

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

ORIGINAL

In the matter of)
)
Verestar, Inc.) SES-T/C-20030918-01300
American Tower Corporation)
SkyTerra Communications, Inc.) **Int'l Bureau** **RECEIVED**

To: Chief, International Bureau)
NOV 17 2003 NOV 14 2003
Front Office FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION TO PETITION TO DENY

SkyTerra Communications, Inc. ("SkyTerra"), by undersigned counsel, hereby submits this Opposition to the Petition to Deny ("Petition") filed by Intelsat Global Sales and Marketing, Ltd. ("Intelsat") on October 31, 2003 against the above-referenced application ("Transfer Application") to transfer control of Verestar, Inc. ("Verestar") from American Tower Corporation ("American Tower") to SkyTerra.¹ The Petition asks the Commission either to deny the Transfer Application or, at a minimum, to "defer action on the application until such time as Verestar reaches agreements with its suppliers"², including Intelsat.

Intelsat lacks standing to object to the Transfer Application because the sole ground for filing the Petition was to gain leverage in a private contractual dispute with Verestar. In accordance with the Commission's longstanding policy of refusing to

¹ By letter to the Commission, dated October 23, 2003, Rare Medium Group, Inc. (the name of the transferee on the Transfer Application when filed) changed its name to SkyTerra.

² *Petition* at pp. 1-2.

adjudicate private contractual disputes, the Petition should be summarily dismissed for this reason alone.

Intelsat's attempts, moreover, to concoct public interest issues arising from the transaction wholly fail because virtually all of the issues it raises are based on unsupported allegations or factual inaccuracies. In this regard, Intelsat's Petition represents the very essence of a "frivolous pleading" because it was filed with little or no effort to ascertain the underlying facts and expressly requests delay for the sole purpose of giving Intelsat time to work out its differences with Verestar in a private contractual dispute.³ In order to deter other parties from filing similarly frivolous pleadings in the future, the Commission should invoke its power to strike the Petition as a "sham"⁴ as expeditiously as possible so that SkyTerra can begin the process of building Verestar's business for the benefit of its customers.

I. INTELSAT LACKS STANDING TO OBJECT TO THE TRANSFER APPLICATION BECAUSE THE SOLE REASON IT FILED THE PETITION TO DENY WAS TO GAIN LEVERAGE IN A PRIVATE CONTRACTUAL DISPUTE WITH VERESTAR

The Commission's rules require a petition to deny to contain specific allegations of fact, supported by affidavit, sufficient to demonstrate that the filer is a "party in interest" to the proceeding.⁵ In short, a petition to deny must demonstrate that the entity filing the pleading has standing. Not only did Intelsat fail to file an affidavit in support of its Petition, it failed *even to allege* in the Petition that it has standing to object to the

³ See *Commission Taking Tough Measures Against Frivolous Pleadings*, Public Notice, 11 FCC Rcd 3030 (1996).

⁴ See 47 C.F.R. § 1.52.

⁵ See 47 C.F.R. § 25.154. See also Section 309(d)(1) of the Communications Act of 1934, as amended.

proposed transfer. Given that Intelsat has not satisfied even the most basic requirements for a properly filed pleading, the Commission should summarily dismiss the Petition.

Intelsat's failure to allege that it has standing is not surprising, however, given that it would not be able to meet even a single element of the Commission's three-part test for demonstrating standing: "(1) personal injury, (2) that is 'fairly traceable' to the challenged action, and (3) a substantial likelihood that the relief requested will redress the injury claimed."⁶ The only arguable "personal injury" Intelsat refers to in the Petition relates to amounts Intelsat claims it is owed by Verestar in an ongoing contractual dispute.⁷ As described by Intelsat in the Petition, Verestar, SkyTerra and Intelsat have been negotiating over this contractual dispute for some time now and have failed to reach an agreement.⁸ The parties have negotiated many (though not all) of the terms for a settlement of their private contractual dispute but have failed to exchange signature pages on their letter agreement. As the attached email from a senior executive of Intelsat to Keith Kammer of SkyTerra and Ray O'Brien of Verestar demonstrates, it is precisely the fact that Verestar and SkyTerra had not acquiesced to Intelsat's demands for a signed agreement by October 31, 2003 – the last date for filing petitions to deny the Transfer Application – that formed the basis for Intelsat's Petition:

⁶ *In re Application of MCI Communications Corp., Transferor, and Southern Pacific Telecommunications Company, Transferee, for Consent to Transfer Control of Qwest Communications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 7790, 7794 (1997) (citation omitted).

