

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
Motient Corporation and Subsidiaries, Transferors, ) WC Docket No. 06-106
and ) File Nos. ITC-T/C-20060518-00283
SkyTerra Communications, Inc., Transferee, ) SAT-T/C-20060517-00062
Application for Authority to Transfer Control of ) SES-T/C-20060517-00828/829
Mobile Satellite Ventures Subsidiary LLC ) 0020-EX-TC-2006

MEMORANDUM OPINION AND ORDER AND DECLARATORY RULING

Adopted: September 15, 2006

Released: September 15, 2006

By the Acting Chief, International Bureau; Chief, Wireline Competition Bureau; and Acting Chief, Office of Engineering and Technology

I. INTRODUCTION

1. In this Memorandum Opinion and Order and Declaratory Ruling, we consider an application filed by Motient Corporation and subsidiaries ("Motient") and SkyTerra Communications, Inc. ("SkyTerra," and together with Motient, the "Applicants") for consent to transfer control of Commission licenses and authorizations held by Mobile Satellite Ventures Subsidiary LLC ("MSV") from Motient to SkyTerra (the "Application").

1 See Application for Authority to Transfer Control of Motient Corporation and Subsidiaries, Transferors, and SkyTerra Communications, Inc., Transferee, File Nos. ITC-T/C-20060518-00283, SAT-T/C-20060517-00062, SES-T/C-20060517-00828, SES-T/C-20060517-00829, 0020-EX-TC-2006 (filed May 17, 2006).

2 Appendix A to this Memorandum Opinion and Order and Declaratory Ruling lists the authorizations and licenses associated with the Application. On June 12, 2006, SkyTerra and Motient filed a request to withdraw the related transfer of control application for space station S2487. See Policy Branch Information: Actions Taken, Public Notice, Report No. SAT-00370, DA 06-1310, 21 FCC Rcd 6891, 6893 (Int'l Bur. 2006). Contemporaneously, MSV International LLC surrendered its license for space station S2487. See Letter from Jennifer A. Manner, Vice President, Regulatory Affairs, MSV International LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, File No. SAT-LOA-20030827-00174 (filed June 12, 2006).

## II. BACKGROUND

### A. The Current Ownership Structure

2. MSV, the current holder of the FCC authorizations and licenses that are the subject of the transfer of control Application, operates a Mobile Satellite Service (MSS) system in the L-band and is planning a next generation system.<sup>3</sup> MSV, a Delaware limited liability company, is a direct wholly-owned subsidiary of Mobile Satellite Ventures LP (“MSV LP”), a Delaware limited partnership. The general partner of MSV LP is Mobile Satellite Ventures GP Inc. (“MSV GP”), a Delaware corporation. The limited partners of MSV LP consist of affiliates of the following entities: (i) Motient (the transferor under the Application); (ii) MSV Investors, LLC (“MSV Investors”), an 80%-owned subsidiary of SkyTerra (the transferee under the Application); (iii) TMI Communications and Company, Limited Partnership (“TMI”); (iv) Columbia Capital; and (v) Spectrum Equity.<sup>4</sup> These limited partners are also the stockholders of MSV GP. According to the Application, the existing ownership and control structure of MSV is set forth in the following table:<sup>5</sup>

	MSV GP (voting interest in MSV)	MSV LP (equity interest in MSV)
Motient, the transferor	45.2%	45.1%
MSV Investors	22.8%	22.8%
TMI	21.8%	21.8%
Funds affiliated with Columbia Capital	7.8%	7.8%
Funds affiliated with Spectrum Equity	2.3%	2.3%

3. The five entities whose affiliates comprise the MSV LP limited partners also hold interests in TerreStar Networks, Inc. (“TerreStar”). TerreStar is developing a spot beam satellite network in the 2 GHz MSS band to provide diverse services to mobile and transportable terminals, including handheld devices,<sup>6</sup> and is the proposed assignee of TMI’s authorization to provide 2 GHz MSS to the United States.<sup>7</sup> Specifically, Motient holds 60.9%, MSV Investors holds 16.5%, TMI holds 15.8%, and the Columbia/Spectrum investors jointly hold an approximately 4.9% interest in TerreStar.<sup>8</sup>

<sup>3</sup> The “L-band” is a general designation for frequencies from 1 to 2 GHz. In the United States, the Commission has allocated L-band spectrum for MSS downlinks (space-to-Earth transmissions) in the 1525-1544 MHz and 1545-1559 MHz bands and for MSS uplinks (Earth-to-space transmissions) in the 1626.5-1645.5 MHz and 1646.5-1660.5 MHz bands. *See* 47 C.F.R. § 2.106.

<sup>4</sup> *See* Application at Figure 1.

<sup>5</sup> *Id.* Investors not listed in the table hold less than one percent of the ownership interests in MSV LP.

<sup>6</sup> *See* Press Release, “Motient and SkyTerra Announce Transactions to Consolidate Ownership of Mobile Satellite Ventures and TerreStar Networks,” dated May 8, 2006, available at [http://www.motient.com/ci\\_nr\\_pr.php?id=63](http://www.motient.com/ci_nr_pr.php?id=63) (Motient May 8 Press Release). *See also* <http://www.terrestarnetworks.com>. The term “2 GHz MSS band” refers to the 2000-2020 MHz uplink (Earth-to-space transmission) and 2180-2200 MHz downlink (space-to-Earth transmission) frequencies.

<sup>7</sup> *See* File No. SAT-ASG-20021211-00238; *Policy Branch Information: Satellite Space Applications Accepted for Filing*, Public Notice, Report No. SAT-00130 (rel. December 27, 2002) (*TMI/TerreStar Public Notice*).

<sup>8</sup> *See* Letter from Gregory C. Staple, Counsel to TMI and Henry Goldberg, Counsel to TerreStar, to Marlene H. Dortch, Secretary, Federal Communications Commission, File Nos. 189-SAT-LOI-97, SAT-LOI-19970926-00161,

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4. SkyTerra, the proposed transferee, presently owns 80% of MSV Investors, LLC, which translates into a 22.8% indirect voting and an 18.2% indirect equity interest in MSV, and a 14.7% indirect interest in TerreStar.<sup>9</sup> SkyTerra is a publicly-traded Delaware corporation currently controlled by funds affiliated with Apollo Advisors, L.P., a/k/a Apollo Management.<sup>10</sup> The individuals or entities with a 10% or greater interest in SkyTerra are Apollo Investment Fund IV, L.P. (approximately 54%) and Harbinger Capital Partners Master Fund I, Ltd. (approximately 13%).<sup>11</sup>

## B. The Proposed Transaction

5. The proposed transaction is part of an overall plan by Motient and other owners of MSV and TerreStar to realign the ownership of MSV and TerreStar. The purpose of the instant Application is to consolidate the ownership and control of MSV LP and MSV GP under SkyTerra, as follows:<sup>12</sup>

	MSV GP (voting interest in MSV)	MSV LP (equity interest in MSV)
SkyTerra, the transferee	78.2%	58.8%
TMI	21.8%	21.8%
Motient	0%	19.2%

In a related part of the overall plan, which is not before us in the instant Application, Motient will increase its control of TerreStar to approximately 74%, while SkyTerra will exchange its 14.7% indirect interest in TerreStar for an approximately 12% direct interest in TerreStar, and TMI will retain an approximately 14% interest in TerreStar.<sup>13</sup>

6. The transaction before us involves a two-step exchange between SkyTerra and four out of the five limited partner groups of MSV LP (all but TMI). The first step in the exchange involves SkyTerra issuing to Motient non-voting SkyTerra common stock in exchange for all of Motient's interests in MSV GP and a majority of Motient's interests in MSV LP (the "Motient Exchange").<sup>14</sup> Through similar arrangements, SkyTerra will issue SkyTerra voting common stock to MSV Investors, Columbia Capital, and Spectrum Equity in exchange for the interests of these entities' affiliates in MSV GP and MSV LP (the "Investor Exchange," and together with the Motient Exchange, the "Initial Exchange").<sup>15</sup> The Applicants state that the second part of the exchange will occur when the SkyTerra non-voting stock

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SAT-AMD-20001103-00158, SAT-MOD-20021114-00237, SAT-ASG-20021211-00238 (filed June 15, 2005), at Schedule I.

<sup>9</sup> See Application at 3 & Figure 1.

<sup>10</sup> See SkyTerra Communications, Inc., Form 10-K (filed March 29, 2006), at 23; see generally <http://biz.yahoo.com/ic/40/40036.html>.

<sup>11</sup> See Letter from Tom W. Davidson, Counsel to SkyTerra Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (filed September 1, 2006) (Davidson September 1 Letter).

<sup>12</sup> See Letter from Tom W. Davidson, Counsel to SkyTerra Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (filed August 22, 2006) (Davidson Update Letter), updated Application Figure 2; see also Application at 4.

<sup>13</sup> See Motient Investor Presentation at 13 (June 2006), available for download at <http://phx.corporate-ir.net/phoenix.zhtml?c=110135&p=irol-irhome>.

<sup>14</sup> See Application at 3.

<sup>15</sup> *Id.* at 4.

issued to Motient will be distributed by way of a dividend to Motient's stockholders (the "Motient Dividend").<sup>16</sup> Upon such distribution, the Applicants advise that the non-voting stock will convert into SkyTerra voting stock.<sup>17</sup> Motient anticipates that the Motient Dividend will be made within two to four months after the Initial Exchange.<sup>18</sup>

7. After consummation of these transactions, SkyTerra will control MSV and will hold the majority of the equity interests in MSV. The Applicants state that no single shareholder will have a 50% or greater equity or voting interest in SkyTerra, and that five funds affiliated with Apollo Management (Apollo Investment Fund IV, L.P., Apollo Overseas Partners IV, L.P., AIF IV/RRRR LLC, AP/RM Acquisition LLC and ST/RRRR, LLC, and collectively, the "Apollo Funds") will be the only individual or entity to hold a 10% or greater equity or voting interest in SkyTerra.<sup>19</sup> Mr. Leon D. Black, a U.S. citizen, ultimately controls the Apollo Funds' voting interests in SkyTerra through a series of intermediate subsidiaries and management arrangements.<sup>20</sup>

### C. Comments on the Application

8. The Application was placed on Public Notice on June 16, 2006.<sup>21</sup> The Commission received filings from two parties in response to the Public Notice: (1) the U.S. Department of Justice ("DOJ"), including the Federal Bureau of Investigation ("FBI"), with the concurrence of the U.S. Department of Homeland Security ("DHS," and together with DOJ/FBI, the "Executive Branch Entities"); and (2) Highland Capital Management, L.P. ("Highland").

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<sup>16</sup> *Id.* at 3-4; Letter from Henry Goldberg, Counsel to Motient Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed August 24, 2006) (Goldberg August 24 Letter) at 2.

