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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Received

MAR 20 1995

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 Bands)
_____)

Satellite and Radiocommunication Division
Office of the Chief

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

To the International Bureau:

**OPPOSITION TO CONSTELLATION COMMUNICATION'S
PETITION FOR RECONSIDERATION**

Motorola Satellite Communications, Inc. ("Motorola") hereby opposes Constellation Communications, Inc.'s ("Constellation") Petition for Reconsideration^{1/} of the International Bureau's Order finding Constellation not financially qualified and deferring further consideration of the above-captioned Application until January 31, 1996.^{2/} Motorola is an interested party in this proceeding having previously petitioned the Commission to deny Constellation's Application on financial grounds,^{3/} and having

^{1/} See Constellation Petition for Reconsideration (Mar. 2, 1995).

^{2/} 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, Order, DA 95-129 (rel. January 31, 1995) ("Constellation Order").

^{3/} See Motorola's Consolidated Comments and Petition to Defer and/or Deny, at 14-17 (Dec. 22, 1994). At this time, Motorola takes no position as to the Application for Review submitted on March 2, 1995, by Loral/Qualcomm Partnership, L.P. ("LQP") of the Constellation Order.

been granted authority to construct, launch and operate a Big LEO mobile satellite service ("MSS") system which would compete with the one proposed by Constellation in its Application.^{4/}

Constellation's reconsideration request is procedurally defective and substantively flawed. First, the Constellation Order deferring Constellation's Application, but not denying it, is not a "final action" of the Bureau subject to reconsideration under the Commission's Rules. Second, contrary to Constellation's protestations, the Bureau correctly concluded that Constellation's Application, as amended, did not satisfy the Commission's strict financial requirements established in the Big LEO Report and Order.^{5/} Constellation's belated attempts to clarify the so-called management "commitment" letters from two of its shareholders do not demonstrate sufficient financial support for its proposed Big LEO satellite system. Third, Constellation has completely misconstrued the Bureau's reliance upon the National Exchange^{6/} decision as a basis for finding it financially unqualified. The Bureau did not apply a new or different standard to Constellation when it contrasted its financial showing with the one made by National Exchange. Rather, it merely distinguished that case -- first brought to its attention by Constellation itself -- from the facts presented by Constellation in applying the financial standard established in the Big LEO Report and Order. Under such circumstances, there is absolutely no basis for the Bureau to reconsider its well-reasoned Order in this proceeding.

^{4/} See Order and Authorization, DA 95-131 (rel. Jan. 31, 1995).

^{5/} See In the Matter of Amendment of the Commission's Rule to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5 MHz/2483.5-2500 MHz Frequency Bands, 9 FCC Rcd. 5936, 5948-54 (1994) ("Big LEO Report and Order").

^{6/} 3 FCC Rcd. 6992 n.5 (1988).

I. THE ORDER DEFERRING CONSTELLATION'S APPLICATION IS NOT A FINAL BUREAU ACTION SUBJECT TO RECONSIDERATION

Under Section 1.106 of the Commission's Rules, a petition for reconsideration can only be submitted by a party in response to a **final** action of the Commission or a **final** action taken pursuant to delegated authority.^{7/} This Rule further provides that petitions for reconsideration of all "other interlocutory actions will not be entertained."^{8/} As the Commission has stated:

. . . the threshold question [is] whether there has, in fact, been "final action" under delegated authority as envisioned by Section 1.106 of our Rules and Regulations and Section 551(13) of the Administrative Procedure Act.^{9/}

The International Bureau's decision to defer consideration of Constellation's Application until a later date is not a "final action," and, therefore, not subject to reconsideration at this time. The concept of "finality" with respect to agency action has been well defined in the courts. As the Supreme Court has stated:

[T]he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.^{10/}

^{7/} See 47 C.F.R. § 1.106(a)(1) (1994).

^{8/} Id.

^{9/} AT&T Co., Long Lines Department, 65 F.C.C.2d 621, 622-23 (1977)(footnotes omitted).

^{10/} Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970) (citing ICC v. Atlantic Coast Line R.R., 383 U.S. 576, 602 (1966); Rochester Telephone Corp. v. United States, 307 U.S. 125, 143 (1939)); see also, Honicker v. NRC, 590 F.2d 1207, 1209 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979) (An order is final if it "imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process"); Intercity (continued ...)

