

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FILED/ACCEPTED
APR 10 2008
Federal Communications Commission
Office of the Secretary

In the Matter of)
)
TerreStar Networks Inc.)
Petition for Declaratory Ruling) File No. ISP-PDR-20080229-00004
Pursuant to Section 310(b)(4) of the)
Communications Act of 1934)

**PETITION TO DENY
OF SPRINT NEXTEL CORPORATION**

TerreStar Networks Inc. (TerreStar) seeks a declaratory ruling that the public interest will be served by allowing it to exceed the foreign ownership limits set forth in the Communications Act of 1934, as amended (Act).¹ Consistent with its foreign ownership policies, the Commission should not grant TerreStar's request without assurances that TerreStar will not pose a risk to competition and will comply with its regulatory obligations. Terrestar appears to have violated the foreign ownership limitations in the recent past and is not entitled to any presumption that exceeding these statutory limits is in the public interest. With its proposed new foreign ownership structure, moreover, Terrestar will compete against Sprint Nextel Corporation (Sprint Nextel) in providing wireless services in the 2 GHz band and will have an unfair competitive advantage over Sprint Nextel if it does not bear its fair share of the cost of clearing that band.

I. Background

TMI Communications and Company, Ltd. (TMI), a Canadian company, initially held TerreStar's authorization to provide Mobile Satellite Service (MSS) in the 2 GHz band. TMI

¹ TerreStar Networks Inc., Petition for Declaratory Ruling, IBFS File No. ISP-PDR-20080229-00004 (Feb. 29, 2008) (Petition).

received Canadian regulatory approval to operate a 2 GHz MSS system,² and also obtained an FCC letter of intent authorization to provide MSS in the U.S. on 20 MHz of spectrum in the 2 GHz band.³ TMI subsequently transferred its U.S. letter of intent authorization to TerreStar,⁴ but has assigned its underlying Canadian license to operate an MSS satellite to TerreStar Networks (Canada), Inc. (TerreStar Canada), a Canadian corporation.⁵ Ownership of the satellite (TerreStar-1) will also be transferred to this Canadian company.⁶ TerreStar consequently will be providing service in the U.S. using a satellite owned by a Canadian company and licensed by the Canadian government. As the Commission has stated, even under TerreStar's prior ownership structure, there is a "close affiliation between TerreStar and TerreStar Canada."⁷

Now, however, TerreStar seeks Commission permission to expand its foreign affiliations beyond those permitted by the Act. Specifically, TerreStar requests a ruling to allow it to exceed the 25% foreign ownership benchmark set forth in section 310(b)(4) of the Act.⁸ TerreStar, in

² See Letter to Steven Nichols, TerreStar Networks (Canada) Inc., from Michael D. Connolly, Radiocommunications and Broadcasting Regulatory Branch, Industry Canada, File No. 46215-1 (113554 CL) (Apr. 27, 2007).

³ *TMI Communications and Company, Limited Partnership, Letter of Intent to Provide Mobile-Satellite Service in the 2 GHz Bands*, Order, 16 FCC Rcd. 13808 (Int'l Bur. 2001) (*TMI Order*), declared null and void, *TMI Communications and Company, Limited Partnership, Memorandum Opinion and Order*, 18 FCC Rcd. 1725 (Int'l Bur. 2003) (*TMI Milestone Order*), reinstated, *TMI Communications and Company, Limited Partnership and TerreStar Networks Inc., Application for Review and Request for Stay*, Memorandum Opinion and Order, 19 FCC Rcd. 12603 (2004) (*TMI Reinstatement Order*), modified, *Use of Returned Spectrum in the 2 GHz Mobile Satellite Service Frequency Bands*, Memorandum Opinion and Order, 20 FCC Rcd. 19696 (2005) (*2 GHz Returned Spectrum Order*).

⁴ *TMI Communications and Company, Limited Partnership, and TerreStar Networks, LLC; Application for Modification of Spectrum Reservation for 2 GHz Mobile Satellite Service System*, Order, 22 FCC Rcd. 8602 (2007) (*TerreStar Transfer Order*).

⁵ *TerreStar Transfer Order* ¶ 4.