<sup>17</sup> *See* Goldberg August 24 Letter at 2.

<sup>18</sup> *Id.* We note that, although taking place some time after the Investor Exchange, the parties are contractually bound to make the Motient Dividend.

<sup>19</sup> Specifically, the Apollo Funds' interests in SkyTerra will be a 27.04% voting interest and a 25.54% equity interest. *See* Davidson Update Letter, updated Application Figure 2 & Exhibit C, pages 3-4. According to the Applicants, Motient will acquire 5.5% of SkyTerra stock as part of the Initial Exchange, initially to be voting stock for a period of 60 days, at which time it will be converted to non-voting stock. Motient has entered into a voting agreement pursuant to which it has agreed to vote this stock on a *pro rata* basis with the other SkyTerra shareholders during the 60 day period. Accordingly, the Applicants treat Motient's 5.5% interest in SkyTerra as non-voting stock for purposes of this proceeding. *See* Letter from Tom W. Davidson, Counsel to SkyTerra Communications, Inc., and Henry Goldberg, Counsel to Motient Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed August 22, 2006) (August 22 Foreign Ownership Supplement), at 5 n.3. Motient also has a right to exchange any or all of its remaining 19.2% equity interest in MSV for additional shares of SkyTerra non-voting stock, which, if fully exercised, would give Motient a combined equity interest in SkyTerra of approximately 57.7%. *See* Goldberg August 24 Letter at 2-3. The Applicants state that they do not seek approval for this future exchange, claiming "prior FCC approval is not required to transfer non-voting interests in SkyTerra to Motient." *Id.* at 3 n.2. It is not clear from the record before us that the future exchange would not require prior Commission approval. We refer the Applicants to 47 C.F.R. § 25.119(b)(2) and 47 C.F.R. § 63.24(c) as guidance for the need to receive prior Commission approval should Motient decide to exercise its rights to effect this future exchange. We also caution Motient to consider whether the future exchange may require prior Commission approval under the foreign ownership provisions of 47 U.S.C. § 310(b)(4) due to foreign equity and voting interests that may be held in Motient at the time of the future exchange.

<sup>20</sup> *See* Davidson Update Letter, updated Application Exhibit C, page 4.

<sup>21</sup> *See Applications filed for Consent to Transfer Control of Mobile Satellite Ventures Subsidiary LLC from Motient Corporation and Subsidiaries to SkyTerra Communications*, WC Docket No. 06-106, Public Notice, DA 06-1254, 21 FCC Rcd 6534 (2006).

9. The Executive Branch Entities filed a letter on July 17, 2006 (“EB Letter”), requesting that the Commission defer action on the Application pending further review by the Executive Branch Entities.<sup>22</sup> The EB Letter notifies the Commission that the Application raises potential national security, law enforcement, and public safety issues requiring the Executive Branch Entities’ review. On August 25, 2006, the Executive Branch Entities filed a Petition to Adopt Conditions to Authorizations and Licenses (“Executive Branch Petition”), advising the Commission that they have no objection to the Commission granting the Application, provided that the Commission conditions the grant on compliance by the Applicants with the commitments and undertakings contained in an Agreement attached as Exhibit A to the Executive Branch Petition (the “Executive Branch Agreement”).<sup>23</sup>

10. Highland, one of Motient’s shareholders,<sup>24</sup> filed comments on the Application on July 18, 2006.<sup>25</sup> Highland maintains that the Applicants’ proposed transaction is not in the public interest, asserting that the Applicants have failed to provide sufficient factual support for the Commission to make a public interest determination.<sup>26</sup> Highland argues that the Applicants have failed to meet their burden of demonstrating that the potential benefits of proposed transaction outweigh its potential harms.<sup>27</sup> Accordingly, Highland requests that the Commission fully and completely investigate the public interest implications of the proposed transaction, including the potential impact on TerreStar and competition in the relevant market.<sup>28</sup> In that regard, Highland claims that, due to the intertwined nature of the MSV and TerreStar transactions, the Commission should evaluate the impact of the transaction on MSV’s build out of its L-band network and TerreStar’s proposed build out of a 2 GHz MSS network.<sup>29</sup> Specifically,

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<sup>22</sup> Letter from Sigal P. Mandelker, Deputy Assistant Attorney General, U.S. Department of Justice, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 17, 2006).

<sup>23</sup> Petition to Adopt Conditions to Authorizations and Licenses of the U.S. Department of Justice, the Federal Bureau of Investigation, and the U.S. Department of Homeland Security (August 25, 2006), *attaching* Letter from Robert Lewis, Senior Vice President and General Counsel, SkyTerra Communications, Inc. and Randy S. Segal, Senior Vice President and General Counsel, Mobile Satellite Ventures LP to Sigal P. Mandelker, Deputy Assistant Attorney General, U.S. Department of Justice, Elaine N. Lammert, Deputy General Counsel, Federal Bureau of Investigation, and Stewart A. Baker, Assistant Secretary for Policy, U.S. Department of Homeland Security (dated August 21, 2006).

<sup>24</sup> Highland’s current equity ownership in Motient is approximately 14% of Motient’s outstanding and issued shares. Comments of Highland Capital Management, LP (July 18, 2006) (Highland Comments), at 1. If the proposed transaction is consummated, Highland would receive shares of SkyTerra in exchange for its shares of Motient. *Id.* at 2 n.2.

<sup>25</sup> July 18<sup>th</sup> was one day after comments were due under the pleading cycle established in this case. Thus, Highland also filed a Motion to Accept Late-Filed Comments on July 19, 2006. Motient filed an Opposition to Highland’s Motion (filed July 20, 2006) (Motient Opposition to Motion to Accept Late-Filed Comments), to which Highland replied (filed August 4, 2006) (Highland Reply to Opposition to Accept Late-Filed Comments). We do not view Highland’s late filing as egregious in this instance. The Applicants had a full and adequate opportunity to respond to Highland’s comments. The comments supplemented the existing record and created a full and more complete record for our review. Highland’s tardiness has not prevented us from acting in an expeditious fashion on the Application. We therefore grant Highland’s motion and accept Highland’s one-day late-filed comments as a part of our record on review.

<sup>26</sup> *See* Highland Comments at 2-3.

<sup>27</sup> *Id.* at 3-14.

<sup>28</sup> *Id.* at 17.

<sup>29</sup> *Id.* at 7-8. Highland explains that TMI, TerreStar’s “Canadian partner,” currently holds one of the two spectrum reservations to provide 2 GHz MSS to U.S. consumers, and that TerreStar is the U.S. entity that is constructing the 2 GHz MSS satellite and terrestrial communications network. *Id.* at 5. TMI has an application pending at the Commission to assign its spectrum reservation to TerreStar. *See TMI/TerreStar Public Notice, supra* footnote 7.

Highland explains that, should TerreStar be assigned one of only two reservations of spectrum to provide 2 GHz MSS to U.S. consumers, it would be an important competitor in the globally-harmonized 2 GHz MSS market, and “given the market implications of the transaction, for public safety, homeland security and rural and other remote area services, the Commission should carefully evaluate the likely impact on both MSV *and* TerreStar of the proposed transaction before deciding whether to grant the pending Application.”<sup>30</sup>

11. Highland also claims that Motient is incurring a significant tax liability as a result of the proposed transaction that would render Motient illiquid and unable to fund TerreStar, thus eliminating a viable competitor in the MSS marketplace.<sup>31</sup> In addition, Highland asserts that the Application contains no factual support for Motient’s assertion that development of its integrated and terrestrial communications network will be facilitated by grant of the Application.<sup>32</sup> Highland suggests that the Commission wait for information that may emerge from depositions and discovery being conducted in a civil lawsuit between Highland and Motient, which “should shed much light on the true nature of the transaction under consideration by the Commission.”<sup>33</sup> Finally, Highland requests that, if the Applicants fail to support the claims in their Application, the Commission should designate the Application for hearing.<sup>34</sup>

12. Motient and SkyTerra filed oppositions to Highland’s comments.<sup>35</sup> Motient alleges that: (1) Highland has provided no information that is material to Commission review of the Application; (2) any potential impact on TerreStar is irrelevant to the Application; (3) the Applicants have demonstrated that the proposed transaction is in the public interest; and (4) the private dispute between Highland and Motient has no bearing on the public interest determination to be made by the Commission.<sup>36</sup> SkyTerra argues that the Commission’s application review process is not the proper forum for adjudication of civil litigation claims that do not implicate the Applicants’ qualifications under the Communications Act of 1934, as amended (the “Act”) or Commission rules.<sup>37</sup> Moreover, SkyTerra rebuts Highland’s public interest argument, maintaining that the MSS market is highly competitive, and that the transaction

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<sup>30</sup> Highland Comments at 8 (emphasis in original); *see also id.* at 10-11.

<sup>31</sup> *See id.* at 13.

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 14-17. Highland’s pending lawsuit against Motient seeks rescission of the agreement between Motient and SkyTerra that is the subject of the instant Application, as unenforceable under the Investment Company Act of 1940 and contract law. *Highland Crusader Offshore Partners, L.P., et al. v. Motient Corporation, et al.*, Cause No. D-1-GN-06-002219 (District Court of Travis County, TX, 53<sup>rd</sup> Judicial District, filed June 19, 2006), *removed to federal court, Highland Crusader Offshore Partners, L.P., Highland Equity Focus Fund, L.P., Highland Capital Management, L.P., and Highland Capital Management Services, Inc. v. Motient Corporation and Capital & Technology Advisors, Inc.*, Case No. 1:06-cv-00540-LY (W.D.Tex., removed July 14, 2006).

<sup>34</sup> *See* Highland Comments at 17-18 n.24.

<sup>35</sup> Opposition of Motient to Comments of Highland Capital Management, LP (filed July 27, 2006) (Motient Opposition); Opposition of SkyTerra to Comments (filed July 27, 2006) (SkyTerra Opposition). Motient provided information that one of Highland’s principal shareholders acquired an almost 9% ownership interest in ICO Global Communications (Holdings) Limited (“ICO”), which Motient characterized as the “other mobile satellite new entrant in the 2 GHz band” asserting that Highland is disingenuous in expressing interest for TerreStar’s future. Motient Opposition at 2.

<sup>36</sup> *See* Motient Opposition at 1-2.

