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August 8, 2000

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AUG 9 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: Request for Limited Waiver and Extension of Time  
File Nos. 17-DSS-P-91(48), CSS-91-013, 10-SAT-AMEND-95  
159-SAT-AMEND-96

Dear Ms. Salas:

Pursuant to Section 1.3 and Section 25.117 (e) (1) of the Commission's Rules, Constellation Communications Holdings, Inc. ("Constellation") hereby requests a waiver of the milestones specified in the Commission's *Order and Authorization* (the "*Constellation O&A*"), D. A. 97-1366, released July 1, 1997,<sup>1</sup> granting a license (the "License") to construct, launch and operate a satellite system (the "Constellation Satellite System") pursuant to the rules governing the Above 1 GHz Mobile Satellite Service.

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## I. BACKGROUND

Constellation is authorized to operate in the 1.6/2.4 GHz Mobile Satellite Service ("MSS") as one of four current<sup>2</sup> "Big LEO" licensees.<sup>3</sup> The other members of this group are Iridium LLC ("Iridium"),<sup>4</sup> Globalstar Telecommunications LP ("Globalstar")<sup>5</sup> and Mobile Communications Holdings, Inc.<sup>6</sup>

Despite a promising beginning and the support of major corporations and financial institutions, market conditions have turned against the Big LEO licensees. Even with substantial financial backing from Motorola, Iridium declared bankruptcy in August 1999.<sup>7</sup> Globalstar's system is fully on line, but questions have arisen as to the sources for financing of long-term operations.<sup>8</sup> Such problems have adversely impacted Globalstar notwithstanding support from Loral, Lockheed Martin and Qualcomm, who have served as Globalstar's primary financial sponsors.

It should also be noted that ICO Global Communications Ltd. ("ICO"), the holder of a MSS license in the 2 GHz band issued by Oftel in the United Kingdom, experienced major difficulties in securing funding in the international equity market. Such problems persisted despite the support of major international telecommunications administrations. As a result, ICO declared bankruptcy in August 1999.<sup>9</sup> Recent reports indicate that ICO has emerged from bankruptcy, but with a materially different business plan.<sup>10</sup>

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## II. CONSTELLATION'S PROGRESS AGAINST MILESTONES

In the *Constellation O&A*, the Commission required that CCI commence construction of the first two system satellites by July 1998 (the "July 1998 Construction Commencement Milestone"). Additional milestones included requirements that construction on the remaining system satellites be commenced by July 2000 (the "System Construction Commencement Milestone"), that construction of the first two satellites be completed by July 2001 (the "Two Satellite Construction Completion Milestone"), and that the system be operational by July 2003 (the "System Operational Status Milestone").

The July 1998 Construction Commencement Milestone was satisfied with the June 30, 1998 execution of a contract between CCI's affiliate, CCII, and Orbital Sciences Corporation ("Orbital") for the construction of twelve spacecraft as part of the Constellation Satellite System. Under separate contracts, Orbital agreed to make substantial phased equity investments in CCII and committed to vendor financing for a significant portion of the initial satellite system construction effort. The Commission was notified that CCI had met this milestone on July 2, 1998, with the filing of an Affidavit of Dr. C. J. Waylan, President and Chief Executive Officer of CCI. The Waylan Affidavit was filed as part of the annual report required by Section 25.143 (e) of the Commission's Rules.<sup>11</sup>

As Orbital proceeded under the satellite construction contract, CCII continued to work toward satisfaction of the remaining milestones. In September 1999, at the conclusion of extended technical, design and financial negotiations pertaining to the Constellation Satellite System, CCII entered into contracts with Raytheon Company ("Raytheon") and ASRC Aerospace Corporation ("ASRC"). Raytheon agreed to make an equity investment in CCII and to provide substantial vendor financing in connection with a satellite system subcontract with Orbital. ASRC agreed to become a member of the ground segment team for the system and to make a phased equity investment in CCII. The contracts with Orbital, Raytheon and ASRC remain in full force and effect.

Despite the financial support CCII received from various sources, including Orbital and Raytheon, CCII and its affiliates recognized that it was essential to attract significant amounts of additional investment to proceed with the full implementation of the Constellation Satellite System as required to satisfy the remaining milestones. To accomplish this objective, CCII established a working relationship with Lehman Brothers during the fourth quarter of 1999 to

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explore the possible sources of funds within the financial community. Lehman Brothers expressed support for CCII's business plan, but cautioned that the market uncertainties created by the Iridium and ICO bankruptcies, and the operating results of Globalstar raised significant hurdles in the path of CCII's financing efforts.