⁷ *Petition* at pp. 1, 4.

⁸ *Id.*

Dear Keith and Ray

As you know, Intelsat filed a pleading before the FCC at 6 pm on Friday 31 October, after we had been unable to get signatures from either SkyTerra or Verestar on the letter of agreement which had been agreed between Keith and I on Thursday 23 October and sent to SkyTerra on 24 October.

It wasn't the path we preferred to go down – and one I, and others at Intelsat, had worked to try to avoid.⁹

And lest there be any doubt that the Petition was filed solely as a weapon to pressure Verestar and SkyTerra into agreeing to Intelsat's commercial demands, the email continues:

We still have an opportunity to collectively change the situation.

Intelsat is willing to withdraw its pleading as soon as we can get the letter of agreement signed AND get the requisite signatures on the legally-binding execution documents that will finalize the agreement between the three parties concerning the arrears owed to Intelsat. I believe we would need to complete this work by next Wednesday, 12 November, which I understand is just in advance of the deadline for SkyTerra to file a counter-pleading with the FCC, should it decide to do so.¹⁰

Intelsat's displeasure over its inability to resolve a private contractual dispute hardly constitutes "personal injury" that is "fairly traceable" to the challenged action here, namely, Commission grant of the Transfer Application. On the contrary, Intelsat's Petition is nothing more than an attempt to involve the Commission in a private contractual dispute, which the Commission has a longstanding policy of refusing to

⁹ Email, dated November 5, 2003, attached hereto as Exhibit A.

¹⁰ *Id.*

adjudicate.¹¹ In order to prevent a frivolous pleading from resulting in a commercial advantage to Intelsat, SkyTerra respectfully requests that the Commission promptly dismiss the Petition and, equally important, that it evaluate any public interest concerns raised by Intelsat's negotiation tactics only as a separate matter.

As for the third element of the test for standing – redressability – Intelsat has not even alleged that its requested relief would redress its alleged injury resulting from the unrelated contractual dispute with Verestar. In fact, even if its private contractual dispute with Verestar were a valid reason for the Commission to deny or delay the grant of the Transfer Application – which it is not – the relief requested is far more likely to harm than to help Intelsat. Verestar's financial troubles are a matter of public record, including in this very proceeding.¹² Denial – or even delay – in granting the Transfer Application likely will exacerbate those financial troubles, thus making it more difficult for Intelsat and Verestar to reach a commercial accord.

In sum, the Commission should recognize Intelsat's Petition for what it is: an attempt to obtain relief from the Commission in connection with Intelsat's private contractual dispute with Verestar. As such, the Petition should be summarily dismissed.

¹¹ *In re Application of MCI Telecommunications Corporation, Assignor and EchoStar 110 Corporation, Assignee, Order and Authorization*, 16 FCC Rcd 21608, ¶ 29 (1999) (citing *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987); *Stockholders of Renaissance Communications Corp.*, 12 FCC Rcd 11866, 11869 (1997); *Northwest Broadcasting, Inc.*, 12 FCC Rcd 3289, 3293 (1997); *WHOA-TV, Inc.*, 11 FCC Rcd 20041, 20043 (1996)).

¹² As described in the public interest statement in the Transfer Application, "[w]ithout the many benefits that will flow from this transaction, Verestar may not be able to continue as a going concern." Transfer Application, Response to Items 43 and A21, p. 2.

II. INTELSAT'S ATTEMPTS TO FABRICATE LEGITIMATE PUBLIC INTEREST ISSUES IN THE TRANSFER APPLICATION WHOLLY FAIL BECAUSE THEY ARE GROUNDED ON UNSUPPORTED ALLEGATIONS AND FACTUAL INACCURACIES

Even if Intelsat had standing to object to the Transfer Application – which it neither has nor alleges it has – Intelsat has failed to raise a single legitimate public interest issue with respect to the Transfer Application. Instead, Intelsat's Petition is a long parade of unsupported allegations and factual inaccuracies.