<sup>37</sup> *See* SkyTerra Opposition at 3-5.

enhances competition by consolidating controlling ownership of MSV, noting that ownership of TerreStar is already consolidated under Motient.<sup>38</sup>

13. In reply, Highland re-emphasizes that the Commission should make a full and complete investigation of the public interest implications of the proposed transaction.<sup>39</sup> Highland contends that neither Motient nor SkyTerra explain and support their position that the proposed transaction will enable MSV to attract more capital, emphasizing that the proposed transaction will impact not just MSV, but also TerreStar, the partner of one of the two remaining U.S.-authorized service providers in the 2 GHz MSS bands. Specifically, Highland argues that the success or failure of TerreStar affects specific goals under the Act – competition, national security, public safety and rural/remote access to communications services.<sup>40</sup>

14. After the pleading cycle closed, Commission staff requested that the Applicants and representatives of TerreStar file supplemental information to ensure a full and complete record of the proposed transaction. In response, the Applicants and TerreStar collectively submitted eight *ex parte* letters that have been incorporated into the record on review.<sup>41</sup>

### III. PUBLIC INTEREST ANALYSIS

#### A. Framework of Analysis

15. Pursuant to sections 214(a) and 310(d) of the Act,<sup>42</sup> the Commission must determine whether the proposed transfer of control to SkyTerra of licenses and authorizations held and controlled by MSV will serve the public interest, convenience, and necessity.<sup>43</sup> In making this determination, we first assess

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<sup>38</sup> *Id.* at 6-8.

<sup>39</sup> Reply of Highland to Oppositions to Comments (filed August 1, 2006) (Highland Reply). In its reply, Highland claims that its acquisition of ICO shares is irrelevant to the Application because Highland has been an ICO investor for substantially the same amount of time that it has been an investor in Motient, and that the shares have no supermajority voting control, making Highland a passive investor. Highland notes that Motient has “conflicting investment interests in the MSS space segment” that were not disclosed to the Commission, creating an incentive for Apollo, SkyTerra’s potential investor, to “complicate the business plans of MSV and TerreStar.” *Id.* at 10-14.

<sup>40</sup> *See id.* at 6-10, 14-21.

<sup>41</sup> Letter from Joseph A. Godles, Counsel to TerreStar Network Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (filed August 3, 2006); Letter from Henry Goldberg, Counsel to Motient Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed August 7, 2006) (Goldberg August 7 Letter); Letter from Henry Goldberg, Counsel to Motient Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed August 14, 2006) (Goldberg August 14 Letter); Davidson Update Letter, *supra* footnote 12; August 22 Foreign Ownership Supplement, *supra* footnote 19; Goldberg August 24 Letter, *supra* footnote 16; Letter from Tom W. Davidson, Counsel to SkyTerra Communications, Inc., and Henry Goldberg, Counsel to Motient Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed August 31, 2006) (August 31 Foreign Ownership Supplement); Davidson September 1 Letter, *supra* footnote 11.

<sup>42</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>43</sup> 47 U.S.C. § 310(d) requires that we consider the applications for transfer of Title III licenses (space station and earth station authorizations in this case) under the same standard as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. *See SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, FCC 05-183, 20 FCC Rcd 18290, 18300 n.60 (2005) (*SBC/AT&T Order*); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, FCC 05-184, 20 FCC Rcd 18433, 18443 n.59 (2005) (*Verizon/MCI Order*); *Applications of Western Wireless Corporation and Alltel Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket

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whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules. If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against the potential public interest benefits.<sup>44</sup> The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.<sup>45</sup> If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, we may designate the application for hearing.<sup>46</sup>

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No. 05-50, Memorandum Opinion and Order, FCC 05-138, 20 FCC Rcd 13053, 13062-63 ¶ 17 (2005) (*Alltel/Western Wireless Order*); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket 04-70, Memorandum Opinion and Order, FCC 04-255, 19 FCC Rcd 21522, 21542 ¶ 40 (2004) (*Cingular/AT&T Wireless Order*); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, FCC 03-330, 19 FCC Rcd 473, 485 ¶ 18 (2004) (*News Corp./Hughes Order*). Thus, we must examine the Applicants' qualifications to hold licenses.

<sup>44</sup> See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon/MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, FCC 05-148, 20 FCC Rcd 13967, 13976 ¶ 20 (2005); *Alltel/Western Wireless Order*, 20 FCC Rcd at 13062-63 ¶ 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-43 ¶ 40; *News Corp./Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, CC Docket 98-184, Memorandum Opinion and Order, FCC 00-221, 15 FCC Rcd 14032, 14046 ¶¶ 20, 22 (2002); *Applications of VoiceStream Wireless Corporation and Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee*, IB Docket No. 00-187, Memorandum Opinion and Order, FCC 01-142, 16 FCC Rcd 9779, 9789 ¶ 17 (2001) (*Deutsche Telekom/VoiceStream Order*); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, FCC 99-279, 14 FCC Rcd 14712, 14737-38 ¶ 48 (1999) (*SBC/Ameritech Order*); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, FCC 98-225, 13 FCC Rcd 18025, 18031 ¶ 10 (1998) (*WorldCom/MCI Order*); *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion and Order, FCC 97-286, 12 FCC Rcd 19985, 19987 ¶ 2 (1997).

<sup>45</sup> See, e.g., *SBC/AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon/MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-44 ¶ 40 (citing, e.g., *News Corp./Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70, Memorandum Opinion and Order, FCC 02-310, 17 FCC Rcd 23246, 23255 ¶ (2002) (*AT&T/Comcast Order*); *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, FCC 02-284, 17 FCC Rcd 20559, 20574 ¶ 25 (2002) (*EchoStar/DirecTV Order*)).

<sup>46</sup> We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications. See *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979). We may, however, do so if we find that a hearing would be in the public interest. However, with respect to the applications to transfer licenses subject to Title III of the Act, if we are unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we designate the application for

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16. Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,”<sup>47</sup> which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest.<sup>48</sup> Our public interest analysis may also entail assessing whether the proposed transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.<sup>49</sup> In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.<sup>50</sup>

17. Our analysis starts with an examination of whether the Applicants are qualified to hold and assign licenses pursuant to sections 214(a) and 310(d) of the Act.<sup>51</sup> Next, we consider the arguments raised by Highland regarding the potential harms and benefits of the proposed transaction, as well as its effects on competition. Then we consider foreign ownership issues. Finally, we consider issues related to national security, law enforcement, foreign policy, and trade policy.

## B. Qualifications of the Applicants

18. As a threshold matter, we must determine whether the Applicants meet the requisite qualifications to hold and transfer licenses under section 310(d) of the Act and the Commission’s rules. In general, when evaluating assignments under section 310(d), we do not re-evaluate the qualifications of the transferor.<sup>52</sup> The exception to this rule occurs where issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.<sup>53</sup> This is not the case here, so we need not re-evaluate Motient’s basic qualifications.

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hearing. 47 U.S.C. § 309(e); see *EchoStar/DirecTV Order*, 17 FCC Rcd at 20574 ¶ 25; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-44 ¶ 40.

<sup>47</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18301 ¶ 17; *Verizon/MCI Order*, 20 FCC Rcd at 18443 ¶ 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41 (citing, e.g., *News Corp./Hughes Order*, 19 FCC Rcd at 483-84 ¶ 16; *AT&T/Comcast Order*, 17 FCC Rcd at 23255 ¶ 27; *EchoStar/DirecTV Order*, 17 FCC Rcd at 20575 ¶ 26).

<sup>48</sup> See 47 U.S.C. §§ 157 nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) (1996 Act), 254, 332(c)(7)); 1996 Act, Preamble; *SBC/AT&T Order*, 20 FCC Rcd at 18301 ¶ 17; *Verizon/MCI Order*, 20 FCC Rcd at 18443-44 ¶ 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41; see also *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9; *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, FCC 01-328, 16 FCC Rcd 22668, 22696 ¶ 55 (2001) (citing 47 U.S.C. §§ 301, 303, 309(j), 310(d)); cf. 47 U.S.C. §§ 521(4), 532(a).

<sup>49</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18301 ¶ 17; *Verizon/MCI Order*, 20 FCC Rcd at 18443-44 ¶ 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41 (citing, e.g., *AT&T/Comcast Order*, 17 FCC Rcd at 23255 ¶ 27; *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9).

<sup>50</sup> See *SBC/AT&T Order*, 20 FCC Rcd at 18301-02 ¶ 17; *Verizon/MCI Order*, 20 FCC Rcd at 18444 ¶ 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

<sup>51</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>52</sup> See *Deutsche Telekom/VoiceStream Order*, 16 FCC Rcd at 9790 ¶ 19.

<sup>53</sup> *Id.*

19. Section 310(d) also requires that the Commission consider the qualifications of the proposed transferee as if the transferee were applying for the license directly under section 308 of the Act.<sup>54</sup> We note that no party has challenged SkyTerra's basic qualifications, and nothing has come to our attention that would disqualify SkyTerra on the grounds that it lacks the technical, legal, or other basic qualifications necessary to be a Commission licensee. Thus, we find that SkyTerra possesses the requisite basic qualifications to be a Commission licensee.

### C. Potential Harms/Benefits

20. Highland contends that the proposed transaction will adversely affect both MSV and TerreStar. Highland argues that the Applicants have not provided supporting information that demonstrates the alleged benefits of the transaction outweigh potential harms, and therefore, have failed to satisfy their burden of demonstrating that the transaction is in the public interest.<sup>55</sup> It therefore maintains that the Commission should conduct a full and complete investigation of the public interest implications of the transaction by, for example, awaiting completion of discovery in a related civil lawsuit.<sup>56</sup> Commission staff responded to Highland's concerns by requesting that the Applicants answer questions regarding the transaction, many of which paralleled those set forth in Highland's comments.<sup>57</sup>

21. We find, based on the record before us, that the public interest benefits of the transaction outweigh the alleged harms claimed by Highland. We conclude that the Applicants have met their burden in demonstrating that the proposed transaction will serve the public interest. As a result, there is no need to delay action on the Application pending receipt of additional information from the discovery phase of the pending civil lawsuit.<sup>58</sup>

22. In the Application, the Applicants claim that the transaction will facilitate MSV's development of its planned integrated satellite and terrestrial network that will provide broadband services in North America. They assert that, as a result of the transaction, MSV will be controlled by a publicly-traded company, SkyTerra, thereby enabling MSV to more easily attract capital and engage in arrangements with potential strategic partners that are essential to development of MSV's next generation system.<sup>59</sup> Highland criticizes these statements as conclusory and proffered without supporting information.<sup>60</sup> Highland also points out that the Commission requires that claimed benefits to a transaction be transaction-specific and verifiable.<sup>61</sup> Contrary to Highland's contentions, we find that the benefits claimed in the Application are specific to the transaction, and that the record developed in this proceeding provides sufficient evidence supporting the claimed benefits for us to credit them. We further find that such benefits outweigh any potential harms.

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<sup>54</sup> Section 308 requires that applicants for Commission licenses set forth such facts as the Commission may require as to citizenship, character, and financial, technical, and other qualifications. *See* 47 U.S.C. § 308. Our rules implementing the provisions of section 308 regarding an applicant's qualifications to hold the Commission licenses involved in this transfer are set forth in Parts 5, 25 and 63 of the Commission's rules. *See* 47 C.F.R. Parts 5, 25, 63.

