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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

MAR 20 1995

Satellite and Telecommunications Division
Office of the Chief

In the Matter of)

CONSTELLATION COMMUNICATIONS, INC.)

Application for Authority to Construct,
Launch and Operate a Non-Geostationary
Satellite System to Provide Mobile
Satellite Service in the 1.6/2.4 GHz Bands)

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

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

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Dated: March 17, 1995

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SUMMARY

In the accompanying Opposition to Application For Review, Constellation Communications, Inc. ("Constellation") opposes the limited appeal ("Review Application") filed by Loral/Qualcomm Partnership, L.P. ("LQP"), which challenges the correct conclusions by the Chief, International Bureau, in Order, DA-95-129, released January 31, 1995 ("Order"), that the ownership changes reported by Constellation in its November 16, 1994 Amendment ("Amendment") to its MSS Above 1 GHz Application warranted a waiver of the "major amendment" rule and did not convert Constellation's Application into a "newly filed" one. Although LQP's own Big LEO application was granted by a separate Order and Authorization, released the same day, LQP is not content with that grant, and it continues, via a frivolous Review Application, to engage in an unprincipled war of attrition against Constellation.

LQP's Review Application challenges the Order's proper rejection of two erroneous accusations made in LQP's previous Petition to Deny, namely that:

- (1) The gradual changes in voting authority and ownership of Constellation's voting stock and in the membership of its Board of Directors over the last three years constitute a "major amendment" of Constellation's Application, which should not be waived; and
- (2) Constellation's non-reporting of those gradual changes prior to its Amendment violated the reporting requirements of §1.65 of the Rules and raises questions about Constellation's character to be a Commission licensee.

As Constellation shows herein, the Order correctly concluded that the three years of gradual changes in Constellation's stock ownership or control and in its Board membership warrant a waiver or exemption from the Commission's "major amendment" rule, and the non-reporting of those changes prior to the Amendment is not disqualifying and need

not be explored further.

LQP's Review Application has not demonstrated any error in the Order's treatment of the issues which it challenges and has not raised any substantial and material questions of fact requiring a hearing or further inquiry into Constellation's qualifications under §309(d) of the Communications Act of 1934, as amended. Therefore, LQP's Review Application should be summarily denied.

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Satellite System to Provide Mobile)	
Satellite Service in the 1.6/2.4 GHz Bands)	

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Constellation Communications, Inc. ("Constellation"), by counsel, hereby opposes the Application for Review ("Review Application" or "Rev. App.") filed by Loral/Qualcomm Partnership, L.P. ("LQP") in response to the Order, DA-95-129, released January 31, 1995 ("Order"), by the Chief, International Bureau, in the above-referenced matter. As shown below, the Order should be affirmed on the limited issue raised by LQP, because the Bureau correctly concluded that the ownership changes reported by Constellation in its November 16, 1994 Amendment ("Amendment") warranted a waiver of the "major amendment" rule and did not convert Constellation's Application into a "newly filed" one.

I. Introduction

Since it filed its non-geostationary MSS system Application in June 1991, Constellation has diligently worked to refine and improve its Application technically and financially. Its search for strategic and financial partners has proven fruitful, as demon-

strated by the current technical and financial participation by E-Systems, Inc. ("E-Systems") and Bell Atlantic Enterprises International, Inc. ("Bell Atlantic"). Although LQP's own Big LEO application was granted by Order and Authorization, DA 95-18, released January 31, 1995, LQP is not content with that grant, and it continues, via its frivolous Review Application, to engage in an unprincipled war of attrition against Constellation.

LQP's Review Application challenges the Order's proper rejection (at ¶¶18-22) of two erroneous accusations made in LQP's previous Petition to Deny ("Petition"), namely that:

- (1) The gradual changes in voting authority and ownership of Constellation's voting stock and in the membership of its Board of Directors over the last three years constitute a "major amendment" of Constellation's Application, which should not be waived; and
- (2) Constellation's non-reporting of those gradual changes prior to its Amendment violated the reporting requirements of §1.65 of the Rules and raises questions about Constellation's character to be a Commission licensee.

Instead, the Order correctly concluded that the three years of gradual changes in Constellation's ownership and in its Board membership warranted a waiver of the Commission's "major amendment" rule, and that the non-reporting of those changes prior to the Amendment was not disqualifying and did not need to be explored further.

II. The Order Correctly Decided The Ownership, Reporting, And Character Issues Raised

In Exhibit 5 of its Amendment, Constellation reported on its Form 430 certain changes in the identity of the entities holding or controlling more than 10% of Constella-

tion's voting stock and in the membership of its Board of Directors. LQP erroneously argues that these changes required contemporaneous notification to the Commission under §1.65 of the Rules and were a major amendment of Constellation's application. However, the Order (at ¶21) refused to find any violations; instead, the Bureau correctly concluded that, whether or not the changes amounted to a major amendment, Constellation merited a "public interest" exemption under §25.116(c)(2) of the Rules.

