

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of)	
)	
CONSTELLATION)	File Nos. 17-DSS-P-91(48)
COMMUNICATIONS, INC.)	and CSS-91-013
)	9-SAT-LA-95
For Authority to Construct,)	10-SAT-AMEND-95
Launch and Operate a Low-Earth)	
Orbit Satellite System in the)	
1.6/2.4 GHZ Bands)	
_____)	

OPPOSITION TO PETITION FOR DECLARATORY RULING

Loral/QUALCOMM Partnership, L.P. (LQP), hereby opposes the Petition For a Declaratory Ruling ("Petition") filed by Constellation Communications, Inc. ("Constellation").¹ In the Petition, Constellation seeks a ruling that a proposed change in its ownership structure will not affect the position of Constellation's application in the current processing group for MSS Above 1 GHz satellite systems, and requests an exemption from the cut-off rules pursuant to Section 25.116(c)(2) for its pending application. For the reasons set forth below, the ownership changes proposed by Constellation do not warrant an exemption of the cut-off rules, and, if the transactions are consummated, the application must be treated as "newly filed" under Section 25.116 of the Commission's Rules.

¹ LQP has been authorized to construct, launch, and operate an MSS Above 1 GHz system in the same user links for which Constellation's application is pending. See Loral/QUALCOMM Partnership, L.P., 10 FCC Rcd 2333 (1995).

BACKGROUND

Constellation initially filed its application for an authorization in the MSS Above 1 GHz service on June 3, 1991. In an amendment to the application filed on November 16, 1994, Constellation disclosed for the first time that between June 3, 1991 and November 16, 1994, a number of changes in the ownership of its voting stock had occurred. As Constellation conceded, the cumulative effect of these changes was that more than 50% of Constellation's voting stock had changed hands. See Constellation Amendment and Application for Launch Authorization and License, at Ex. 5, Att. A (Nov. 16, 1994) ("Amended Application").

On December 22, 1994, LQP filed a Petition to Deny Constellation's application. LQP demonstrated that Section 309 of the Communications Act and Section 25.116 of the Commission's Rules required that Constellation's change in ownership be considered a major amendment to its application and, therefore, that Constellation's application must be deemed a "newly filed" application and placed in the next Big LEO processing group. In an order deferring action on Constellation's application based on the applicant's deficient financial showing, the International Bureau found that if a "major" change in Constellation's ownership had occurred, Constellation was entitled to an exemption under Section 25.116 of the Commission's Rules. See Constellation Communications, Inc., 10 FCC Rcd 2258, 2261 (1995). The Bureau, however, directed Constellation to seek a ruling concerning the Commission's cut-off rules if it or its parents "contemplate concluding future transactions which would have the cumulative effect of changing

ownership or control of more than 50% of Constellation's stock." Id. LQP filed an Application for Review of the Bureau's Order on the grounds that the Bureau's grant of an exemption from Section 25.116 for Constellation violated settled Commission policy.² LQP's Application for Review remains pending.

Constellation's new Petition seeks a ruling that an exemption from Section 25.116 is justified for additional ownership changes beyond those disclosed in the 1994 amendment, "which could potentially trigger a finding that Constellation has permitted a transfer of control in violation of the cut-off rules." Petition, at 3. Constellation's Petition reflects changes to both its stock ownership and Board of Directors.

With respect to stock ownership, Constellation proposes to convert all of its convertible debt to equity.³ According to the information provided by Constellation, these transactions would result in ownership of over 35% of its stock by E-Systems, Inc., 22% by SpaceVest, Inc., and 14.9% by Bell Atlantic Enterprises International. Of these three entities, only SpaceVest was an initial

² Since its ruling on LQP's Petition to Deny, the Bureau has found waivers of the cut-off rules warranted based on reasoning similar to that outlined in Constellation. See Volunteers in Technical Assistance, 78 RR 2d 1632, 1638 (IB 1995); STARSYS Global Positioning, Inc., DA 95-2342 (IB released Nov. 20, 1995). LQP has explained why it believes the Bureau's reasoning in the Constellation decision is inconsistent with Commission policies in its Application for Review.

³ Constellation has not provided information on the actual number of shares which would be affected by the proposed transactions, nor when the parties holding convertible debt acquired such interests.

shareholder in Constellation, and its equity interest at that time was a nominal 1.2%. See Petition, at 3 n. 5.

The interests of E-Systems and Bell Atlantic Enterprises in the applicant were first disclosed in the 1994 amendment. In that amendment, Constellation disclosed that it had issued new stock to E-Systems and Bell Atlantic Enterprises, after which these companies held approximately 31% and 8% of Constellation's stock, respectively. The other major shareholder in Constellation at that time was CTA Launch Services, Inc., which held an 18.35% interest as a result of acquisition of two existing shareholders.

