

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)) CONSTELLATION COMMUNICATIONS) HOLDINGS, INC.)) Request for Limited Waiver and Extension of) Time)))) And)) Application For Amendment of its Pending) Application for Modification of the Milestone) Schedule Established for its Above 1 GHz) Low-Earth Orbit Mobile-Satellite System)	File No. 17-DSS-P-91(48); CSS-91-013; 10- SAT-AMEND-95; 159-SAT- AMEND-96; SAT-MOD-20000907- 00131 File No. SAT-AMD-20010829-00081
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MEMORANDUM OPINION AND ORDER

Adopted: November 7, 2002

Released: November 8, 2002

By the Chief, International Bureau:

I. INTRODUCTION

1. By this Order, we deny the application of Constellation Communications Holdings, Inc. (“Constellation”) for modification of its authorization to construct, launch, and operate a “Big LEO” low-earth orbit mobile-satellite system above 1 GHz.¹ Constellation requests an extension or waiver of the satellite construction and launch milestones upon which its Big LEO license is conditioned. Because Constellation has missed two milestones and has not justified a milestone extension, its Big LEO authorization is null and void.

II. BACKGROUND

2. In 1997, the International Bureau (“Bureau”) granted Constellation a license to launch and operate a Big LEO system.² Like all Big LEO licenses, Constellation’s license prescribes a

¹ The Big LEO service provides for the use of non-geostationary satellite systems that subscribers equipped with mobile earth terminal transceivers could use to conduct two-way voice and data communications with similarly-equipped subscribers or telephone users anywhere else in the world. The Commission’s rules specify that the 1610-1626.5 MHz and 2483.5-2500 MHz bands are to be used for transmission between Big LEO satellites and mobile earth terminals. See 47 C.F.R. § 25.143 (2001) and associated sections of Part 25 of the Commission’s rules.

² See Constellation Communications, Inc., *Order and Authorization*, DA 97-1366, 12 FCC Rcd 9651 (Int’l Bur. 1997) (“*Constellation License Order*”). The *Constellation License Order* originally granted authority to Constellation’s predecessor in interest, Constellation Communications, Inc. (“CCI”). The Bureau subsequently granted a request for the pro forma assignment of the license to CCI International N.V. (“CCII”). See Letter from (continued....)

construction-progress milestone schedule for the implementation of its system. According to this schedule, Constellation was required to commence construction of the first two satellites of its system by July 1998, commence construction of the remaining satellites of its system by July 2000, complete construction of the first two satellites by July 2001, and place the system fully into operation by July 2003.³ The license order declared that the license would become null and void in the event that Constellation failed to meet the milestone schedule, unless the Commission were to extend the schedule for good cause shown.⁴

3. Section 25.143(e)(2) of the Commission's rules requires a Big LEO licensee to report whether it has met a milestone within ten days following the milestone deadline.⁵ In July 1998 Constellation certified that it met its first milestone deadline by executing a satellite construction contract with Orbital Sciences Corp. ("Orbital Sciences").⁶ Constellation has not, however, certified completion of the next two construction milestones, which expired in July 2000 and July 2001. By letter dated June 30, 2000, Constellation indicated that financial and operational problems faced by other mobile satellite service licensees caused it to question its ability to meet future milestones. Constellation has not certified completion of its remaining milestones in any subsequent status reports to the Commission.⁷

4. Instead, in August 2000, Constellation filed an application to modify its license by extending or waiving certain of its remaining milestone deadlines.⁸ Constellation requested the Commission to extend its July 2000 milestone for commencing construction of its remaining satellites until July 2002 and to extend its July 2003 milestone for placing its full system into operation until July 2004.⁹ Constellation argues that disruptions in the financial marketplace and the resulting reluctance of financial institutions to fund Big LEO systems made it necessary to seek an extension of the remaining milestones and to defer further activities on its system until market conditions improve.¹⁰ Constellation claims an extension would serve the public interest by giving it more time to raise the financing necessary

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Thomas S. Tycz, Chief, Satellite and Radiocomm. Div., to Robert Mazer, dated September 14, 1999 (File No. SAT-ASG-19990222-00023). The Bureau later granted a request for the pro forma assignment of the license to Constellation, a wholly owned affiliate of CCII. See Letter from Thomas S. Tycz, Chief, Satellite and Radiocomm. Div., to Robert Mazer and Albert Schuldiner, dated December 22, 1999 (File No. SAT-ASG-19991028-00105).

³ See *Constellation License Order*, 12 FCC Rcd at 9661 (para. 29).

⁴ See *id.*

⁵ See 47 C.F.R. § 25.143(e)(2) (2001). See also 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, *Report and Order*, FCC 94-261, 9 FCC Rcd 5936, 6010 (para. 195) (1994) ("*Big LEO Order*").