The continued attempt by LQP to paint Constellation's actions regarding this matter as inconsistent with the Commission's Rules is plainly wrong. First, it was not until the Report and Order in CC Docket No. 92-166, 9 FCC Rcd 5936 (1994), which was released on October 14, 1994, that the Commission adopted rules for 1.6/2.4 GHz LEO MSS applicants. During 1992 and 1993, when most of the changes in ownership or voting control over Constellation stock occurred, there was no Commission guidance on these matters. Second, the Commission has never required prior Commission approval of separate multiple transfers of minority shares in companies occurring over an extended period of time. Finally, the Order's grant of a major amendment exemption to Constellation for the ownership changes in question is fully consistent with Commission case precedent, where, as here: (a) the transactions took place for legitimate business reasons totally unrelated to Constellation's Application; (b) the changes in voting control of Constellation's stock were the incidental result of arm's-length transactions over which Constellation had no control; and (c) the ownership changes were otherwise clearly in the public interest.

**A. The Changed Stock Interests And Officers And Directors
Do Not Constitute A Major Amendment**

As explained in Constellation's January 3, 1995 Opposition ("Opposition") to LQP's Petition, Constellation is a Delaware corporation whose voting stock is broadly owned by individuals and business entities. Thus, while only three individuals or entities each owned 10% or more of Constellation's voting stock when its Application was filed in June 1991, some 18 other individuals owned stock in Constellation, with each holding less than a 10% interest.¹ As reflected in Exhibit VI of Constellation's current Form 430 (Exhibit 5 of its Amendment), two entities now individually vote or own 10% or more of Constellation's voting stock (CTA Launch Services ("CTA") and E-Systems); however, some 29 entities each own less than 10% of the stock, including Bell Atlantic's 8% voting interest. Thus, LQP is clearly incorrect when it tries to characterize Constellation as a closely-held corporation with "five 20-percent shareholders" (Petition at 13).

Once Constellation's Application was filed on June 3, 1991, no change in voting control or ownership of its voting stock occurred until 12 months later, when CTA obtained control of Defense Systems, Inc. ("DSI"). Nine months later, in March 1993, Cirrus Logic, Inc. obtained control of Pacific Communications Sciences, Inc. ("PCSI"). Then, in September 1993, CTA obtained control of Microsat Launch Systems, Inc. ("Microsat"). Finally, in March, 1993 and October, 1994, respectively, newly issued voting

¹ The 10-percent benchmark is appropriate because Form 430 requires the disclosure of the identity and voting stock holdings of stockholders owning 10% or more of an applicant's voting stock.

stock was sold to E-Systems and Bell Atlantic, amounting to only approximately 39% of Constellation's outstanding voting stock -- Bell Atlantic, 8%; E-Systems, 31%. Similarly, the changes in the officers and directors of Constellation occurred gradually over the last three years, and, importantly, there has not been a single point in time at which a majority of the officers or directors changed.² Thus, Constellation rejects as groundless LQP's claims (Rev. App. at 4-5 and 13) that "a wholesale restructuring" of Constellation's Board occurred between 1991 and 1993 and that Bell Atlantic and E-Systems may now "control" Constellation because, out of Constellation's nine directors, Bell Atlantic has two directors affiliated with it and E-Systems has three. Obviously, Bell Atlantic and E-Systems are distinct and unrelated business entities, and LQP has stated no basis, nor is there one, for lumping them together to measure "control". Simply put, there is no merit to LQP's control charges.

In sum, the Commission has long recognized that gradual changes in voting stock interests and the officers and directors of a corporation over time -- such as described above -- do not constitute a de facto or de jure transfer of control requiring prior Commission approval, or constituting a "major amendment," even when more than 50 percent of the stock or director seats are eventually held by new persons. In other words, where, as here, there was not a sudden 50% change in voting stock ownership or control or in the majority of Constellation's Board of Directors, and no evidence that any shareholder or officer or director had the power to dominate the management of

² See roster of Constellation's officers and directors from June 1991 to the present, appended to Exhibit B of Constellation's Opposition.

corporate affairs, the Commission's transfer of control and major amendment policies do not come into play. See Opposition (at 23-24) for a full discussion of relevant case precedent, which Constellation hereby incorporates by reference.

However, the Order chose not to specifically rule on Constellation's contentions that the five gradual stock transactions in question and the gradual changes in Constellation's officers and directors over the last three years did not constitute a "substantial change" in Constellation's ownership within the meaning of Commission rule, policy, and case precedent and that, therefore, no major amendment of Constellation's application was necessary. The Order (at ¶21)(emphasis added) held that "some of the changes in Constellation's ownership may be 'major amendments'," but the Bureau decided the issue on exemption/waiver grounds (see below).

