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

MAY 19 1992

Federal Communications Commission  
Office of the Secretary

In the Matter of:	)	
	)	
Amendment of Section 2.106 of the	)	ET Docket No. 92-28
Commission's Rules to Allocate	)	
Spectrum to the Mobile-Satellite	)	PP-29
Service above 1 GHz for Low-Earth	)	PP-30
Satellites -- Requests for Pioneer's	)	PP-31
Preference by Constellation, Ellipsat,	)	PP-32
Loral, Motorola and TRW	)	PP-33
	)	
	)	

COMMENTS

Constellation Communications, Inc. ("CONSTELLATION™"), by its attorneys, hereby submits comments in support of the Motion filed by TRW, Inc. ("TRW") on May 5, 1992 to stay Commission action on the above-captioned pioneer's preference requests. In its Motion to Stay ("Motion"), TRW seeks to delay the Commission's decision on the above-captioned requests until there has been a final resolution of the issues raised in the pending petition for further reconsideration in the rulemaking proceeding that established the pioneer's preference.<sup>1/</sup> In

<sup>1/</sup> Establishment of Procedures to Provide a Preference Proposing an Allocation for New Services, 6 FCC Rcd. 3488 (1991) ("Pioneer's Preference Order") recon. in part, 7 FCC 1808 (1992) ("Pioneer's Preference Recon. Order"), recon. pending.

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this comment, CONSTELLATION strongly urges the Commission to grant the TRW Motion.

CONSTELLATION has pending an application to construct and operate the ARIES™ low-Earth orbit (LEO) satellite system that will use the 1610-1626.5 MHz and 2483.5-2500 MHz bands currently allocated to the radiodetermination satellite service ("RDSS"). CONSTELLATION also has pending a Request for Pioneer's Preference for its ARIES system. At present, there are five applications pending to construct and operate LEO systems in the RDSS bands - CONSTELLATION, Motorola Satellite Communications, Inc. ("Motorola"), Ellipsat Corporation ("Ellipsat") and Loral Qualcomm Satellite Systems, Inc. ("LQSS"). Each of these applicants also has pending a Request for Pioneer's Preference.

CONSTELLATION believes that the Commission cannot grant a pioneer's preference to any applicant at this time because such a grant would have a severe detrimental impact on the Commission's consideration of the pending applications to construct and operate LEO systems in the RDSS bands.<sup>2/</sup> CONSTELLATION concurs with TRW that all the relevant factors

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<sup>2/</sup> CONSTELLATION believes that for all of the reasons stated in these comments, the Commission should also grant the Motion for Stay filed by TRW, Inc. with regard to the pending pioneer's preference request of CELSAT, Inc.

necessary for the Commission to grant a motion for stay are met in the present situation. These factors include:

- the likelihood that the party seeking the stay will prevail on the merits;
- the likelihood that the moving party will be irreparably harmed absent a stay;
- the prospect that others will be harmed if the agency grants the stay;
- the public interest will be served by grant of the stay<sup>3/</sup>

In its motion, TRW demonstrates that there is significant likelihood that TRW will prevail in its arguments in the Pioneer's Preference Proceeding. In particular, TRW demonstrated that an award of a pioneer's preference will be in conflict with rights of FCC applicants recognized by the Supreme Court in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) (Ashbacker). In its Petition for Reconsideration, TRW noted that the Commission made only brief mention of Ashbacker rights in the original order establishing the pioneer's preference.<sup>4/</sup> TRW further noted that in the Commission's order reconsidering the pioneer's preference procedure, there was no detailed analysis provided

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<sup>3/</sup> See Motion at 5.

<sup>4/</sup> See Petition for Further Reconsideration, filed in General Docket No. 90-217 by TRW Inc., April 6, 1992.

as to how an FCC applicant's rights under Ashbacker could be reconciled with the pioneer's preference process.

In its Opposition to the Motion for Stay,<sup>5/</sup> Motorola argues that the Commission can utilize eligibility criteria to render an application as unacceptable and a means to avoid providing an applicant with a hearing. In support of this contention Motorola cites United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) ("Storer") and Hispanic Info. and Telecommunications Network Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989) ("HITN"). These two cases considered FCC eligibility criteria for Title III applications. They are not relevant to the present discussion on pioneer's preference. The criteria in both of these cases were objective generic standards that applied to all potential applicants. Analysis of the criteria in both cases did not require any subjective evaluation by the Commission. Rather, the applicant either complied or failed to comply with the criteria. In Storer the rule considered was one that limited the number of broadcast station licenses an individual entity could hold. If that entity exceeded the limit, it was not eligible to be considered for any additional licensees. This requirement applied to all

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<sup>5/</sup> See Opposition to Motion to Stay in ET Docket No. 92-28 filed by Motorola Satellite Communications, Inc., May 12, 1992.

Commission licenses and could be simply and objectively implemented without a record other than a list of FCC licenses held.