Subsequently, CCII retained Banc of America Securities LLC ("BoA-S") in May 2000 as its primary financial advisor. BoA-S also validated Constellation's business plan. Nevertheless, despite a concerted and focused effort to secure investments from strategic and financial sources in the United States and abroad, BoA-S found that investor caution had continued unabated with respect to the Big LEO industry. BoA-S suggested that the investment objectives for the Constellation Satellite System were best served by deferring further activities until market conditions improved.

Notwithstanding the restraints imposed by the financial marketplace, CCII remains committed to pursue construction of the Constellation Satellite System. In order to do so, however, it will be necessary to secure a waiver of the remaining milestones set forth in the *Constellation O&A*.

In summary, even though the Constellation Satellite System was conceptualized and designed by a start up company with limited financial backing, Constellation and its affiliates have made substantial progress toward the construction of the Constellation Satellite System. In addition to its satellite design, engineering and international business development activities,<sup>12</sup> Constellation, and its corporate parent CCII, have aggressively pursued efforts designed to secure additional private investment from financial and strategic investors in anticipation of an initial public offering in U.S. and international financial markets. However, as noted above, during the past eighteen months, the financial community has been reluctant to participate in funding for the Big LEO market segment.

### III. REQUEST FOR LIMITED WAIVER AND EXTENSION OF TIME

Constellation requests a limited waiver of Section 25.117 (e) (1) of the Commission's Rules to extend (i) the Two Satellite Construction Completion Milestone to July 2001, (ii) the System Construction Completion Milestone to July 2002, and (iii) the System Operational Status Milestone to July 2004. While it can be argued that disruptions in the financial marketplace caused by the bankruptcies of Iridium and ICO and the resulting reluctance of financial institutions and strategic investors to commit substantial amounts of capital to fund the

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Constellation Satellite System were “special circumstances”<sup>13</sup> beyond the control of Constellation, Constellation believes that there are other factors that constitute “good cause” for waiving the rule.<sup>14</sup>

#### IV. THE WAIVER AND EXTENSION REQUEST IS SUPPORTED BY PRIOR COMMISSION ACTIONS

##### A. Approval of the Waiver Request Would Serve the Public Interest.

As the Commission has noted, waiver is appropriate “if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.”<sup>15</sup> Most recently, the Commission has stated that waivers will be granted where the “relief requested would not undermine the policy objective of the rule in question, and would otherwise serve the public interest.”<sup>16</sup> The 1.6/2.4 GHz MSS systems were licensed in recognition of the potential benefits that could accrue to wide sectors of public users. For example, the Commission noted, “Big LEO service can offer an almost limitless number of services, including ubiquitous voice and data mobile services [to] help meet the demand for a seamless, nationwide and eventually global communications system.”<sup>17</sup> The Commission also stated that such systems can be extended throughout the world to provide “an ‘instant’ global and national telecommunications infrastructure [to] countries that have not been able to develop a nationwide communication service.”<sup>18</sup> The granting of a waiver would serve the public interest by affording Constellation an additional opportunity to demonstrate the validity of the Commission’s Big LEO policy.

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<sup>13</sup> See *EarthWatch Incorporated*, DA 00-909, *Order and Authorization* (rel. April 24, 2000) (“*EarthWatch Order*”).

<sup>14</sup> See Section 1.3 of the Commission’s Rules, 47 C.F.R. 1.3. See also *WAIT RADIO v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (“*WAIT Radio*”); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”); *EarthWatch Order*, supra n. 12 at para. 9.

<sup>15</sup> *EarthWatch Order*, supra n. 13, para. 9 (citing *Northeast Cellular*, 897 F.2d at 1166). Circumstances that would justify a waiver include “considerations of hardship, equity of more effective implementation of overall policy.” *WAIT Radio*, supra n. 13, 418 F.2d at 1159. These factors have been addressed in previous paragraphs of this waiver request.

<sup>16</sup> *Earth Watch Order*, supra n. 13, at para. 9.

<sup>17</sup> *Big LEO Order*, supra n. 3 at para. 3.

