CCI's claim that BAC's alleged commitment meets the Commission's test. BAC's support at this time does not show that corporation's present willingness to fund the construction, launch, and operation of the CCI system. BAC clearly has no such present intention and can have no such intention until its board of directors approves this project.

CCI argues that applicants are not required to obtain board of director approval. Citing to the 1985 Domestic Fixed-Satellite Order in which the Commission decided against requiring all domsats to submit a board resolution, CCI claims that since board approval was not specifically required in all cases in the 1985 domsat order, it is not required now. CCI Opposition, at 16 (citing 101 FCC 2d 223 (1985), at ¶¶ 10-15). This misstates the 1985

^{6/} CCI's attempts to supplement the record with new letters of support highlights the need for the Commission to establish rules that will clarify the procedures that will apply to the submission of financial qualifications information after the November 16, 1994 deadline. The letters themselves, however, do not appear to say anything that adds to the level of commitment being made by either company.

order, which did not say that the absence of board approval would never be relevant to an examination of an entity's financial commitment. In fact, shortly after issuing the 1985 order, the Commission dismissed a domsat applicant as financially unqualified because the applicant was relying on internal financing that was subject to board of director approval and there was no evidence that such approval had been secured. See National Exchange, Inc., 103 FCC 2d 836, 838 (1985).^{7/} In National Exchange, the Commission noted that since financing was subject to board approval, there was no assurance that it could be obtained. Id. at 838, 839. Moreover, as discussed above, the financial standards for today's Big LEO applicants go beyond what was required in 1985.

The MFJ presents a similar obstacle to CCI's ability to claim that BAC has the kind of present commitment that the Commission requires. Neither CCI nor BAC deny that a waiver of the MFJ would be required before BAC can make the kind of investment in a Big LEO system that CCI claims BAC is prepared to make. CCI instead claims that the Commission has left such issues to the federal courts. But this argument reveals a misunderstanding of the nature of AMSC's objection. All the Commission said in the cellular cases cited by CCI is that it will not concern itself with enforcement of the MFJ.^{8/}

^{7/} In its Opposition, CCI states that National Exchange has no value as precedent regarding CCI's financial qualifications because National Exchange deals with external financing. CCI Opposition, at 8, note 8. CCI's attempt to distinguish the case from its own situation is without merit. Under the financial standards of the Report and Order governing this proceeding, there is no distinction between the level of commitment required of external and internal sources of financing; both require the commitment to be non-contingent. Therefore, the fact that the absence of board approval in National Exchange was disqualifying is directly relevant to the adequacy of CCI's financing showing in this case.

^{8/} See New York SMSA Limited Partnership, 58 RR 2d 525, 530 (1985); Bell Atlantic Mobile Systems of Philadelphia, Inc., 2 FCC 2d 719 (1987); and Bell Atlantic Mobile
(continued...)

Here, AMSC is not asking the Commission to enforce the MFJ. Instead, all AMSC is doing is pointing to the obvious fact that BAC is not presently in a position to make the kind of commitment required by the Commission's rules, since before it can make any such commitment it will need a waiver of the MFJ, which it so far apparently has not even requested.

⁸⁷(...continued)


Systems of Philadelphia, Inc., 2 FCC 2d 7531 (1987). In the lead case cited by CCI, the Commission apparently had been asked by the challenger to overrule a decision by the U.S. District Court which had granted the RBOC a waiver of the MFJ to permit the particular cellular operations. New York SMSA Limited Partnership, at 530, note 14. By the time of the subsequent cases, Judge Greene had granted a number of similar waivers.

Conclusion

The Commission's rules in this proceeding make it imperative that it adhere strictly to its financial qualifications standards. To do otherwise would be unfair to AMSC, which took those rules at face value and accepted the Commission's invitation to defer its financial showing until more of the key spectrum issues have been resolved. AMSC therefore respectfully urges the Commission to find that CCI is not financially qualified and to defer the processing of its application until CCI is able to demonstrate its qualifications.

Respectfully submitted,

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January 13, 1995

CERTIFICATE OF SERVICE

I, Ana J. Ayala, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P. do hereby certify that on this 13th day of January 1995, a copy of the foregoing "Reply of AMSC Subsidiary Corporation" was sent by U.S. first class mail, postage prepaid to:

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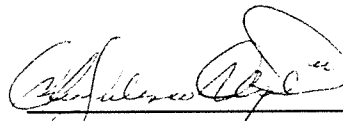
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