

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

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FEDERAL COMMUNICATIONS COMMISSION
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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

PETITION TO DEFER PROCESSING

AMSC Subsidiary Corporation ("AMSC") urges the Commission to find that Constellation Communications, Inc. ("CCI") is not financially qualified to construct, launch and operate its proposed Mobile Satellite Service ("MSS") system.^{1/} CCI's application

^{1/} AMSC is licensed by the Commission to construct and operate the U.S. MSS system in the 1544-1599/1645.5-1660.5 MHz bands. See Memorandum Opinion, Order and Authorization, 4 FCC Rcd 6041 (1989); Final Decision on Remand, 7 FCC Rcd 266 (1992), aff'd sub nom. Aeronautical Radio, Inc. v. FCC, 983 F.2d 275 (1993); Memorandum Opinion and Order, 8 FCC Rcd 4040 (1993). Development of the \$650 million domestic geostationary orbit ("GSO") system is well underway, with launch of the first satellite (AMSC-1) scheduled for March 1995. AMSC's MSS system should be fully operational by this summer, providing for the first time truly nationwide two-way mobile communications service to even the most rural and remote parts of the United States. Investment in AMSC's system has been largely in the form of equity from the principal shareholders, subsidiaries of GM Hughes Electronics Corp., AT&T Corp., Singapore Telecommunications, Ltd., Mobile Telecommunications Technologies Corp. and an Initial Public Offering completed in 1993 which raised \$178 million in public investment.

AMSC filed an application in 1991 to add the bands at issue in the Commission's Big LEO Report and Order (Report and Order, CC Docket No. 92-166; FCC No. 94-261, 59 Fed. Reg. 53,294 (October 21, 1994)) to AMSC-2 and AMSC-3, two other GSO satellites that are authorized as part of AMSC's domestic MSS system. Application of AMSC, FCC File Nos. 15/16-DSS-MP-91 (June 3, 1991). Pursuant to the procedures set forth in the Report and Order, on November 16, 1994 AMSC filed an amendment to its initial application to bring AMSC's proposed use of this spectrum into conformity with the Commission's rules and policies regarding the non-

(continued...)

demonstrates that it has not obtained the commitment to the financing of this undertaking that is required by the Commission's new rules. In order to insure adherence to the Commission's rules and fairness to the other applicants, the Commission should defer considering the grant of a license to CCI until such time as the applicant is able to demonstrate its full qualifications.

Background

Both AMSC and CCI are applicants in the Commission's Big LEO proceeding to license non-GSO MSS systems in the 1.6/2.4 GHz bands, along with four other entities.^{2/} Pursuant to the Commission's new 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, due to the substantial uncertainty that exists about such matters as feeder-link spectrum, by January 31, 1996. AMSC is the only applicant that declined to make any financial qualifications showing in its amendment. The Commission indicated that if all five of the other applicants (including CCI) are found to be qualified, AMSC's application may be dismissed. Report and Order, at ¶¶ 41, 42.

In the Report and Order, the Commission adopts a financial qualifications standard that requires each applicant to show that immediately upon grant of its license it can pay for

^{1/}(...continued)

geostationary orbit ("non-GSO") use of the band. Application of AMSC, FCC File Nos. 19-SAT-LA-95, 20-SAT-AMEND-95 (November 16, 1994).

^{2/} See Report and Order, at ¶ 2; Public Notice, Report No. DS-1481 (November 21, 1994); Public Notice, Report No. DS-1482 (November 30, 1994).

construction, launch and operation of an MSS system for one year after launch of the first satellite. Id., at ¶¶ 32, 38, 41.^{3/}

An applicant relying on external financing must have "irrevocably" committed financing. Report and Order, at ¶ 32. An irrevocable commitment requires "financing that has been approved and does not rest on contingencies which require action by either party to the loan or equity investment." Id. Absent a material change in circumstances, the lender must be willing to make the loan once the applicant receives Commission authorization. Id.

An applicant that relies on internal financing must demonstrate that it has current assets or operating income sufficient to cover its costs. Report and Order, at ¶ 31. In addition, the applicant must demonstrate a "management commitment" that, absent a material change in circumstances, management is prepared to spend the necessary funds immediately upon grant of a license. Report and Order, ¶ 35.^{4/} Applicants relying on financing from a parent corporation must make the identical showing with respect to the commitment by the parent corporation. Id.

According to the Commission, the tests for internal and external financing require equivalent levels of commitment. In its comments in the rule making, Mobile Communications Holdings, Inc., another applicant, urged that there should be parity among the applicants regardless of what method of financing they use. Id. The Commission responded by adopting requirements for applicants relying on internal financing that, in the Commission's own words, are "consistent with [the] approach to credit arrangements

^{3/} See also, 1985 Domestic Fixed-Satellite Order, 101 FCC 2d 223 (1985), at ¶ 11. The Report and Order incorporates the financial qualification standards as adopted in the 1985 Domestic Fixed-Satellite Order.

^{4/} See also, 47 C.F.R. § 25.140(c).

provided by outside sources." *Id.* Moreover, in a recently filed federal court pleading, the Commission stated that the requisite management commitment for applicants relying on internal financing is "exactly equivalent to the irrevocable financing required for companies" relying on external financing.^{5/}

In its application, CCI estimates that the cost of constructing and launching its proposed satellites and operating the system for one year after the launch of the first satellite is \$1.695 billion.^{6/} The only evidence that CCI submits to demonstrate its ability to finance this undertaking is the alleged support of Bell Atlantic Corporation ("BAC"), E-Systems, Inc. ("E-Systems") and Telecommunicacoes Brasileiras S.A. ("Telebras"). CCI describes BAC and E-Systems as its parent corporations. BAC currently holds less than ten percent of the stock of CCI; E-Systems holds slightly more than thirty percent of CCI's shares. BAC and CCI have no common officers or directors. Just one officer of E-Systems is on CCI's eight-member Board of Directors. Telebras has no financial stake in CCI, and the two companies do not share any common officers or directors.