In HITN, the FCC established local ownership as a threshold standard for the awarding of Instructional TV Fixed Services ("ITFS") licenses. As in Storer, this was an objective and simple criteria to evaluate. The applicant was either locally based or it was not. No hearing, no record or subjective evaluation was necessary to make this determination. It was only necessary to determine the precise location of the applicant's operations. This is vastly different from the issues presented by the pioneer's preference process. In the case of the pioneer's preference, there is no objective eligibility criteria or standards. Rather, as applied to the pending LEO applications, the Commission will be making a subjective evaluation of the relative merits of competing LEO applications to determine which one is most innovative. Contrary to Motorola's own view as to the innovative nature of its Iridium system, there is no conceivable way the Commission can simply or objectively determine that any individual applicant is eligible for a pioneer's preference. Certainly this is not a situation where the Commission is applying objective eligibility criteria. This selection process is a subjective determination by the Commission to give one applicant a preference in the regulatory process vis-a-vis

another applicant. It requires a detailed analysis of the merits of each particular proposal. Since the Commission can not turn this process into an objective yes or no analysis, it is extremely difficult to understand how a pioneer's preference can be made in the midst of a mutually exclusive applications. For these reasons, the cases cited by Motorola in its Opposition to Motion for Stay are not applicable.<sup>6/</sup>

Notwithstanding the arguments made by Motorola, it is clear that the Commission cannot merely wish away any of the pending LEO applicant's Ashbacker rights by regulatory fiat. The pioneer's preference must be properly reconciled with Ashbacker rights. Such a reconciliation will require that an applicant's Ashbacker hearing rights, as defined by the Supreme Court, be recognized. Under these circumstances, it seems quite likely that TRW will prevail on the merits of its arguments, and it has met the first factor necessary for the grant of the Motion.

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<sup>6/</sup> Motorola also cites the D.C. Circuit's decision in Maxcell Telecom Plus, Inc. v. FCC., 815 F.2d 1551 (D.C. Cir. 1987) as providing the Commission authority to establish a retroactive application procedure. Like the cases cited previously, this case deals with a generic rule change that applied to all applicants on an equal basis. It did not in any manner require subjective determination by the Commission of the relevant merits of any particular application vis-a-vis any other application.

TRW also meets the second factor for granting a Motion to Stay. There can be no doubt that if the Commission awards a pioneer's preference to one of the five pending applicants to operate a LEO system in the RDSS bands, the remaining four applicants will be irreparably harmed. Each of these applicants has made a serious and comprehensive proposal to construct and operate a LEO satellite system. Although, there are some fundamental technical and operational differences between these applicants, each is proposing to establish a satellite system that will provide mobile telecommunication services. Obviously, if one of these five applicants is granted a pioneer's preference, such action will have a significant ripple effect on all the pending regulatory proceedings relating to LEO systems proposing to use the RDSS bands. The four applicants who do not receive the preference will be put in the position of explaining why these proposals did not receive a pioneer's preference.

Even more damaging is that a pioneer's preference decision will result in the preliminary selection of certain LEO technology. The principal decision the Commission must make in the LEO application proceedings is whether LEO systems should use Code Division Multiple Access ("CDMA"), which allows multiple entry, or Time Division Multiple Access ("TDMA"), which can only be used on an exclusive basis. A decision between these technologies should not be made in the context of

the pioneer's preference proceeding; these two technologies must be judged on their relative merits and commercial capabilities, not solely on their innovativeness.

Nevertheless, if the Commission grants a pioneer's preference in this proceeding, it will have made a determination in favor of one of these technologies.

If the Commission were to make a decision between CDMA or TDMA, proponents of the technology that does not prevail will be deprived the opportunity to participate in the global mobile radio market. This is because of the likely non-compatibility of these two competing technologies (CDMA and TDMA) and the inherent delay in implementation of a system by the applicants not awarded a preference. The regulatory and market implications of this result will be prejudicial and irreparable to the applicants. There can be no doubt that the TRW Motion amply meets the second factor for granting a stay -- irreparable harm.

The grant of the TRW Motion will not harm any interested party and therefore meets the third factor for granting a Motion to Stay. Postponement of a decision on the pioneer's preference will allow the Commission to fully consider the relative merits of each of the proposed systems in a single comprehensive proceeding without the cloud of possible changes in the pioneer's preference hanging over the process. This will insure a quicker regulatory decision and balanced

consideration of all the issues. It is extremely difficult to identify how any individual applicant can be harmed by this approach.

Finally, grant of the Motion will serve the public interest by enabling the Commission to make a decision on the pending applications based on a full and fair record. This will insure that the public receives the benefits of this new and innovative mobile communications service in an expeditious and economic manner.

CONCLUSION

For the reasons stated above, Constellation Communications, Inc. strongly supports the Motion to Stay filed by TRW, Inc.

Respectfully submitted,

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May 19, 1992

CERTIFICATE OF SERVICE

I, Michelle V. Richardson, hereby certify that a copy of the foregoing Comments of Constellation Communications, Inc., was sent by first class United States mail, postage prepaid, this 19th day of May 1992, to the following:

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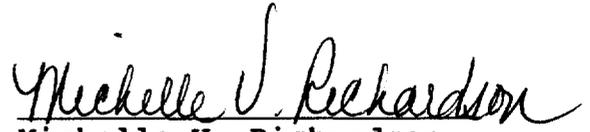
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