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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

COMMUNICATIONS
FILE

In the Matter of:

Amendment of Section 2.106 of the
Commission's Rules to Allocate
Spectrum to the Mobile-Satellite
Service above 1 GHz for
Low-Earth Orbit Satellites --
Request for Pioneer's Preference
by Motorola Satellite Communications,
Inc.

ET Docket No. 92-28

PP-32

In the Matter of:

Ellipsat Corp.; TRW, Inc.; and
Constellation Communications, Inc.

FOIA Control Nos.
92-83, 92-86, 92-88

On Request for Inspection
of Records.

To: The Commission and the General Counsel

OPPOSITION TO MOTION FOR STAY

Motorola Satellite Communications, Inc. ("Motorola")
hereby files its Opposition to the Motion for Stay submitted by
AMSC Subsidiary Corporation ("AMSC") in the above-captioned
proceedings.^{1/} AMSC requests a stay of all further action on

^{1/} TRW, Inc. has also filed a stay request in these
proceedings. See Motion for Stay, filed by TRW, Inc. (May 5,
1992). Motorola opposed that motion for many of the same reasons
presented here. See Opposition to Motion for Stay, filed by
Motorola (May 12, 1992). Motorola hereby incorporates by
reference those portions of its earlier opposition which are
relevant to the Commission's consideration of AMSC's motion.

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the pending pioneer's preference request of Motorola until such time as the Commission acts on AMSC's application for review of the Protective Order entered in these proceedings by the Office of Engineering and Technology ("OET").^{2/} As set forth below, no useful purpose would be served by delaying further action in these proceedings. Accordingly, AMSC's motion must be denied.

I. ARGUMENT

AMSC has not demonstrated that a stay is warranted under the four-part test set forth in Cuomo v. U.S. Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985) (originally enunciated in Virginia Petroleum Jobbers, 259 F.2d 921 (1958), and Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977)). A party moving for a stay must show all of the following:

- (1) the likelihood that it will prevail on the merits;
- (2) the likelihood that it will be irreparably harmed absent a stay;
- (3) the prospect that others will not be harmed if the agency grants the stay; and
- (4) the public interest in granting the stay.

^{2/} Protective Order, DA 92-674 (May 28, 1992). AMSC filed its application for review on the same day it filed the stay motion. See Application for Review, FOIA Control Nos. 92-83, 92-88, 92-86 (June 12, 1992). AMSC's motion also requests a stay of the June 12, 1992 deadline established by OET for submitting reply comments on the supplemental materials submitted by Motorola. Such a request, on the date that such reply comments were due, is obviously untimely and not entitled to further consideration. Moreover, contrary to the assertion of AMSC, counsel for Motorola was never informed of the filing of AMSC's motion by telephone or otherwise on June 12, 1992.

772 F.2d at 974. AMSC has not done so here.

A. AMSC IS NOT LIKELY TO SUCCEED ON THE MERITS

AMSC is extremely unlikely to succeed with its application for review of OET's determinations concerning the requests for inspection filed by other parties in this proceeding.^{3/} AMSC erroneously claims that the Protective Order effectively has denied AMSC access to Motorola's confidential information because of asserted similarities between this information and the research and development being conducted by AMSC. According to AMSC, examination of Motorola's confidential materials would subject AMSC to a "substantial risk" of a trade secret misappropriation action by Motorola as to which AMSC "would have great difficulty defending."^{4/}

AMSC apparently is the only one of the five other applicants in these proceedings to have such concerns. All of the other applicants have reviewed the materials deemed confidential by the Commission and filed comments on them without claiming that they have been effectively denied access because of

^{3/} AMSC lacks standing to request review of OET's determination as to the FOIA requests filed by TRW, Inc., Constellation Communications, Inc. and Ellipsat Corporation. In accordance with the Commission's Rules, only the persons who submitted the records and the persons who filed requests for inspection of such records may file an application for review of a decision to partially grant or deny such requests. See 47 C.F.R. § 0.461(h)(2) (1991). AMSC neither submitted the materials under consideration nor filed a FOIA request to have Motorola's confidential information released for inspection.

