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

In re

Application of Mobile Communications Holdings, Inc. for Authority to Construct the ELLIPSO™ Elliptical Orbit Mobile Satellite System	File Nos. 11-DSS-P-91(6) 18-DSS-P-91(18)

ORDER ON RECONSIDERATION

Adopted: December 21, 1994; Released: December 21, 1994

By the Chief, International Bureau:

1. On November 25, 1994, the Bureau, on delegated authority, denied a request for confidentiality filed by Mobile Communications Holdings, Inc. ("MCHI").[1] MCHI had sought confidential treatment, under Section 0.459 of the Commission's rules, of "Exhibit 3" to its application for a license in the "Big LEO" service. By a later letter to the Bureau Chief, however, MCHI narrowed its request from the whole of Exhibit 3 -- over 200 pages long -- to only five letters contained therein. The letters were submitted in connection with the financial qualifications showing in the MCHI application. We ruled that MCHI's request had included only a conclusory showing, insufficient to justify nondisclosure to the public.[2]

2. On December 2, 1994, MCHI filed an Application for Review of the Bureau's decision, in which it yet again narrowed its request -- this time to cover only limited portions of just three of the five letters for which it had previously sought confidential treatment. MCHI submitted redacted copies of these three letters to facilitate public inspection of all but the precise portions which MCHI maintains are confidential.[3] Those specific portions are:

(a) the portion of a letter from Allister F. Fraser, Vice President, AEC-Able Engineering Co., to Dr. David Castiel of MCHI, which describes the services for which AEC-Able has agreed to arrange financing;

(b) the portions of a letter from Milton S. Goldstein, Vice President of Satellite Transmission Systems, Inc., to Mr. Jeff Amerine of Westinghouse Electric Corporation, that describe the part of MCHI's overall satellite development and construction project for which Satellite Transmission Systems and Westinghouse have arranged a deferral of payments; and

(c) portions of a letter from David Archer, Executive Director, Spectrum Network Systems, Inc., to Dr. David Castiel of MCHI. This letter outlines an arrangement whereby Spectrum Network Systems may acquire 80% of the exclusive rights to distribute MCHI's satellite service in some regions of the world, unless a third party acquires 60% of those rights, in which case Spectrum has the right to acquire the remaining 40%. MCHI seeks confidentiality for portions of the letter that (1) name that third party, (2) describe the valuation, on a country by country basis, of Spectrum's right to acquire the 40% interest, and (3) describe an agreement for services between Spectrum and MCHI and the number of voting shares Spectrum is to be paid for those services.

3. The International Bureau, of course, has no authority to act on MCHI's Application for Review by the Commission.[4] Nonetheless, we take notice of the fact that MCHI has further narrowed its request for confidentiality. We also take notice that MCHI includes in its Application for Review new arguments that the redacted excerpts from the three letters still in question contain the type of sensitive commercial information that Section 0.459 of our Rules was designed to protect from disclosure, in that its disclosure could result in substantial competitive harm. MCHI notes that the information relating to the pricing of satellite subsystems is proprietary and, if disclosed, could cause substantial harm to the vendor in future negotiations with other purchasers. It also notes that the pricing of distribution rights for certain international markets is also highly sensitive information, and that disclosing such information may adversely affect MCHI's ability to bargain for the sale of distribution rights in other international markets. Finally, MCHI argues that its limited request "balance[s] the public interest in inspection of relevant materials with the equally legitimate interest in ensuring protection of sensitive commercial information which has no bearing on Commission deliberations."[5]

DISCUSSION

4. On our own motion,[6] we hereby reconsider the *Confidentiality Order* for the limited purpose of addressing the information and arguments that MCHI did not include in its first request for confidentiality, and on which the International Bureau was therefore not given any prior opportunity to pass.[7] In doing so, we in no way condone MCHI's decision not to present these arguments in its initial request for confidentiality. We acknowledge, however, that the Bureau's lax treatment of at least some

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[1] *See Order*, DA 94-1322 (November 25, 1994) (the "*Confidentiality Order*").

[2] The *Confidentiality Order* also denied a similar request from Motorola Satellite Communications, Inc., on similar reasoning. Motorola did not seek Commission review and this *Order* does not apply to Motorola's request for confidentiality.

[3] Thus MCHI's entire application, except for the redacted portions of these three letters, has been available for public inspection and comment since December 2, 1994.

[4] *See* 47 U.S.C. § 155(c)(4).

[5] Although, as we have said, the Application for Review is not before us, we also take notice that Loral/QUALCOMM Partnership, L.P. ("LQP"), Constellation Communications, Inc., ("Constellation") and AMSC Subsidiary Corporation ("AMSC") oppose MCHI's Application for Review. MCHI filed a reply to these oppositions on December 16, 1994.

[6] *See* 47 CFR 1.113(a).

[7] *Cf.* 47 C.F.R. § 1.115(c) (applications for review are not to rely on questions of fact or law upon which the Bureau has been afforded no opportunity to pass).

bare-bones requests in the past may have encouraged the submission of requests like MCHI's. To avoid any genuine hardship, we will reconsider to address MCHI's new arguments in this case. We trust, however, that the *Confidentiality Order* makes clear that the Bureau will quickly deny such conclusory or unsubstantiated requests in the future. Where such requests are made and denied by this Bureau in the future, we do not expect to grant reconsideration based on new arguments in Applications for Review. Indeed, a general practice of granting such reconsideration would place the Bureau in the untenable position of being forced to rule on requests for which parties have little incentive to present their best and fullest arguments.

