BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Applications of Verestar, Inc. (Debtor-In-Possession) and Verestar Networks, Inc. (Debtor-In-Possession) for Consent to Assignment of Licenses and Authorizations To SES Americom, Inc.	)	IB Docket No. 04-174

OPPOSITION TO PETITION TO DISMISS OR DENY

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July 6, 2004

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OPPOSITION TO PETITION TO DISMISS OR DENY

Verestar, Inc. (Debtor-In-Possession), Verestar Networks, Inc. (Debtor-In-Possession) (collectively, "Verestar") and SES AMERICOM, Inc. ("SES Americom", and together with Verestar, the "Applicants"), by their attorneys, hereby oppose the Petition to Dismiss or Deny (the "Petition") the above-captioned applications that was filed on June 25, 2004 by GWTP Investments, L.P. ("GWTP" or "Petitioner").

I. SUMMARY

Verestar filed for protection under Chapter 11 of the Bankruptcy Code in December 2003. Subsequently, the bulk of Verestar's assets were purchased by SES Americom at an auction held by the Bankruptcy Court in April 2004.[1] Verestar and SES Americom filed the Applications with the Commission relating to this acquisition on April 29, 2004.[2] The Applicants have since withdrawn from the Applications all of Verestar's Section 214

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[1] *See generally* Application for Assignments of Authorization and Transfers of Control, File No. 0001685559, Exhibit A ("*Exhibit A*") (filed April 29, 2004).

[2] *See* IFS Submission ID Nos. IB2004000889, IB2004000890, SES-ASG-INTR2004-00866, and SES-ASG-INTR2004-00887; US Submission ID No. 0001685559; and the Domestic Section 214 Authorization assignment application (collectively and as amended, the "Applications") (filed April 29, 2004).

authorizations[3] and terrestrial common carrier wireless licenses.[4] Further, Verestar has requested that all common carrier earth station licenses involved in the transaction be modified to non-common carrier status[5] and SES Americom has notified the Commission that the instant transaction will not be consummated until after the grant of the requested modification.[6] In sum, the applications now pending in IB Docket No. 04-174 include only non-common carrier earth station licenses and private wireless licenses.

On June 25, 2004, GWTP filed the above-referenced Petition, which is based largely on its allegation that SES Americom breached a contractual obligation to sell certain Verestar assets to GWTP, a claim that the GWTP has filed in U.S. District Court for the Northern District of Texas, Dallas Division (the "Court").[7] GWTP has failed to establish that it has standing to file the Petition. The Commission has repeatedly made clear that it will not involve itself in private contracting matters. The GWTP standing is predicated entirely on this contract claim, which is directly contrary to the Commission's "long-standing policy of repudiating involvement in contractual disputes."[8]

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[3] *See* Letter from Jeffrey H. Olson to Marlene H. Dortch, Secretary, dated June 7, 2004 ("*June 7 Letter*").

[4] *See* Letter from Jeffrey H. Olson to Marlene H. Dortch, Secretary, dated June 23, 2004 ("*June 23 Letter*").

[5] Application for Space and Earth Station Modification or Amendment, File Nos. SES-MOD-INTR2004-01257-74 ("*Status Modification Applications*") (filed June 24, 2004).

[6] *See* Letter from Jeffrey H. Olson to Marlene H. Dortch, Secretary, dated June 24, 2004, at 2 ("*June 24 Letter*").

[7] *See* Petition at 5-11 and attachment.

[8] In the Matter of Application of Bank of America, 16 F.C.C.R. 15772, 15773 (2001) ("*BOA/Customtronics Order*"); *see also* In the Matter of Loral Corporation, 12 F.C.C.R. 21164, 21171 (1997) ("[W]e will not interfere in a private contractual dispute absent a

In order to create the impression that its Petition has some relationship to the statutory public interest standard,[9] GWTP also asserts – without citation to any relevant authority – that the Commission must undertake a thorough and painstaking evaluation of various other issues, including: (1) SES Americom's compliance with Sections 310(a) and 310(b)(4) of the Communications Act;[10] (2) whether the proposed transaction will be anti-competitive;[11] and (3) whether the proposed transaction raises significant national security or law enforcement concerns.[12]

Each of GWTP's mistaken and inapposite assertions is addressed in detail below. It should be noted here that with respect to every one of its "public interest" claims, GWTP asserts no facts that support its expressed concerns, and it completely ignores the undisputed facts to the contrary set out in the Applications and related documents.

