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

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

PETITION TO DISMISS OR DENY

GWTP Investments, L.P.

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PETITION TO DISMISS OR DENY

GWTP Investments, L.P. ("GWTP"), by its attorneys and pursuant to the Commission's May 26, 2004 *Public Notice*,[1] as amended June 9, 2004,[2] hereby petitions to dismiss or deny the above-referenced applications (the "Applications") seeking the Commission's approval of the assignment of licenses held by Verestar, Inc. (Debtor-in-Possession), Verestar Networks, Inc. (Debtor-in-Possession) (collectively, "Verestar") to SES AMERICOM, Inc. ("SES Americom"), a wholly-owned subsidiary of SES Global, Inc. ("SES Global") (Verestar, SES Americom and SES Global, collectively, the "Applicants"). GWTP is a party in interest with standing to submit this Petition.

I. Introduction and Summary

The Commission cannot grant the Applications as presently cast. SES Americom is wholly owned and controlled by SES Global, which is incorporated in Luxembourg and

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[1] *Public Notice,* Verestar Inc. (Debtor-in-Possession), Verestar Networks, Inc. (Debtor-in-Possession) and SES Americom, Inc. Seek FCC Consent to Assign and/or Transfer Control of Licenses and Authorizations, DA 04-1502, IB Docket No. 04-174 (rel. May 26, 2004) ("*First Public Notice*").

[2] *Public Notice*, Verestar Inc. (Debtor-in-Possession), Verestar Networks, Inc. (Debtor-in-Possession) and SES Americom, Inc. Seek FCC Consent to Assign and/or Transfer Control of Licenses and Authorizations. DA 04-1696, IB Docket No. 04-174 (rel. Jun. 9, 2004).

itself controlled by foreign entities, including the governments of Luxembourg and Germany.[3] As discussed in detail below, the Commission's consent to the proposed transaction would adversely affect GWTP and fail to serve the public interest.

At the very least, the Commission must review in detail the foreign ownership and control and competitive impact issues raised by the proposed transaction. Because the presumption established in the Commission's *Foreign Participation Order*[4] does not apply in this circumstance, the Commission must specifically evaluate the appropriateness of the assignment of Verestar's licenses to SES Americom. In addition, the Commission must specifically consider, in its public interest analysis, the competitive, national security and law enforcement implications of the proposed transaction.

To this end, the Applicants must affirmatively prove to the Commission that the transaction will promote the public interest and enhance competition. The record does not show that the Applicants have met this burden. The Commission, in concert with the Executive Branch, cannot proceed without a record demonstrating conclusively that the assignment of licenses to a foreign entity will not create an opportunity for those licenses to be used to contravene the Commission's policies and the laws of the United States.

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[3] *First Public Notice* at 2.

[4] In the *Foreign Participation Order,* the Commission established, as a factor in its public interest analysis, the rebuttable presumption that applications for Section 214 authority, applications to land and operate submarine cables, and applications for common carrier licenses filed by carriers from World Trade Organization ("WTO") member countries would not pose competitive concerns that would justify denial of an application. *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration,* 12 FCC Rcd 23891, 23913, ¶50 (1997) (*"Foreign Participation Order"*).

II. Background

A. The Parties

Verestar, Inc., a wholly owned subsidiary of American Tower Corp., provides domestic and international communications services by reselling transponder space capacity and providing teleport (earth station uplink/downlink) services.[5] Verestar is based in Fairfax, Virginia and operates four teleports in the United States, in Holmdel, New Jersey; Alexandria, Virginia; Brewster, Washington; and Cedar Hill, Texas.[6] Verestar also owns Verestar, A.G. a Swiss Corporation, which operates a teleport in Leuk, Switzerland, and serves Europe, Africa and the Middle East.[7] Verestar provides international telecommunications services to several U.S. Government agencies, news backhaul and distribution for television networks and provides commercial service to various maritime mobile, fixed broadband, international telecommunications and Internet service provider companies.[8]

SES Americom, Inc. is a Delaware corporation with offices in Princeton, New Jersey.[9] SES GLOBAL S.A., the parent of SES Americom, has several subsidiaries that have interests in satellite service providers in other parts of the world and that provide satellite services in the Americas, Asia, Europe and Africa.[10] SES Global is a foreign

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[5] American Tower Corporation, SEC Form 10-K, Dec. 31, 2003, at 4.

[6] SES Americom Signs Deal to Acquire Verestar Assets Out of Bankruptcy, Verestar Press Release, Apr. 2, 2004. http://www.verestar.com.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Application of SES Americom. Inc. and Verestar, Inc. (DID), File No. SES-ASG-20040503-00672, Exhibit A, FCC Form 312, at 2.

owned and operated company. Non-U.S. citizens hold approximately 70% of the economic interest and approximately 80% of the voting power in SES Global.[11] The two largest shareholders, which in combination hold 29.27% of the economic interest and 45% of the voting power in SES Global, are:

- The State of Luxembourg, which directly and through two wholly government-owned institutions, the Banque et Caisse d'Epargne de l'Etat and the Sociététe Nationale de Crédit et d'Investissement, holds 16.67% of the economic interest and 34.9% of the voting power in SES Global;[12] and