⁶ TerreStar Corp., Annual Report (Form 10-K), at 7 (March 31, 2008) ("TerreStar 10-K").

⁷ *TerreStar Transfer Order* ¶ 6.

⁸ 47 U.S.C. § 310(b)(4).

fact, has apparently exceeded this benchmark already, contrary to the requirement that “[a]pplicants and licensees are required to inform the Commission and obtain *prior* approval *before* direct or indirect foreign ownership of their U.S. parent company exceeds 25 percent.”⁹ TerreStar’s Petition indicates that foreign investors already indirectly own up to 32.65% of its equity and hold up to a 36.34% voting interest in the company.¹⁰ TerreStar also seeks permission to increase this foreign ownership by an additional 25% so that foreign investors can indirectly own 57.65% of TerreStar’s equity and 61.34% of its voting shares.¹¹

II. Requiring TerreStar to Pay Its Share of BAS Relocation Costs Is Consistent with the Commission’s Competition and Foreign Ownership Policies

The Commission has adopted a policy of requiring all new entrants to bear their fair share of relocation costs to ensure that competitors face each other on a level playing field. The Commission has found that later entrants that benefit from the clearance of spectrum by a first entrant would receive a “significant competitive advantage” if they were not required to

⁹ *Foreign Ownership Guidelines for FCC Common Carriers and Aeronautical Radio Licenses*, 19 FCC Rcd. 22612, DA 04-3610, at 26 (Int’l Bur. 2004) (emphasis added) (*Foreign Ownership Guidelines*) (citing *Application of Fox Television Stations, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd. 8452, ¶¶ 52-53 (1995)); see also *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23891, ¶ 114 (1997) (*Foreign Participation Order*).

¹⁰ Petition at 1, 3-4; Letter from Joseph Godles, Counsel to TerreStar, to Marlene Dortch, FCC Secretary, File No. SES-LIC-20061206-02100 (July 13, 2007). TerreStar’s apparent failure to obtain *prior* approval for exceeding the statutory limits on foreign ownership warrants greater scrutiny in a separate enforcement proceeding and should inform the Commission’s review of TerreStar’s instant request. See *Satamatics, Inc.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd. 21011 (Enf. Bur. 2007) (finding that Satamatics, a licensee of satellite mobile earth terminals, violated the requirement for prior approval of foreign ownership in excess of the 25% level established by the Communications Act and proposing forfeitures for Satamatics’ unlawful behavior).

¹¹ Petition at 1.

reimburse the first entrant for a share of the relocation costs.¹² TerreStar has acknowledged it will be competing against Sprint Nextel,¹³ and to allow TerreStar to impose on Sprint Nextel the entire cost of clearing broadcast auxiliary service (BAS) licensees would give TerreStar an unfair cost advantage against Sprint Nextel. This unfair competitive advantage would violate the Commission's cost sharing and competition policies, and cannot be permitted under the Commission's rules.

The Commission has determined in its policy on foreign ownership that “[w]here there is a showing of a risk to competition in the U.S. market from foreign investments by an individual or entity from a WTO Member country, the Commission may impose specific conditions on the licensee to address such risks to competition.”¹⁴ In this case, TerreStar seeks an infusion of foreign capital beyond that permitted by the Act to help cover the cost of launching its U.S. business interests. As a condition of being granted any such approval of this level of foreign ownership, TerreStar should be required to abide by the Commission's rules and policies, including the cost-sharing principle that licensees that benefit from the spectrum cleared by the first entrant must bear their fair share of the clearing costs.¹⁵ To permit TerreStar to avoid its

¹² *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd. 13999, ¶ 16 (2000).

¹³ TerreStar 10-K at 11, 29.

¹⁴ *Foreign Ownership Guidelines*, DA 04-3610 at 10.