⁶ See Letter from Robert A. Mazer, Counsel to Constellation Communications, Inc., to Magalie Roman Salas, Secretary, dated July 2, 1998 (File No. 159-SAT-Amend-96).

⁷ See, e.g., Letter from Robert A. Mazer, Counsel to Constellation Communications, Inc., to Magalie Roman Salas, Secretary, dated October 15, 2001 (File No. 159-SAT-Amend-96); Letter from Robert A. Mazer, Counsel to Constellation Communications, Inc., to Magalie Roman Salas, Secretary, dated July 11, 2001 (File No. 159-SAT-Amend-96)

⁸ See Constellation Communications Holdings, Inc., Request for Limited Waiver and Extension of Time, File No. SAT-MOD-20000907-00131 (filed August 9, 2000) ("*August 2000 Application*").

⁹ See *id.* at 4. Although Constellation's application requests an extension of what it refers to as a "System Construction Completion Milestone" until July 2002, taken in context it appears that the request is to extend the "System Construction Commencement Milestone," i.e., the July 2000 milestone for commencement of construction of its remaining satellites.

¹⁰ See *id.* at 4-5.

to bring its Big LEO services to the public and would be consistent with Commission precedent.¹¹ The Commission placed Constellation's extension application on public notice.¹² No comments were filed in response to the public notice. In August 2001, Constellation applied for further extensions of its milestones; namely, it sought to extend its deadline for commencing construction of its remaining system satellites until July 2003 and to extend its deadline for a fully operational system until July 2005.¹³ Constellation also requested, for the first time, an extension of the construction completion milestone for its first two satellites from July 2001 until July 2002. Constellation based these further extension requests on the same grounds as its initial extension application. The Commission placed Constellation's amended application on public notice.¹⁴ Mobile Communications Holdings Inc. ("MCHI") filed comments supporting Constellation's amended application.¹⁵

III. DISCUSSION

5. It is long-standing Commission policy to adopt construction milestones for satellite space station licensees.¹⁶ Milestones are necessary to ensure that licensees are building their systems in a timely manner and that orbital resources and spectrum are not held by licensees unwilling or unable to proceed with their plans.¹⁷ Requiring licensees to make and fulfill realistic construction and launch commitments prevents increasingly scarce orbital resources from being warehoused by licensees. Such warehousing could hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately with the construction and launch of their satellite systems.¹⁸ Because it is manifestly in the public interest to ensure that licensees proceed expeditiously in completing construction of their systems and commencing service, the Commission has strictly enforced

¹¹ See *id.* at 5-7.

¹² See Public Notice, Satellite Policy Branch Information: Applications Accepted for Filing, Report No. SAT-00055 (September 28, 2000).

¹³ See Constellation Communications Holdings, Inc., Request for Modification of Request for Limited Waiver and Extension of Time, File No. SAT-AMD-20010829-00081 (filed August 29, 2001) ("August 2001 Application").

¹⁴ See Public Notice, Satellite Policy Branch Information: Applications Accepted for Filing, Report No. SAT-00085 (September 19, 2001).

¹⁵ See Comments of Mobile Communications Holdings Inc., File No. SAT-AMD-20010829-00081 (filed October 22, 2001) ("MCHI Comments"). In its comments, MCHI urges the Commission to grant similar milestone extensions to all Big LEO licensees, including MCHI. MCHI's authorization was previously determined to be null and void by the Bureau due to MCHI's own failure to meet its milestone conditions. See Mobile Communications Holdings, Inc., *Memorandum Opinion and Order*, DA 01-1315, 16 FCC Rcd 11766 (Int'l Bur. 2001). Since the filing of MCHI's comments, the Bureau has considered and denied MCHI's petition for reconsideration. See Mobile Communications Holdings, Inc., *Memorandum Opinion and Order*, DA 02-1468, 17 FCC Rcd 11898 (Int'l Bur. 2002), application for review pending.

¹⁶ See Norris Satellite Commun., Inc., *Memorandum Opinion and Order*, FCC 97-377, 12 FCC Rcd 22299 (1997) ("Norris Satellite").

¹⁷ See, e.g., Astrolink International LLC, *Memorandum Opinion and Order*, DA 02-1431, 17 FCC Rcd 11267, 11268 (para. 5) (Sat. Div. 2002); Columbia Commun. Corp., *Memorandum Opinion and Order*, DA 00-113, 15 FCC Rcd 15566, 15571 (para. 11) (Int'l Bur. 2000).