- Deutsche Telekom, A.G. ("DT"), which indirectly holds 12.6% of the economic interest and 10.1% of the voting power in SES Global.[13] The German government owns 42.77% of DT.[14]

SES Americom and its affiliates provide domestic and international satellite services through geosynchronous satellites and supporting network facilities.[15] The company's primary business is providing bulk transponder capacity.[16] SES Americom's

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[11] Application of SES Americom. Inc. and Verestar, Inc. (DID), File No. SES-ASG-20040503-00672, Exhibit A, FCC Form 312, at 2. *See also* In the Matter of SES Americom, Inc. Applications for Modification of Fixed-Satellite Service Space Station Licenses and Columbia Communications Corporation, Application for Modification of Fixed-Satellite Service Space Station Licenses, File Nos. SAT-MOD-20021108-00204, SAT-MOD-20021108-00205, SAT-MOD-20021108-00206, SAT-MOD-20021108-00207, SAT-MOD-20021108-00208, SAT-MOD-20021108-00209, SAT-MOD-20021108-00210, SAT-MOD-20021108-00211, SAT-AMD-20021108-00215, SAT-STA-20011211-00127, SAT-MOD-20020628-00094, SAT-STA-20030613-00106, SAT-STA-20021121-00223, SAT-STA-20030610-00101, SAT-STA-20021121-00224, SAT-STA-20030410-00063, SAT-STA-20021002-00185, SAT-STA-20030506-00082, SAT-STA-20021025-00197, SAT-MOD-20021108-00216, SAT-MOD-20021108-00217, SAT-MOD-20021108-00219, SAT-AMD-20021108-00218, SAT-MOD-20020627-00095, SAT-STA-20011211-00131, DA 03-2683 18 FCC Rcd. 16589, 16589 at n.4. (rel. Aug.15, 2003) ("*SES Americom/Columbia Order*").

[12] *Application of General Electric Capital Corporation and SES Global, S.A. for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214(a) and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act*, Order and Authorizations, File Nos. SAT-T/C-20010402-00030, SAT-T/C-20010402-00031, SAT-T/C-20010402-00736, SAT-T/C-20010402-00740, SAT-T/C-20010402-00741, SAT-T/C-20010402-00742, SAT-T/C-20010402-00743, SAT-T/C-20010402-00744, SAT-T/C-20010402-00178, 0000413466, and ISP-PDR-20010402-00017 16 FCC Rcd 17575, at ¶ 13 (rel. Oct. 2, 2001) ("*GE/SES Global Order*").

[13] *Id.*

[14] Deutsche Telekom Annual Report, 2003, at 116.

[15] *First Public Notice* at 1-2.

[16] *Id.*

customers use this satellite capacity for video distribution (e.g., broadcast, direct-to-home, and cable), radio programming distribution, high speed Internet access, private network, data and voice services.[17] SES Americom's customers include carriers, private industry, video service providers, government agencies and resellers.[18]

GWTP Investments, L.P., ("GWTP") is a Texas limited partnership. The general partner of GWTP Investments, L.P. is GWTP Holdings, L.L.C., a Texas limited liability company. Mission Holdings, Inc., ("Mission"), a Texas corporation, is a member of GWTP Holdings, L.L.C. Mission has assigned to GWTP all of its rights, duties, and obligations arising under and related to its agreement for the purchase of certain Verestar assets, as described below.

B. GWTP Is a Party in Interest.

A party in interest may file with the Commission a petition to deny any application to which Section 309(b)[19] of the Telecommunications Act of 1934, as amended ("the Act") applies.[20] A petitioner may establish that it is a party in interest if it can show that it will be adversely affected or aggrieved by the protested Commission action.[21]

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17 *Id.*

18 *Id.*

19 Section 309(b) requires that the Commission must find that granting the application for a license will serve the public interest, convenience and necessity. *See* 47 U.S.C. § 309(b).

20 *See* 47 U.S.C. § 309(d)(1).

21 *See James Robert Meachem and June H. Meachem*, 12 Rad. Reg. 1427, 1429 (1955). In other words, the party must be "able to establish that a grant of the instant application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature." *See Time Warner Entertainment*, 10 FCC Rcd 9300, 9302, ¶ 17 (1995) (*quoting Pinelands, Inc.*, 7 FCC Rcd 6058, 6063, ¶ 18 (1992)).

On June 24, 2004, GWTP filed in the U.S. District Court for the Northern District of Texas, Dallas Division, (the "Court") a complaint averring that SES Americom has breached its Agreement with GWTP pursuant to which GWTP was to acquire certain Verestar assets.[22] The Applicants now seek the Commission's approval for the assignment of the licenses associated with these assets to SES Americom.

If the Commission were to continue to review or authorize the assignment to SES Americom of the licenses relevant to the proposed transaction during the pendency of GWTP's legal action against SES Americom, it is likely that the Court would gain the incorrect impression that the Commission has "signed off" on the proposed transaction. This misperception by the Court could prejudice the resolution of GWTP's contract and other claims against SES Americom.