<sup>55</sup> Highland Comments at 2-3.

<sup>56</sup> *Id.* at 13-15.

<sup>57</sup> *See supra* footnote 41 and accompanying text.

<sup>58</sup> *See supra* footnote 33.

<sup>59</sup> Application at 7.

<sup>60</sup> Highland Comments at 3-4.

<sup>61</sup> *Id.* at 4 (citing *Verizon/MCI Order*, 20 FCC Rcd at 18530-18531 ¶¶ 195-196).

23. The realignment of the ownership structure of MSV and TerreStar is intended to result in each of the two companies being controlled by separate publicly-traded entities.<sup>62</sup> Motient states that the proposed transaction will separate the ownership of MSV and TerreStar in a manner that will facilitate capital investment in TerreStar by enabling potential investors and banks to negotiate an investment or a loan with a single majority owner rather than negotiating with multiple parties, each with different demands and requirements.<sup>63</sup> Motient later explains that MSV and TerreStar have two very different investment profiles, the former being an established licensed satellite operator, and the latter being a “greenfield” start-up. It asserts that each company, therefore, presents opportunities to equity investors, different debt providers, and different strategic partners, any of which might be opposed to investing in a co-owned situation with a mixed investment message and material cross-collateralization concerns. As a result, according to Motient, separating the ownership of the companies will generate interest from separate investor groups, making it possible for both companies’ business plans to be financed more easily.<sup>64</sup> Motient further points out that analysts, asked to review the proposed transaction, have concluded that the overall realignment plan would be beneficial for both Motient and TerreStar, a conclusion that Highland failed to rebut.<sup>65</sup> SkyTerra adds that MSV will be in a better position to secure additional capital in order to deploy its next generation system, and to establish strategy arrangements to implement its business plan for that system, following consummation of the proposed transaction.<sup>66</sup>

24. Highland has not articulated transaction-specific harms to MSV resulting from the proposed transaction before us. Its allegations of harm to TerreStar appear speculative and more a matter of business judgment.<sup>67</sup> Highland questions whether TerreStar will continue to benefit from the intellectual property assets of MSV, expresses concern about the potential loss of MSV expertise in satellite communications, and alleges that TerreStar may be insufficiently funded because of a tax liability that MSV will incur as a result of the transaction.<sup>68</sup> With respect to the first issue, the record reflects that, in the spring of 2005, the intellectual property held by MSV was transferred to a limited liability holding company, which is owned in equal shares by MSV and TerreStar.<sup>69</sup> The co-owned holding company executed an irrevocable license agreement with MSV for its L-band use and with TerreStar for its use in the 2 GHz MSS band. Pursuant to these license agreements, MSV and TerreStar each has unencumbered access to all of the intellectual property each company needs, irrespective of the instant proposed transaction.<sup>70</sup> As to the second issue, the record clearly reflects the background and experience of the TerreStar management team and Motient’s intent to turn its attention predominantly to TerreStar and to

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<sup>62</sup> See Motient May 8 Press Release, *supra* footnote 6.

<sup>63</sup> Goldberg August 14 Letter, *attaching* Letter from Robert L. Macklin, Vice President, General Counsel, Motient Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed August 14, 2006) (Macklin August 14 Letter).

<sup>64</sup> See Goldberg August 24 Letter at 4.

<sup>65</sup> Macklin August 14 Letter; *see also* Goldberg August 7 Letter (citing Motient Investor Presentation, *supra* footnote 13); SkyTerra Opposition at 7-8 n.22.

<sup>66</sup> SkyTerra Opposition at 7-8.

<sup>67</sup> We note that while TerreStar is not a party to the instant application, we recognize and consider the public interest benefits that affect TerreStar as a result of this transaction. *Cf. Shareholders of GAF Corporation*, Memorandum Opinion and Order, FCC 92-185, 7 FCC Rcd 3225, 3229 ¶ 15 (1992) (“[W]hile we believe, as a general principle, that we should not become involved in reviewing corporate financing decisions, specific allegations of fact in particular cases may warrant such an inquiry under our public interest mandate.”).

<sup>68</sup> Highland Comments at 9-12.

<sup>69</sup> See Goldberg August 24 Letter at 3.

<sup>70</sup> *Id.*

the execution of its business plan.<sup>71</sup> On these issues, we do not need to look beyond the information before us. As to the issue of TerreStar's future liquidity, the Commission no longer looks at financial qualifications for new providers, let alone in the context of an assignment or transfer.<sup>72</sup> Finally, the TerreStar management, states that it has given careful consideration to and supports the proposed transaction.<sup>73</sup>

25. Based upon the information provided by the Applicants, we find that the proposed transaction, as part of Motient's overall plan to realign the ownership of MSV and TerreStar, is designed to facilitate development of MSV's next generation satellite system and TerreStar's new satellite system by improving each entity's ability to attract the significant financing necessary for such development. The Applicants have articulated the purpose of the realignment and have shown that they are moving forward reasonably within the current corporate governance and ownership framework to effectuate their plans. The plan to realign ownership has been presented to the Motient shareholders, who elected a Motient board of directors that approved the plan.<sup>74</sup> Further, Highland, as a Motient shareholder, has other avenues open to it should it believe that there is a breach of fiduciary duty on the part of the Motient board of directors. Commission proceedings are not the appropriate forum for the adjudication of shareholder disputes.<sup>75</sup> We agree with the Applicants that, without specific allegations of harm by Highland, Commission precedent supports giving deference to the business judgments underlying the transaction.<sup>76</sup>

26. Additionally, the record contains considerable discussion by the parties as to the effect of the lawsuit brought by Highland under, *inter alia*, the Investment Company Act of 1940, as amended.<sup>77</sup> The Applicants contend that Highland is attempting to delay Commission action on the Application pending

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<sup>71</sup> See Motient Investor Presentation at 23, 33, 37.

<sup>72</sup> See *Amendment of the Commission's Space Station Licensing Rules and Policies*, IB Docket No. 02-34, First Report and Order and Further Notice of Proposed Rulemaking, FCC 03-102, 18 FCC Rcd 10760, 10822-10824 ¶¶ 161-165 (2003) (Commission eliminates the examination of financial qualifications that, at one time, was intended to help ensure that licensees have the financial resources to proceed with satellite construction and implementation plans and make service available to users promptly, instead concluding that strict milestone enforcement provides more certainty that systems will be timely built, while allowing the lesser-funded smaller or start-up companies an opportunity to succeed or fail in the marketplace).

<sup>73</sup> Goldberg August 14 Letter, *attaching* Letter from Robert H. Brumley, President and CEO, TerreStar to Marlene H. Dortch, Secretary, Federal Communications Commission (filed August 14, 2006).

<sup>74</sup> See Goldberg August 7 Letter.

<sup>75</sup> As a federal agency, the "public interest standard does not entitle us, nor would we seek, to control or manage" a company's day to day business operations, or "undertake any action of a corporate governance nature" that would affect the rights of shareholders, the current board of directors and/or management. More "appropriate forums" are available for a company to "redress its alleged grievances." *Comsat Corporation*, Memorandum Opinion and Order, FCC 97-422, 13 FCC Rcd 2714, 2729 ¶ 33 (1998).

<sup>76</sup> See *MMM Holdings, Inc. for Transfer of Control of LIN Broadcasting Corporation*, Memorandum Opinion and Order, FCC 89-300, 4 FCC Rcd 8243, 8245 ¶ 14 (1989) (noting "the Commission's basic predilection not to second-guess [the] kinds of business judgments" that "must be ratified by a significant segment of the financial community."); *cf. Stockholders of CBS Inc. (Transferor) and Westinghouse Electric Corporation (Transferee)*, Memorandum Opinion and Order, FCC 95-469, 11 FCC Rcd 3733, 3746 ¶ 26 (1995) ("the Commission generally refrains from interfering with a company's capital structure"); *GAF Corporation*, 7 FCC Rcd at 3229 ¶ 15 ("The Commission's general policy is not to interfere with a company's capital structure or second guess the financial community or investors . . .").

<sup>77</sup> The Investment Company Act regulates the structure and operation of mutual funds, requiring funds to safeguard their portfolio, forward price their securities, and keep detailed books and records. See 17 C.F.R. Part 270.

the outcome of that lawsuit. They argue that the lawsuit involves adjudication of a private dispute not relevant to this proceeding.<sup>78</sup> They also argue that the Commission has authority to act upon the Application notwithstanding the pending lawsuit.<sup>79</sup> Highland denies that it is seeking to defer Commission action pending the outcome of the litigation and states that its intent is to present facts and information concerning the proposed transaction to ensure a full and complete record upon which to base public interest findings.<sup>80</sup> Highland agrees that the Commission has ample authority to make its public interest determination independent of the lawsuit.<sup>81</sup> In view of our finding that the Applicants have demonstrated public interest benefits on the record before us, there is no need to delay action on the Application pending additional information that may result from the discovery phase of the court proceeding.

#### D. Effect on Competition

27. Part of the Commission's public interest analysis considers the competitive effect of the transaction. To evaluate the competitive effects of a transaction, the Commission first identifies the relevant product and geographic markets.<sup>82</sup> For satellite service providers, generally, the Commission has determined that the relevant product markets include domestic and international telecommunications markets.<sup>83</sup> For MSS providers, it has been determined that they compete in the same product markets.<sup>84</sup> In examining the MSS product markets, we consider whether the proposed transaction will lessen or enhance competition in the provision of communications services within the markets in, to, or from the United States and foreign points.<sup>85</sup>

28. In the United States, several MSS providers operating in different bands offer multiple products including voice and data services in fixed and mobile environments to a variety of terminals (e.g., hand-held terminals, or laptop-sized and larger terminals that can be transported from one location to another). In addition to MSV, Inmarsat Ventures Ltd. also provides voice and data communications

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<sup>78</sup> Motient Opposition at 2; Motient Opposition to Motion to Accept Late-Filed Comments at 3-4; SkyTerra Opposition at 3-4.

<sup>79</sup> Motient Opposition at 2; Motient Opposition to Accept Late-Filed Comments at 4 (citing *Comsat Corporation*, 13 FCC Rcd at 2729 ¶ 33; *Loral Satellite Inc. (Debtor-in-Possession) and Loral SpaceCom Corp. (Debtor-in-Possession), Assignors, and Intelsat North America, Assignee*, Order and Authorization, DA 04-357, 19 FCC Rcd 2404, 2420 ¶ 37 (Int'l Bur. 2004)). See also SkyTerra Opposition at 3-5.

<sup>80</sup> Highland Reply to Oppositions at 16-17, 21-22.

<sup>81</sup> Highland Reply to Opposition to Accept Late-Filed Comments at 8-9.