The ownership of the initial applicant and as now proposed is as follows:

<u>June 1991 Ownership</u>		<u>Proposed Ownership</u>	
Microsat	39%	E-Systems	35.6%
David Wine	14.3%	SpaceVest	22.1%
Defense Systems	10.1%	Bell Atlantic Enterprises Int.	14.9%
Not identified	36.6%	CTA, Inc. ⁴	12.3.%
		Miscellaneous Investors	15.1%

Compare Constellation "Aries" Application, at App. F, FCC Form 430, Ex. VI

(dated June 3, 1991) with Petition For Declaratory Ruling, at 3. Under the proposed ownership structure, E-Systems, SpaceVest and Bell Atlantic Enterprises -- none of which was identified as owners in the initial application -- would have a combined ownership of 72.6% of Constellation.

⁴ According to Constellation, CTA Launch Services would hold 7.5% outright; its parent CTA, Inc. would hold 2.8% as a result of the conversion; and, CTA would control an additional 2% though its interest in another shareholder, CTA Space Systems, Inc. See Petition, at 3 n. 4.

Changes to Constellation's Board of Directors are reflected in the draft Form 430 attached to its Petition, but were also the subject of a recently filed updated Form 430. See Constellation Form 430 (filed Nov. 20, 1995). Three of the 10 directors listed in the updated Form 430 are affiliated with E-Systems and one with Bell Atlantic Enterprises. Cf. LQP's Application for Review, at 5 (listing Board members in original application and 1994 amendment). SpaceVest has apparently acquired two seats on the Board. The two newly appointed directors, John Higginbotham and Francis DiBello, are apparently partners in SpaceVest, Inc. See Exhibit 1.

I. THE PROPOSED CHANGES IN CONSTELLATION'S OWNERSHIP CONSTITUTE A MAJOR AMENDMENT UNDER SECTION 25.116.

Section 309 of the Communications Act of 1934, as amended, requires that a substantial change in the ownership or control of an applicant must be deemed a major change subjecting the application to Public Notice requirements. 47 U.S.C. § 309; see, e.g., Hughes Communications Mobile Satellite, Inc., 4 FCC Rcd 6041, 6045 (1989) (subsequent history omitted). A transfer of 50% or more of an ownership interest in an applicant is generally considered a substantial change in ownership or control under Section 309. Hughes Communications, 4 FCC Rcd at 6045. Section 25.116(b)(4) states that an amendment itself or the "cumulative effect" of the amendment may be deemed a major change pursuant to Section 309. 47 C.F.R. § 25.116(b)(4).

Constellation has not disclosed how many shares would be issued and/or transferred as a result of the transactions described in the Petition. However, it is clear that the "cumulative effect" of the proposed transactions together with those disclosed in the 1994 amendment would result in a shift in control of more than 50% of Constellation's stock. Thus, to the extent the conversion is viewed with the stock transfers previously disclosed, there is no question that a major amendment would be the result, for the reasons set forth in LQP's Application for Review.⁵

Moreover, six of the directors on Constellation's new 10-member Board appear to be affiliated with investors which had no Board representation or significant equity interest when Constellation's application was filed. To the extent control of Constellation resides with the Board, there has been a shift in control to directors affiliated with new investors.

Constellation concedes that "the conversion would result in dilution of and changes to existing shareholder interests which could potentially trigger a finding that Constellation has permitted a transfer of control in violation of the cut-off rules set out in Section 25.116 of the Commission's Rules." Petition, at 3. It has not sought a Commission ruling that its amendment is "minor," but instead requests that the Commission grant an exemption from the Section 25.116 cut-off rule for the proposed changes. For all these reasons, the proposed changes should be deemed a major amendment within the meaning of Section 25.116.

⁵ Section 25.116 does not explain when the "cumulative effect" is considered. Even though certain changes in ownership may have been approved, the cumulative effect of changes may trigger Section 25.116(c).

II. AN EXEMPTION FROM THE SECTION 25.116 CUT-OFF RULES IS UNWARRANTED AND NOT IN THE PUBLIC INTEREST.

Constellation's proposed ownership changes continue the transfer of control over its Big LEO application from the initial investors to an entirely new set of parties. As LQP pointed out in its Application for Review, Section 25.116 was designed to apply to exactly such a transfer, and, in this case, the Commission's settled policy requires dismissal of the application from the current processing group.