Moreover, the Commission's continued review of the proposed transfer will cause GWTP to incur additional and unnecessary legal costs. Specifically, GWTP must not only bear the cost of enforcing its Agreement and corresponding legal rights against SES Americom before the federal court in Texas, but it must also participate in the instant proceeding. The burden on GWTP would be exacerbated by the fact that the outcome of the instant proceeding may be rendered moot if the Court rules in favor of GWTP's contract claims against SES Americom. Should GWTP prevail in its suit in Texas, it will file an application requesting the assignment of the affected licenses to GWTP. This outcome would render useless the Commission's current review of the proposed assignment of the affected licenses to SES Americom.

[22] *See* GWTP Investments, L.P v. SES Americom, Inc., Civil Action No. 3-04CV-1383L, D. Tex., N.D.Tx., Complaint, attached hereto ("*GWTP Civil Complaint*").

Clearly, GWTP is a party in interest, as it will suffer prejudice and adverse economic effects as a direct result of the Commission's ongoing review of the pending Applications.

C. The Transaction

On December 22, 2003, Verestar, Inc. and its subsidiaries, Verestar Networks and Verestar International, Inc. filed a voluntary petition for reorganization in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").[23] This Chapter 11 filing caused the FCC licenses and authorizations held by Verestar, Inc. and Verestar Networks to undergo involuntary, *pro forma* assignments to Verestar, Inc. (Debtor-in-Possession) and Verestar Networks, Inc. (Debtor-in-Possession), respectively.[24]

Also in connection with that bankruptcy proceeding, substantially all of the assets of Verestar were offered for sale at an auction scheduled to occur on March 30, 2004. The assets were divided into eight (8) "asset pools" on which bidders could submit bids. Mission desired to acquire the asset pools denominated as Asset Pool 5, "Brewster Teleport," and Asset Pool 6, "Cedar Hill Teleport" (hereinafter "Verestar Teleports"). With the encouragement of the auction company, Mission began to contact other bidders about combining bid efforts. On March 29, 2004, Mission contacted SES Americom. SES Americom thereafter informed Mission that it was interested in acquiring all of the Verestar assets *other than* the Brewster and Cedar Hill teleports. In light of that, Mission and SES Americom agreed that forming a strategic relationship for the purpose of acquiring Verestar's assets would be beneficial to both parties, and entered into a

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[23] *In re Verestar, Inc. et al.*, Case No. 03-18077 (Bankr. S.D.N.Y.).

[24] *First Public Notice* at 2.

Memorandum of Understanding ("MOU"). In the MOU, the parties agreed to "work cooperatively" to purchase "the Verestar assets." The parties further expressed their collective goal, specifically, that "Mission Holdings would offer to purchase Asset Pool 5, Brewster, and Asset Pool 6, Cedar Hill (including the Texas Video Network). SES Americom would offer to purchase the remaining Asset Pools."

During the auction, on March 30, 2004, Mission and SES Americom entered into an agreement wherein Mission would purchase the Verestar Teleports for a fixed sum not to exceed $1.5 million, which could include up to $200,000.00 of "cure costs." (the "Agreement"). Later that day, SES Americom made an offer of $25 million for all of the Verestar assets on the condition that such bid would conclude the auction.

On April 2, 2004, the Bankruptcy Court accepted SES Americom's bid, contingent upon the Commission's consent to the assignment of Verestar's licenses.[25] On April 23, 2004, the Bankruptcy Court issued an Order approving the proposed transaction between Verestar and SES Americom.

On May 13, 2004, SES Americom notified Mission that it would not honor the Agreement, allegedly because it had no "legal obligation" to sell the Verestar Teleports to Mission. Since that date, Mission has attempted to reach an accord with SES Americom, but Mission's efforts have not been successful.

Mission thereafter assigned to GWTP, a newly-created entity in which Mission is a member of the general partner, all of its rights, duties and obligations arising under and related to the Agreement. On June 24, 2004, GWTP filed a complaint against SES

[25] SES Americom Signs Deal to Acquire Verestar Assets Out of Bankruptcy, Verestar Press Release, Apr. 2, 2004. http://www.verestar.com.

Americom in the United States District Court for the Northern District of Texas, Dallas Division seeking relief for the damages it has suffered as a result of SES Americom's breach of the Agreement.[26]

III. The Commission Should Not Approve the Assignment of Licenses to a Party that Does Not Have A Clear Right to Own the Corresponding Communications Assets.

SES Americom has reported to the Commission that it intends to purchase substantially all of Verestar's assets, including Verestar's interests in the subject FCC licenses at issue in this proceeding,[27] and filed a request for the Commission's approval to assign the following licenses to SES Americom:

Earth Stations:

File No.	Licensee	Lead Call Sign
SES-ASG-20040503-00672	Verestar, Inc. (DIP)	E030294
SES-ASG-20040503-00673	Verestar, Inc. (DIP)	E020093

Other Wireless Licenses:

File Number[28]	Licensee	Lead Call Sign
0001685559	Verestar, Inc. (DIP)	WAH564

As noted above, GWTP has an agreement with SES Americom pursuant to which GWTP will acquire the Cedar Hill and Brewster teleports and the associated licenses. However, the Applicants have included these licenses with their request to assign Verestar's wireless licenses in File No. 0001685559. Because the Applicants include these

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[26] *See GWTP Civil Complaint*, attached hereto.