With respect to their willingness to provide financing for the CCI project, the three entities made the following relevant statements:

BAC's Vice President of Corporate Development stated:

BAC has completed an initial review of CCI's FCC application and its business plans for satellite system construction and operation. It is BAC's intent to provide financial

^{5/} 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), at 14. The FCC filed its Opposition in response to MCHI's emergency motion for a stay of the Commission's Report and Order.

^{6/} Cost estimates do not include the ground segment.

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.

E-Systems states that it intends to provide "the necessary financial support for the ... project, subject to normal business reviews of market conditions."

Telebras states that it has entered into a Memorandum of Understanding with CCI with the intent of creating an international joint venture to own and operate a LEO communications system.

Discussion

It is apparent on its face that CCI has failed to show that it is financially qualified to receive a license from the Commission for its proposed satellite system. The letters do not show the required commitments under the Commission's new rules.

BAC says only that it intends to provide some unspecified amount of support for CCI's proposal. There is no indication that BAC is willing to supply financing equal to its eight percent ownership of CCI, let alone the full amount. Moreover, Brian Oliver, the Vice President of Corporate Development who signed the letter, recognizes that his letter is not a "commitment" in any meaningful sense. Mr. Oliver indicates that the company has made only an "initial review" of CCI's application and business plan and indicates that any "actual" financial commitment would only come after additional review. To further demonstrate just how preliminary BAC's review has been, Mr. Oliver closes by indicating that he is not even certain whether he has authority to make any actual financial commitment on behalf of BAC, noting that such approval may require action by BAC's Board of Directors.

It is clear that a substantial commitment, to finance a project that will cost nearly \$1.7 billion dollars, must be made by a corporation's board of directors.^{2/} If the decision has not been approved by BAC's Board of Directors, it does not meet the Commission's test that the commitment not be subject to additional approvals. Therefore, the Commission should require CCI to clarify whether BAC's alleged commitment is supported by an appropriate decision by BAC's Board of Directors.

BAC -- which holds less than ten percent of the shares of CCI and has no common officers or directors with CCI -- should, in reality, be treated as an outside source of funding for CCI. Although CCI refers to BAC as its parent corporation, their relationship appears attenuated. None of the indicia of a parent-subsidiary relationship (i.e., sole or substantial ownership or common officers and directors) exists.

Even if BAC were willing to finance CCI's satellite system, the Modification of Final Judgment ("MFJ") would prohibit it. Under Section II(D) of the MFJ, Bell Operating Companies ("BOCs") are prohibited from investing in companies that provide long-distance services. MSS systems will provide interexchange telecommunications. Therefore, BAC cannot currently invest in CCI's MSS system.

The letter from E-Systems is deficient inasmuch as it leaves unspecified the amount of support that E-Systems is willing to provide and appears to indicate that E-Systems has not

^{2/} The board of directors of a corporation cannot delegate authority which is so broad that it enables an officer to bind the corporation to extraordinary commitments or to significantly encumber the principal assets of the corporation. Boston Athletic Ass'n v. International Marathons, Inc., 392 Mass. 356, 363, 467 N.E.2d 58, 62 (1984). See 2 Fletcher Cyclopedia of Private Corporations § 496 (1990). Certain transactions, such as the one involving a large financial commitment, require specific authorization by the board in order to be valid. Boston Athletic Ass'n, 392 Mass. at 365, 467 N.E.2d at 63.

completed "normal business reviews" that are required before it can make a true commitment. Moreover, the available evidence indicates that E-System does not have sufficient current assets and operating income to meet the Commission's test for such an undertaking. CCI has also failed to demonstrate that E-Systems' Board of Directors is willing to fund the project.

The letter from Telebras similarly contains no indication of the amount of financial support that Telebras might be prepared to invest in CCI's system. The letter on its face contains no commitment whatsoever to the CCI project, but only refers to a Memorandum of Understanding among Telebras, BAC and CCI, no copy of which is provided.

Telebras appears to be at best a possible source of outside funding for CCI's satellite project since Telebras and CCI have no formal relationship other than their Memorandum of Understanding. If CCI intends to rely on Telebras for financing, under the Report and Order, CCI must obtain an irrevocable commitment from Telebras to supply the financing.^{8/}

Conclusion

The Commission's rules in this proceeding make it imperative that it adhere strictly to its rules in reviewing the financial qualifications of the applicants. To do otherwise would be unfair to AMSC, which took those rules at face value and accepted the Commission's invitation to defer a financial showing until more of the key spectrum issues have been resolved. AMSC's owners have extraordinary resources for the construction and operation

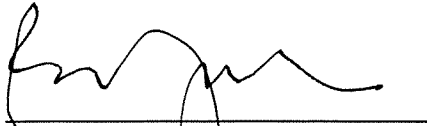
^{8/} If CCI argues that Telebras is an internal source of financing, CCI has failed to obtain the requisite management commitment from Telebras since the Telebras letter contains no commitment of financial support.

of a global MSS system but, unless the Commission strictly enforces its rules, AMSC may be prevented from going forward with such a system.

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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CERTIFICATE OF SERVICE

I, Cynthia L. Smith, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P. do hereby certify that on this 22nd day of December 1994, a copy of the foregoing Petition to Defer Processing of AMSC Subsidiary Corporation" was sent by U.S. first class mail, postage prepaid to:

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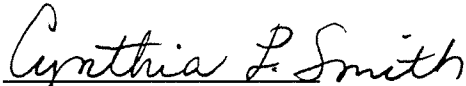
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