Since no decision was rendered on the major amendment question, Constellation does not dispute the Order's rationale. However, Constellation strongly rejects LQP's notions (Rev. App. at 7, 9) that "there is no question that the changes in ownership resulted in a major amendment which triggers the cut-off rules". Thus, if the Commission decides to rule on the question, Constellation urges it to conclude that the cumulative effect of the five stock transactions and the Board changes was not "substantial" under §25.116(b)(4) of the Rules for the simple reason that the changes occurred over so long a period of time and involved a widely-enough held corporation that they should not be treated cumulatively.

B. The Contingent Request For Exemption Or Waiver Of The Major Amendment Cut-Off Rule Was Properly Granted

Constellation now turns to LQP's attack on the Order's grant of Constellation's contingent request for exemption or waiver, pursuant to §25.116(c)(2), from the rule's "cut-off" date requirement for major amendments. Although §25.116 is relatively new, exemptions have been routinely granted under similar Commission rules where the Commission determined that (1) a change in ownership or control is calculated "to further a legitimate business purpose" (rather than merely to acquire the pending application itself) and (2) the acquisition is in the public interest. The leading cases applying this test -- the latter two specifically involving §25.116 -- are Airsignal International, Inc., 81 FCC 2d 472 (1980); ISA Communications Services, Inc., 90 FCC 2d 938 (1982); STARSYS Global Positioning, Inc., 8 FCC Rcd 1662, 1663 ¶¶ 6-7 (CC Bur. 1993); and Satellite CD Radio, Inc., 9 FCC Rcd 2569, 2569 (CC Bur. 1994).

Consistent with these rulings, the Order concluded (at ¶21) that an exemption was warranted because Constellation had demonstrated that the transfers in question revealed "no intent to traffick in applications"; hence, the ownership changes were "in the public interest pursuant to Section 25.116(c)(2)". The Bureau was persuaded by Constellation's showings: (a) that the primary purpose of the purchases of DSI, Microsat, and PCSI were not to acquire Constellation stock or Constellation's application, but rather

for legitimate private business reasons wholly unrelated to Constellation's application;³ (b) that the changes in voting control of Constellation's stock were the incidental result of arm's-length transactions concerning which Constellation had no control; and (c) that the minority voting stock acquisitions by Bell Atlantic and E-Systems in 1993 and 1994 were for a separate equally legitimate public interest purpose of infusing financial strength and technical expertise into Constellation and not to buy control of Constellation's pending application.

The above-cited Airsignal line of cases fully supports the Order's waiver/exemption for Constellation. LQP is clearly incorrect when it asserts (Rev. App. at 10) that the Order applied an "entirely new [waiver] standard -- that there was no evidence of intent to traffic in applications". Review of the Airsignal line of cases shows that the underlying policy theme involved in their emphasis on "legitimate business purpose" and "public interest" justifications for post-filing ownership changes is to prevent trafficking in applications. Thus, there is nothing new or novel in the Order's pronouncement; it is merely a synthesis of established case precedent, which should be summarily affirmed by the Commission.

In the face of this sobering reality, LQP vainly casts about to disparage Constel-

³ Thus, in June 1992, CTA (a systems engineering and software development company) purchased DSI. This transaction was consummated to merge CTA's system engineering capabilities with DSI's manufacturing capabilities and was concluded on a bilateral basis between CTA and DSI. Nine months later, in March 1993, Cirrus Logic, Inc. purchased PCSI. Cirrus Logic is a large semiconductor manufacturer and was interested in acquiring PCSI's telecommunications capability. Six months after the PCSI/Cirrus Logic transaction was consummated, CTA purchased Microsat in September 1993. The acquisition of Microsat added launch services capabilities to CTA's system engineering and manufacturing capabilities.

lation's waiver/exemption showings in its Amendment and Opposition. For instance, LQP erroneously claims (Rev. App. at 11) that Constellation violated the Commission's Rules by failing to request waiver of the cut-off rules prior to the subject stock transactions. However, in ISA Communications Services, Inc., supra, at 942 (emphasis added), the Commission specifically held: "[T]he question of exemption from the cut-off rule should be addressed after the transfer has been completed, that is in the context of a 21.31(e)(3) exemption request". Thus, Constellation's actions were not unlawful.⁴

C. §1.65 Reporting And Character Issues Are Unwarranted

As to LQP's view that Constellation failed to comply with the reporting requirements of §1.65 of the Rules concerning the stock transactions and that this warrants a character inquiry, the Order correctly declined to hold that the non-reporting was culpable, stating (at ¶22) that Constellation's actions "did not result from intent to deceive or mislead the Commission". LQP is utterly mistaken when it asserts (Rev. App. at 12) that the non-reporting warrants denial of Constellation's waiver request. See Merrimack Valley Broadcasting, Inc., 99 FCC 2d 680, 683 n.9 (1984) (prima facie showing of intent to conceal or of significant carelessness or inattentiveness needed for reporting violation inquiry). In the instant case, Constellation reasonably believed that the subject transactions were not "substantial" or "significant" enough to require previous