For example, Intelsat erroneously describes SkyTerra as "a highly leveraged, financially stressed venture capital company."¹³ Intelsat provides no support whatsoever for this assertion. Given that SkyTerra has no debt, it is patently false to describe the company as highly leveraged.¹⁴ And while Intelsat notes that SkyTerra has faced financial challenges in recent years, Intelsat fails to mention that SkyTerra was heavily involved in Internet-related businesses in the late 1990s, a market segment that suffered one of the most notorious meltdowns in the history of Wall Street.¹⁵ When the dot-com boom went bust in 2000, SkyTerra – like virtually every other company participating in the Internet space – faced a number of difficult business choices.¹⁶ So the fact that SkyTerra pulled out of a number of Internet ventures in 2001 hardly makes it unique and certainly does not justify Intelsat's claim that SkyTerra "is a venture capital company whose business is to take positions in independently managed companies, and to sell

¹³ *Petition* at p. 1.

¹⁴ Rare Medium Group, Inc., U.S. Securities and Exchange Commission, Form 10-K, filed March 5, 2003 ("*SkyTerra 10-K*").

¹⁵ *Id.* at 3-17.

¹⁶ *Id.*

them or to discontinue their operations, as quickly as possible."¹⁷ There is simply no basis for such an assertion and Intelsat's attempts to mischaracterize the facts set forth in SkyTerra's 10-K are disingenuous at best.

Intelsat also claims that SkyTerra has "neither the financial ability nor the technical expertise necessary to continue to provide service to Verestar's customers."¹⁸ With respect to SkyTerra's technical expertise, SkyTerra first notes that it is merely acquiring control of Verestar and that Verestar's seasoned management will continue to operate the company. SkyTerra itself, moreover, has impressive credentials in satellite communications. Jeffrey Leddy, President of SkyTerra, has more than 25 years of experience in satellite communications.¹⁹ In addition, SkyTerra Vice President Eric Goldman has substantial experience working in the satellite industry, including six years with a Little LEO company. SkyTerra also controls MSV Investors, LLC, which is an active participant in the Mobile Satellite Ventures, L.P. ("MSV") joint venture involving Motient, TMI Communications, Inc. and others. MSV provides mobile digital voice and data communications services via satellite in North America.²⁰ In short, Intelsat's claim that SkyTerra lacks the requisite technical expertise to build Verestar's business is not only irrelevant to the merits of the Transfer Application, it is also false.

¹⁷ *Petition* at p. 2

¹⁸ *Id.* at p. 1.

¹⁹ From 1980 to 2001, Mr. Leddy served in key executive and operating leadership roles with EMS Technologies, a leading provider of wireless, satellite and broadband communications products and solutions. He was elected to the U.S. Space Foundation's Hall of Fame in 1997 for his role in the development of NASA's Ka-band Advanced Communications Technology Satellite. *See SkyTerra 10-K* at pp. 32-33, 40.

²⁰ *Id.* at p. 3.

As for SkyTerra's financial ability to consummate the transaction and build Verestar's business, Intelsat once again offers only unsupported allegations in its Petition. Intelsat notes, for example, that SkyTerra suffered a net loss of \$4.0 million for the year ending December 31, 2002. In light of its strong cash position, SkyTerra's net loss last year is wholly irrelevant to its ability to consummate the transaction with Verestar and build the Verestar business.

And Intelsat concludes its improper effort to exercise commercial leverage by stating:

SkyTerra has neither the ability nor the desire to fund Verestar for the long-haul nor does it care about service to Verestar's current or future customer base. SkyTerra's only interest in Verestar is the speed at which it can flip the company.²¹

Intelsat has no knowledge, personal or otherwise, that could possibly substantiate these assertions about SkyTerra's motives. Indeed, SkyTerra and American Tower have committed to extend significant financing to Verestar upon closing. Moreover, Intelsat fails to explain how SkyTerra – or any other entity for that matter – could make money by "flipping" companies that are financially troubled like Verestar. The position simply defies logic. Suffice it to say that SkyTerra's motives for acquiring Verestar and providing new financing to the enterprise are entirely consistent with the public interest (namely, to return the company to profitability for the benefit of its existing and future customers), and Intelsat has supplied not one iota of evidence to suggest otherwise.

²¹ *Petition* at p. 4.