The Commission's standard for considering a waiver of Section 25.116 was articulated in Airsignal International, Inc., 81 FCC 2d 472 (1980), and has been applied in the context of satellite applications in more recent cases. See Satellite CD Radio, Inc., 9 FCC Rcd 2569 (CCB 1994); STARSYS Global Positioning, Inc., 8 FCC Rcd 1662 (CCB 1993). Under these cases a waiver may be granted where the ownership transaction (1) has an independent, legitimate business purpose and (2) serves the public interest. See Airsignal, 81 FCC 2d at 475-76. As LQP noted in its Application for Review, the "legitimate business purpose" test requires that an independent business reason be demonstrated for acquiring ownership of an applicant, separate from obtaining an interest in the application itself. See LQP's Application for Review, at 12.

As in its 1994 amendment, Constellation has not demonstrated for the 1995 changes that the proposed transactions have any independent business purpose other than transferring control over its application. For example, there is no

indication in the Petition that Constellation has any business interests or other assets which prompted the investment by E-Systems, Bell Atlantic and SpaceVest. Cf. Airsignal, 81 FCC 2d at 476 (acquisition of an applicant's shareholder was incidental to larger corporate acquisition). Moreover, Constellation acknowledges that the purpose of the 1995 ownership change is to permit Constellation, the applicant, to strengthen its financial structure in order to be able to demonstrate to the Commission that it is financially qualified to hold a satellite system license. Petition at 5. Thus, the only purpose of the ownership changes is to satisfy a regulatory requirement, rather than to fulfill a business interest independent from the Commission's application processing procedure.

The Commission's cut-off rules are intended to prevent a cut-off applicant from substantially modifying its application to the prejudice of pending and potential applicants. Constellation is attempting to upgrade its application through an ownership change. The Commission should not allow it to bootstrap an upgrade to its financial standing into the business purpose necessary to satisfy the Airsignal standard. To do so would vitiate the cut-off rules. As LQP pointed out in its Application for Review, grant of a waiver of Section 25.116 would improperly allow the insertion into these three-year-old proceedings of an application for a completely revised system with completely new sources of funding and new parties in interest. See Application for Review, at 15-18. Based on the information provided in the Petition, the same analysis should apply to the

changes proposed in the Petition, and the requested exemption from Section 25.116 should be denied.

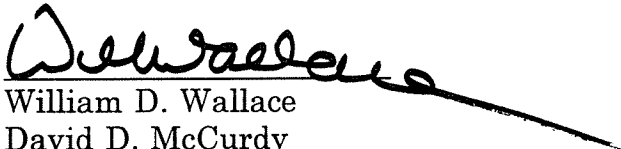
III. CONCLUSION

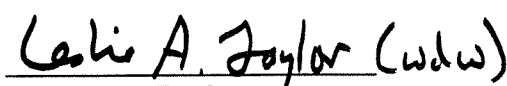
For the reasons set forth above and in LQP's Application for Review of the International Bureau's order in Constellation Communications, Inc., 10 FCC Rcd 2258 (1995), grant of Constellation's requested waiver of the "major amendment" rules is contrary to the Commission Rules, precedent and policy. Accordingly, Constellation's Petition should be denied.

Respectfully submitted,

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EXHIBIT 1

LEVEL 1 - 1 OF 25 STORIES

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HEADLINE: SpaceVest Takes Off, Lands First Close

BODY:

RESTON, Va. - SpaceVest this summer lined up \$42 million in an initial close for its first full-scale venture capital fund, said John Higginbotham, general partner.

California Public Employees' Retirement System committed \$30 million to SpaceVest Fund, and the District of Columbia Retirement Board and Virginia Tech Foundation came in for the rest. The three institutions invested in SpaceVest's \$2.5 million pilot effort, The SpaceVest Partners (VCJ, October 1993, page 18).

The latest fund, launched last summer (VCJ, July 1994, page 16), targets high-technology companies associated with the space industry. The primary areas of investment are telecommunications companies, new technology spin-offs, and infrastructure and support service providers.

The new fund has committed a total of \$15 million to six deals; the pilot fund has seven or eight portfolio companies. Two current investments include Geophysical & Environmental Research Corp. and Analytical Graphics.

Other fund partners are Frank DiBello, Stephen Rochereau and Roger Widing. - L.V.

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CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 4th day of December 1995, caused copies of the foregoing Opposition to Petition for Declaratory Ruling to be delivered via hand delivery (indicated with *) or by U.S. mail, postage prepaid, to the following:

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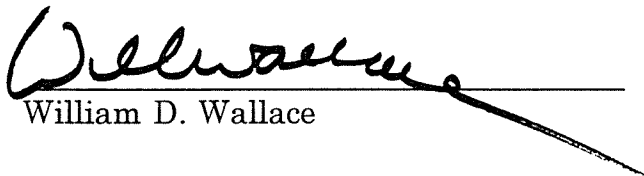
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