¹⁵ See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, Memorandum Opinion and Order, 20 FCC Rcd. 16015, ¶ 111 & n.309 (2005) (*800 MHz MO&O*); Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd. 14969, ¶ 261 (2004) (*800 MHz R&O*), as amended by Erratum, WT Docket No. 02-55 (rel. Sep. 10, 2004); Second Erratum, 19 FCC Rcd. 19651 (2004) (subsequent history omitted); see also, e.g., *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9, First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd. 6886, ¶ 24 (1992); Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd. 6589, ¶ 2 (1993); Memorandum Opinion and

cost-sharing obligations would impose a “risk to competition in the U.S. market,” which would be inconsistent with the Commission’s foreign ownership policies.

III. The Commission Should Condition Any Grant of the Petition on TerreStar Satisfying Its BAS Relocation Obligations

Although the Commission has adopted a presumption in favor of granting most foreign ownership waiver requests under streamlined review procedures, the Commission nonetheless “maintain[s] the oversight necessary to ensure” that foreign ownership exceeding the statutory benchmark “is consistent with the public interest.”¹⁶ Moreover, Terrestar, which now apparently seeks belated approval for what appear to be past violations of the federal limitations on foreign ownership, has forfeited any presumption that additional foreign ownership in excess of statutory limits should be permitted by the Commission.¹⁷ Indeed, the Commission has indicated that it will exercise that oversight closely in this proceeding by removing TerreStar’s Petition from its streamlined review procedures and seeking public comment on the Petition.¹⁸ Consistent with this closer scrutiny and to ensure that TerreStar’s request serves the public interest, the Commission should deny Terrestar’s request absent a condition that requires TerreStar to fulfill its BAS relocation responsibilities, specifically including reimbursing Sprint Nextel for the 1.9 GHz relocation expenses Sprint Nextel incurs for TerreStar’s benefit.¹⁹

Order, 9 FCC Rcd. 1943, ¶ 3 (1994); Second Memorandum Opinion and Order, 9 FCC Rcd. 7797, ¶ 4 (1994), *aff’d sub nom. Association of Public Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996).

¹⁶ *Foreign Participation Order*, 12 FCC Rcd. 23891, ¶ 50.

¹⁷ *See supra* note 10 and accompanying discussion, p. 3.

¹⁸ Public Notice, Report No. TEL-01245NS (March 13, 2008).

¹⁹ The Commission should simultaneously require Terrestar to provide additional information concerning the facts and circumstances relevant to any transfers of control or assignments resulting in foreign ownership in excess of 25% that the Commission did not previously approve. TerreStar must produce this information to allow for full public review and analysis of any violations of federal law.

TerreStar bears an obligation under the Commission's rules to either relocate eligible BAS facilities or reimburse Sprint Nextel for a portion of the cost of doing so. The Commission has repeatedly stated that "both Sprint Nextel and 2 GHz MSS licensees have equal obligations to relocate the 2 GHz BAS incumbents."²⁰ The Commission has also affirmed that "the underlying relocation rules . . . established for MSS entrants to undertake the relocation of BAS incumbents" remain unchanged.²¹ TerreStar, however, apparently has no intention of itself performing any portion of the work associated with BAS relocation. TerreStar has instead chosen to leave it to Sprint Nextel to work with the broadcast industry in relocating the hundreds of complex BAS systems across the country.

Sprint Nextel's efforts in relocating BAS licensees will significantly benefit MSS licensees. Sprint Nextel is consequently entitled under the Commission's rules to receive *pro rata* reimbursement of eligible BAS clearing costs from MSS licensees, including TerreStar, that enter the band prior to the completion of the 800 MHz band reconfiguration and "true up"

²⁰ See, e.g., *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Order, 23 FCC Rcd. 575, ¶ 2 (2008).

²¹ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 08-73, 2008 FCC LEXIS 1896, ¶ 39 (rel. March 5, 2008) (*BAS Extension Order*), citing *800 MHz R&O*, 19 FCC Rcd. 14969, ¶ 250. Specifically, prior to beginning operations, TerreStar must relocate (i) the BAS incumbents in the top thirty markets and (ii) all fixed BAS links, regardless of market size. 47 C.F.R. § 74.690(e)(1)(i). The Commission recently stated that:

As we noted in the *800 MHz R&O*, 'except as discussed below, those rules will remain in effect.' At no place in our rules, the *800 MHz R&O*, or subsequent orders have we stated that MSS was no longer obligated to relocate BAS in the top 30 markets and all fixed BAS prior to beginning operations.