There is no doubt that a final determination with respect to Constellation's Application has not been made by the International Bureau. No ultimate or essential rights or obligations have been determined in the Constellation Order, and will not be determined until a final order either granting or denying Constellation's Application is issued by the Bureau. The Bureau has not dismissed or denied Constellation's Application; nor has it held that this applicant has lost its status in the current processing group.^{11/} Rather, the Order merely specifies that, in order to obtain further consideration of its Application, Constellation must submit an adequate financial showing by January 31, 1996.^{12/} If at that time, Constellation fails to demonstrate its financial qualifications, the Bureau would then be in a position to reach a definitive conclusion as to Constellation's Application.

To entertain a petition for reconsideration now of the Bureau's interim Order clearly would disrupt the Commission's adjudicatory processes and waste valuable resources.^{13/} One can envision an endless stream of reconsideration requests

^{10/} (... continued)

Transp. Co. v. United States, 737 F.2d 103, 106 (D.C. Cir. 1984); Capital Network System, Inc. v. FCC, 3 F.3d 1526, 1530 (D.C. Cir. 1993) ("an agency action is final if it '(1) represents a terminal, complete resolution of the case before the agency' and (2) 'determine[s] rights or obligations, or ha[s] some legal consequence'") (citations omitted); State of Alaska v. FERC, 980 F.2d 761, 763 (D.C. Cir. 1992)(citation omitted) ("A 'final order' is one that imposes an obligation, denies a right or fixes some legal relationship, usually at the consummation of an administrative process").

^{11/} Constellation Order at ¶ 17.

^{12/} Id.

^{13/} In the same way that courts are reluctant to review interim decisions by a federal agency, the International Bureau should not review its own interim orders. See Rochester Tel. Corp. v. U.S., 307 U.S. 125, 131 (1939) ("[E]ver since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding").

and applications for review of the Bureau's orders with updated financial information dribbling out along the way. A far better approach would be to await a final determination by the Bureau on Constellation's Application before considering any appeals or petitions for reconsideration.

Constellation barely addresses this finality question. It maintains that the Constellation Order is appealable as a "final" action because of "the prevailing Big LEO competitive situation" and its uncertain future prospects for obtaining a license.^{14/} Neither of these reasons turns the Bureau's deferral order into a "final" action subject to reconsideration. Any uncertainty regarding Constellation's license prospects are of its own making. A stronger financial showing by it last November would have resulted in a license grant by the Bureau instead of the deferral of its Application. Constellation can still receive a license if it can meet the Commission's strict financial qualification standards by January 1996. Reconsideration of the Bureau's decision to defer Constellation's Application for one year will not alleviate this burden. Constellation's right to request reconsideration and/or appeal a decision taken pursuant to delegated authority must await the outright denial of its Application irrespective of the state of competition in the Big LEO market.

^{14/} See Constellation Petition, at 1, n.1.

II. THE BUREAU PROPERLY DEFERRED CONSTELLATION'S APPLICATION BECAUSE OF A LACK OF FINANCIAL QUALIFICATIONS

A. The Letters And Declarations From Bell Atlantic And E-Systems Do Not Demonstrate A Sufficient Management Commitment By These Shareholders To Constellation

The International Bureau correctly concluded that the letters submitted by Constellation in support of its Application do not meet the Commission's strict financial requirements for Big LEO applicants. A Big LEO applicant relying on internal financing must provide the Commission with a balance sheet from its parent corporation and evidence of a commitment from the management of the corporation that it is prepared to expend the necessary funds "absent a material change in circumstances."^{15/}

Bell Atlantic's letter merely states that, on the basis of an "initial review" of Constellation's application and business plans, Bell Atlantic "inten[ds] to provide financial 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."^{16/} This letter is further qualified by subjecting Bell Atlantic's commitment "to negotiation of satisfactory agreements; and our customary internal business approval procedures, including, if applicable, approval by the Board of Directors."^{17/} In rejecting the sufficiency of this letter, the Bureau quite properly held that the level of commitment from Bell Atlantic was too tentative, and thus, not sufficient to meet the financial

^{15/} Big LEO Report and Order, 9 FCC Rcd. at 5952.

^{16/} Constellation Amendment, at Ex. 4.

^{17/} Id.

requirements of the Commission's Rules.^{18/} Clearly, an intent to provide financial support is not a commitment to expend all of the funds necessary to construct, launch and operate the proposed system. Under the terms of its letter, Bell Atlantic remains free to decide not to expend any funds for the project even if there is no "material change" in circumstances.

