

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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MAR 27 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Application of

CONSTELLATION COMMUNICATIONS, INC.

For Authority to Construct, Launch and Operate a
Low Earth Orbit Satellite System in the 1610 -
1626.5 MHz/2483.5 - 2500 MHz Band

)
)
) File Nos. 17-DSS-P-91(48)
) CSS-91-013
) 9-SAT-LA-95
) 10-SAT-AMEND-95
)

To: Chief, International Bureau

MAR 30 1995

Satellite and Radiocommunication Division
Office of the Chief

**CONSOLIDATED REPLY TO OPPOSITIONS TO
PETITION FOR RECONSIDERATION**

Constellation Communications, Inc. ("Constellation"), by its attorneys, pursuant to §1.106(h) of the Commission's Rules, hereby replies to the Oppositions filed by AMSC Subsidiary Corporation ("AMSC"), Loral/QUALCOMM Partnership, L.P. ("LQP"), TRW, Inc. ("TRW"), and Motorola Satellite Communications, Inc. ("Motorola") (together, the "Opponents") in response to Constellation's March 2, 1995 "Petition for Reconsideration" ("Petition") of the Order, DA 95-129, released January 31, 1995, which deferred Constellation's above-captioned Big LEO Mobile Satellite Services ("MSS") Application. The Petition pointed out several reversible errors in the Order's conclusion that Constellation is not financially qualified "at this time" to construct, launch, and operate its proposed Big LEO system, and the Opponents have failed to rebut Constellation's arguments. Upon reconsideration, the Bureau is urged to find that Constellation is financially qualified and to grant its Application.

I. Motorola's Opposition Is Late And Should Be Dismissed

At the outset, Constellation urges that Motorola's untimely Opposition should be

dismissed without consideration. While Motorola glibly asserts, in its separate Motion to Accept Opposition ("Motion") (at 1), that Constellation will not be prejudiced by the Bureau's entertaining of the Opposition, the opposite is true. Just as a late-filed Petition to Deny is entitled to no consideration, the same should hold true for Motorola's late-filed Opposition, particularly, where, as here, Constellation is faced with three other Oppositions. See Meredith/New Heritage Strategic Partners, L.P., 9 FCC Rcd 6841, 6842 ¶¶8, 9 (1994)(miscalculation of filing deadline not good cause for lateness; Commission announces that henceforth it will apply "strict good cause standard"). Motorola's pleading is redundant of matters raised in the other Oppositions and makes only one novel point, which is addressed in footnote 1 below.¹ Therefore, Motorola cannot

¹ Motorola challenges Constellation's administrative due process right to seek reconsideration of the Order, claiming that it is not a "final" action within the meaning of §1.106(a)(1) of the Rules, that consideration of Constellation's Petition at this time "would disrupt the Commission's adjudicatory processes and waste valuable resources, and that "[a] far better approach would be to await a final determination by the Bureau on Constellation's Application". Motorola Opp. at 3, 4, 5.

However, the Order itself (at ¶27) invites such interlocutory pleadings, holding that Constellation may submit "a showing demonstrating its financial qualifications no later than January 31, 1996" (emphasis added). Importantly, the Order does not require Constellation to wait until January 31 to clarify matters and to set the record straight, which are the Petition's purposes. Hence, no disruption of the orderliness of this proceeding or waste of resources will occur. Moreover, case precedent supports waiver of the "final" action proviso of §1.106(a) for good cause shown. See, e.g., Investigation of Access and Divestiture Related Tariffs, FCC 83-568 at ¶6 and n.6, 1983 FCC Lexis 324 *6-7 (1983) (Commission reviews merits of petition for reconsideration of Order suspending tariff and specifically invokes its general waiver authority under §1.3 of the Rules to waive §1.106(a)(1)); cf. Communications Satellite Corp., 32 FCC 2d 533 (1971)(§1.115(e)(1) waived to allow interlocutory appeal via application for review because of extraordinary circumstances). In the instant case, Constellation has shown good cause and extraordinary circumstances in that deferral of its Application "makes its future prospects for obtaining a license very uncertain"; hence, immediate reconsideration and reversal of the Order is necessary to prevent irreparable injury to Constellation.

seriously maintain that its pleading is necessary for a full consideration of the issues raised by Constellation, and responding is needlessly burdensome to Constellation. Hence, Motorola's Motion should be denied, and its Opposition should be dismissed.

II. Constellation Has Demonstrated Its Financial Qualifications To Be A Big LEO Licensee

The Petition details how Constellation adequately established its financial qualifications for immediate grant under §25.140(d)(1) of the Rules, and it also anticipated and answered most of the Opponents' arguments. Constellation will address two new points.

A. Bell Atlantic Qualifies As A "Parent" of Constellation

LQP and TRW try to deny that the Order concluded that Bell Atlantic and E-Systems, Inc. qualify as "parents" for purposes of demonstrating Constellation's financial qualifications under §25.140(d)(1) of the Rules. But there is no other way to read Paragraph 5-16 of the Order, which analyze Constellation's financial showing under subsection (d)(1) of §25.140 -- the subsection that pertains to internal financing or financing by one or more corporate parents. If, as LQP and TRW maintain, Bell Atlantic and E-System were treated by the Bureau as mere investors, then the Order would have analyzed Constellation's showing under the separate and very different standards of subsection (d)(2) of the Rules. Since the Order applied only a subsection (d)(1) analysis, the Bureau obviously deemed Bell Atlantic and E-Systems to be corporate parents of Constellation.

