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Federal Communications Commission  
Office of Secretary

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

received

DEC 30 1996

In the Matter of )  
 )  
 Application of Constellation Communications, Inc. )  
 for Authority to Construct, Launch and Operate )  
 a Low Earth Orbit Mobile Satellite System in the )  
 1610-1626.5/2483.5-2500 MHz Bands )

File Nos: 17-DSS-P-91(48)  
 CSS-91-013  
 9-SAT-LA-94  
 10-SAT-AMEND-94

## PETITION TO DENY

TRW Inc. ("TRW"), by its attorneys and pursuant to Section 25.154 of the Commission's rules, hereby petitions the Commission to deny the above-referenced application of Constellation Communications, Inc. ("CCI").<sup>1</sup> CCI has failed to demonstrate its compliance with the unambiguous financial qualifications standard for the Mobile Satellite Service Above 1 GHz (the "MSS Above 1 GHz"), and is entitled to no further opportunities to make that demonstration. The International Bureau first found CCI financially unqualified on January 31, 1995 (Constellation Communications, Inc., 10 FCC Rcd 2258 (Int'l. Bur. 1995) ("CCI Order") and the Commission affirmed this finding on June 24, 1996 in the MSS Above 1 GHz Licensing Recon. Order. The CCI application should now be denied or dismissed with prejudice.

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<sup>1</sup> TRW is authorized to operate a satellite system in the Mobile Satellite Service Above 1 GHz (the "MSS Above 1 GHz") in the same service link bands sought by CCI for its proposed system. See TRW Inc., 10 FCC Rcd 2263, erratum, 10 FCC Rcd 3924 (1995), recon./review denied sub nom. Constellation Communications, Inc., FCC 96-279 (released June 27, 1996) ("MSS Above 1 GHz Licensing Recon. Order"). See also TRW Inc., DA 96-1923 (Int'l Bur., released November 19, 1996).

CCI's most recent attempt at a financial qualifications demonstration<sup>2</sup> contains no new information on its finances other than to state that it is reducing the projected cost of its system by eliminating spares from the calculation. Thus, following the Commission's affirmation of the International Bureau's finding that CCI does not meet the MSS Above 1 GHz financial standard,<sup>3</sup> CCI has submitted no information of any kind to remedy its earlier deficient showing (where both the Bell Atlantic and E-Systems letters were found insufficient to meet the required level of commitment specified in the Commission's rules).<sup>4</sup> As a consequence, CCI's more recent claim that its "partners have demonstrated that they each have the current assets and operating income to meet the Commission's financial qualification standard"<sup>5</sup> rings hollow indeed. And the purported "take or pay contracts" that CCI now claims are in the works<sup>6</sup> are clearly inadequate

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<sup>2</sup> See Amendment to Constellation Application (filed September 16, 1996) ("CCI Amendment").

<sup>3</sup> MSS Above 1 GHz Licensing Recon. Order, FCC 96-279, slip op. at ¶¶ 4, 12-16.

<sup>4</sup> CCI Order, 10 FCC Rcd at 2260 (¶¶ 13-16).

<sup>5</sup> CCI Amendment at 2.

<sup>6</sup> Id. Despite CCI's assertion that "take or pay contracts" are a financing tool in other industries (CCI Amendment at 2 n.5), TRW observes that CCI has provided no details (e.g., source or amount of revenues) as to these supposed agreements, nor has it even claimed that any proceeds from those contracts would be applied to construction and/or first year operation costs of CCI's proposed system. In any event, CCI is vague as to the status of the purported agreements, stating only that "it is in the advanced stages of several substantial take or pay contracts." CCI Amendment at 2.

under Commission rules to be considered at all.<sup>7</sup>

Having thus completely failed to meet the Commission's well-defined financial standard, and recognizing the resources of Commission personnel that it has already taken up in its past attempts to demonstrate it has the necessary financial backing to build a more than \$1 billion satellite system, CCI states in a footnote:

In the event the FCC continues to believe that Constellation is not financially qualified, Constellation hereby requests additional time, pursuant to Commission direction, to cure any defects, or in the alternative, a waiver of the rules if mutual exclusivity ceases to exist in this proceeding. (CCI Amendment at 2 n.4.)

There is no merit to either request.

Contrary to CCI's claims — claims for which no justification whatsoever is provided — grant of its MSS Above 1 GHz satellite system application would not serve the public interest. Rather, based on the patent inadequacy of its financial qualifications demonstration, grant of CCI's application would seriously impair the integrity of the Commission's application processes, and lead to the very kind of warehousing of valuable orbital and spectrum resources that the Commission's financial standard for this service was meant to dissuade.<sup>8</sup>

First, the licensing of a financially unqualified MSS Above 1 GHz applicant would severely constrain other MSS Above 1 GHz licensees by forcing them to alter the technical

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<sup>7</sup> See 47 C.F.R. §§ 25.143(b)(3) and 25.140(d)(2)(i)-(iv).