<sup>82</sup> See, e.g., *AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection With the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc*, IB Docket No. 98-212, Memorandum Opinion and Order, FCC 99-313, 14 FCC Rcd 19140 (1999); *Deutsche Telekom/VoiceStream Order*, 16 FCC Rcd 9779.

<sup>83</sup> See *WorldCom/MCI Order*, 13 FCC Rcd at 18039 ¶ 23, 18070 ¶ 78; *Application of General Electric Capital Corporation, Transferors, and SES Global, S.A., Transferees*, Order and Authorization, DA 01-2100, 16 FCC Rcd 17575, 17594 ¶ 43 (Int'l Bur. & WTB 2001).

<sup>84</sup> See *Use of Returned Spectrum in the 2 GHz Mobile Satellite Service Frequency Bands*, IB Docket Nos. 05-220 and 05-221, Order, FCC 05-204, 20 FCC Rcd 19696, 19711 ¶ 33 (2005).

<sup>85</sup> See, e.g., *Lockheed Martin Corporation, Comsat Government Systems, LLC, and COMSAT Corporation, Application for Transfer of Control of COMSAT Corporation and its Subsidiaries, Licensees of Various Satellite, Earth Station, Private Land Mobile Radio and Experimental Licenses, and Holders of International Section 214 Authorizations*, Order and Authorization, FCC 00-277, 15 FCC Rcd 22910, 22916 ¶ 18 (2000).

via satellite in the L-band. Both Globalstar Licensee LLC and Iridium Satellite LLC are using Big LEO MSS licenses to offer mobile voice and data services.<sup>86</sup> ICO and TMI currently have spectrum reserved for their use to provide MSS to U.S. consumers in the 2 GHz MSS bands, though neither has yet begun commercial service. As noted above, TMI has an application pending before the Commission to assign its spectrum reservation to TerreStar.<sup>87</sup>

29. The Application before us does not involve a merger of MSS providers that arguably may lessen competition. Rather, the Application seeks approval of a transaction that is part of the realignment of ownership of an existing provider planning a next generation satellite system, and a future provider developing a new system. In this respect, the competitive landscape described above is not changed. The only allegation of competitive harm on the record comes from Highland, which asks the Commission to carefully look at the competitive implications of the transaction as a result of harm that Highland alleges will accrue to MSV and TerreStar.<sup>88</sup> However, as discussed above, the Applicants have identified benefits of the transaction designed to strengthen both MSV and TerreStar competitively, and we are not persuaded that the transaction is likely to be harmful to TerreStar. As a result, we find no basis to conclude that the proposed transaction is likely to harm competition.

### E. Foreign Ownership

30. In the Application, the Applicants request that the Commission approve the proposed transfer of control of MSV, a common carrier radio licensee, without issuing a declaratory ruling under section 310(b)(4) of the Act that would specifically approve the indirect foreign equity and voting interests that will be held in MSV upon consummation of the proposed transaction.<sup>89</sup> According to the Applicants, no foreign ownership ruling is necessary because MSV's indirect foreign equity and voting interests, including interests held by TMI, a Canadian limited partnership, will fall within the parameters of the foreign ownership ruling we issued to MSV in the *MSV 2001 Order*.<sup>90</sup> At the time of the *MSV 2001 Order*, TMI proposed to acquire a 39.9% limited partnership interest in MSV LP and a 26.4% ownership interest in MSV GP, in excess of the 25% foreign ownership benchmark set forth in section 310(b)(4) of the Act.<sup>91</sup> TMI presently holds a 21.8% limited partnership interest in MSV LP and a 21.8% ownership interest in MSV LP's general partner, MSV GP, which TMI will retain after consummation of the proposed transaction. While TMI's retained 21.8% equity and voting interests in MSV LP will fall within

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<sup>86</sup> Big LEO systems provide voice and data communication to users with handheld mobile terminals via non-geostationary satellites in Low Earth Orbit (LEO), *i.e.*, at orbital altitudes below the Van Allen Radiation Belt. The term "Big LEO" was coined to distinguish such systems, operating in the 1.6/2.4 GHz frequency bands, from the so-called "Little LEO" systems that provide data communications via non-geostationary satellites in frequency bands below 1 GHz.

<sup>87</sup> See *TMI/TerreStar Public Notice*, *supra* footnote 7.

<sup>88</sup> Highland Comments at 4-8, 10-11 & Highland Reply at 18-19, 21.

<sup>89</sup> See Application at 7-8.

<sup>90</sup> *Motient Services Inc. and TMI Communications and Company, LP, Assignors and Mobile Satellite Ventures Subsidiary LLC, Assignee*, Order and Authorization, DA 01-2732, 16 FCC Rcd 20469, 20477 ¶ 22 (Int'l Bur. 2001) (*MSV 2001 Order*). The *MSV 2001 Order* permitted MSV "to be owned indirectly by TMI and/or BCE Inc. and their Canadian shareholders in an amount up to and including an equity and/or voting interest of 40%. Additional approval would be required under section 310(b)(4) before TMI or BCE Inc. increases its indirect investment in [MSV] above this authorized level. [MSV] shall also seek additional Commission approval before other foreign individuals or entities, including foreign owners of Motient Corp., Columbia Capital, and Spectrum Equity, MSV Investors, LLC and non-U.S., non-Canadian owners of TMI and BCE Inc., acquire individually and/or in the aggregate a greater than 25% indirect equity and/or voting interest in [MSV]." *Id.*

<sup>91</sup> See *id.* at 20471 ¶¶ 5-6.

the parameters of the ruling we issued in the *MSV 2001 Order*, the transaction under consideration in the instant proceeding will nonetheless result in changes to the foreign equity and voting interests held indirectly in MSV through its parent partnership, MSV LP.

31. Based on the record before us, we find that MSV's indirect foreign voting interests will exceed, albeit by a modest amount, the foreign voting interests permitted under the existing foreign ownership ruling. We conclude, however, for the reasons stated below, that it would not serve the public interest to deny the transfer of control of the licenses and authorizations held by MSV because of the indirect foreign equity and voting interests that will be held in MSV LP. Therefore, on our own motion, we modify MSV's foreign ownership ruling originally issued in the *MSV 2001 Order* to approve specifically the foreign equity and voting interests that will be held indirectly in MSV by or through the Apollo Funds investing in SkyTerra.<sup>92</sup>

32. We examine the foreign ownership interests that will be held in MSV LP pursuant to our public interest analysis under sections 310(b)(4) and 310(d) of the Act and the Commission's foreign ownership policies adopted in the *Foreign Participation Order*.<sup>93</sup> As part of that analysis, we consider any national security, law enforcement, foreign policy, or trade policy concerns raised by the foreign investment.<sup>94</sup> Relying on Commission precedent, we find that the proposed transfer of control does not raise any issues under sections 310(a) and 310(b)(1)-(b)(3) of the Act.<sup>95</sup> Our analysis focuses on issues raised under section 310(b)(4).

### 1. Legal Standard for Foreign Ownership of Radio Licenses

33. Section 310(b)(4) of the Act establishes a 25% benchmark for investment by foreign individuals, corporations, and governments in entities that control U.S. common carrier radio licensees. This section also grants the Commission discretion to allow higher levels of foreign ownership if it determines that such ownership is not inconsistent with the public interest.<sup>96</sup>

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<sup>92</sup> 47 C.F.R. § 1.2.

<sup>93</sup> 47 U.S.C. § 310(b)(4),(d); see *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*"), Order on Reconsideration, FCC 00-339, 15 FCC Rcd 18158 (2000).

<sup>94</sup> The Commission considers national security, law enforcement, foreign policy, and trade policy concerns when analyzing foreign investment pursuant to sections 310(b)(4) and 310(d). *Foreign Participation Order*, 12 FCC Rcd at 23918-21 ¶¶ 59-66. See also *infra* Section III.F.

<sup>95</sup> Section 310(a) of the Act prohibits any radio license from being "granted to or held by" a foreign government or its representative. 47 U.S.C. § 310(a). In this case, no foreign government or its representative holds any of the radio licenses. Section 310(b)(1)-(2) of the Act prohibits common carrier, broadcast and aeronautical fixed or en route radio licenses from being "granted to or held by" aliens, or their representatives, or foreign corporations. 47 U.S.C. § 310(b)(1)-(2). We find that no alien, representative, or foreign corporation holds any of the common carrier licenses in this case. Accordingly, we find that the proposed transaction is not inconsistent with the foreign ownership provisions of section 310(a) or 310(b)(1)-(2) of the Act. See *Deutsche Telekom/VoiceStream Order*, 16 FCC Rcd at 9804-9809 ¶¶ 38-48. Additionally, because the foreign investment in MSV is held through MSV LP, a Delaware limited partnership that is the sole member of MSV, the proposed transaction does not trigger section 310(b)(3) of the Act, which places a 20% limit on alien, foreign corporate or foreign government ownership of entities that themselves hold common carrier, broadcast and aeronautical fixed or en route Title III licenses. Compare 47 U.S.C. § 310(b)(3) with § 310(b)(4). See *Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended*, Declaratory Ruling, FCC 85-295, 103 F.C.C. 2d 511 (1985) ("*Wilner & Scheiner P*"), *recon. in part*, FCC 86-406, 1 FCC Rcd 12 (1986).

<sup>96</sup> 47 U.S.C. § 310(b)(4).

34. The calculation of foreign ownership interests under section 310(b)(4) is a two-pronged analysis in which the Commission examines separately the equity interests and the voting interests in the licensee's direct or indirect parent.<sup>97</sup> The Commission calculates the equity interest of each foreign investor in the parent and then aggregates these interests to determine whether the sum of the foreign equity interests exceeds the statutory benchmark. Similarly, the Commission calculates the voting interest of each foreign investor in the parent and aggregates these voting interests.<sup>98</sup> The presence of aggregated alien equity or voting interests in a common carrier licensee's parent in excess of 25% triggers the applicability of section 310(b)(4)'s statutory benchmark.<sup>99</sup> Once the benchmark is triggered, section 310(b)(4) directs the Commission to determine whether the "public interest will be served by the refusal or revocation of such license."<sup>100</sup>

35. In the *Foreign Participation Order*, the Commission concluded that the public interest would be served by permitting greater investment by individuals or entities from World Trade Organization ("WTO") Member countries in U.S. common carrier and aeronautical fixed and en route radio licensees.<sup>101</sup> Therefore, with respect to indirect foreign investment from WTO Members, the Commission replaced its "effective competitive opportunities," or "ECO," test with a rebuttable presumption that such investment generally raises no competitive concerns.<sup>102</sup> In evaluating an applicant's request for approval of foreign ownership interests under section 310(b)(4), the Commission uses a "principal place of business" test to determine the nationality or "home market" of foreign investors.<sup>103</sup>

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<sup>97</sup> See *BBC License Subsidiary L.P.*, Memorandum Opinion and Order, DA 95-364, 10 FCC Rcd 10968, 10973 ¶ 22 (1995) ("*BBC License Subsidiary*").