[27] *First Public Notice* at 1.

[28] *See* Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, and *De Facto* Transfer Lease Applications Accepted for Filing, Public Notice, Report No. 1827 (WTB rel. May 12, 2004).

licenses among those for which they request consent to assign, the Application is incorrect and should be dismissed or denied.

Continued Commission review or approval of the Applications will substantially prejudice GWTP's legal suit against SES Americom.[29] Fundamentally, continuing this proceeding even though SES Americom does not have the clear right to acquire the Cedar Hill and Brewster teleports and associated FCC licenses would send to the Court the message that the Commission has "signed off" on the proposed transaction and that GWTP's case lacks substance and merit. This impression would cast a dark shadow on the merits of GWTP's claims against SES Americom and could unfairly affect the outcome of the adjudication in Texas. Therefore, the Commission should at least dismiss the Applications in their present form.

Even if the Commission's approval of the Applications was not likely to prejudice the outcome of GWTP's suit against SES Americom, it would remain contrary to the public interest for the Commission to continue to entertain the Applications in their present form. Clearly, if the Court were to find in favor of GWTP, the Commission's review of the Applicant's proposed transaction would be rendered pointless, any corresponding Commission decisions rendered moot, and the executed assignments reversed. Expending precious and scarce Commission resources in an unnecessary, or at least untimely, review of the proposed transaction would not benefit the public interest generally. More specifically, however, continuing the Commission's review of the proposed transaction before the matters between GWTP and SES Americom are resolved would not benefit the

[29] *See* Section II.B, *supra*.

parties, as the litigation pending in Texas would continue to interfere with the ability of Verestar and SES Americom to complete the proposed transaction. Finally, if the Court ultimately decides in favor of GWTP's claims, the Commission will have to review again the assignment of the licenses associated with the Brewster and Cedar Hill teleports, and the Commission's current review of the assignment of those licenses will have been for naught.

IV. The Commission May Not Short-Circuit its Review of the Proposed Transaction Merely Because it has Previously Approved Another Acquisition by SES Global.

The Applicants claim that, although SES Americom is a wholly-owned subsidiary of a foreign company, a declaratory ruling approving foreign ownership exceeding the statutory foreign ownership benchmark[30] is not required because (1) the Commission has previously approved the indirect foreign ownership of SES Americom in excess of 25 percent,[31] (2) the foreign ownership of SES Americom has not materially changed since the Commission's rulings, and (3) the Commission has previously determined that SES Americom is qualified to hold common carrier licenses.[32]

It would be inappropriate for the Commission to accept at face value this bold and unjustified assertion. Giving the Applicants a "pass" on the foreign ownership review required for the approval of the proposed transaction would be contrary to the

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[30] The statutory benchmark for foreign ownership set forth in section 310(b)(4) of the Act is 25%. 47 U.S.C. § 310(b)(4).

[31] *See Application of General Electric Capital Corporation, Transferors, and SES Global, S.A. Transferee,* Order and Authorization, 16 FCC Rcd 17575 (IB/WTB 2001); Application *of General Electric Capital Corporation, Transferors, and SES Global, S.A. Transferee,* Supplemental Order, 16 FCC Rcd 18878 (IB/WTB 2001).

[32] *First Notice at* 2.

Commission's statutory obligations. Moreover, rubber stamping the proposed acquisitions by SES Global or its subsidiaries, including SES Americom, without proper review of the foreign ownership implications has no basis in Commission precedent, is contrary to the Commission's own statements regarding the SES Americom in prior transactions,[33] and would create a dangerous precedent that could cloud future transactions involving foreign ownership.

A. The Commission Must Adhere to the Statutory Standard of Review.

Section 310(a) of the Act prohibits "any foreign government or the representative thereof" from holding Title III licenses.[34] The Commission has held that "[i]f a foreign government or the representative thereof has either *de facto* or *de jure* control of the license, it would be deemed to hold the license" in violation of Section 310(a) of the Act.[35] The Commission has consistently adhered to this straightforward interpretation of Section 310(a).[36]

Section 310(b)(4) prohibits the Commission from authorizing the transfer of common carrier and certain other licenses to "any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is

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33 *SES Americom/Columbia Order*, 18 FCC Rcd. at 16595, ¶ 10.

34 47 U.S.C. § 310(a).

35 *Orion Satellite Corp., Order*, 5 FCC Rcd 4937, 4939 n.26 (1990).