^{4/} AMSC Motion at 3.

concerns about future lawsuits. AMSC would only have to be concerned about a potential lawsuit or other sanctions from the Commission if it violated the terms of the Protective Order and misused the confidential information contained in Motorola's supplemental showing. AMSC's lack of confidence in controlling the dissemination and use of such materials within its own organization cannot form the basis for a claim of prejudice or effective denial of access to such information.

By entering the Protective Order in these proceedings, the Commission has attempted to accommodate Motorola's legitimate concerns as to the safeguarding of its proprietary and confidential information with the due process and fairness concerns of the other applicants. All of the parties that would be most affected by a Commission decision as to Motorola's request for a pioneer's preference now have had an opportunity to comment on all of the information provided by Motorola in support of its request before even a tentative decision is reached by the Commission. It is Motorola that is taking a "substantial risk" by accepting the procedures set forth in the Protective Order, by agreeing to release to its competitors sensitive information about the progress of testing of the IRIDIUM™ system and certain patent materials relating to the system design.

AMSC further claims that OET's decisions as to the confidentiality of some of the materials submitted by Motorola and to limiting access by other parties to those materials are not supported by the record. AMSC is mistaken. As both the Protective Order and OET's earlier letter determination on the

Freedom of Information Act ("FOIA") requests make clear, the materials provided by Motorola were deemed exempt pursuant to Exemption 4 and Section 0.457(d) of the Commission's Rules.^{5/} This provision exempts from disclosure "trade secrets and commercial or financial information obtained from any person and privileged or confidential." 47 C.F.R. § 0.457(d) (1991). There is more than adequate support in the record for OET's decision, including Motorola's letter requests for confidential treatment as well as Motorola's Consolidated Reply to the oppositions for confidential treatment filed by some of the other applicants.^{6/} These filings adequately describe the materials for which confidential treatment was requested and also provide the legal basis for OET's determination in accordance with the Commission's Rules.

B. AMSC WOULD NOT BE IRREPARABLY HARMED
IF ITS STAY REQUEST IS DENIED

The only harm identified by AMSC if a stay is not granted is its asserted inability to comment effectively on, and submit its own evaluation of the materials that it now refuses to review because of the fear of a potential lawsuit for misusing

^{5/} See AMSC's Application for Review at Exhibits A & C.

^{6/} See Letter to Ms. Donna R. Searcy from Philip L. Malet re Request for Confidential Treatment (April 10, 1992); Letter to Mr. David R. Siddall from Philip L. Malet re Freedom of Information Act Requests (May 11, 1992); Consolidated Reply to Oppositions to Request for Confidential Treatment (May 1, 1992). In this regard it is worth noting that AMSC did not file an opposition to Motorola's letter request for confidential treatment.

Motorola's confidential information.^{7/} Such an assertion is ridiculous and cannot possibly constitute irreparable harm if AMSC's requested stay is denied.

Any preliminary determination as to the award of a preference during the pendency of AMSC's application for review will not harm AMSC. The Commission is not on the verge of granting any of the applicants in this proceeding a dispositive preference. Under the pioneer's preference rules, the final award of such a preference must await further comment in any future rulemaking proceeding. If the Commission does not rely upon such confidential information in awarding Motorola a preference in these proceedings or tentatively denies Motorola's request for a preference, then there would be absolutely no harm to AMSC by continuing with the normal processing of the pending requests. Even if the Commission were to rely upon some of the confidential information in preliminarily granting Motorola a pioneer's preference, AMSC would have another opportunity to comment on such an award in the rulemaking proceeding. And if the Commission were to grant AMSC's application for review during the interim period, then the Commission would still have time to reconsider the tentative award absent the confidential materials otherwise relied upon in making its preliminary determination.

^{7/} AMSC Motion at 5.

C. MOTOROLA WOULD BE SERIOUSLY HARMED
BY GRANTING AMSC ITS STAY REQUEST

On the other hand, Motorola would be seriously harmed if the Commission were to grant AMSC's stay request. Motorola has shown that it deserves a pioneer's preference for the innovations associated with its system design.^{8/} Motorola also deserves to have its request considered in a timely manner. To do otherwise would be contrary to the intended objective of the pioneer's preference rules, namely to give innovators of new spectrum uses early assurance that they will eventually obtain licenses from the Commission. Thus, any delay in the normal processing of the pending requests would directly work to Motorola's disadvantage.