The Bureau also correctly observed that E-Systems' management "commitment" letter was inadequate to demonstrate Constellation's financial qualification since the financial statements of E-Systems alone were insufficient to establish that Constellation had sufficient current assets and operating income to meet its projected construction, launch and first year operating costs.^{19/} In any event, the Bureau went on to find that the E-Systems letter was unacceptable because it did not indicate the extent to which E-Systems was prepared to "expend its internal funds or to use its company's assets as a vehicle for raising financing to support Constellation's system."^{20/}

Constellation suggests that the Bureau committed reversible error by failing to consider explanatory declarations filed by Constellation in an effort to satisfy its financial qualifications.^{21/} Although not mentioned in the Constellation Order, these declarations add nothing of substance to support Constellation's financial showing. The Bell Atlantic declaration provides no more financial commitment to Constellation

^{18/} Constellation Order at ¶ 14.

^{19/} Constellation Order at ¶ 16.

^{20/} Constellation Order at ¶ 16.

^{21/} Constellation Petition for Reconsideration at 8.

than the letter originally examined by the Commission in the Constellation Order. The declarant merely asserts Bell Atlantic's belief that the earlier letter it submitted was sufficient to meet the Commission's financial qualification requirements.^{22/} E-Systems' declaration is equally unavailing, again merely indicating the declarant's belief as to the sufficiency of its earlier letter.^{23/} Both declarations simply are wrong in their assessment of the Commission's financial standards.^{24/}

B. Constellation Incorrectly Refers To The National Exchange Decision As Establishing A New Rule For Management Commitments

Constellation argues that the Bureau erred when it unfavorably compared Constellation's management commitment letters with the approved letter ("BNI letter") cited in National Exchange Satellite, Inc.^{25/} Contrary to Constellation's assertion that the BNI letter has been turned into a "talismanic standard,"^{26/} the Bureau merely referred to that letter as an example of the type of letter that can satisfy the Commission's Rules regarding management commitments. Thus, the ultimate standard resides in the Commission's Rules, not in the BNI letter.

^{22/} Constellation Petition for Reconsideration at Ex. 3.

^{23/} Id. at Ex. 4.

^{24/} Constellation attempts to bolster its financial showing by speculating as to the internal approval processes of Motorola, LQP and TRW. There is no record support, however, for this assertion.

^{25/} 3 FCC Rcd. 6992 n.5 (1988).

^{26/} Constellation Petition for Reconsideration at 8.

The Bureau merely related the facts in the National Exchange decision to flesh out the applicability and intricacies of the newly adopted rules.^{27/} The problem with Constellation's approach was "not that the Bell Atlantic letter failed to reproduce the National Exchange letter verbatim," but that it "clearly started with the National Exchange language but modified it in ways that, without exception, introduce contingencies or limitations into language that had contained none."^{28/} Thus, it was not the failure of Constellation to satisfy a new standard established in the National Exchange case, but the use of equivocating language in the letters it submitted which ultimately led to an adverse finding as to Constellation's qualifications.^{29/}

Constellation would like to have it both ways. It originally brought the National Exchange decision and BNI letter to the attention of the Bureau.^{30/} It is, therefore, inconsistent for Constellation now to complain that the Bureau should not have considered the BNI letter in making its determinations of financial commitment. Had the Bureau failed to consider Constellation's arguments regarding the National

^{27/} This process of fleshing out the rules is performed consistently by the Commission. See, e.g., In the matter of Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, 8 FCC Rcd. 7162, 7184-85 (1993)(Commission finding that it had not rewritten the Pioneer Preference rules by stating that it would consider a variety of factors not in the rules because "these factors are wholly consistent with and do not deviate from the criteria clearly specified in the Commission's pioneer's preference rule and merely flesh out those standards") (footnote omitted).

^{28/} Constellation Order at ¶ 14 (emphasis in original).

^{29/} Id.

^{30/} Constellation has apparently forgotten that it first brought the National Exchange case to the Bureau's attention and indicated that its management commitment letters were modeled on the BNI letter. Constellation Order at ¶ 11.

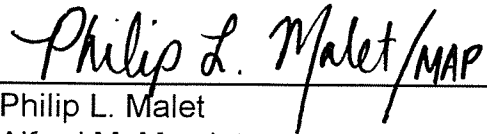
Exchange decision, it most certainly would be requesting reconsideration on that basis as well.

III. CONCLUSION

For the foregoing reasons, Motorola opposes Constellation's Petition for Reconsideration and requests that it be denied or dismissed.

Respectfully submitted,

**MOTOROLA SATELLITE
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March 16, 1995

CERTIFICATE OF SERVICE

I, Marc A. Paul, hereby certify that the foregoing **Motorola's Opposition to Constellation Communications' Petition for Reconsideration** was served, via first class mail (except where indicated), postage prepaid, this 16th day of March, 1995, on the following:

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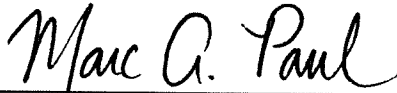
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