<sup>8</sup> 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, 5949-50 (¶¶ 28-30) (1994) ("MSS Above 1 GHz R&O").

designs or operations of their respective satellite systems in order to permit the accommodation of a system that, in all probability, will never be built. As CDMA licensees awarded authorizations to operate uplinks in the 1610 to 1621.35 MHz band, for example, TRW and Loral/Qualcomm have been engaged in “sharing” negotiations looking to the operation of their systems. This process has been difficult and is not yet complete, but will result in each system agreeing ultimately to apportion the interference in the band between them — a process that will permit co-frequency operations, but diminish to some extent the capacity that each system could attain if the other were not present. Adding CCI to the equation will necessitate a further apportioning of the interference in the band, and cause an additional capacity impact. Requiring qualified licensees, who met the Commission’s standard, to proceed under the cloud of an unqualified speculator that is warehousing a valuable resource is wasteful, contrary to longstanding Commission policy, and will place another obstacle in the path of the current licensees who are endeavoring to provide global services.<sup>9</sup>

The necessary consequence of further lengthy and complex negotiating, and undoubtedly expensive operational limitations, would be less versatile and less effective U.S. MSS Above 1 GHz systems that are needlessly restricted in their ability to compete in the international

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<sup>9</sup> For this reason, TRW rejects CCI’s assertion that the elimination of mutual exclusivity is germane to its request for relaxation or waiver of the financial rules. See CCI Amendment at 2 n.4. The fact that the Commission has determined that up to four CDMA systems may be able to share the band 1610-1621.35 MHz and be economically viable (see MSS Above 1 GHz R&O, 9 FCC Rcd at 5953) does not mean that those operators who comply with the Commission’s rules should design and operate systems that are less than optimal, simply to leave room for the prospect that a currently unqualified operator may emerge in the future.

marketplace for communications services. TRW strongly urges the Commission to bear these concerns in mind as it examines CCI's decision to rest on its previously discredited financial showing.

Second, as TRW has also previously stated, the award of MSS Above 1 GHz authorizations without proper verification of applicants' qualifications could spark a crisis of confidence in the development of the U.S. MSS Above 1 GHz industry.<sup>10</sup> The result would be potentially irreparable harm to current MSS Above 1 GHz licensees, whose investors naturally rely upon the Commission to license only financially viable satellite systems.

In spite of the Commission's clear explication of its MSS Above 1 GHz financial standard and the financial showings required of MSS Above 1 GHz applicants in the MSS Above 1 GHz R&O and in its own rules, the International Bureau's reiteration of the same standard and showings requirement in the CCI Order, and the Commission's repetition of the same information in its decision denying CCI's Application for Review of the International Bureau's decision,<sup>11</sup> CCI still professes to need a further opportunity to comply with the MSS Above 1 GHz standard. Thus, although it has had two opportunities in two years in which to bring its application into compliance with the standard, CCI now has the temerity to request that, should the Commission find its financial showing lacking — which it already has done once and must surely do again —

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<sup>10</sup> See Comments of TRW Inc. Concerning MCHI's "Notice of Supplemental Authority," File Nos. 11-DSS-P-91, 18-DSS-P-91, 11-SAT-LA-95, 12-SAT-AMEND-95 (filed February 28, 1996) at 6-7.

<sup>11</sup> MSS Above 1 GHz Licensing Recon. Order, FCC 96-279, slip op. at 5, 7-9.

the Commission should nevertheless outline the additional information that it needs and give CCI yet another opportunity to submit it. The Commission should flatly reject this desperate attempt to delay the inevitable. TRW can envision no circumstance, and CCI has not even attempted to identify one, which would justify both the reward CCI seeks for its intransigence and the concomitant penalty such a reward would impose on those operators such as TRW who followed the Commission's rules and met its deadlines.

Nor is CCI entitled to a waiver of the Commission's rules. CCI offers no factual or legal support for a waiver and, at the Commission's indulgence, it has already taken substantially more time than that required by other applicants in order to assemble sufficient financing to meet the Commission's standard.<sup>12</sup> CCI has had more than enough opportunity to make its financial showing, and any further extension of the instant proceeding would be a senseless drain on the Commission's resources and those of the other parties to the proceeding.

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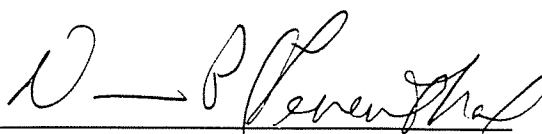
<sup>12</sup> Moreover, a waiver can be justified only when grant would serve the public interest and not undermine the policy of the rule for which waiver is being sought. See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Here, neither test is satisfied.

**Conclusion**

For the foregoing reasons, the Commission should deny or dismiss with prejudice CCI's  
MSS Above 1 GHz application.

Respectfully submitted,

TRW Inc.

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December 27, 1996

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**CERTIFICATE OF SERVICE**

I, Katharine B. Squalls certify that a copy of the foregoing "Petition to Deny" was mailed, first-class postage prepaid, this 27th day of December, 1996 to each of the following:

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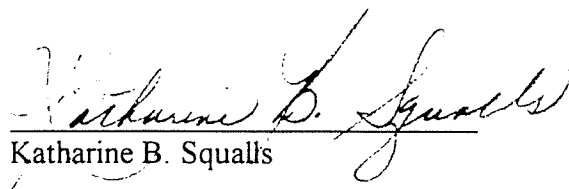
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