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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP - 3 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Application of)
)
MOBILE COMMUNICATIONS)
HOLDINGS, INC.)
)
For Authority to Construct, Launch and)
Operate a Low-Earth Orbit Satellite)
System to Provide Mobile-Satellite Service)
in the 1610-1626.5/2483.5-2500 MHz Band)

File Nos. 11-DSS-P-91(6),
11-DSS-P-91(18),
11-SAT-LA-95,
12-SAT-AMEND-95

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Satellite Policy Branch
International Bureau

COMMENTS ON REQUEST FOR SMALL ENTITY GUIDANCE

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SUMMARY

The Commission should not provide the guidance sought by MCHI. First, MCHI has failed to demonstrate that rulings on its requests would benefit small businesses based on the facts presented. Therefore, its Request does not appear to fall within Section 213(a) of the SBREFA. Second, MCHI has not provided sufficient information for the Commission to rule on these requests. A management commitment letter from a minority shareholder must be considered in light of all facts regarding its relationship to the applicant and the proposed agreement to provide financing. A distribution agreement must include all terms and conditions for the financing for the Commission to determine whether the entity would make funds immediately available to the applicant, as required by the Commission's rules. Such information is not available in MCHI's generic documents. Accordingly, the Commission should not provide the requested rulings.

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COMMENTS ON REQUEST FOR SMALL ENTITY GUIDANCE

L/Q Licensee, Inc. (LQL), by its undersigned attorneys, submits the following comments on the "Request for Small Entity Guidance Pursuant to Section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996" filed by Mobile Communications Holdings, Inc. (MCHI). Specifically, MCHI seeks guidance from the Commission on the interpretation of Sections 25.140(d) and 25.143(b) of its Rules regarding the financial standards applicable to MSS Above 1 GHz applicants.¹

¹ MCHI's Request includes comments about the Commission's alleged errors in adopting rules and policies for MSS Above 1 GHz and in granting a license to Loral/Qualcomm Partnership, L.P. See, e.g., Request, at 8 & n.12. MCHI has sought review of the Commission's decisions in the U.S. Court of Appeals for the District of Columbia Circuit (Case Nos. 94-1695 and 96-1239). LQL will respond to MCHI's arguments in that forum.

LQL has been authorized to construct, launch and operate an MSS Above 1 GHz system.² As a CDMA satellite system, LQL's Globalstar™ would be required to share spectrum with other CDMA systems authorized to use the 1610-1626.5 MHz and 2483.5-2500 MHz bands, including that proposed by MCHI. Therefore, LQL has a substantial interest in any interpretation of the financial standards applicable to MSS Above 1 GHz issued in response to MCHI's Request.

I. MCHI HAS FAILED TO ESTABLISH THAT IT IS APPROPRIATE FOR THE COMMISSION TO PROVIDE "SMALL ENTITY GUIDANCE."

MCHI filed its Request pursuant to Section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which permits informal guidance in response to "inquiries by small entities concerning information on, and advice about, compliance with" statutes and regulations within the jurisdiction of the agency.³ However, for the reasons set forth below, LQL believes that MCHI has incorrectly characterized its Request as the type of "small entity guidance" contemplated by the SBREFA. In effect, MCHI is seeking a declaratory ruling that certain forms of agreement meet the Commission's financial qualifications standard, rather than information on or an explanation for how the rules impact

² See Loral/Qualcomm Partnership, L.P., 10 FCC Rcd 2333 (Int'l Bur. 1995), aff'd, FCC 96-279 (released June 27, 1996).

³ SBREFA of 1996, Pub. L. 104-121, Title II, § 213(a), 110 Stat. 858-59 (Mar. 29, 1996). Section 213(b) provides that each agency regulating the activities of small businesses shall establish a program to respond to such requests within one year of enactment. Id., § 213(b). Assuming these sections are applicable, the Commission is not required to have such a program in place until March 29, 1997.

small businesses.⁴ Accordingly, if it provides the requested guidance, the Commission may not provide specific assistance to small businesses, and may actually detract from the MSS Above 1 GHz service by suggesting that there is a separate set of rules for companies, like MCHI, which rely on financing from sources other than their own funds.⁵

First, MCHI's specific requests for rulings are not based on facts unique to small business entities. For example, MCHI seeks guidance on the type of financial commitment which could be provided by a minority shareholder of an applicant. However, the Commission's Rules permit any applicant, no matter how large or small its balance sheet, to seek to rely upon financing from a minority shareholder.⁶ MCHI has also asked the Commission to approve a form "distribution agreement," but neither the facts provided nor the form itself are restricted to small businesses. Accordingly, the issues raised by MCHI do not

⁴ See SBREFA, § 203 (purposes of Act include, *inter alia*, encouraging effective participation of small businesses in the regulatory process, simplifying language of Federal regulations affecting small businesses, and developing more accessible sources of information on regulatory and reporting requirements for small businesses).