<sup>98</sup> See *id.* at 10972 ¶ 20, & 10973-74 ¶¶ 22-25.

<sup>99</sup> See *id.* at 10973-74 ¶ 25.

<sup>100</sup> *Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, FCC 95-498, 11 FCC Rcd 1850, 1857-58 ¶ 47 (1995) (quoting section 310(b)(4)). It is the licensee's obligation to inform the Commission before its indirect foreign ownership exceeds the 25% benchmark set forth in section 310(b)(4). See *Application of Fox Television Stations, Inc. for Renewal of License of Station WNYW-TV, New York, New York*, Memorandum Opinion and Order, FCC 95-188, 10 FCC Rcd 8452, 8474-75 ¶ 52 (1995).

<sup>101</sup> *Foreign Participation Order*, 12 FCC Rcd at 23896 ¶ 9, 23913 ¶ 50, & 23940 ¶¶ 111-112.

<sup>102</sup> *Id.*

<sup>103</sup> To determine a foreign entity's home market for purposes of the public interest determination under section 310(b)(4), the Commission will identify and balance the following factors: (1) the country of a foreign entity's incorporation, organization or charter, (2) the nationality of all investment principals, officers, and directors, (3) the country in which the world headquarters is located, (4) the country in which the majority of the tangible property, including production, transmission, billing, information, and control facilities, is located, and (5) the country from which the foreign entity derives the greatest sales and revenues from its operations. *Foreign Participation Order*, 12 FCC Rcd at 23941 ¶ 116 (citing *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, FCC 95-475, 11 FCC Rcd 3873, 3951 ¶ 207 (1995)). For examples of cases applying the five-factor "principal place of business" test, see *Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Assignor, and Telenor Satellite Mobile Services, Inc., and Telenor Satellite, Inc., Assignee, Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, Experimental Licenses, and Earth Station Licenses and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act*, Order and Authorization, FCC 01-369, 16 FCC Rcd 22897 (2001), *erratum*, DA 02-266, 17 FCC Rcd 2147 (Int'l Bur. 2002), *recon. denied*, FCC 02-207, 17 FCC Rcd 14030 (2002); *Space Station System Licensee, Inc., Assignor, and Iridium Constellation LLC, Assignee, et al.*, Memorandum Opinion, Order and Authorization, DA 02-307, 17 FCC Rcd 2271 (Int'l Bur. 2002).



36. In light of the policies adopted in the *Foreign Participation Order*, we begin our evaluation of MSV's indirect foreign ownership under section 310(b)(4) by calculating the foreign equity and voting interests in MSV LP, the U.S. parent of MSV. We then determine whether these foreign interests properly are ascribed to individuals or entities that are citizens of, or have their principal places of business in, WTO Member countries. The Commission stated, in the *Foreign Participation Order*, that it will deny an application if it finds that more than 25% of the ownership of an entity that controls a common carrier radio licensee is attributable to parties whose principal place(s) of business are in non-WTO Member countries that do not offer effective competitive opportunities to U.S. investors in the particular service sector in which the applicant seeks to compete in the U.S. market, unless other public interest considerations outweigh that finding.<sup>104</sup>

37. In *Wilner & Scheiner I* and its progeny, the Commission has set forth a standard for calculating both alien equity and voting interests held in a licensee or in the licensee's direct or indirect parent where such interests are held through intervening entities.<sup>105</sup> In calculating attributable alien equity interests in a parent company, the Commission uses a multiplier to dilute the percentage of each investor's equity interest in the parent company when those interests are held through intervening companies. The multiplier is applied to each link in the vertical ownership chain, regardless of whether any particular link in the chain represents a controlling interest in the company positioned in the next lower tier.<sup>106</sup> Once the *pro rata* equity interests of each alien investor are calculated, these interests then are aggregated to determine whether the sum of the interests exceeds the statutory benchmark.<sup>107</sup>

38. By contrast, in calculating alien voting interests in a parent company, the multiplier is not applied to any link in the vertical ownership chain that constitutes a controlling interest in the company positioned in the next lower tier.<sup>108</sup> In circumstances where voting interests in the U.S. parent of a common carrier licensee are held through intervening partnerships, the multiplier is not applied to dilute a general partnership interest or uninsulated limited partnership interest held by a foreign individual or entity. A general partner is considered to hold the same voting interest as the partnership holds in the company situated in the next lower tier of the vertical ownership chain. Similarly, in the absence of a specific demonstration that a limited partner effectively is insulated from active involvement in partnership affairs, a limited partner will be deemed to hold the same voting interest as the partnership holds in the company in the next lower tier of the vertical ownership chain.<sup>109</sup> Thus, when evaluating foreign voting interests in the U.S. parent company of a common carrier licensee, it is possible that multiple investors will be treated as holding the same voting interest in a U.S. parent company where the investment is held through multiple intervening holding companies or partnerships. Our purpose in identifying the citizenship of the specific individuals or entities that hold these interests is not to increase the aggregate level of foreign investment, but rather to determine whether any particular interest that a

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<sup>104</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23946 ¶ 131.

<sup>105</sup> See generally *Wilner & Scheiner I*, 103 F.C.C. 2d 511; *BBC License Subsidiary*, 10 FCC Rcd at 10973-74 ¶¶ 22-25.

<sup>106</sup> See *BBC License Subsidiary*, 10 FCC Rcd at 10973-74 ¶¶ 24-25.

<sup>107</sup> See *id.* at 10973-74 ¶ 25.

<sup>108</sup> See *id.* at 10973 ¶ 23; see also *Wilner & Scheiner I*, 103 F.C.C. 2d at 522 ¶ 19.

<sup>109</sup> See, e.g., *XO Communications, Inc., Applications for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act*, IB Docket No. 02-50, Memorandum Opinion, Order and Authorization, DA 02-2512, 17 FCC Rcd 19212, 19222 ¶ 24 (Int'l Bur., WTB & WCB 2002) ("*XO Communications*").

foreign investor proposes to acquire raises potential risks to competition or other public interest concerns, such as national security or law enforcement concerns.<sup>110</sup>

## 2. Attribution of Foreign Ownership Interests

39. As indicated in Section II.B. above, more than 99% of the limited partnership interests in MSV LP, a Delaware limited partnership, will be held by SkyTerra (58.8%), TMI (21.8%) and Motient (19.2%).<sup>111</sup> All of MSV LP's economic interests will be held by its limited partners,<sup>112</sup> and none will be held by MSV GP, a Delaware corporation that is MSV LP's general partner. All of the ownership interests in MSV GP will be held by SkyTerra (78.2%) and TMI (21.8%). As represented by the Applicants, SkyTerra will hold voting control of MSV LP by virtue of SkyTerra's majority voting interest in MSV GP.

40. Based on the information and representations submitted by the Applicants, and consistent with the foreign ownership case precedent discussed in Section III.E.1, we calculate below the foreign equity and voting interests that will be held in MSV LP, directly or indirectly, by or through its limited partners and its general partner, MSV GP. We find that TMI, a Canadian limited partnership, will hold a 21.8% equity interest and a 21.8% voting interest in MSV LP (based on TMI's 21.8% limited partnership interest in MSV LP and its 21.8% ownership interest in MSV GP). Turning next to SkyTerra, a publicly-traded Delaware corporation, we find that foreign individuals and entities will hold through SkyTerra an aggregate 13.23% equity interest and 22.00% voting interest in MSV LP (based on SkyTerra's 58.8% limited partnership interest in MSV LP and its controlling 78.2% ownership interest in MSV GP).<sup>113</sup> Our

<sup>110</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23940-41 ¶¶ 111-15.

<sup>111</sup> See *supra* paragraph 5. Less than one percent of the limited partnership interests in MSV LP will be held by investors not identified in the Application.

<sup>112</sup> See August 22 Foreign Ownership Supplement at 1. Because MSV GP will hold no equity interest in MSV LP, and given that MSV GP's owners (SkyTerra and TMI) are invested directly in MSV LP as limited partners, we find no reason in the circumstances of this case to inquire into MSV GP's capital structure, which is not discussed in the Application.

<sup>113</sup> SkyTerra's final calculations of its post-transaction foreign ownership are set forth in Attachment 1 of the August 31 Foreign Ownership Supplement. Supporting information also is contained in the August 22 Foreign Ownership Supplement. We calculate total foreign equity and voting interests in SkyTerra of 22.50% and 22.00%, respectively. Thus, foreign individuals and entities will hold, in the aggregate, a 13.23% equity interest (22.5% x 58.8%) and a 22.00% voting interest (22.0% x 100%) in MSV LP. Our calculations of the foreign equity and voting interests that will be held in SkyTerra by or through the Apollo Funds differ from the Applicants' calculations. Applicants calculate the foreign equity and voting interests that will be held in SkyTerra by or through the Apollo Funds as 1.53% and 1.62%, respectively. See August 31 Foreign Ownership Supplement, Attachment 1. We calculate an additional 2.12% foreign equity and voting interests attributable to the Apollo Funds, resulting in a total 3.65% foreign equity interest and a total 3.74% foreign voting interest that will be held in SkyTerra by or through the Apollo Funds. We calculate the additional 2.12% amount as follows. Three of the Apollo Funds are organized as limited liability companies: AIF/RRRR, LLC, AP/RM Acquisition, LLC, and ST/RRRR, LLC (collectively, the "Apollo LLC Funds"). The sole managing member of each of the Apollo LLC Funds is Apollo Investment Fund IV, L.P. See August 31 Foreign Ownership Supplement at 3. Apollo Investment Fund IV, L.P. holds equity interests in each of the Apollo LLC Funds as follows: 1.41% in AIF/RRRR, LLC; 94.91% in AP/RM Acquisition LLC; and 4.09% in ST/RRRR, LLC. See August 22 Foreign Ownership Supplement, Attachment 1 at 3-5. Applicants calculate that foreign entities hold an aggregate 2.11% limited partner interest in Apollo Investment Fund IV, L.P. See *id.*, Attachment 1 at 1. We accept that these foreign equity and voting interests represent passive investment in Apollo Investment Fund IV, L.P., which is controlled by its general partner, Apollo Advisors IV, L.P., which, in turn, is controlled indirectly by Mr. Leon Black. See Application, Exhibit C at 4-5. See also August 31 Foreign Ownership Supplement at 2. Consistent with our foreign ownership case precedent, we use the multiplier to calculate the following foreign equity and voting interests in the Apollo LLC Funds attributable to the 2.11% foreign equity and

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final calculation is for Motient, a publicly-traded Delaware corporation. After giving effect to the Initial Exchange, Motient will hold directly a 19.2% limited partnership interest in MSV LP but will hold no ownership interest in MSV LP's general partner, MSV GP. We find that foreign-held shares in Motient represent a 5.57% foreign equity interest in MSV LP (based on Motient's 19.2% limited partnership interest in MSV LP).<sup>114</sup>

41. Although Motient will not hold any ownership interest in MSV GP, the record indicates that foreign individuals or entities hold 17.3% of Motient's issued and outstanding shares of common stock. The beneficial owners of these shares are also entitled to vote the shares.<sup>115</sup> As noted, Motient will have no voting rights in MSV GP, and the Applicants state that all of MSV LP's voting rights in MSV, the licensee, will be exercised by MSV GP.<sup>116</sup> The Applicants, however, have not provided for the record organizational or other governance documents that would allow us to determine whether or to what extent any of MSV LP's limited partners have voting rights as to particular matters affecting their investments in MSV LP or whether any of the limited partners otherwise have the power to control or direct the policies of MSV LP, which is the sole member of MSV, the common carrier licensee in this case. In the absence of such evidence, we calculate a foreign voting interest based on Motient's 19.2% limited partnership interest in MSV LP. We apply the multiplier to calculate Motient's foreign voting interest in MSV LP, recognizing that Motient will hold directly only a minority share of the limited partnership interests in MSV LP and that SkyTerra, by contrast, will hold a majority of the equity interests in MSV LP and the voting interests in MSV GP.<sup>117</sup> On this basis, we find that foreign-held voting shares in Motient (17.3%) represent a 3.32% foreign voting interest in MSV LP (17.3% x 19.2%).