36 *See In the Matter of Applications of INTELSAT LLC*, 15 FCC Rcd 15460 (2000) ("*INTELSAT Order*"). For example, in the INTELSAT Order, the Commission clearly stated its standard for reviewing applications that implicate Section 310(a): "the Commission applies a 'control' test that considers whether a foreign government or representative thereof exercises either direct *de jure* or de facto control over a licensee. Neither form of foreign government control is permissible under Section 310(a)." *INTELSAT Order* at ¶48. *See also Starsys Global Positioning, Inc., Order*, 10 FCC Rcd 9392, 9393 (Int'l. Bureau 1995); *Alpha Lyracom d/b/a Pan American Satellite, et al., Order*, 8 FCC Rcd 376, 378 n.21 (Com. Car. Bur. 1992).

owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license."[37] Historically, the Commission has applied Section 310(b)(4) to circumstances in which a foreign citizen, corporation or government sought, through a holding company, to obtain ownership interests in a licensee in excess of the 25% benchmark.[38]

Although entities from WTO member countries are entitled to a rebuttable presumption that no competitive concerns are raised by indirect foreign ownership of a company acquiring control of a U.S. communications company or its licenses, the Commission must carefully consider "any relevant factors and evidence that might tend to rebut this presumption."[39]

B. The Commission's Prior Decisions Permitting SES Global to Exceed Foreign Ownership Limitations in Specific Circumstances Do Not Constitute *Nunc Pro Tunc* Approval to Exceed Foreign Ownership Constraints in All Future Acquisitions of U.S. Communications Assets.

The Applicants argue that, although the indirect foreign ownership interests in SES Americom exceed the 25% benchmark set forth under Section 310(b)(4) of the Act,[40] they need not submit a petition for declaratory ruling in connection with this transaction because the Commission has previously permitted the indirect foreign ownership of SES

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37 47 U.S.C. § 310(b)(4).

38 *See, e.g., Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995), at ¶¶ 44-56.

39 *GE/SES Global Order*, 16 FCC Rcd. 17589, at ¶30.

40 47 U.S.C. § 310(b).

Americom to exceed 25%.[41] However, the Applicants fail to recognize that the Commission limited the application of its prior approvals.

For instance, in the GE/SES Global Order, the Commission stated that the United States' market-opening commitments in the WTO Basic Telecom Agreement do not cover Direct-to-Home ("DTH"), Direct Broadcast Satellite ("DBS") and Digital Audio Radio Service ("DARS"), and that the rebuttable presumption in favor of foreign entry does not apply to these services.[42] As a result, the Commission's review of the GE Americom/SES Global transaction did not encompass these services and SES Global had to obtain the Commission's authorization to provide them separately.

In 2003, SES Global's subsidiary, SES Americom and its subsidiary, Columbia Communications Corporation, petitioned the Commission for additional authority to provide DTH service in the United States.[43] In its corresponding Order, the Commission explained that "[t]o ensure . . .that the public interest is served, we will examine, pursuant to our review under Section 309, whether the foreign ownership of the Applicants by SES Global is likely to distort competition in any relevant U.S. market."[44] The Commission also emphasized that it may "take foreign ownership into account to determine whether there are public interest harms resulting from foreign investment in non-common carrier wireless licensees pursuant to our public interest determination under Section 310(d) of the

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41 *See GE/SES Global Order*, 16 FCC Rcd 17598, at ¶ 58. *First Notice* at 2-3.

42 *GE/SES Global Order* at n.110.

43 *See SES Americom/Columbia Order*, 18 FCC Rcd 16589.

44 *SES Americom/Columbia Order*, 18 FCC Rcd 16595, at ¶ 10.

Act."[45] The Commission further clarified that under both Section 309 and Section 310(d), the standard for review is "whether grant of the application would serve the public interest, convenience and necessity.[46] To that end, the Commission considered, with respect to the request by SES Global to provide DTH service in the United States, (1) the likely competitive effects and the possibility of significant anti-competitive issues, and (2) any considerations raised by the Executive Branch regarding issues of national security, law enforcement, foreign policy or trade policy.[47]

Nowhere in either the of these Orders did the Commission pre-approve, or even consider, the extension of the foreign ownership exceptions granted to SES Global to apply prospectively to the company's future acquisitions. Even if the Commission had desired to do so, it could not have achieved that result within the constraints imposed by Sections 309 and 310 of the Act.[48] Clearly, the Applicants have no basis for their request that the Commission ignore its obligation to conduct a proper foreign ownership analysis and, instead, simply presume that the proposed assignment of licenses from Verestar to SES Americom will serve the public interest.

The Commission has already placed SES Americom on notice that its permission to exceed statutory foreign ownership limits is narrow and inflexible. Specifically, the Commission declared in the GE/SES Global Order that no single non-U.S. investor or entity, including any of the entities that currently control SES Global, may acquire

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45 *Id.*

46 *Id.*

47 *Id.*

48 47 U.S.C. §§ 309, 310.

additional indirect ownership or voting interest in SES Global without further Commission approval under Section 310(b)(4).[49] It would directly contradict that statement for the Commission to permit SES Global to acquire – and place under foreign control – additional U.S. communications assets without first subjecting the proposed transaction to the same degree of scrutiny that the Commission applied to SES Americom's previous transactions. To do so would mean that an existing foreign owner could not increase its investment in SES Americom without the Commission first reviewing the potential impact of that investment on the company's licenses and authorizations, but SES Americom, a foreign-owned company, would be free to acquire any number of U.S. communications assets, licenses and authorizations without substantial Commission review.

V. The Record Does Not Show that the Public Interest Would Be Served by Assigning the Verestar Licenses to SES Americom, a Foreign Entity.