II. GWTP LACKS STANDING TO FILE THE INSTANT PETITION

As interpreted by the courts and the Commission, Section 309(d)(1) of the Communications Act limits standing to file petitions to deny to persons who can demonstrate a personal injury that is "fairly traceable" to the challenged action and that may, with substantial

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showing of a violation of the Commission's rules or federal statute."); In the Matter of Applications of Mid-Missouri Telephone Co., 1999 WL 993504 (F.C.C. 1999) ("Commission is not the proper forum for the resolution of private contractual disputes and such matters are appropriately left to the courts.") (*citing* Sonderling Broadcasting Co., 46 Rad. Reg.2d (P&F) 890, 894 (1979)).

[9] *See* 47 U.S.C. § 309(d)(1).

[10] *See* Petition at 11-16.

[11] *Id.* at 16-19.

[12] *Id.* at 19-22.

likelihood, be redressed by the relief requested.[13] A claim of standing based solely on an alleged breach of contract is inadequate to meet the requirements of Section 309(d).[14]

GWTP claims that grant of the Applications is likely to prejudice its civil suit by giving the federal district judge hearing its case the "incorrect impression that the Commission has 'signed off' on the proposed transaction."[15] According to GWTP, Commission action "would cast a dark shadow on the merits of [its] claims" in the proceedings in Court.[16]

Federal district judges tend to be fairly sophisticated individuals and the Court should be fully capable of recognizing the obvious distinctions between the issues before the Commission and the very separate issues that the Court is trying, particularly given the Commission's well-established position on this subject. It is safe to assume that a Commission decision dismissing or denying the Petition will make that fact clear to the Court.

GWTP also complains that it must incur legal costs both in the civil action as well as in prosecuting the instant Petition and that this "injury" provides an independent basis for its standing.[17] This is a "bootstrap" of the most obvious sort. Were the expenses incurred by a petitioner to challenge an application pending at the FCC sufficient to constitute an injury "fairly traceable" to the challenged action, the concept of standing would be rendered meaningless.

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[13] *See, e.g.,* In re Application of MCI Communications Corp., 10 F.C.C. Rcd. 1072, ¶¶ 10-11 (1994); 47 U.S.C. § 309(d)(1).

[14] 47 U.S.C. § 310(d).

[15] Petition at 6.

[16] *Id.* at 10.

[17] *See id.* at 6.

In sum, GWTP can show no injury whatsoever that might flow from the Commission's grant of the Applications, and the requested denial would not redress the injury complained of, but would merely leave the license in the hands of the existing licensee, Verestar.[18] If GWTP prevails in the Texas litigation, a prior grant of the instant Applications would not prevent the Court from ordering SES Americom to sell the relevant assets to GWTP. The clear absence of any injury from grant of the Applications reveals that the Petition is merely a poorly veiled attempt by GWTP to gain leverage in its contractual dispute with SES Americom. The facts alleged by GWTP demonstrate that it is not a party in interest in this proceeding, and that its Petition should be dismissed.

III. THE PETITION IGNORES THE COMMISSION'S LONG-STANDING POLICY OF LEAVING CONTRACTUAL DISPUTES INVOLVING COMMISSION LICENSES TO THE COURTS

Stripped of its inapposite "public interest" rhetoric, the sole basis for the petition is a private contractual dispute that is currently pending in the federal court system. The Commission has repeatedly found that the agency is an inappropriate forum in which to bring contract claims, as it "usually lacks the expertise, the resources and the jurisdiction to adjudicate such matters fully."[19] For this reason, the Commission has consistently declined to "adjudicate

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[18] *See* In re Application of MCI Telecommunications Corp., 16 F.C.C.R. 21608, 21623 (1999) ("*MCI/Echostar Order*") (holding that petitioner bringing contract claim did not meet threshold standing requirements as its injury from the alleged breach was not traceable to Commission action).