5. Based on its newly advanced arguments, we conclude MCHI has established, by a preponderance of the evidence, that confidential treatment of the material it seeks to redact is warranted. The material is the type of detailed cost and pricing information in which there is a legitimate interest in confidentiality.[8] MCHI has posited a number of mechanisms by which disclosure of the information, especially information concerning individually negotiated prices, could result in competitive harm to it and to its vendor/shareholders. The information submitted by MCHI indicates that its vendors do not disclose the prices for their equipment/services outside a confidential process of negotiations with individual purchasers. Disclosure of this information could result in competitive harm to both MCHI (since it might disadvantage MCHI in negotiations with foreign distributors) and MCHI's vendor/shareholders (since buyers receive a clear competitive advantage if they know the prices that other buyers have been charged as a result of individual negotiations). We therefore believe MCHI has established that the information in question here is entitled to confidentiality under our rules.

6. LQP's original letter opposing the MCHI confidentiality request argued that the Commission could not consider any nonpublic information in the licensing proceeding without violating the Commission's rules against *ex parte* presentations. We reject any suggestion that parties before the Commission are entitled as a matter of right to see even the confidential information submitted by other parties. The very existence of Exemption 4 to the Freedom of Information Act,[9] and the other FOIA exemptions, necessarily implies that government agencies sometimes need to see and act on information that should not be made public. Our own rules on confidential submissions, which are based on FOIA Exemption 4, are to precisely the same effect. Thus, we decline to apply the *ex parte* rules in such a way that they conflict with FOIA, its exemptions, and our rules implementing those exemptions.

7. Our determination that the redactions for which MCHI requests confidentiality are within FOIA Exemption 4 does not preclude us from making a discretionary disclosure if such a disclosure would serve the public interest.[10] We might, for example, permit limited disclosure to the other Big LEO applicants, pursuant to either a nondisclosure agreement or a protective order.[11] The Commission has stated that such disclosures will *not* generally be made "on the mere chance that [the information] might be helpful," but only when "the information is a necessary link in a chain of evidence that will resolve a public interest issue."[12]

8. While the information that MCHI seeks to protect "might be helpful," it falls far short of "necessary" to the other Big LEO applicants' participation in the licensing process, and we therefore decline to authorize discretionary disclosure here. Our rules do not require the type of detailed itemization of costs for which some of the redacted information might be relevant. While some of the material could conceivably bear on MCHI's financial qualifications, we think the likelihood that it would be "necessary" to "resolve" our public-interest determination on the MCHI application is sufficiently slight that MCHI's FOIA-authorized interest in confidentiality should prevail here.

9. Some may argue that even limited disclosure is better than none at all, and this argument has merit in any particular case. But we cannot ignore the fact that overuse of such limited disclosure may, in the long run, induce decisionmakers to grant confidentiality *more* frequently (subject to limited disclosure), rather than (a) deny the confidentiality altogether and risk litigation with the submitting party, or (b) grant confidentiality altogether and risk litigation with other interested parties. The effect of such overuse would be disclosure for everyone *except* the public, a result that is inconsistent with the Supreme Court's admonition that Congress "'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest.'"[13] In addition, we note that a limited disclosure in this proceeding would have "ripple effects" even in this particular case specifically, it would require any party commenting on the partially disclosed information to file all or some of its comments in a manner that prevented public disclosure of the confidential information -- and therefore of the comments themselves. Such a withdrawal of even more information from the public domain would, in our view, be contrary to FOIA's pro-disclosure purpose. Finally, we are aware of no argument that public disclosure would, in this case, present any more danger of competitive injury than disclosure to the other Big LEO applicants.

10. Accordingly, IT IS ORDERED that MCHI's Request for Confidentiality is GRANTED as to the excerpts described in MCHI's Application for Review filed December 2, 1994.

11. IT IS FURTHER ORDERED that all other portions of MCHI's application for a Big LEO license are available for public inspection.

12. IT IS FURTHER ORDERED that this Order be effective upon its adoption on December 21, 1994.

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[8] *Cf. Allnet Communications v. FCC*, 800 F. Supp. 984 (D.D.C. 1992), *aff'd*, No. 92-5351 (D.C. Cir. May 27, 1994).

[9] 5 U.S.C. § 552(b)(4).

[10] *Chrysler v. Brown*, 441 U.S. 281, 290-94 (1979). *See* 47 C.F.R. § 0.461(f)(4); *Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariffs*, 7 F.C.C. Rcd. 1526, 1531 (CCB 1992).

[11] MCHI made no offer of limited disclosure in its original request for confidentiality. The November 18 letter in which MCHI narrowed its request to five letters suggested limited disclosure of these letters to the other Big LEO applicants, subject to a nondisclosure agreement drafted by MCHI.

[12] *Classical Radio for Connecticut, Inc.*, 69 F.C.C.2d 1517, 1520 n.4 (1978).

[13] United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149(1975)).

13. As required by Section 0.459(d) of the Commission's Rules, a copy of this ruling has been forwarded to the Commission's Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau