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June 18, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-B204
Washington, D.C. 20554

Re: *Ex Parte* Presentation
File Nos. 47-SAT-WAIV-97; 548-SSA-97(50); 1281-DSE-P/L-96 (Call Sign E960327); ITC-95-341; IB Docket No. 96-111, CC Docket No. 93-23, RM-7931; CC Docket No. 87-75; IB Docket No. 95-41; 730-DSE-P/L-98; 647-DSE-P/L-98; 1217-SSA-98

Dear Ms. Salas:

NTIA recently wrote to the FCC concerning the provision of priority and preemptive access for AMS(R)S by entities proposing to use foreign-licensed satellites to serve land-mobile customers in the United States. Letter from William T. Hatch, Acting Associate Administrator, Office of Spectrum Management, to Roderick K. Porter, Acting Chief, International Bureau (May 27, 1999). NTIA suggests two possible options: (i) that the foreign-licensed system operate on a secondary basis if it cannot provide priority and preemptive access to AMS(R)S, or (ii) that the foreign licensed system make the same commitment that AMSC has made to meeting the Commission's priority and preemptive access requirement.

AMSC's position concerning the letter can be summarized as follows:

OPTION 1. Permitting TMI to operate on a secondary basis is contrary to the FCC's rules for MSS operation in the L-band. The Commission has stated that as "a condition of the license, we will require any MSS system to be capable of providing priority access to AMSS(R)S." Second Report & Order, 2 FCC Rcd 485, para. 28 (1987).

The predicate upon which the proposal for secondary operation is based – intersystem preemption – is unworkable and contrary to the long-held U.S. international position. As NTIA recognizes, intersystem preemption is not practical (NTIA letter, footnote 3). Mechanisms for

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choosing and preempting from among the traffic of multiple systems is technically problematic and no administration would cede control of its system to the demands of another system. It is for these reasons that the U.S. position at every ITU spectrum allocation conference since 1992 has been an explicit and unequivocal opposition to intersystem preemption.

Thus, permitting TMI to operate on a secondary basis would result in TMI having superior service to that of AMSC. Each AMSC customer is subject to a service preemption requirement and each AMSC contract includes a provision that, pursuant to U.S. regulations, the customer's service can and will be preempted on a real-time basis without notice. If TMI operates on a secondary basis, its customers will have the luxury of using a service that is effectively not subject to real-time preemption, and TMI will be able to claim that on this basis its service is superior to that of AMSC. This will result in TMI getting more customers, which will have the perverse effect of hurting AMSC's ability to gain access to additional spectrum in the annual process of negotiating with other North American MSS system operators for access to spectrum.

OPTION 2. Requiring TMI to comply with all AMS(R)S requirements requires careful scrutiny. So far, TMI has shown a remarkable and cavalier willingness to claim that it meets US requirements without any showing that it understands the technical, operational, or business ramifications. AMSC Reply to Satcom, pp. 16-19 (June 4, 1998) (attached); AMSC Reply to TMI, pp. 15-17 (June 29, 1998) (attached); *see also* Letter from Office of the Deputy Attorney General, Department of Justice, to FCC Chairman Kennard (June 14, 1999) (describing TMI's lack of cooperation in negotiations with U.S. law enforcement officials). The Commission's review must include compelling evidence that TMI's ability to meet U.S. obligations for providing priority and preemptive access for aviation safety services are consistent with Canadian regulations, because the Canadian standard is not as stringent. This is similar to the issue the Justice Department raised concerning TMI's apparent inability, under Canadian law, to comply with the requirements of U.S. law enforcement. Before moving forward, TMI must explain and demonstrate how it will implement a system that is capable of preempting on a real-time basis all lower priority traffic. The traffic to be preempted must include all lower priority traffic, not only that of U.S. customers. To limit preemption to U.S. customers would result in TMI having an advantage over AMSC, which must make its entire system capacity available to priority safety services. If nonetheless the Commission chooses to permit TMI to preempt only U.S. traffic, then TMI must show how technically it is going to distinguish the spectrum used by its U.S. customers from that of its other customers and how it is going to make that "U.S. spectrum" available on a real-time preemptible basis. Also, TMI should be required to revise its customer and reseller contracts, and have its resellers revise their contracts, to reflect its new obligation to provide priority and preemptive access.