[19] In re Applications of D.H. Overmeyer Telecasting Co., Inc., 53 R.R.2d (P&F) 1701, ¶ 9 (1983).

contractual matters where an alternative forum exists to resolve the matter and the contractual dispute does not bear on the public interest."[20]

As noted above, GWTP's concern that the Court will receive the wrong signal from the Commission's consent to the assignments[21] is unfounded. The Commission has repeatedly made clear that it does not seek to reach the merits of any underlying contractual dispute in cases such as this.[22] Furthermore, GWTP's prediction that the efforts put forth now by the Commission and the parties would be rendered moot should the Court decide in favor of Petitioner[23] does not distinguish this case from the many others in which the Commission has declined to litigate contract disputes or stay its proceedings pending the outcome of separate civil litigation.[24] In short, the Petitioner has failed to allege an injury cognizable under Section 309(d)(1).[25] The Petition should be dismissed on this basis alone.

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[20] *MCI/Echostar Order* at 21624. The Petitioner does not (and could not) allege that the conduct it complains of – SES Americom's failure to sell it certain assets purchased out of the Verestar bankruptcy – represents "egregious misconduct", *see generally* In the Matter of USA Broadcasting, Inc., 19 F.C.C.R. 4253, 4256 (2004) (noting that egregious misconduct could be considered in determination of a party's character qualifications), or that it in any other way affects or harms the public interest, e.g., a violation of the Commission's Rules or a federal statute.

[21] *See* Petition at 6, 10.

[22] In the Matter of Loral Satellite, Inc., 19 F.C.C.R. 2404, 2420 (Int'l Bur. 2004) ("*Loral Order*") ("[W]e do not address the apparent contractual disputes between the parties … any action we take in this proceeding should not be construed to resolve any such disputes.").

[23] Petition at 6, 10-11.

[24] *See, e.g., BOA/Customtronics Order* at 15773 (rejecting petitioner's request to classify as 'pending' an FCC authorization while related contract issue disputed in court, finding it could not "honor [petitioner's] request without inserting the Commission into the contract dispute").

[25] 47 U.S.C. § 309(d)(1).

IV. THE APPLICATION, AS AMENDED, RAISES NO SIGNIFICANT ISSUES UNDER THE COMMISSION'S FOREIGN OWNERSHIP RULES

A. To The Extent That Section 310(b) Is Relevant At All In This Case, The Instant Application Is Covered By The Earlier Commission Approval Of SES Americom's Foreign Ownership Structure

The Applicants have shown that a declaratory ruling on foreign ownership issues related to the assignments is not necessary given the Commission's earlier approval of the foreign ownership and qualifications of the transferee, SES Americom.[26] While Petitioner correctly notes that the *GE/SES Order* is not unlimited in its scope, and that the Commission's prior approval would not necessarily cover a situation involving different services or where there had been a material change in SES Americom's foreign ownership,[27] that hypothetical set of facts or circumstances is not before the Commission. Most importantly, GWTP has not even suggested any fact or Commission precedent to the contrary.

GWTP's reliance on the Columbia Communications matter[28] involving direct-to-home ("DTH") services is misplaced. A declaratory ruling was required for the Columbia acquisition because: (1) DTH services, like Direct Broadcast Satellite ("DBS") services and Digital Audio Radio Service ("DARS"), are not subject to the rebuttable presumption favoring entry of WTO Members;[29] and (2) DTH services were not addressed in the *GE/SES Order*. The

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[26] Application of General Electric Capital Corporation and SES Global, S.A., *Order and Authorization*, 16 F.C.C. Rcd. 17575 (Int'l Bur. & Wireless Tel. Bur. 2001); General Electric Capital Corporation and SES Global, S.A., *Supplemental Order*, 16 F.C.C. Rcd. 18878 (Int'l Bur. & Wireless Tel. Bur. 2001) (collectively referred to as "*GE/SES Order*").

[27] Petition at 13, 15-16.