Intelsat also maintains that the Commission should defer action on the Transfer Application because – in Intelsat's view – the transaction "cannot close until such time as Verestar reaches accords with its vendors, including Intelsat"22 The issue of whether Verestar can reach commercial agreements with its vendors is wholly unrelated to the Communications Act, Commission rules, and the public interest. Even if the issue were a relevant concern for the Commission, moreover, Intelsat is wrong as a factual matter because *SkyTerra can waive the condition*.23

In the final analysis, Intelsat's repeated requests for delay of Commission action on the Transfer application belie its true motives: to pressure Verestar into capitulating to Intelsat's commercial demands.24 Indeed, a party raising legitimate public interest issues concerning a proposed transfer application should be seeking *prompt* Commission action, not delay. Intelsat's Petition – with its baseless assertions about SkyTerra's finances and motives, its misreading of straightforward provisions of the SPA, and its express request for delay only so long as Intelsat's dispute with Verestar remains outstanding – all point to the same conclusion: Intelsat is not seeking resolution of any public interest issues whatsoever.

²² *Id.* at p. 1.

²³ *See Stock Purchase Agreement ("SPA")* at Section 6, p. 28, first sentence ("[SkyTerra]'s obligation to purchase the Purchased Units from [American Tower] at the Closing is subject to the satisfaction on or prior to the Closing Date of each of the following conditions *unless waived* by [SkyTerra].") (emphasis added). The SPA is an exhibit to the Transfer Application.

²⁴ The SPA also contains a "drop-dead date" of December 31, 2003. *See SPA* at Section 11.1(b). The existence of this "drop-dead date" – which Intelsat knows about given that it read the SPA when preparing its Petition – increases Intelsat's ability to exert pressure on Verestar to cave to Intelsat's commercial demands.


Intelsat also raises licensing issues at Verestar that it claims indicate that Verestar lacks "the requisite expertise or technical qualifications to be a Commission licensee."²⁵ SkyTerra refers the Commission to the Joint Opposition to Petition to Deny filed today by Verestar and American Tower, which responds to each of Intelsat's claims concerning these licensing matters.

III. CONCLUSION

For the foregoing reasons, the Commission should summarily dismiss Intelsat's Petition so that SkyTerra may acquire control of Verestar and expand its business for the benefit of Verestar's present and future customers.

Respectfully submitted,

SKYTERRA COMMUNICATIONS, INC.

By: 

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Its Attorneys

Dated: November 14, 2003

²⁵ *Petition at p. 7.*

EXHIBIT A

-----Original Message-----

From: John.Stanton@intelsat.com [mailto:John.Stanton@intelsat.com]
Sent: Wednesday, November 05, 2003 4:04 AM
To: keith.kammer@comcast.net; ray.obrien@verestar.com
Cc: david.meltzer@intelsat.com; ramu.potarazu@intelsat.com
Subject: Agreement

Dear Keith and Ray

As you know, Intelsat filed a pleading before the FCC at 6pm on Friday 31 October, after we had been unable to get signatures from either Skyterra or Verestar on the letter of agreement which had been agreed between Keith and I on Thursday 23 October and sent to Skyterra on 24 October.

It wasn't the path we preferred to go down - and one I, and others at Intelsat, had worked to try to avoid.

We still have an opportunity to collectively change the situation.

Intelsat is willing to withdraw its pleading as soon as we can get the letter of agreement signed AND get the requisite signatures on the legally-binding execution documents that will finalise the agreement between the three parties concerning the arrears owed to Intelsat. I believe we would need to complete this work by next Wednesday, 12 November, which I understand is just in advance of the deadline for Skyterra to file a counter-pleading with the FCC, should it decide to do so.

Can I have an indication please that you are both still ready to formalise our agreement. If so, could we get the ball rolling by having both Verestar and Skyterra send me by fax today a signed copy of the agreement letter. My fax number is +44 208 899 6194. We will get working immediately on the execution documents.

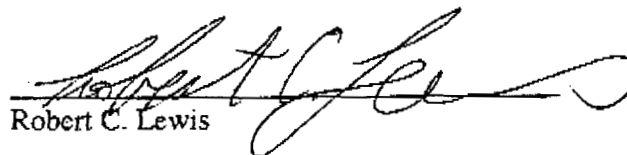
Looking forward to getting back to where we want to be, and continuing to grow our business together

best regards

John

CERTIFICATION

I, Robert C. Lewis, Senior Vice President and General Counsel of SkyTerra Communications, Inc., hereby certify under penalty of perjury that the information in this Opposition to Petition to Deny is true and accurate to the best of my knowledge.


Robert C. Lewis

Executed on: November 14, 2003

CERTIFICATE OF SERVICE

I, Malcolm J. Tuesley, hereby certify that on November 14, 2003, I caused a copy of the foregoing Opposition to Petition to Deny to be served via first class mail, postage prepaid, or by hand delivery* upon the following:

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