¹⁸ See PanAmSat Licensee Corp., *Memorandum Opinion and Order*, FCC 01-178, 16 FCC Rcd 11534, 11537-38 (para. 12) (2001) (citing National Exchange Satellite, Inc., *Memorandum Opinion and Order*, DA 92-294, 7 FCC Rcd 1990 (Com. Car. Bur. 1992) ("Nexsat Order"); MCI Commun. Corp., *Memorandum Opinion and Order*, DA 87-24, 2 FCC Rcd 233 (Com. Car. Bur. 1987) ("MCI Order").

its milestone schedules.¹⁹

6. Under the milestone conditions of its license, Constellation was required to commence construction of its remaining satellites by July 2000 and to complete construction of its first two satellites by July 2001. Both these dates have passed without Constellation having certified that it has completed the required tasks. Accordingly, Constellation's authorization is rendered null and void, unless the Commission finds good cause for an extension.

7. Constellation's applications fail to provide sufficient grounds to justify an extension of the Commission's milestone deadlines. The standard that licensees must meet to justify a milestone extension request is well-established. Milestone extensions are granted only when the delay in implementation is due to circumstances beyond the control of the licensee²⁰ or when there are unique and overriding public interest concerns that justify an extension.²¹ For the reasons discussed below, Constellation's extension request fails to meet this standard.

8. Constellation's principal argument for an extension of its milestone obligations is that the financial difficulties of other satellite licensees – such as Iridium LLC, Globalstar Telecommunications LP, and ICO Global Communications Ltd. – created market uncertainties that resulted in an unfavorable business climate for investment in Big LEO licensees like Constellation.²² As a result of this unfavorable business climate, Constellation states that the financial community has been reluctant to participate in the funding of Big LEO operations and has denied Constellation access to the funds necessary to continue with the deployment of its system. Constellation argues that this unfavorable business climate represents a circumstance beyond its control that warrants an extension of its milestone obligations. The Commission has held, however, that a failure to attract investors, an uncertain business situation, or an unfavorable business climate in general have never been an adequate excuse for failure to meet a construction timetable.²³ As the Commission has previously explained, to whatever extent a licensee's ability or willingness to construct satellite facilities is dependent on uncertain future fundraising or tentative business projections, the risk of success or failure in that endeavor falls squarely on the licensee's shoulders.²⁴ Neither the Commission nor existing or potential licensees can, or should be expected to, accommodate mistaken projections or modified expectations.²⁵ Accordingly, Constellation's reliance on unfavorable market conditions is insufficient to justify an extension of its milestone requirements.

9. Constellation also argues that its extension request is supported by the Commission's

¹⁹ See, e.g., *Morning Star Satellite Co., L.L.C., Memorandum Opinion and Order*, DA 00-1265, 15 FCC Rcd 11350, 11352 (para. 7) (Int'l Bur. 2000) (citing *Advanced Commun. Corp., Memorandum Opinion and Order*, DA 95-944, 10 FCC Rcd 13337 (Int'l Bur. 1995) (“*Advanced Order*”)).

²⁰ See 47 C.F.R. § 25.117(e)(1) (2001). See also *INTELSAT LLC, Order and Authorization*, DA 02-333, 17 FCC Rcd 2391, 2392 (para. 5) (Int'l Bur. 2002); *Columbia Commun. Corp., Memorandum Opinion and Order*, DA 00-702, 15 FCC Rcd 16496, 16497 (para. 4) (Int'l Bur. 2000); *Nexsat Order*, 7 FCC Rcd at 1991 (para. 8); *Hughes R and Galaxy A-R Domestic Fixed-Satellites, Order and Authorization*, DA 90-780, 5 FCC Rcd 3423, 3424 (para. 11) (Com. Car. Bur. 1990); *MCI Order*, 2 FCC Rcd at 233 (para. 5)).

²¹ See 47 C.F.R. § 25.117(e)(2) (2001).

²² See August 2000 Application at 2; August 2001 Application at 3.

²³ See *United States Satellite Broadcasting Co., Memorandum Opinion and Order*, FCC 88-383, 3 FCC Rcd 6858, 6859 (para. 11) (1988) (“*USSB Order*”). See also *EchoStar Satellite Corp. et al., Memorandum Opinion and Order*, DA 02-1164, 17 FCC Rcd 8831, 8835 (Int'l Bur. 2002); *Advanced Order*, 10 FCC Rcd at 13341 (para. 13).

²⁴ See *USSB Order*, 3 FCC Rcd at 6859 (para. 11).