BAS Extension Order ¶ 39 n.118 (citations omitted).

processes.²² Because TerreStar will occupy 10 megahertz of the 35 megahertz of cleared BAS spectrum, TerreStar is liable for a *pro rata*, two-sevenths share or 28.57% (10 MHz / 35 MHz) of Sprint Nextel's eligible BAS relocation costs.²³ On February 4, 2008, Sprint Nextel sent a letter to TerreStar regarding its *pro rata* share of BAS relocation expenses. In this letter, Sprint Nextel provided TerreStar with an initial interim billing estimate for TerreStar's *pro rata* reimbursement obligation, and in good faith proposed a meeting between the companies' respective business and finance teams to ensure a timely payment. Sprint Nextel projects that TerreStar's total, cumulative BAS reimbursement obligation will be approximately \$100 million.

In a February 11, 2008 letter to Sprint Nextel, however, TerreStar claimed that it is not required to pay its fair share of BAS relocation costs because it allegedly will not enter the 2 GHz band by June 27, 2008, the previously projected date for the end of 800 MHz band reconfiguration and the commencement of the 800 MHz true-up process. The Commission should not allow TerreStar to avoid both its obligation to relocate BAS licensees and its obligation to bear its fair share of the cost of BAS relocation. TerreStar's refusal to pay its share of BAS relocation costs is wrong on the facts, ignores its own delays in implementing its satellite operations, disregards the need to adjust the 800 MHz true-up schedule, and is contrary to the Commission's well-settled cost-sharing principles. The Commission must consider these facts in reviewing the instant petition.

²² *800 MHz R&O*, 19 FCC Rcd. 14969, ¶ 261; *accord*, *800 MHz MO&O*, 20 FCC Rcd. 16015, ¶ 111 (“Nextel, as the first entrant, is entitled to seek *pro rata* reimbursement of eligible clearing costs from subsequent entrants, including MSS licensees.”).

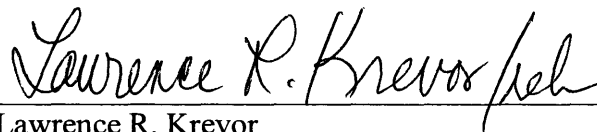
²³ *See, e.g.*, *800 MHz MO&O* ¶ 111. On March 7, 2006, Sprint Nextel provided notice of its intent to seek reimbursement from 2 GHz MSS licensees, including TerreStar. *See* Letter from Lawrence R. Krevor, Sprint Nextel Corporation, to Marlene H. Dortch, Federal Communications Commission, WT Docket No. 02-55 (March 7, 2006).

IV. Conclusion

To protect competition and ensure compliance with the Commission's cost sharing policies, any grant of TerreStar's Petition should be denied pending TerreStar compliance with its obligation to pay its *pro rata* share of the total cost of relocating BAS operators in the top 30 markets and all fixed links through the completion of the BAS relocation and 800 MHz true-up processes. TerreStar has sought to avoid the Commission's requirement that new entrants share the cost of clearing incumbent licensees. Denying approval of TerreStar's foreign investment unless TerreStar provides assurances that the company will satisfy its obligation to pay its fair share of eligible BAS relocation expenses will prevent TerreStar from gaining an unfair competitive advantage over Sprint Nextel, a U.S. company.

Respectfully submitted,

SPRINT NEXTEL CORPORATION



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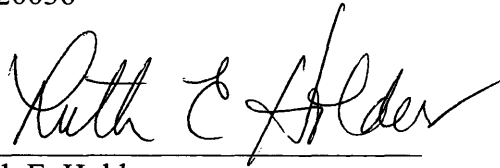
April 10, 2008

Certificate of Service

I, Ruth E. Holder, hereby certify that on this 10th day of April, 2008, I caused true and correct copies of the foregoing Petition to Deny of Sprint Nextel Corporation to be mailed by first class U.S. mail, postage prepaid, to:

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A handwritten signature in black ink that reads "Ruth E. Holder". The signature is written in a cursive style with a horizontal line underneath it.

Ruth E. Holder