Finally, the NTIA letter acknowledges that the consequence of licensing TMI "could well be a reduction of spectrum for the U.S. operator," providing further support for AMSC's point that unless and until AMSC is able to coordinate access to 10 MHz of spectrum, the licensing of

additional systems is contrary to AMSC's L-band authorization. This acknowledgment is consistent with the argument that TMI's own parent corporation made in trying to keep Inmarsat from providing service in Canada. *See* Comments of Telesat Canada in response to Canada Gazette Notice No. DGTP-006-98, pp. 14-15 (June 30, 1998) (attached to AMSC July 16, 1998 *ex parte* filing). All of this highlights the mutual exclusivity that exists between AMSC's system and that of TMI. With the continued shortage of spectrum in the L-band, licensing TMI to provide land mobile service in the United States plainly has an adverse impact on AMSC's ability to coordinate access to its licensed spectrum.

Very truly yours,

Lon C. Levin

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Moreover, while AMSC appreciates the flexibility that the Commission provided in its *DISCO I* decision[25] for domestic satellite operators to provide service outside the United States, AMSC recognizes that its primary mission and responsibility is to provide U.S. service. AMSC is prepared to consider limiting the amount of service it provides to customers whose needs are for service outside the United States. In particular, if necessary to preserve its spectrum access and facilitate coordination, AMSC is willing to forego providing service in Canada, in order to maintain reciprocity.

SatCom also argues that AMSC's plans to temporarily consolidate its space segment with TMI undercuts AMSC's spectrum concerns. The consolidation, however, is only temporary; AMSC may operate on both satellites at some point in the next few years, and it is planning to launch a second-generation satellite that would operate in these same bands. Moreover, even with the consolidation, AMSC has more power on half a satellite than it has spectrum available through the present coordination agreement.

B. SatCom's attempt to address the Commission's requirements for priority and preemptive access for aeronautical safety communications shows that SatCom and TMI do not understand U.S. requirements and cannot meet them

SatCom's defense of its claim that it meets the Commission's priority and preemptive access requirements only confirms that SatCom and TMI do not take seriously these longstanding and fundamental Commission requirements and are not prepared or able to meet them. The entire defense consists of a single affidavit supplied by TMI that is little more than two pages and contains only conclusory, self-serving statements without any substantiation or

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[25] Report and Order, Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 11 FCC Rcd 2429 (1996).

detail.[26] This contrasts with the Chief Scientist Reports that AMSC has submitted to the Commission, which contain extensive and detailed discussions of AMSC's capability.[27] It is particularly appalling that TMI claims without any support that it has even greater capability than AMSC to handle preemption requirements. Burrows Affidavit at 2. AMSC has spent hundreds of hours and millions of dollars to meet this requirement, including ongoing coordination with the U.S. Federal Aviation Administration. TMI should not be able to claim with a mere one-sentence statement to have met or exceeded the results of AMSC's extensive and documented effort.

The laxity of TMI's analysis is further evidenced by two obvious flaws in its brief attempt to describe what it claims is the "similarity" between U.S. and Canadian government requirements with respect to priority and preemptive access. First, TMI fails to grasp that while the Canadian requirement for priority and preemptive access for AMS(R)S is limited to the frequencies that are allocated internationally to AMS(R)S on a primary basis, the U.S. requirement applies to the entire upper L-band. Thus, on its face, the Canadian government requirements are not as stringent as those of the United States. The second flaw is TMI's assertion that the U.S. requirements are equivalent to those established by ITU RR 729A, which is limited to the preemption of aircraft public correspondence traffic in order to meet the needs of higher priority aviation traffic. In fact, the U.S. requirements are more comprehensive than what TMI understands to be the Canadian requirements. The U.S. requirements involve preemption of

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26/ SatCom Opposition, Exhibit 2, Affidavit of Michael Burrows ("Burrows Affidavit").