⁵ Moreover, as the Commission is aware, there are significant risks associated with providing "informal" advice to applicants. For example, MCHI relies on its interpretation of the Commission's Staff's statements at an informal meeting on July 3, 1996, for several assumptions regarding the nature of the financial showing required for the MSS Above 1 GHz service. See Request, at 7. LQL participated in that meeting and disagrees with MCHI's descriptions of the Staff's comments. However, since the Staff's informal comments are not binding, LQL is not disputing MCHI's characterizations, but rather, is responding to MCHI's written requests.

⁶ See 47 C.F.R. § 25.140(d)(1).

appear unique to small businesses, and would tend to elicit generic responses potentially applicable to all MSS Above 1 GHz applicants.

Second, MCHI attempts to explain its Request by describing the "disproportionate difficulties" of obtaining funding for MSS Above 1 GHz applicants. These difficulties are based, not on the size of an applicant, but on differences in business plans of applicants and difficulties which all applicants face in obtaining the financing required for a global satellite system incorporating new commercial technology. See MCHI Request, at 5 & Ex. A.⁷ MCHI's real complaint with the Commission's financial standard is that it does not allow "progressive deployment" of the system and a corresponding progressive financial showing. See MCHI Request, at Ex. A (affidavits of Trevor Nash and Davinder Sethi). The desire to use anticipated revenues to satisfy the Commission's financial showing is again not unique to small business entities.⁸

⁷ E.g., Affidavit of Davinder Sethi, at A3-A4 ("The proposed financial standard does not accommodate legitimate variations between systems in terms of market approach and strategy"; "A strict financial test is, in my view, unsuitable for an emerging technology such as the Big LEOs.")

⁸ The Commission has invoked sound public policy reasons for rejecting the approach advocated by MCHI. To permit a partial financial showing "would not promote the global availability of this service. A system that relies too heavily on operating income from its first satellites for its completion could easily become stalled before it is able to provide domestic or global service that meets our service requirements." Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile-Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 FCC Rcd 5936, 5951 (1994) (footnote omitted), modified on recon., 2 CR 673 (1996).

Third, the Commission must be mindful that an applicant's status as a small business is irrelevant to the impact of granting it a license on other MSS Above 1 GHz licensees. Unlike services in which licensees receive authority to use specific blocks of spectrum in specific geographic areas, the MSS Above 1 GHz service requires all licensees to share the same spectrum.⁹ If MCHI were granted a license, it would share the 1610-1621.35 MHz and 2483.5-2500 MHz bands with LQL and TRW because all three have chosen a CDMA architecture for their systems.¹⁰ The resulting need for coordination negotiations among the companies and potential reduction in available spectrum for each system would not be affected by either the size of MCHI's balance sheet or the number of its employees.

Because MCHI's requests are not directed at "small business" issues *per se*, the Commission would be justified in deciding not to issue any declaratory ruling pursuant to Section 213(a).¹¹ If it does issue the requested guidance, then the Commission must consider MCHI's requests in light of their impact on any sized applicant. In particular, the Commission has recognized the potential adverse

⁹ See Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile-Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 FCC Rcd at 5954-56.

¹⁰ See Mobile Communications Holdings, Inc. 10 FCC Rcd 2274, 2274 (Int'l Bur. 1995), aff'd, FCC 96-279 (released June 27, 1996); TRW Inc., 10 FCC Rcd 2263 (Int'l Bur. 1995), aff'd, FCC 96-279 (released June 27, 1996).