The Commission clearly stated in the *Foreign Participation Order* that a foreign entity's "acquisition of a *controlling interest* [in a domestic communications company] would be reviewed under our merger analysis that examines in detail the competitive impact of the proposed merger."[50] To conduct its merger analysis, the Commission must consider the likely competitive and anticompetitive effects of the proposed transfers of control, any other public interest benefits and the prospect of national security, law enforcement, foreign policy or trade policy concerns.[51] Through this analysis, the Commission balances the potential public interest harms and benefits that may result from

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49 *GE/SES Global Order* 16 FCC Rcd. 17593, at ¶ 42.

50 *Id.* at n.85 (emphasis added).

51 *Vodafone Americas Asia Inc. and Globalstar Corporation*, 17 FCC Rcd 12849, 12854 at ¶15. (2002) ("*Vodaphone/Globalstar Order*").

the proposed transfer.[52] Because this proposed transaction involves the acquisition of a domestic carrier by a foreign entity, the inquiry also must consider how the transaction will affect competitive conditions in the United States.[53]

The Commission's merger analysis considers market power as well as antitrust laws.[54] Here, the Applicants must demonstrate to the Commission, not merely that the transaction will not "substantially ... lessen competition … [or] ... tend to create a monopoly"[55] but that the transaction in fact "will enhance competition."[56] In addition, the Commission must consider whether any efficiencies or other public interest benefits are likely to result from the proposed assignments.[57] Therefore, the Applicants bear the burden of affirmatively proving that the transaction will *benefit*, and not merely fail to harm, the public interest.

The Applicants claim that the assignment of Verestar's licenses to SES Americom will serve the public interest because, in the absence of the proposed transaction, Verestar

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52 *AT&T Corp., British Telecommunications, plc, VTC Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications; For Grant of Section 214 Authority, Modifications of Authorizations and Assignments of Licenses in Connection With the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, Memorandum Opinion and Order*, 14 FCC Rcd. 19140, 19147, ¶15 (1999) ("*AT&T/BT Order*").

53 *See SES Americom/Columbia Order*, 18 FCC Rcd 16595, at ¶ 10.

54 *AT&T/BT Order* at ¶16. In particular, the Commission must consider in its antitrust analysis the horizontal effect of the transaction and the opportunity for the proposed assignee to exercise market power by raising prices above competitive levels. *See Merger of MCI Communications Corporation and British Telecommunications plc, Memorandum Opinion and Order*, 12 FCC Rcd. 15351, 15369, ¶37 (1997) ("*MCI/BT Order*"). *See also* United States Dept. of Justice Antitrust Division, and Federal Trade Commission, *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 41552 (1992); United States Dept. of Justice and the Federal Trade Commission, *Revision to Horizontal Merger Guidelines* (1997) ("*Horizontal Merger Guidelines*").

55 15 U.S.C. § 18; *See Merger of MCI Communications Corporation and British Telecommunications plc, Memorandum Opinion and Order*, 12 FCC Rcd. 15351, at ¶¶ 3, 28 (1997) ("*MCI/BT Order*").

56 *MCI/BT Order* at ¶3.

57 *See, e.g., VoiceStream/DT Order* at ¶17.

might have to discontinue service.[58] The Applicants also maintain that the assignment of Verestar's licenses will not adversely affect competition in the U.S. satellite service and transponder leasing markets.[59] The record in this proceeding, however, does not provide sufficient information to show that the proposed transaction will "enhance competition." Because the Applicants have not yet met this burden, it would be inappropriate for the Commission to consent to the assignment of licenses to an entity that already exceeds statutory foreign ownership limitations.

In its review of the GE/SES Global transaction, the Commission evaluated, on a country-by-country and market-specific basis, the potential competitive effects of the acquisition on international communications traffic from and to the United States.[60] Through that analysis, the Commission determined that the proposed GE/SES Global transaction would not produce a significant overlap in the provision of services in the same product and geographic markets in, to or from the United States.[61] The basis for that finding was that, because prior to the transaction SES Global did not provide services "in, to or from the United States," the GE/SES Global transaction would not reduce competition or result in the consolidation of assets used to provide U.S. services under a foreign owner.[62] In this sense, the proposed Verestar/SES Americom transaction is markedly different. As opposed to GE Americom and SES Global, which provided service

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58 *First Public Notice at* 2.

59 *Id.*

60 *GE/SES Global Order*, 16 FCC Rcd at 17594, ¶ 45.

61 *Id.* at 17594, ¶ 46.

62 *Id.* at 17593-594, ¶ 43.

to non-overlapping areas of the globe, SES Americom and Verestar both provide the same categories of services to the United States market. Therefore, the Commission must examine closely the possibility that the proposed transaction will reduce competition in an identifiable market.

VI. The Commission Must Weigh Carefully National Security Concerns.

Finally, the Commission must consider whether the transaction will present any national security, law enforcement, foreign policy or trade policy concerns.[63]

A. The Transaction Could Result in Foreign Government Control of Communications Facilities that Are Critical to U.S. Government Communications.