27/ Report of AMSC's Chief Scientist on Matters Involving the Provision of Aeronautical Mobile Satellite (R) Service (June 4, 1990); Report to FCC by W.B. Garner, Chief Scientist, AMSC Subsidiary Corporation, AMS(R)S Resource Provisioning and Interference Management in the AMSC Satellite System, DOC AMSS-92-01, November 1992 (November 24, 1992).

all traffic, including land mobile traffic, to meet the needs of AMS(R)S communications. How can SatCom and TMI claim to be able to meet requirements that they so obviously do not even understand?[28]

TMI claims that an unnamed official at Industry Canada has "verbally confirmed by telephone" that TMI's compliance with U.S. preemption requirements "would not be inconsistent with TMI's Canadian license." In addition to being cavalier in its expectation that the Commission will consider such hearsay to be sufficient evidence on so important an issue, this statement completely begs the many questions related to the application of the Commission's priority and preemptive access requirement to carriers providing service through foreign-licensed space segment providers that are not subject to the Commission's jurisdiction. Putting aside for the moment the unanswered questions about TMI's technical capability, SatCom does not indicate how much of TMI's capacity will be available to a U.S. aeronautical safety service provider, or adequately explain how it will comply with both the Canadian and U.S. priority and preemptive access requirements simultaneously. SatCom does not describe how, if necessary, TMI would divide its capacity between Canadian and U.S. aeronautical safety communications services or whether such division would be consistent with either the U.S. or Canadian access requirements. These questions are complicated by TMI's inability to distinguish between U.S. and Canadian traffic, and to determine how much of its capacity is being used within each of these jurisdictions at any given time. Clearly, these issues must be settled before any application to use a foreign-licensed system in the L-band can be processed, and they clearly are not resolved by the 'verbal confirmation' from an Industry Canada official that TMI's compliance with the

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[28] It is telling that TMI qualifies its statements on priority and preemptive access by saying that it can meet any "reasonable" FCC preemption requirements. Who will determine what FCC requirements are reasonable, SatCom? TMI? Industry Canada?

U.S. requirement would not be "inconsistent" with its Canadian license.

SatCom's failure highlights the need for the Commission to conduct a rulemaking on these issues before it considers granting any applications to use a foreign-licensed system in this band.

III. SatCom Fails to Demonstrate That It Meets Other Key Commission Requirements

The Commission's *DISCO II* policy requires a foreign-licensed satellite operator, before being licensed domestically, to demonstrate that it meets all technical and operational requirements applicable to U.S. satellite operators in that particular satellite service, and describe how it intends to achieve such compliance. In its Opposition, SatCom again fails to demonstrate that it complies with several key regulatory and operational requirements applicable to AMSC.

It is apparent from SatCom's failure to come to terms with these issues that it may be necessary for the Commission to undertake a comprehensive rulemaking, prior to any licensing, to address whether and how MSS service providers using foreign-licensed systems might comply with the Commission's rules.

A. Access to emergency communications

In its Opposition, SatCom fails to demonstrate that it has any emergency communication capability whatsoever. SatCom arrogantly dismisses this issue, stating that the Commission has imposed no emergency communications requirement on MSS providers and effectively conceding that it has no present ability to provide such services. SatCom Opposition at 13-14.

SatCom ignores the context for the Commission's 1996 decision on the "Enhanced 911" requirements.[29] In that proceeding AMSC requested an exemption from proposed requirements

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[29] Report and Order, Revision of the Commission's Rules to Ensure Compatibility with (continued...)

B. Priority and preemptive access

In the SatCom and TMI application proceedings, AMSC has demonstrated the inadequacy of TMI's efforts to show that it complies with the Commission's requirements for priority and preemptive access of aeronautical safety communications.[25] TMI's first attempt was a two-and-a-half page affidavit that contained only conclusory, self-serving statements regarding its technical capability and avoided key issues of multi-jurisdictional compliance.[26] TMI failed to grasp that the U.S. requirement applies to the entire upper L-band, not just those frequencies that are allocated internationally to AMS(R)S on a primary basis, and cited an ITU requirement, ITU RR 729A, which is limited to the preemption of aircraft public correspondence traffic in order to meet the needs of higher priority aviation traffic. Burrows Declaration at 2-3. As evidence of TMI's legal ability to comply with U.S. regulations, TMI felt that it was sufficient to merely note an Industry Canada official's "verbal confirmation" that TMI's compliance with U.S. preemption requirements "would not be inconsistent with TMI's Canadian license." Burrows Declaration at 3.