<sup>18</sup> *Id.*

B. Constellation Has Satisfied the EarthWatch Test for Approval of Waiver Requests.

In the *EarthWatch Order*, the Commission's Satellite and Radiocommunication Division (the "Division") articulate a two-fold test for the review of milestone waiver requests.<sup>19</sup> First, the record must demonstrate that the applicant intends to proceed with construction<sup>20</sup> and is not engaged in the "warehousing" of spectrum.<sup>21</sup> A third component of the first prong of the EarthWatch test is whether the public interest would be furthered by a grant of the waiver.<sup>22</sup> The second element of the test requires a determination that a grant of the waiver would not preclude new entrants from entering the market in question;<sup>23</sup> here the Big LEO market

1. Constellation Has Demonstrated the Intent to Proceed With Construction.

(a) Intent to Construct. As noted in Section II, Constellation has demonstrated its intent to construct the Constellation Satellite System. The system design was developed by CCI and CCII and formed the basis for awarding the construction contract to Orbital in satisfaction of the July 1998 Construction Commencement Milestone. Since that date, additional contracts have been awarded to Raytheon and ASRC. In addition, efforts have been undertaken and are ongoing to obtain the financing necessary to fund the Constellation Satellite System. These actions demonstrate Constellation's ongoing intent to proceed with construction as required under the *Constellation O&A*.

(b) A Grant of the Waiver will Not Result in Spectrum "Warehousing." In the *Earth Watch Order*, the Division noted that the determination of whether a licensee was "warehousing" its authorization turned on the extent to which the licensee had commenced and continued construction of its satellites.<sup>24</sup> The Division noted that once a licensee had met its construction commencement milestone, the Commission "can be more certain that it will

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<sup>19</sup> *EarthWatch Order*, *supra* n. 11, at para. 10.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (citing *Application of AMSC Subsidiary Corporation to Modify Space Station Authorizations in the Mobile Satellite Service, Memorandum Opinion and Order*, File No. 33-DSS-EXT-92, 8 FCC Rcd 4040, 4042 (para. 13) (1993) ("*AMSC Order*").

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

proceed with its business plan.”<sup>25</sup> Constellation reiterates the fact that it commenced construction in accordance with the July 1998 Construction Commencement Milestone contained in the O&A. Further, Constellation notes that that the construction contract for the Constellation Satellite System remains in full force and effect.

(c) A Grant of the Waiver Would Further the Public Interest. In EarthWatch, the Division found that the public interest would be served by affording the licensee more time to conduct testing of its satellite and to customize its service to the needs of its customers.<sup>26</sup> A grant of the waiver requested herein would further the public interest by allowing Constellation additional time to secure the level of funding necessary to bring the its system on-line in accordance with new milestones. Moreover, the milestone extension period would allow Constellation to “tailor” its mobile satellite service to meet the needs of its customers.

2. A Grant of the Waiver will Not Preclude New Entry. In the Big LEO Order, the Commission determined that the 1.6/2.4 GHz band should be subject to a frequency sharing plan and that the available spectrum could only accommodate four Code Division Multiple Access (“CDMA”) systems and one Time Division Multiple Access/Frequency Division Multiple Access system.<sup>27</sup> The CDMA systems (including the Constellation system) were capable of sharing use of the same frequencies. If and to the extent that one or more of the original Big LEO licensees fails to proceed with its system, new entry is conceptually possible, subject obviously to Commission jurisdiction. Nothing contained in the waiver requested by Constellation would operate to the disadvantage any other existing participant in the Big LEO licensee group. In the multiple entry environment established by the Commission, sufficient spectrum exists to accommodate all of the current licensees.<sup>28</sup> There are no other pending applications for Big LEO licensees. Moreover, since significant periods of time (even beyond the periods requested by Constellation) would be required before the Commission could authorize other, as yet unknown entities, to operate in the 1.6/2.4 GHz frequency bands, it would be difficult to argue that a grant of Constellation’s limited waiver request would, of itself, deny new entry.

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<sup>25</sup> *Id.* (citing Columbia Communications Corporation, *Memorandum and Opinion*, DA 00-702 (Int’L Bur., rel. April 5, 2000) at para 16.

<sup>26</sup> *Id.*

<sup>27</sup> *See Big LEO Order*, supra n. 3 at para. 43.