¹¹ Section 213(a) directs agencies which regulate small business entities to provide such guidance when "appropriate in the interest of administering statutes and regulations within their jurisdiction." SBREFA, § 213(a). In fact, the Commission has already addressed the impact of the financial standard in Section 25.140(d) on entrepreneurial companies. See Domestic Fixed-Satellite Service, 58 RR 2d 1267, 1271 (1985).

impact on other applicants and the public of warehousing MSS Above 1 GHz spectrum by companies unable to proceed financially with their systems.¹²

Accordingly, LQL urges the Commission not to undermine its rules by suggesting that a *de facto* waiver of Sections 25.140(d) and 25.143(b) is available to applicants which cannot rely on internal financing to meet the financial qualifications standard.

II. A FINANCIAL COMMITMENT FROM A MINORITY SHAREHOLDER MUST EVIDENCE AN IRREVOCABLE COMMITMENT OF FUNDS.

MCHI has asked the Commission to state whether a specific form of commitment letter from a minority shareholder for the entire cost of construction, launch and operation of its system for one year meets the standard under Section 25.140(d)(1) for financial commitments from internal sources.¹³ See Request, at 6-8 & Ex. B. The Commission should not issue the guidance sought by MCHI

¹² See Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile-Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 FCC Rcd at 5950.

¹³ MCHI justifies this request with the claim that the Commission has created an ambiguity by finding satisfactory a management commitment letter discussed in National Exchange Satellite, Inc., 3 FCC Rcd 6992 (1988), but not a somewhat similarly-worded letter considered in Constellation Communications, Inc., 10 FCC Rcd 2258 (Int'l Bur. 1995), aff'd, FCC 96-279 (released June 27, 1996). As the Commission pointed out in the Constellation order, although their texts are similar, there are significant differences between the two letters, and, therefore, no ambiguity was created in the Commission's precedent. See Constellation, 10 FCC Rcd at 2259-60.

because MCHI has not provided sufficient facts to evaluate the model letter within the MSS Above 1 GHz financial standard.

As the Commission itself has recognized, there is no "magic language" to demonstrate financial qualifications.¹⁴ Therefore, the Commission cannot determine whether the language in a form letter standing alone will be sufficient to meet the Commission's financial standards even if the balance sheet of the shareholder demonstrates the assets necessary to cover the commitment. In addition to the language of the letter itself, the Commission must have access to all relevant facts concerning the relationship of the committing company to the applicant and the nature of the agreement regarding provision of funds. The reason for this is that the size of a shareholder's stake in an applicant and nature of the agreement regarding the commitment are essential factors in evaluating whether specific language meets the Commission's standard.¹⁵ A brief review of the Commission's financial standard explains why this is true.

The purpose of the MSS Above 1 GHz financial standard is "to identify applicants who are financially capable of proceeding with the construction and launch of their proposed satellites immediately upon grant of their applications."¹⁶

¹⁴ Constellation Communications, Inc., 10 FCC Rcd at 2260. In this order, the Commission provided substantial exposition on how it would apply the financial qualification standard.

¹⁵ Id.

¹⁶ Domestic Fixed-Satellite Service, 58 RR 2d at 1271 (emphasis supplied); see Mobile Communications Holdings, Inc., 10 FCC Rcd 2274, 2277 (Int'l Bur. 1995), aff'd, FCC 96-279 (released June 27, 1996).

With respect to internal financing, the Commission recognizes that a majority parent corporation can "be more readily expected to commit funds unconditionally, given its ability to control the subsequent expenditures of those funds by the subsidiary."¹⁷ Thus, to meet the internal financial standard, the Commission requires a commitment letter from management and a balance sheet demonstrating funds adequate to cover the commitment. From such documentation, the Commission has assurance that funds will be immediately available to the applicant to finance the project.

In order to establish the equivalent commitment for external financing, the Commission must have access to additional information. Unlike a parent corporation, a financing entity has no obligation to the applicant, and the applicant has no right to expect funds from the financing entity, except through the financing agreement. Without evidence of an "irrevocable" commitment from the financing entity in the record, the Commission cannot be assured that the funds are immediately available to the applicant upon grant of its application. Accordingly, evidence of an irrevocable commitment is necessary.¹⁸

A minority shareholder stands in the same position vis a vis the applicant as a non-affiliated lender of funds. Like a non-affiliated lender and unlike a majority parent, a minority shareholder does not have the "ability to control the

¹⁷ Constellation Communications, 10 FCC Rcd at 2260.