42. We next add the foreign equity and voting interests that will be held in MSV LP by and through its limited partners and its general partner, MSV GP. We calculate a total 40.60% foreign equity interest and a total 47.12% foreign voting interest. As discussed in paragraph 30 above, we previously approved indirect foreign ownership of MSV LP by TMI in the *MSV 2001 Order*. Specifically, the ruling "permits [MSV] to be owned indirectly by TMI and/or BCE Inc. and their Canadian shareholders in an amount up to and including an equity and/or voting interest of 40 percent."<sup>118</sup> Based on the information in the record of the instant proceeding, we find that TMI's 21.8% equity interest in MSV LP and its 21.8% voting interest in MSV LP's general partner, MSV GP, continue to be properly ascribed to Canada, a WTO Member country.<sup>119</sup> We also note that the Applicants have stated for the record that only 0.1% of BCE Inc. shares are held by non-U.S., non-Canadian shareholders.<sup>120</sup>

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voting interests in Apollo Investment Fund IV, L.P.: AIF/RRRR, LLC (0.03%) (2.11% x 1.41%); AP/RM Acquisition LLC (2.00%) (2.11% x 94.91%); and ST/RRRR, LLC (0.09%) (2.11% x 4.09%), totaling an additional 2.12% foreign equity and voting interests attributable to the Apollo Fund investment in SkyTerra.

<sup>114</sup> Motient's final calculations of its post-transaction foreign ownership are set forth in the August 31 Foreign Ownership Supplement. *See also* August 22 Foreign Ownership Supplement. We calculate the 5.57% foreign equity interest that will be held in MSV LP through Motient's 19.2% limited partnership interest in MSV LP by multiplying the percentage of foreign-held shares in Motient (29% of Motient's issued and outstanding common and preferred shares) by Motient's 19.2% limited partnership (*i.e.*, equity) interest in MSV LP (29% x 19.2% = 5.57%).

<sup>115</sup> *See* August 31 Foreign Ownership Supplement at 6.

<sup>116</sup> *Id.* at 2.

<sup>117</sup> *See* Application at 3.

<sup>118</sup> *MSV 2001 Order*, 16 FCC Rcd at 20477 ¶ 22.

<sup>119</sup> TMI is a limited partnership organized under the laws of Canada. Its general partner, TMI Communications Inc., is wholly owned by BCE Inc. Both TMI Communications Inc. and BCE Inc. are organized under the laws of

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43. We find that the majority of the remaining 18.80% foreign equity interests and 25.32% foreign voting interests that will be held in MSV LP, through SkyTerra and Motient, are also properly ascribed to WTO Member countries.<sup>121</sup> The total 25.32% foreign voting interest that will be held in MSV LP through SkyTerra and Motient, however, will exceed the 25% aggregate amount that we authorized in the *MSV 2001 Order* for unidentified foreign equity and/or voting interests in MSV.<sup>122</sup> Specifically, the ruling requires MSV to obtain Commission approval before foreign individuals or entities other than TMI and/or BCE Inc. and their Canadian shareholders acquire individually and/or in the aggregate a greater than 25% indirect equity and/or voting interest in MSV.<sup>123</sup> For purposes of calculating this additional aggregate amount, the ruling requires that MSV include *all* foreign equity and voting interests that it did not specifically identify in the record of the *MSV 2001* proceeding, including “foreign owners of Motient Corp., Columbia Capital, Spectrum Equity, MSV Investors, LLC and non-U.S., non-Canadian owners of TMI and BCE Inc.”<sup>124</sup> Thus, in order to comply with the 25% allowance for unidentified foreign investment, MSV must include the 18.80% foreign equity interests and the 25.32% foreign voting interests that will be held in MSV LP through SkyTerra and Motient. It must also include the 0.02% equity and voting interests that will be held indirectly in MSV LP by BCE Inc.’s non-U.S., non-Canadian shareholders.<sup>125</sup> Thus, we find that MSV will have, upon closing of the proposed transaction, 18.82% foreign equity interests and 25.34% foreign voting interests that we did not specifically approve in the *MSV 2001 Order*. Based upon these calculations, we find that the proposed transaction would not

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Canada. The sole limited partner of TMI is 3484203 Canada Inc., a Canadian company that is wholly owned by Telesat Canada. Telesat Canada also is organized under the laws of Canada and, like TMI, is wholly owned and controlled by BCE Inc. We find that each of these named entities have their principal places of business in Canada. See August 22 Foreign Ownership Supplement at 6-7; see also August 31 Foreign Ownership Supplement at 9.

<sup>120</sup> See August 22 Foreign Ownership Supplement at 6.

<sup>121</sup> Information submitted by the Applicants indicates that no more than 4.96% of the equity interests and no more than 4.99% of the voting interests in MSV LP would be held by individuals or entities from non-WTO Member countries. Applicants calculate that non-WTO investors account for 4.00% and 3.43% of the equity and voting interests in SkyTerra, respectively. See August 31 Foreign Ownership Supplement at 2-9 and Attachment 1. Thus, we calculate non-WTO equity and voting interests in MSV LP through SkyTerra as 2.35% (4.00% x 58.80%) and 3.43% (3.43% x 100%), respectively. According to the Applicants, no more than 13.60% of Motient’s equity (common and preferred stock) interests and no more than 8.10% of Motient’s voting (common stock) interests are held by non-WTO investors. See August 31 Foreign Ownership Supplement at 6-9. We therefore calculate non-WTO equity and voting interests in MSV LP through Motient as no more than 2.61% (13.60% x 19.20%) and 1.56% (8.10% x 19.20%), respectively. As discussed *supra* paragraph 41, we apply the multiplier to calculate Motient’s (but not SkyTerra’s) foreign voting interest in MSV LP.

<sup>122</sup> Generally, the section 310(b)(4) rulings we issue to common carrier licensees under the *Foreign Participation Order* approve the specific indirect equity and/or voting interests made by *named* foreign investors from WTO Member countries; and provide an allowance for an additional, aggregate 25% amount of unidentified foreign equity and/or voting interests, subject to certain limitations to ensure that no individual investor obtains an interest that exceeds 25% without prior Commission approval and that non-WTO Member investment does not exceed 25%. See *XO Communications*, 17 FCC Rcd at 19223 n.77.

<sup>123</sup> See *MSV 2001 Order*, 16 FCC Rcd at 20477 ¶ 22.

<sup>124</sup> *Id.*

<sup>125</sup> As explained in paragraph 42, Applicants state that only 0.1% of BCE Inc. shares are held by non-U.S., non-Canadian shareholders. Consistent with our foreign ownership case precedent, we apply the multiplier to calculate a 0.02% equity interest and a 0.02% voting interest in MSV LP attributable to these non-U.S., non-Canadian shareholders of BCE Inc., which will retain (through TMI) its indirect 21.8% limited partnership (equity) interest in MSV LP (0.1% x 21.8%) and its 21.8% non-controlling ownership (voting) interest in MSV GP (0.1% x 21.8%).

comport with MSV's existing foreign ownership ruling because MSV's indirect foreign voting interests will exceed the foreign voting interests permitted under the existing foreign ownership ruling.<sup>126</sup>

44. We find, however, that it would not serve the public interest to deny the transfer of control of the licenses and authorizations held by MSV because of the indirect foreign equity and voting interests that will be held in MSV LP. Accordingly, on our own motion, we modify MSV's foreign ownership ruling based on the foregoing analysis of the foreign equity and voting interests that will be held in MSV indirectly as a result of the proposed transaction. The record indicates that the vast majority of the foreign equity and voting interests that will be held indirectly in MSV are properly ascribed to WTO Member countries. MSV is therefore entitled to a rebuttable presumption that its indirect foreign ownership would not pose a risk to competition in the U.S. market. We find no evidence in the record that rebuts this presumption and, as we explain in Section III.D., we find no basis to conclude that the proposed transaction is likely to harm competition.<sup>127</sup> We also determine in Section III.F. below that the Executive Branch Agreement among the Executive Branch Entities and the Applicants addresses any national security and law enforcement concerns.<sup>128</sup>

45. The ruling that we issue to MSV in this transfer of control proceeding approves specifically the 2.15% foreign equity interest and the 3.74% foreign voting interest that will be held by the following Apollo Funds indirectly in MSV through SkyTerra:<sup>129</sup> Apollo Investment Fund IV, L.P.; Apollo Overseas Partners IV, L.P.; AP/RM Acquisition, LLC; AIF/RRRR, LLC; and ST/RRRR, LLC. Based on the information submitted by the Applicants, we find that all of this investment is properly ascribed to WTO Member countries.<sup>130</sup> Our specific approval of the Apollo Fund foreign interests will enable MSV to comply with the additional, aggregate 25% amount that the foreign ownership ruling allows for unidentified foreign equity and/or voting interests.<sup>131</sup> The ruling below also maintains the approval we granted in the *MSV 2001 Order* for indirect foreign investment by TMI and/or BCE Inc. and their Canadian shareholders up to and including an equity and/or voting interest of 40%. As noted, TMI will

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<sup>126</sup> While in this case the Applicants stated they did not need a declaratory ruling, we find above that the Applicants' post-transaction foreign voting interests would exceed, slightly, the parameters of the ruling in the *MSV 2001 Order* under which the Applicants claimed they remained in compliance. We make this finding based upon the record, and based upon our calculation of the total foreign equity and voting interests in MSV LP through TMI, SkyTerra and Motient. All common carrier radio licensees and their parent companies should err on the side of caution in calculating and making statements about foreign ownership. Applicants should consult the *Foreign Ownership Guidelines* before filing applications, provide all requisite calculations, and request a properly-supported declaratory ruling. See *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, DA 04-3610, 19 FCC Rcd 22612 (Int'l Bur. 2004), *erratum*, DA 06-1242, 21 FCC Rcd 6484 (Int'l Bur. 2006) (*Foreign Ownership Guidelines*).