²⁵ See *id.*

grant of additional time to New Skies Satellites N.V.²⁶ and Inmarsat Ventures Ltd.²⁷ to consummate initial public offerings due to adverse market conditions.²⁸ Constellation claims that the Commission's decision to grant additional time in these cases demonstrates that adverse market conditions should be considered when evaluating requests for extensions of the Commission's milestone rules.²⁹ We disagree. As Constellation itself admits,³⁰ there are obvious differences between Constellation's request for an extension of its satellite milestone deadlines and the statutory duty of former intergovernmental satellite organizations ("ISOs") to conduct public offerings under the Open-Market Reorganization for the Betterment of International Telecommunications Act ("ORBIT Act").³¹ The ORBIT Act establishes deadlines for public offerings by ISOs, but specifically allows the Commission to extend these deadlines for a limited amount of time due to adverse business and market conditions.³² By contrast, no explicit market condition exception exists for the Commission's milestone rules, and the Commission has already found that milestone extensions based on market conditions are not in the public interest.³³

10. Finally, Constellation argues that a waiver of its milestone obligations is justified by the grant of a milestone waiver to Earth Watch Inc. ("Earth Watch"), a licensee in the commercial remote-sensing satellite service.³⁴ In *Earth Watch*, the Satellite and Radiocommunication Division determined that good cause existed to extend a licensee's construction completion milestone deadline for six months because there was no evidence in the record that the licensee was warehousing its authorization and because grant of the waiver would not preclude new entrants from entering the remote-sensing satellite services market.³⁵ Constellation argues that it similarly merits a waiver on these grounds. Constellation asserts that it is not warehousing spectrum resources because it has certified that it has met its initial construction commencement milestone for its first two satellites by entering into a satellite construction contract with Orbital Sciences Corp.³⁶ Constellation also claims that grant of a waiver will not preclude new market entry because there are no other pending applications for Big LEO licenses.³⁷

11. Constellation's reliance on *Earth Watch* for waiver of its milestone obligations is misplaced. *Earth Watch* presented a factual situation that is clearly distinguishable from that of Constellation. In *Earth Watch*, physical construction of the satellite system had already commenced and the extension was necessary to complete testing of certain satellite components.³⁸ The *Earth Watch* waiver extended the construction completion milestone for only six months, which reflects that fact that

²⁶ See New Skies Satellites N.V., *Memorandum Opinion and Order*, FCC 00-234, 15 FCC Rcd 11934 (2000).

²⁷ See Inmarsat Ventures Ltd., *Memorandum Opinion and Order*, FCC 01-193, 16 FCC Rcd 13499 (2001).

²⁸ See August 2000 Application at 8; August 2001 Application at 3. See also MCHI Comments at 2.

²⁹ See August 2000 Application at 8; August 2001 Application at 3.

³⁰ See August 2000 Application at 8.

³¹ ORBIT Act, Pub. L. 106-180, 114 Stat. 48 (2000).

³² See Pub. L. 106-108 §§ 621(5)(A)(ii) and 623(1) (establishing a deadline for the required public offering, but explicitly providing that "the Commission may extend this deadline in consideration of market conditions and relevant business factors relating to the timing of an initial public offering").

³³ See *USSB Order*, 3 FCC Rcd at 6859.

³⁴ See Earth Watch Inc., *Order and Authorization*, DA 00-909, 15 FCC Rcd 13594 (Sat. Radiocomm. Div. 2000) ("*Earth Watch*").

³⁵ See *id.* at 13597-98.

³⁶ See August 2000 Application at 6.

³⁷ See *id.* at 7.

³⁸ See *Earth Watch*, 15 FCC Rcd at 13596, 13598.

completion of satellite construction was close at hand at the time of the waiver, and that Earth Watch was actively proceeding with the construction of its system. By contrast, Constellation has held its license since 1997 without any indication of progress towards the actual physical construction of a satellite system. None of the efforts cited in Constellation's modification applications include the physical construction of a satellite system. Constellation instead points to efforts in satellite design, engineering, and international business development.³⁹ Although these efforts may constitute preliminary steps towards providing service, they cannot substitute for the actual physical construction and implementation of a satellite system.⁴⁰ Furthermore, Constellation indicates that it has deferred further physical construction of its satellite system until market conditions improve.⁴¹ Given that Constellation appears unwilling or unable to proceed with the implementation of its system in a timely manner, waiver of its construction deadlines would only further undermine the stated policy objective of the Commission's milestone rules and is inappropriate in this instance.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the applications of Constellation Communications Holdings, Inc. for Limited Waiver and Extension of Time, File Nos. SAT-MOD-20000907-00131 and SAT-AMD-20010829-00081, are DENIED.

13. IT IS FURTHER ORDERED that the authorization granted in 12 FCC Rcd 9651 (Int'l Bur. 1997) to Constellation Communications Holdings Inc., File Nos. 17-DSS-P-91(48), CSS-91-013, 10-SAT-AMEND-95, 159-SAT-AMEND-96, is DECLARED NULL and VOID.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
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³⁹ See August 2000 Application at 4.

⁴⁰ See *Advanced Commun. Corp., Memorandum Opinion and Order*, FCC 95-428, 11 FCC Rcd 3399, 3412 (para. 31) (1995) (promotional and other efforts "are not adequate substitute for the concrete progress toward the construction and operation of a [satellite] system that is required under our rules").

⁴¹ See August 2000 Application at 4.