[28] In the Matter of SES Americom, Inc., 18 F.C.C.R. 16589 (Int'l Bur. 2003) ("*Columbia Order*").

[29] *Id.* at 16591.

Columbia case presented the first instance in which SES Americom sought authorization to provide such services. By contrast, in the instant proceeding, Verestar does not provide any DTH, DBS, DARS or any other services not fully addressed in the *GE/SES Order*.

Therefore, unlike SES Americom's earlier acquisition of Columbia, the Applications are covered by the *GE/SES Order*; a second review of SES Americom's foreign ownership would not be warranted under any circumstances. However, as discussed further below, as amended, the Applications do not involve any licenses that are even subject to Sections 310(a) or 310(b).[30]

B. Neither Section 310(a) Nor 310(b)(4) Applies To The Instant Transaction

GWTP's citations to Section 310(a) are inapposite and inexplicable.[31] As the Commission made unmistakably clear in both the *GE/SES Order* and the *Columbia Order*, Section 310(a) applies only to situations in which a foreign government or the representative thereof seeks to hold a Commission license.[32] That is prohibited. But SES Americom is not a foreign government or the representative thereof.[33] Section 310(a) does not prohibit the kind of indirect foreign government ownership present in the instant proceeding.[34]

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[30] 47 U.S.C. §§ 310(a)-(b).

[31] *See* Petition at 12.

[32] 47 U.S.C. § 310(a); In re Application of VoiceStream Wireless Corp., 16 F.C.C.R. 9779, 9807 (2001) ("*VoiceStream*").

[33] *See Columbia Order* at 16593 (finding that "our review does not fall under Section 310(a) of the Act because "SES Americom and Columbia … are commercial enterprises and are not a foreign government or a representative of a foreign government.").

[34] *See VoiceStream*, 16 F.C.C.R. at 9807.

Most significantly, Section 310(b)(4) has no applicability in the instant case. Section 310(b) applies only to broadcast, common carrier and certain aeronautical licenses, none of which is involved in this transfer.[35] The Applicants have withdrawn all common carrier microwave licenses[36] and Verestar has applied for the modification of all common carrier earth stations to non-common carrier status.[37] SES Americom has notified the Commission that it will not consummate the transfer until the Commission has approved the modifications.[38] As a result of these withdrawals and modifications, the Applications do not include any common carrier authorizations. Put simply, Section 310(b)(4) does not apply.

V. THE APPLICANTS HAVE MET THEIR BURDEN TO SHOW THAT THE TRANSFER IS IN THE PUBLIC INTEREST

The Applicants have shown that the instant transaction serves the public interest, convenience, and necessity. Specifically, the Applicants have demonstrated that the transaction is essential to ensuring the continuation of services offered by Verestar, that no anti-competitive consequences will result, and that there are no adverse implications for national security or law enforcement.[39] Petitioner argues that the Applicants' showings on these issues fall short,[40] but nowhere does GWTP dispute the Applicants' factual demonstration or provide any Commission

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[35] *See, e.g., Columbia Order* at 16593 (finding 310(b)(4) inapplicable where applicants had notified of modification to non-common carrier status of the only common carrier services).

[36] *See June 23 Letter.*

[37] *See Status Modification Applications.*

[38] *See June 24 Letter* at 2.

[39] *See Exhibit A* at 3-4. *See also* Application for Assignments of Authorization and Transfers of Control, Supplement (the "Supplement") (filed May 19, 2004).

[40] *See* Petition at 16-19.

precedent that would undermine that demonstration. Contrary to the provisions in Section 309(d)(1), the Petition does not "contain specific allegations of fact sufficient to show that ... a grant of the application would be prima facie inconsistent with"[41] the public interest, convenience and necessity.

A. The Transaction Results In Important Efficiencies And Raises No Anti-Competitive Concerns

The Applicants have demonstrated that the transaction will benefit the public interest. The acquisition addresses the significant risk that Verestar's services, among them important government services, will be interrupted or discontinued in the absence of new investment.[42] Of equal import, GWTP makes no suggestion to the contrary.