In 1996, the President identified eight critical infrastructures, the loss of any of which would have a debilitating impact on the defense or economy of the United States.[64] One of the eight critical infrastructures is telecommunications.[65] Similarly, Congress, in the USA Patriot Act of 2001 defined "critical infrastructure" as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[66]

Verestar's special government services unit carries communications for, *inter alia*, the Department of State, the Federal Aviation Administration, the National Oceanic and Atmospheric Administration, the U.S. Drug Enforcement Administration and the U.S.

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63 *See Foreign Participation Order* at ¶¶ 61-66.

64 Executive Order 13010, Critical Infrastructure Protection, July 15, 1996 http://www.fas.org/irp/offdocs/eo13010.htm.

65 *Id.*

66 USA Patriot Act of 2001, 115 Stat. 272, §1016(e).

Navy.[67] Verestar provides commercial satellite gateway service for government-leased C-band transponders worldwide.[68] In addition, Verestar has a contract with the Space and Naval Warfare Systems Command ("SPAWAR") to support the Navy Commercial Wideband Satellite Program, Challenge Athena, a command and control/communications system.[69]

In addition, the supporting materials provided to the Commission in the Applications indicates that the communications capability provided by the company to the U.S. Government serves the Persian Gulf area, Central Asia and western and southern Africa. In fact, 80% of the satellite communications used during Operation Iraqi Freedom were provided by commercial satellite providers, including Verestar.[70] Clearly, Verestar is a provider of critical communications links that are very important to national security and the war against terrorism. Therefore, the proposed transfer of Verestar's FCC licenses and authorizations to a foreign-controlled entity warrants a thorough analysis.

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[67] Verestar/SES Americom Applications, Supplement filed May 19, 2004, at 4-5.

[68] The Defense Information Technology Contracting Organization has established Contract No. DCA200-98-C-0035, a firm fixed price contract, with Maritime Telecommunications Network, Inc./Verestar, on a sole source basis. The contract expired on November 30, 2003, and has been extended for one year with two addition one year options to extend through November 30, 2006. FBO Daily Issue of July 16, 2003, FBO #0594 Solicitation Notice, http://www.fbodaily.com.

[69] SPAWAR Business Opportunity, Solicitation N00039-02-R-2300 – C-Band Satellite Space Segment and Gateway Services for U.S. Navy Ships. https://e-commerce.spawar.navy.mil. The Contract extends from October 15, 2001 through October 15, 2006. The nominal dollar amount of the contract is $36, 577,440.

[70] Satellite Industry Association, Government Use of Commercial Satellite Capacity, Presentation, http://www.sia.org.

B. The Commission Cannot Adequately Perform its Analysis Before the Executive Agencies Review the National Security Implications of the Proposed Transaction and the Comments of Interested Parties on These Matters Are Solicited.

Because the proposed transaction raises national security concerns, it is subject to the provisions of Section 271 of the Defense Production Act.[71] Consequently, the proposed transfer should be reviewed by the Defense Information Systems Agency ("DISA"), the Defense Department's combat support agency responsible for planning, operating and support of the U.S. government's command, control, communications and information systems. Ordinarily, a DISA review provides the Department of Defense with an opportunity to inform the Commission of any national security concerns that it may have. In addition, the Department of State and the DEA, as well as the Department of Justice and the Federal Bureau of Investigation should be given an opportunity to conduct an independent review of the proposed transaction.

The Commission's responsibility would not be fulfilled if it were to conduct its public interest analysis without undertaking a thorough and independent analysis of the national security, law enforcement, foreign policy and trade policy concerns raised by the transaction.[72] At the very least, the Commission should not approve the Applications without first establishing that the Executive Branch has satisfied its national security and law enforcement concerns relating to the proposed transaction. The Commission should obtain approval from the State Department and to seek advice from other Executive

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[71] 50 U.S.C. App. § 2170.

[72] In the *Foreign Participation Order*, the Commission noted the DOD and FBI's comments that "no presumption should be applied to national security issues.... [E]very application should be reviewed on its own facts, issues should be affirmatively resolved, and the FCC should defer to the Executive Branch's findings on national security issues." *Foreign Participation Order* at ¶¶ 60-61.

Branch agencies *before* approving the assignment of licenses that are currently used to provide State Department, law enforcement and military communications. The Commission should not undertake its public interest analysis of the proposed transaction until it receives from the Executive Branch a clear, written communication regarding the pertinent national security, law enforcement and military implications and obtaining public comment on the Executive Branch's findings.

VII. Conclusion

WHEREFORE, in light of the foregoing, GWTP requests that the Commission dismiss or deny the Applications.

Respectfully submitted,

GWTP Investments, L.P.

By: _____

Mark J. Tauber
Vincent M. Paladini

PIPER RUDNICK LLP
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
Tel: (202) 861-3445
Fax: (202) 689-7525

Its Attorneys

Before the
Federal Communications Commission
Washington, DC 20554

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

AFFIDAVIT

I, Philip J. Wise, do hereby attest as follows:

(1) I am over 18 years of age and am competent to provide this Affidavit. The statements contained in this Affidavit are based on my personal knowledge.