<sup>127</sup> See *supra* paragraphs 27-29.

<sup>128</sup> See *infra* paragraphs 47-49.

<sup>129</sup> See *supra* footnote 113 for the calculation of the 3.65% foreign equity interests and the 3.74% foreign voting interests that will be held in SkyTerra by or through the Apollo Funds. As the next step, we calculate a 2.15% foreign equity interest and a 3.74% foreign voting interest that will be held indirectly in MSV through the Apollo Fund investments in SkyTerra. For equity, we calculate as follows: we multiply the foreign equity interest that will be held in SkyTerra by and through the Apollo Funds (3.65%) by SkyTerra's proposed equity interest in MSV LP (58.80%) (3.65% x 58.80% = 2.15%). Consistent with our foreign ownership case precedent, we do not apply the multiplier in calculating the foreign voting interest that will be held indirectly in MSV through the Apollo Fund investments in SkyTerra because SkyTerra will have voting control of MSV LP. Thus, we calculate a 3.74% foreign voting interest that will be held indirectly in MSV through the Apollo Fund investments in SkyTerra (3.74% x 100% = 3.74%).

<sup>130</sup> See August 31 Foreign Ownership, Attachment 1; August 22 Foreign Ownership Supplement, Attachment 1.

<sup>131</sup> See *infra* paragraph 46; see also *supra* footnote 122.

hold only an indirect 21.8% equity and voting interest in MSV. We find no basis on this record, however, to reduce the level of investment previously approved for TMI in the *MSV 2001 Order*.

### 3. Declaratory Ruling

46. Accordingly, this declaratory ruling permits MSV to be owned indirectly by TMI and/or BCE Inc. and their Canadian shareholders (up to and including an equity and/or voting interest of 40%); and the named Apollo Funds and their foreign limited partners and members (up to and including a 2.15% equity interest and a 3.74% voting interest). MSV may accept up to and including an additional aggregate 25% indirect foreign equity and/or voting interests from these foreign investors and other foreign investors without seeking prior Commission approval under section 310(b)(4), subject to three conditions. First, for purposes of calculating the aggregate 25% amount, MSV shall include non-U.S., non-Canadian owners of TMI and BCE Inc., additional foreign equity and/or voting interests acquired by or through the named Apollo Funds; foreign equity and/or voting interests held through Motient and SkyTerra, and any other foreign equity and/or voting interests acquired indirectly in MSV through MSV LP. Second, MSV shall obtain prior Commission approval before any foreign individual or entity other than TMI or BCE (or their Canadian holding companies) acquires individually an indirect equity and/or voting interest in MSV that exceeds 25%. Third, MSV shall obtain prior Commission approval before its direct or indirect equity and/or voting interests from non-WTO Member countries exceeds 25%. In calculating the 25% amount for non-WTO Member investment, MSV shall include non-WTO Member investment from any source, including interests held through TMI, the Apollo Funds, SkyTerra and Motient. We emphasize that, as a Commission licensee, MSV has an affirmative duty to continue to monitor its foreign equity and voting interests and to calculate these interests consistent with the attribution principles enunciated by the Commission.<sup>132</sup>

#### F. National Security, Law Enforcement, Foreign Policy and Trade Concerns

47. When analyzing a transfer of control or assignment application in which foreign investment is involved, we also consider any national security, law enforcement, foreign policy, or trade policy concerns raised by the Executive Branch.<sup>133</sup> As noted above, the Executive Branch Agreement among the Executive Branch Entities and the Applicants addresses Executive Branch national security, law enforcement, and public safety concerns about the MSV system.<sup>134</sup>

48. In the Executive Branch Agreement, SkyTerra and MSV agree that, following consummation of the proposed transfer of control of MSV to SkyTerra, SkyTerra and MSV will continue to abide and be bound by, and to comply with, the terms, conditions, and requirements of an Agreement, dated November 14, 2001, by and among MSV, Motient, TMI, the DOJ and the FBI.<sup>135</sup> The Executive Branch Petition states that the Executive Branch Entities have taken the position that their ability to satisfy their obligations to protect the national security, enforce the laws, and preserve the safety of the public could be impaired by transactions in which foreign entities will own or operate a part of the U.S. telecommunications system, or in which foreign-located facilities will be used to provide domestic

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<sup>132</sup> See, e.g., *Foreign Ownership Guidelines*, 19 FCC Rcd 22612, *erratum*, 21 FCC Rcd 6484.

<sup>133</sup> *Foreign Participation Order*, 12 FCC Rcd at 23918 ¶ 59; *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, IB Docket No. 96-111, Report and Order, FCC 97-399, 12 FCC Rcd 24094, 24170 ¶ 178 (1997).

<sup>134</sup> See *supra* paragraph 9.

<sup>135</sup> The November 14, 2001 Agreement by and among MSV, Motient, TMI, the DOJ and the FBI is attached to the *MSV 2001 Order*, 16 FCC Rcd at 20483-20501.

telecommunications services to U.S. customers.<sup>136</sup> After discussions with the Applicants, the Executive Branch Entities have concluded that the commitments set forth in the Executive Branch Agreement address their concerns, and therefore asked the Commission to condition the grant on the Applicant's compliance with the commitments set forth in the letter.<sup>137</sup>

49. In assessing the public interest, we take into account the record and accord deference to Executive Branch expertise on national security and law enforcement issues.<sup>138</sup> As the Commission stated in the *Foreign Participation Order*, foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch.<sup>139</sup> In accordance with the request of the Executive Branch Entities, in the absence of any objection from the Applicants, and given the discussion above, we condition our grant of the Application on Applicant's compliance with the commitments set forth in the Executive Branch Agreement. We include the Executive Branch Petition and the Executive Branch Agreement as Appendix B to this *Memorandum Opinion and Order and Declaratory Ruling*.

#### IV. CONCLUSION

50. Upon review of the Application and the record in this proceeding, we find that, based on the conditions specified below, grant of the Application for consent to transfer control of Commission licenses and authorizations held by MSV from Motient to SkyTerra will serve the public interest. Further, based on the foregoing findings and pursuant to section 310(b)(4) of the Act and the Commission's precedent for indirect investment by WTO Members in U.S. common carrier licensees, we conclude that it would not serve the public interest to prohibit the indirect foreign ownership of MSV, subject to the limitations specified in paragraph 46 above. We condition grant of the Application on Applicant's compliance with commitments to the DOJ, FBI and DHS as specified below.

#### V. ORDERING CLAUSES

51. Accordingly, having reviewed the Application, the comments, and the record in this matter, IT IS ORDERED that, pursuant to sections 4(i) and (j), 214(a), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 309, 310(d), the Application for consent to transfer of control of the licenses and authorizations identified in Appendix A from Motient Corporation and subsidiaries to SkyTerra Communications, Inc. IS GRANTED.

52. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 309, 310(b), 310(d), the Petition to Adopt Conditions to Authorizations and Licenses filed jointly by the U.S. Department of Justice, the Federal Bureau of Investigation, and the U.S. Department of Homeland Security on August 25, 2006 IS GRANTED. Grant of the Application is conditioned upon compliance with the commitments set forth in the Executive Branch Agreement, attached to this *Memorandum Opinion and Order and Declaratory Ruling* as Appendix B.

53. IT IS FURTHER ORDERED that, pursuant to section 310(b)(4) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(b)(4), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2,

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<sup>136</sup> Executive Branch Petition at 2.

<sup>137</sup> *Id.*

<sup>138</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23919-21 ¶¶ 61-66.

<sup>139</sup> *Id.* at 23919 ¶ 62.

the foreign ownership ruling issued to Mobile Satellite Ventures Subsidiary LLC in *Motient Services Inc. and TMI Communications and Company, LP, Assignors and Mobile Satellite Ventures Subsidiary LLC, Assignee*, Order and Authorization, DA 01-2732, 16 FCC Rcd 20469, 20477 ¶ 22 (Int'l Bur. 2001) IS MODIFIED to the extent specified in this *Memorandum Opinion and Order and Declaratory Ruling*.

54. IT IS FURTHER ORDERED that Highland Capital's Motion to Accept Late-Filed Comments IS GRANTED and Motient's Opposition to that Motion is DENIED.

55. This *Memorandum Opinion and Order and Declaratory Ruling* is issued pursuant to sections 0.241, 0.261 and 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. §§ 0.241, 0.261, 0.291, and is effective upon release. Petitions for reconsideration under section 1.106 or applications for review under section 1.115 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of the date of the release of this *Memorandum Opinion and Order and Declaratory Ruling*. See 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

John V. Giusti  
Acting Chief, International Bureau

Thomas Navin  
Chief, Wireline Competition Bureau

Julius P. Knapp  
Acting Chief, Office of Engineering and Technology



## APPENDIX A

## SECTION 214 AUTHORIZATIONS

## A. International

<u>File No.</u>	<u>Authorization Holder</u>	<u>Authorization Number</u>
ITC-T/C-20060518-00283	Mobile Satellite Ventures Subsidiary LLC	ITC-214-19950314-00022 ITC-214-19951215-00023

## B. Domestic

<u>Docket No.</u>	<u>Authorization Holder</u>
WC Docket No. 06-106	Mobile Satellite Ventures Subsidiary LLC

## SECTION 310(D) AUTHORIZATIONS

## A. Part 25-Satellite Earth Station Authorizations

<u>File No.</u>	<u>Licensee</u>	<u>Call Sign</u>
SES-T/C-20060517-00828	Mobile Satellite Ventures Subsidiary LLC	E930124 E940374
SES-T/C-20060517-00829		E930367 E980179 E990133

## B. Part 25-Satellite Space Station Authorizations

<u>File No.</u>	<u>Licensee</u>	<u>Call Sign</u>
SAT-T/C-20060517-00062	Mobile Satellite Ventures Subsidiary LLC	AMSC-1 S2358

PART 5-EXPERIMENTAL RADIO SERVICE (OTHER THAN BROADCAST)  
AUTHORIZATION

<u>File No.</u>	<u>Licensee</u>	<u>Call Sign</u>
0020-EX-TC-2006	Mobile Satellite Ventures Subsidiary LLC	WD2XNL

**APPENDIX B**

**[Executive Branch Petition and Executive Branch Agreement]**