<sup>28</sup> *Id.*

C. Conditions in the Financial Marketplace are Relevant Considerations When Evaluating Waiver Requests.

The Commission recently recognized the impact market conditions have on the implementation of business plans in the satellite industry when it granted an extension of time to New Skies Satellites N.V. to complete a statutorily mandated initial public offering ("IPO").<sup>29</sup> New Skies stated that it was prepared to go forward with the IPO "pending improvement of market conditions."<sup>30</sup> In support of its request for an extension of time, New Skies cited the advice of its underwriters as to the "adverse conditions" that existed with respect to "market stability, investor interest and market strength."<sup>31</sup> As noted above, similar conditions in the financial marketplace have impeded Constellation's efforts to obtain additional financing for its system. While there are obviously differences between the situation faced by Constellation and the situation facing New Skies as it attempts to complete an IPO, Constellation submits that the Commission is entitled to give appropriate weight to financial market conditions when evaluating the instant waiver request.

D. The Public Interest will Not be Served by Denying Constellation's Limited Waiver and Extension Request.

A denial of the instant waiver request will almost certainly delay competition within the Big LEO industry and will further weaken the public perception of mobile satellite service. The basic public interest considerations that were cited in the *Big LEO Order* remain valid and applicable despite the fact that some of the licensees selected by the Commission have experienced difficulties in implementing their systems. Furthermore, a denial of Constellation's waiver request will ultimately operate to the advantage of ICO, which has a pending application to provide services in the United States that will compete with the 1.6/2.4 GHz operators licensed by the Commission. In an era of global competition, the public interest will not be served by Commission actions that hold its licensees to stringent milestone requirements that result in unfair "time to market" benefits for competing systems licensed by other countries.

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<sup>29</sup> *New Skies Satellites N.V.*, FCC 00-234, *Memorandum Opinion and Order* (rel. June 30, 2000), File No. SAT-MS-20000526-0093 ("*New Skies Order*").

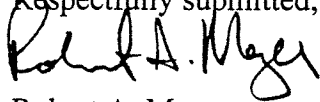
<sup>30</sup> See Letter to Ms. Magalie Roman Salas from Andrew R. D'Uva, New Skies Satellites N.V., dated June 12, 2000, File No. SAT-MS-20000526-00093 [sic].

<sup>31</sup> *New Skies Order*, *supra* n. 29 at para. 8.

## V. CONCLUSION

It seems probable that anticipated improvements in the operating results of Globalstar,<sup>32</sup> the successes of ICO in attracting capital in response to its modified business plan<sup>33</sup> and other anticipated events will stimulate the capital markets over time.<sup>34</sup> This experience with financing multi-billion dollar MSS systems demonstrates the need for Big LEO licensees to adjust their financing and construction schedules to reflect the realities of the investment community.<sup>35</sup>

Constellation believes that the 1.6/2.4 GHz MSS licenses issued by the Commission continue to offer the promise of extending basic telephone and internet access services to areas that can not be reasonably served by purely terrestrial networks. However, recent experience in the Big LEO and other satellite markets indicates the need for patience in allowing market and investor acceptance to mature. Such patience has been justified in the past to allow sufficient time for other satellite services to develop,<sup>36</sup> and is fully warranted in the case of 1.6/2.4 MSS. For these reasons, Constellation respectfully requests that the Commission grant the limited waiver and extension of time requested herein.

Respectfully submitted,  


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<sup>32</sup> See Armand Musey, Globalstar Telecommunications Limited, Banc of America Securities, July 17, 2000.

<sup>33</sup> An investment estimated at \$1.2 billion enabled ICO to emerge from bankruptcy in May 2000. See Barnaby J. Feder, Can Craig McCaw Keep His Satellites From Crashing?, The New York Times on the Web, June 4, 2000 <<http://www.nytimes.com/library/sunday/060400biz-mccaw.html>> (visited June 5, 2000).

<sup>34</sup> See Sam Silverstein, ICO-Teledesic Looks to Stock Sale to Raise Funds, Space News, Aug. 7, 2000.

<sup>35</sup> See *New Skies Satellites N.V., Memorandum Opinion and Order*, FCC 00-234 (rel. June 30, 2000), File No. SAT-MS-20000526-0093, FCC 00-234 (extension of time warranted in view of "tremendously adverse" market conditions)

<sup>36</sup> See, e.g., Letter from James R. Keegan, Chief Domestic Facilities Division to Latham & Watkins, dated June 7, 1990.