TMI's Opposition includes a new, more extensive, but still defective, affidavit that claims that TMI is in fact aware that the U.S. priority and preemptive access requirements apply to the entire upper L-band, and that these requirements apply to all types of MSS traffic, including land mobile traffic. Declaration of J. Gordon Fraser ("Fraser Declaration") at 1. These new and contradictory assertions, however, beg important questions about the credibility of TMI's earlier response. How is the Commission to know which response is correct?

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[24] (...continued)
States.

[25] Petition at 11-13; Reply at 16-19.

[26] SatCom Opposition, Exhibit 2, Declaration of Michael Burrows ("Burrows Declaration").

Moreover, while TMI's new exhibit does includes a more detailed description of its system for priority and preemptive access, this technical showing is still deficient. TMI still does not indicate how quickly it can execute the steps necessary to provide priority and preemptive access over its network.[27] In contrast, AMSC has stated that it can provide access to its reserve pool of AMS(R)S frequencies instantly and can preempt all calls on its network and transfer those channels to AMS(R)S use within 30 seconds. Petition at 5, n. 7. Speed of access is a critical part of the priority and preemptive access framework, and the technical capability that TMI describes is meaningless if it cannot execute these processes with sufficient speed.

TMI also remains vague as to how it plans to divide its capacity between Canadian and U.S. aeronautical safety communications services, if necessary, and whether such division would be consistent with either the U.S. or Canadian access requirements. TMI states that the spectrum it would use in the upper L-band would be "clearly identified by frequency to the FCC and which spectrum would be preemptible for AMS(R)S services in the USA." Fraser Declaration at 5. The precise meaning of this statement is ambiguous, but it appears that TMI intends to set aside a portion of its coordinated frequencies for U.S. traffic and limit aeronautical safety access to these frequencies. Putting aside the question of how TMI will segregate its traffic,[28] any such segregation is antithetical to the U.S. policy and the U.S. allocation scheme, which holds that all of a system's upper L-band spectrum must be preemptible, not just spectrum used by U.S. customers.

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[27] There has been no agreement on how much time an MSS system operator is allowed to respond to frequency requests under these various conditions.

[28] In its Opposition, TMI fails to explain (i) how it will even define what constitutes "U.S. traffic," given its inability to determine the location of mobile terminals operating over its system, and (ii) how, on a technical basis, it would limit that U.S. traffic to a particular block of frequencies.

TMI also fails to establish that compliance with U.S. requirements would be consistent with Canadian policy. Any Canadian requirement other than compliance with the largely irrelevant ITU RR 729A is completely unspecified in TMI's Opposition: all we have is TMI's statement that it has "determined" that its compliance with U.S. priority and preemptive access requirements would

> not be contrary to its Canadian license, as AMSC wrongly implies, because TMI's license also requires it to respect the provisions of the ITU's Radio Regulations, which provide priority for certain aeronautical and maritime safety communications.

TMI Opposition at 13.[29] As AMSC has previously shown, the ITU's priority and preemptive access requirements are much less comprehensive than the U.S. requirements, and, as a result, the fact that Canadian licensees are subject to these ITU rules does not mean that application of the U.S. requirements to Canadian-licensed systems will be consistent with Canadian policy.[30]

C. CALEA

In its Petition, AMSC pointed out that TMI's application does not address the requirements contained in the Communications Assistance for Law Enforcement Act ("CALEA"), which requires that telecommunications carriers ensure that law enforcement agencies can intercept certain communications transmitted over their networks and are able to access certain "call-identifying" information relating to communications over these networks. 47 U.S.C. 1001 *et seq.* In particular, AMSC questioned TMI's obvious failure to confront law

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[29] In his declaration, Gordon Fraser states in a conclusory fashion that TMI's described "designation and preemption of spectrum would be consistent with the Canadian government policies," and provides no legal support at all for this proposition. Fraser Declaration at 5.

[30] For instance, would the preemption of crucial land mobile safety communications by an AMS(R)S system on upper L-band frequencies outside the ITU requirement comply with Canadian policy?