Motorola and the other applicants for LEO systems are currently competing, not only with each other, but also with proposed foreign systems. Several other satellite systems recently have been proposed by foreign administrations and international organizations. Foreign administrations have already started the international coordination process. Prompt action in this proceeding is necessary in order to enable the U.S. applicants to compete in the international marketplace for investors and potential customers.

^{8/} See Motorola's Comments (April 8, 1992); Motorola's Reply Comments (April 23, 1992); Motorola's Supplement (April 10, 1992).

D. THE PUBLIC INTEREST WOULD BE SERVED BY DENYING AMSC'S MOTION TO STAY

The public interest rarely is served by delay. This is especially the case in this proceeding where the Commission will be analyzing which of the applicants should receive a pioneer's preference as a reward for the innovations associated with its system design. The Commission established the pioneer's preference rules in order to create incentives for the early introduction of new and innovative services and technical proposals which better utilize the limited frequency spectrum. Further delay would only frustrate the underlying purposes of these rules.

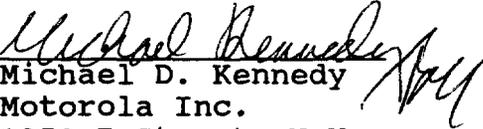
Furthermore, as previously mentioned, it is imperative that the Commission act expeditiously in order to ensure that the U.S. licensees in the RDSS bands will be able to seek investors in their respective systems in the face of stiff international competition. The public interest would not be served by any further delays in the introduction of U.S. licensees into the global marketplace.

II. CONCLUSION

For the foregoing reasons, the Commission must deny AMSC's motion to stay these proceedings.

Respectfully submitted,

MOTOROLA SATELLITE
COMMUNICATIONS, INC.


Michael D. Kennedy
Motorola Inc.
1350 I Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-6900


Philip L. Malet
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6239

James G. Ennis
Fletcher Heald & Hildreth
1225 Connecticut Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 828-5782

Its Attorneys

June 19, 1992

CERTIFICATE OF SERVICE

I, Philip L. Malet, hereby certify that the foregoing Opposition to Motion for Stay was served by first-class mail, postage prepaid, this 19th day of June, 1992 on the following persons:

Leslie Taylor, Esquire
Leslie Taylor Associates
6800 Carlynn Court
Bethesda, MD 20817-4302
(Counsel for Norris Satellite and LQSS)

Linda K. Smith, Esquire
Robert Halperin, Esquire
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(Counsel for Loral Qualcomm)

Bruce D. Jacobs, Esquire
Glenn S. Richards, Esquire
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
(Counsel for AMSC)

Robert A. Mazer, Esquire
Albert Shuldiner, Esquire
Nixon, Hargrave, Devans & Doyle
One Thomas Circle, NW, Suite 800
Washington, DC 20005
(Counsel for Constellation)

Norman R. Leventhal, Esquire
Raul R. Rodriguez, Esquire
Stephen D. Baruch, Esquire
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809
(Counsel for TRW, Inc.)

Jill Abeshouse Stern, Esquire
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Second Floor
Washington, D.C. 20037
(Counsel for Ellipsat)

Jeffrey L. Sheldon
General Counsel
Utilities Telecommunications Council
1140 Connecticut Avenue, NW
Suite 1140
Washington, D.C. 20036

William K. Keane
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005

J. Geoffrey Bentley
Birch, Horton, Bittner & Cherot
1155 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036

Cheryl Lynn Schneider
Communications Satellite Corporation
950 L'Enfant Plaza, S.W.
Washington, D.C. 20024

J. Ellis McSparran, President
3S Navigation
23141 Plaza Pointe Drive
Laguna Hills, CA 92653

John L. Bartlett
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

M. Worstell
Vice President, Contracts
Litton Aero Products
6101 Condor Drive
Moorpark, CA 93021

Lon Levin
American Mobile Satellite Corp.
1500 Connecticut Avenue, N.W.
Washington, D.C. 20036

Robert L. Pettit
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554



Philip L. Malet