The Applicants also provided an expansive showing that the transaction would have no effect on the competitive market for transponder capacity. The Applicants explained that given the small amount of transponder capacity contractually held by Verestar, compared to the vast supply of transponder capacity in the United States, the transaction would not and could not affect the relevant market.[43] Even taking into account the maximum possible number of Verestar transponder contracts, SES Americom would gain access to only 2.2% of the aggregate supply of transponder capacity available to serve the U.S. market and then only for the duration

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[41] 47 U.S.C. § 309(d)(1).

[42] *Exhibit A* at 3.

[43] Supplement at 2, 8-9.

of those transponder leases.[44] The Supplement lists additional operators capable of providing transponder services in a market that is properly characterized as highly competitive.[45]

Moreover, GWTP incorrectly suggests that SES Americom and Verestar provide similar services.[46] As demonstrated in the Applications and Supplement, SES Americom's primary business is providing bulk transponder capacity to large customers who have their own terrestrial facilities; very rarely has SES Americom provided the kind of customer-tailored telecommunication services, such as end-to-end services, that are provided by Verestar.[47] The Applicants have demonstrated that the transaction does not increase the market power of SES Americom in any relevant market and, again, Petitioner has provided no facts to suggest otherwise. There is simply no basis for the illusory concerns proffered by GWTP.

B. The Transaction Does Not Threaten National Security

GWTP's argument that the transaction raises national security concerns is based on the undisputed fact that Verestar has a number of contracts with U.S. government agencies, some potentially involving sensitive communications. However, GWTP ignores the equally undisputed fact that SES Americom's Americom Government Services subsidiary ("AGS") already provides similar services to a number of U.S. government customers, and has secured all the necessary approvals and security clearances to conduct such business.[48] Rather than raising

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[44] *Id.* at 8.

[45] *Id.* at 2, 8.

[46] Petition at 18-19.

[47] Supplement at 7.

[48] *Exhibit A* at 3-4.

national security concerns, the public interest is served by the transfer of Verestar's U.S. government contracting activities to AGS, a financially stable entity with extensive experience and qualifications to assume these contracts. In Applicants' discussions with U.S. government customers of Verestar, none has raised any objection to the transaction, and several are moving forward with projects that will take advantage of the combined assets and expertise of Verestar and AGS.

In addition, in order to facilitate the Commission's review of national security and law enforcement issues related to the transaction, and recognizing that the Commission defers to the Executive Branch on these issues, Applicants have been discussing network security issues with the relevant U.S. government agencies since shortly after the transaction was announced. As an outgrowth of this dialogue, SES Americom recently submitted a letter to the Departments of Justice and Homeland Security in which it outlined the Applicants' current and planned business activities and committed SES Americom to provide both agencies with advance notice if at any point in the future it decides to provide switched communications services.

In sum, based on the Applicants' discussions with relevant U.S. government agencies, we believe that all national security and law enforcement issues have been vetted and addressed, and we are aware of no opposition to the consummation of the transaction. Moreover, the record of this proceeding supports the proposition that no such opposition exists.

CONCLUSION

The Petition is a poorly-disguised attempt to manipulate the Commission's processes for ends unrelated to the public interest. GWTP's private economic interests will be protected – to the extent they have merit – in the separate lawsuit brought by GWTP specifically for that purpose. GWTP's hollow expressions of concern regarding the public interest are unsupported by any fact, are inconsistent with all relevant precedent, and are proffered solely to delay a transaction that indisputably will serve the public interest. The Petition should be expeditiously dismissed and the Applications granted.

Respectfully submitted,

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UNSWORN DECLARATION

Nancy Eskenazi hereby states as follows:

(1) I am Vice President and Associate General Counsel of SES AMERICOM, Inc.;

(2) I have read the foregoing Opposition to Petition to Dismiss or Deny. The facts stated therein are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of July, 2004.

Nancy Eskenazi

Nancy Eskenazi

CERTIFICATE OF SERVICE

I, Kathleen Kerr, hereby certify that a true and correct copy of the foregoing Opposition to Petition to Dismiss or Deny was served this 6th day of July, 2004 via E-mail and U.S. Mail, First Class, postage pre-paid, to each of the following:

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