⁴ Constellation notes and will, of course, adhere to the Order's specific requirement (at ¶22)(emphasis added) that "to the extent Constellation 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, it is expected to seek a ruling concerning our cut-off rules prior to consummating those transactions".

notification. Constellation's decision not to report the transactions cannot be faulted when the transactions are analyzed in a reasonable, good faith manner, as the Order did.⁵

LQP also challenges the Order's conclusion (at ¶21) that the Bell Atlantic and E-Systems stock purchases were designed to help finance the cost of the Constellation system, and that this is a public interest benefit supporting a major amendment exemption. Given the fact that the system refinements in Constellation's Amendment are acceptable, and in some cases required,⁶ under the Rules -- and presumptively in the public interest as a more efficient use of the spectrum -- Constellation cannot be faulted for seeking investors to make the refinements financially possible. And LQP has presented absolutely no support for its thinly-veiled attacks upon the initial bona fides and financial qualifications of Constellation's Application. The Order correctly recognizes -- in the context of Constellation's factual presentation -- that, absent proof that an applicant has attempted to profit from the sale of an application, "procuring partners to help finance the enormous costs of these systems" has an important public interest value and is a realistic necessity. Loral's feigned concern (Rev. App. at 17) that the Order's

⁵ Further illustrating how LQP is grasping at straws, the Review Application notes and appends a certification by Delaware's Secretary of State that Constellation has technically ceased to exist as a Delaware corporation because of non-payment of franchise taxes. Payment will be made on March 20, 1995, after which Constellation will be restored to good standing. Constellation's oversight proves nothing and should have no bearing on the outcome of this proceeding.

⁶ In adopting rules for this service, the Commission imposed global and U.S. coverage requirements that necessitated certain changes in the Constellation system. See 47 CFR §25.143(b)(2)(ii) and (iii).

rationale will allow "virtually any ownership change, no matter how radical" is erroneous. The Commission has not abandoned its rigorous case-by-case analysis of §25.116 exemption requests; it has simply exercised its administrative discretion, consistent with the Airsignal line of cases and WAIT Radio, Inc. v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), in a manner displeasing to LQP.

Finally, LQP urges (Rev. App. at 15-16) that the Order's grant of a major amendment exemption to Constellation prejudices the other Big LEO applicants because keeping Constellation in this processing group does not eliminate the possibility of mutual exclusivity among the applicants. This anti-competitive argument comes with particularly poor grace from a Big LEO applicant whose application has just been granted while two other applications, including Constellation's, were deferred.

As the Commission stated definitively almost 25 years ago, "No applicant has a vested interest in the disqualification of a competing applicant". Azalea Corporation, 31 FCC 2d 561, 563 (1971). LQP has confused its private interest in eliminating competition with the public interest in seeing that justice is done. Administrative due process cannot be served by depriving Constellation of a justly deserved major amendment exemption or waiver because it is "inconvenient" to LQP's ambitions.

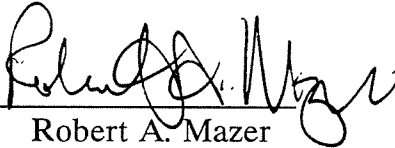
III. Conclusion

LQP's Review Application has not demonstrated any error in the Order's treatment of the issues which it challenges and has not raised any substantial and material questions of fact requiring a hearing or further inquiry into Constellation's

qualifications under §309(d) of the Communications Act of 1934, as amended. See Astroline Communications Co. v. FCC, 857 F.2d 1556 (D.C. Cir. 1988); Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392 (D.C. Cir. 1985); California Public Broadcasting Forum v. FCC, 752 F.2d 670 (D.C. Cir. 1985); Tele-Media Corp. v. FCC, 466 F.2d 316 (D.C. Cir. 1972).

WHEREFORE, in light of the foregoing, Constellation respectfully requests that LQP's Review Application should be denied.

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Dated: March 17, 1995

CERTIFICATE OF SERVICE

I, Jerold L. Jacobs, hereby certify that the foregoing "Opposition to Application For Review" was served by hand or first-class mail, postage prepaid, this 17th day of March, 1995, on the following persons:

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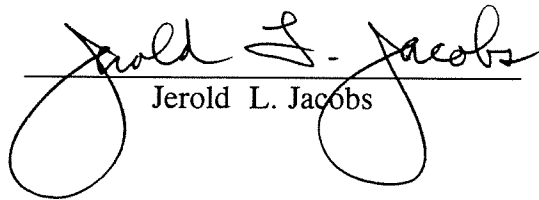
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