LQP and TRW are clearly mistaken when they attempt to parse Paragraph 15 of

the Order as holding that Bell Atlantic and E-Systems do not have sufficient equity interest in Constellation to be considered corporate parents. That is not what Paragraph 15 says, and the Commission has never set any equity percentage standard for being a corporate "parent". Thus, the Order correctly held that Constellation could demonstrate its financial qualifications by relying on the showings provided by Bell Atlantic and E-Systems as its parents under §25.160(d)(1) of the Rules.

B. The Order Converted the National Exchange Case Into a New "Management Commitment" Standard

The Order concluded (at ¶¶13-15) that Bell Atlantic's "management commitment" letter was insufficient to demonstrate Constellation's financial qualifications. While conceding that "there is no 'magic language' to demonstrate financial qualifications," the Bureau held that the management commitment contained in the Bell Atlantic letter was "inadequate under the standards embodied in our rules and the 1988 National Exchange [National Exchange Satellite, Inc., 3 FCC Rcd 6992 n.5 (1988)] case". Order at ¶¶14, 16. Constellation urged in its Petition that this was reversible error because, at the time of the Order, there were no Commission pronouncements which provided adequate notice - - consistent with administrative due process -- of the Commission's management commitment "standards" for satellite applications. Neither the Big LEO Order nor §25.140(d)(1) of the Rules contains any specific language which must be included or excluded from a management commitment letter for it to pass muster. Moreover, the diversity of language in the management commitment letters supplied in this proceeding by Motorola, TRW, and LQP, as well as Bell Atlantic and E-Systems, show that there are no true "magic words" for demonstrating management commitment and that the actual wording

may vary without undoing the commitment made.

Despite the express reliance by the Order (at ¶16) upon "the standards embodied in our rules and the 1988 National Exchange case" (emphasis added), when holding that Bell Atlantic's commitment letter was inadequate, the Opponents maintain that the Order did not convert the National Exchange case into a standard. However, when they try to identify other pre-Order "standards," they essentially rely on language in Paragraph 35 of the Big LEO Order, supra at 5952, to define "management commitment" -- not on the text of §25.140(d)(1) of the Rules or Commission case precedent. This is not surprising, for §25.140(d)(1) provides no guidance -- just the phrase "commitment to the proposed satellite program by management". Thus, by a process of deduction using the Order's above-quoted language, the Order must be relying upon the BNI letter in the National Exchange case -- not upon the rule or the Big LEO Order -- to flesh out and give meaning to the phrase "management commitment" and to measure the adequacy of Bell Atlantic's letter. Indeed, Paragraphs 11-16 of the Order cite or quote from the National Exchange case at least 14 times, but cite and quote the Big Leo Order only once.

Under these circumstances, it is wholly disingenuous for the Opponents to claim that the Order only used the National Exchange case to illustrate why its rejection of Bell Atlantic's letter was consistent with "long-standing and well-known" DOMSAT financial qualifications standards ((LQP Opp. at 2). Although the National Exchange case was decided in 1988, the Petition makes clear that it was not until the Order that the actual text of BNI's letter ever appeared in a published Commission decision. So much for "well-known" standards and compliance with the mandatory publication and notice-and-comment rulemaking requirements of Sections 552 and 553 of the Adminis-

trative Procedure Act ("APA"), 5 U.S.C. §§552 and 553 (1982).

Thus, Constellation urges that its innocent selection of National Exchange's BNI letter as a useful "model" for a management commitment does not estop it from maintaining that its administrative due process rights were violated when the Order (at ¶16) transformed that "model" into a talismanic "standard" and penalized Constellation for minor departures from its wording. The Order erroneously converted the National Exchange case's BNI letter into a substantive "rule" without following APA requirements and then incorrectly applied that "standard" to Constellation.

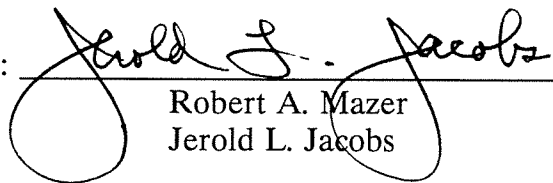
III. Conclusion

Constellation has shown above that it is fully qualified technically, financially, and legally to construct, launch and operate a 1.6/2.4 GHz LEO MSS system. Its demonstration of financial qualifications should be reconsidered, and the Chief, International Bureau should conclude that Constellation is financially qualified and that its Application should be granted.

Respectfully submitted,

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Dated: March 27, 1995

CERTIFICATE OF SERVICE

I, Jerold L. Jacobs, hereby certify that the foregoing "Consolidated Reply to Oppositions to Petition for Reconsideration" was served by hand or first-class mail, postage prepaid, this 27th day of March, 1995, on the following persons:

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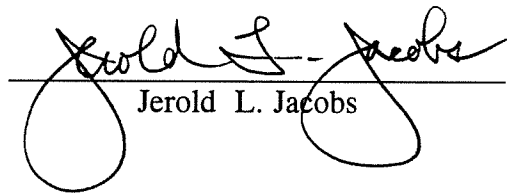
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