¹⁸ In this respect, the Commission's standards for "internal" and "external" financing are "exactly equivalent" as the Commission has represented to the D.C. Circuit. See MCHI Request, at 3 n.7.

subsequent expenditures of those funds by the subsidiary." Also, the applicant has no obvious right to anticipate or demand financing from a minority shareholder (except, perhaps, in an amount equivalent to the shareholder's equity share) except through a separate agreement. Therefore, in order to ensure that an applicant relying on financing from a minority shareholder would be financially capable of proceeding with the construction and launch of its proposed satellites immediately upon grant of its application, the Commission must obtain evidence equivalent to the irrevocable commitment of funds required from a non-affiliated lender.

MCHI has not provided any information regarding the minority shareholder from whom the form letter would be obtained. Accordingly, the Commission does not have sufficient information to provide the ruling requested by MCHI, and should qualify any guidance to reflect this need for additional information.

III. THE APPLICANT MUST SUBMIT EVIDENCE FROM AN ENTITY PROVIDING FINANCIAL SUPPORT DEMONSTRATING THAT ITS COMMITMENT IS IRREVOCABLE.

MCHI also requests a ruling that Section 25.140(d)(2) does not require submission of the actual business agreement documenting external financing, and that a summary of the relevant terms accompanied by an affidavit is sufficient to meet the Commission's requirements. Request, at 9. Submission of a summary of the agreement and affidavit from the party providing financing may be appropriate for the public record. However, to establish financial qualifications,

the entire agreement should be submitted in confidence for review by interested parties under a protective order, and the Commission has existing procedures for this purpose.¹⁹ Only by review of the entire agreement can the Commission be satisfied that there are no contingencies which would lead to the conclusion that the agreement is not "fully negotiated" as required.²⁰

MCHI has also provided a model "distribution agreement" and has asked the Commission whether this agreement demonstrates an "irrevocable" commitment pursuant to Section 25.140(d)(2)(iii). See Request, at 10 & Ex. C. Again, MCHI's request is simply too vague for the Commission to offer a response as definite as MCHI seeks.

Obviously, whether a commitment is "irrevocable" depends on the language and terms in the agreement. It is difficult for a "model" to offer the concrete facts on which to make such a finding. For example, in MCHI's distribution agreement, there are gaps which could have a significant bearing on whether the commitment is irrevocable. Section 4(b) provides for distribution of the allegedly committed funds "in accordance with the operational and technical requirements of the ELLIPSO™ program" -- which is not described. As the Commission is well aware, MCHI is attempting to implement a program of "progressive deployment" of its constellation, and to use anticipated revenues from partial operation to finance

¹⁹ LQL reserves comment on any proposed protective order until it becomes necessary to negotiate such an agreement and the relevant facts are known.

²⁰ See Constellation Communications, 10 FCC Rcd at 2260.

completion of the system.²¹ The actual terms of Section 4(b) could easily be written to be consistent with such deployment to and obviate any immediate commitment of funds by the distributor to the project, as required by the Commission.²²

By careful drafting such a section could allow MCHI to present a "commitment" to the Commission to establish its financial qualifications which is either no commitment at all or subject to *de facto* withdrawal after award of a license. Accordingly, this model distribution agreement is too open-ended to provide the Commission with a basis to determine whether an executed agreement could be deemed an "irrevocable" commitment by the distributor.

²¹ See MCHI Request, Ex. A, Affidavit of Trevor Nash, at 2; Affidavit of Davinder Sethi, at A3-A4.

²² See Mobile Communications Holdings, 10 FCC Rcd at 2277.

IV. CONCLUSION

For the above reasons, LQL recommends that the Commission not provide MCHI with the rulings it seeks based on the information and model documents provided in MCHI's Request.

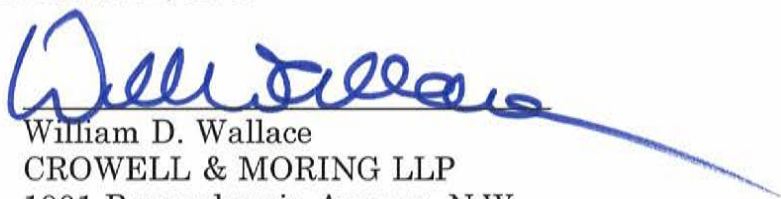
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CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 3rd day of September, 1996, caused copies of the foregoing Comments on Request for Small Entity Guidance to be delivered via hand delivery (indicated with *) or by U.S. mail, postage prepaid, to the following:

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