(2) I am, and have been since Dec [month], 2000 [year], President [office] of Mission Holdings, Inc., a member of GWTP Holdings, L.L.C, the general partner of GWTP Investments, L.P.;

(3) I have read the foregoing Petition to Dismiss or Deny. I declare under penalty of perjury that, to the best of my knowledge and belief, the facts set forth therein are correct and true.

Executed this 21th day of June, 2004.

[name] Philip J. Wise

Sworn to, subscribed and acknowledged in my presence this 21th day of June, 2004, by:

Zina Cunningham
Notary Public

ZINA B CUNNINGHAM
My Commission Expires
April 12, 2008

-WASH1:4593527.v1 |6/22/04
1-826901

ATTACHMENT

HUGHES · LUCE LLP
ATTORNEYS AND COUNSELORS

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matthew.nielsen@hughesluce.com

June 24, 2004

Via Courier

Ms. Karen Mitchell, Clerk
United States District Court
1100 Commerce Street, Room 14A20
Dallas, Texas 75242

Re: *GWTP Investments, L.P. v. SES Americom, Inc.*
in the United States District Court for the
Northern District of Texas, Dallas County

Dear Ms. Mitchell:

Enclosed for filing of the initial lawsuit in the referenced matter are the original and three copies each of the following:

1. Civil Cover Sheet,
2. Original Complaint,
3. Summons in a Civil Action, and
4. Plaintiff's Certificate of Interested Parties.

Also enclosed is our firm check in the amount of $150.00 for the filing fee. Please return the file-stamped copies to the undersigned via the courier. Please call me if you have any questions.

Thank you for your assistance.

Very truly yours,

Matthew G. Nielsen

013664.00011:850213.01

MGN:kvb
Enclosures

JS 44
(Rev. 03/99)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) **PLAINTIFF**
GWTP Investments, L.P.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF **Dallas**
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANT
SES Americom, Inc.

3-04CV-1808-L

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
Mark A. Shank
Matthew G. Nielsen
Hughes & Luce, LLP
1717 Main St., Suite 2800
Dallas, TX 75201
Phone: 214-939-5500
FAX: 214-939-5849

ATTORNEYS (IF KNOWN)

RECEIVED
JUN 24 2004
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not A Party)
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY) (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☒ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☒ 5
Citizen or Subject of a Foreign Country ☐ 3	☐ 3		Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(PLACE AN "X" IN ONE BOX ONLY)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☒ 190 Other Contract
- ☐ 195 Contract Product Liability

TORTS
PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury-Med Malpractice
- ☐ 365 Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt. Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS-Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/Accommodations
- ☐ 444 Welfare
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

HABEAS CORPUS:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

V. ORIGIN *(PLACE AN "X" IN ONE BOX ONLY)*

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify) Litigation
- ☐ 6 Multidistrict Litigation Judgment
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUES UNLESS DIVERSITY.)

Breach of contract suit seeking specific performance.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION ☐ UNDER F.R.C.P.23

DEMAND $ Specific performance

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE 6-24-04

SIGNATURE OF ATTORNEY OF RECORD Mark A. Shank

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 2 4 2004
CLERK, U.S. DISTRICT COURT
By _____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GWTP INVESTMENTS, L.P.,	§	
	§	
Plaintiff,	§	CIVIL ACTION
v.	§	NO. _____
	§	
SES AMERICOM, INC.	§	
	§	
Defendant.	§	

ORIGINAL COMPLAINT

Plaintiff GWTP Investments, L.P. files this Original Complaint and in support thereof shows the following:

PARTIES

1. Plaintiff GWTP Investments, L.P. is a limited partnership formed under the laws of the State of Texas with its principal offices located at 1950 Stemmons Freeway, Suite 7014, Dallas, Texas 75207.

2. Defendant SES Americom, Inc. is a corporation formed under the laws of the State of Delaware with its principal place of business located at 4 Research Way, Princeton, New Jersey 08540-6618 and may be served with citation by serving its registered agent for service of process in Texas, CT Corporation System, 1021 Main Street, Suite 1150, Houston, Texas 77002.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1) because the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between citizens of different States.

a. Plaintiff GWTP Investments, L.P. is a citizen of the States of Texas and Pennsylvania. Mission Holdings, Inc., a corporation formed under the laws of the State of Texas and who maintains its principal place of business in the State of Texas, and Floyd Ganassi, who is presently domiciled in the State of Pennsylvania, are both (1) the sole members of GWTP Holdings, L.L.C., the general partner of GWTP Investments, L.P. and (2) the limited partners of GWTP Investments, L.P.

b. Defendant SES Americom, Inc. is a citizen of the States of Delaware and New Jersey.

4. Pursuant to 28 U.S.C. § 1391(c), Defendant is subject to personal jurisdiction in this judicial district at the time this action is commenced, and therefore, venue is proper in this district pursuant to 28 U.S.C. § 1391(a) because Defendant "resides" in this judicial district.

STANDING

5. On or about June 21, 2004, Mission Holdings, Inc. assigned to GWTP Investments, L.P. all of its rights, duties, and obligations arising under and related to its contract for the purchase of certain assets from Defendant. The term "Plaintiff" as used herein refers to GWTP Investments, L.P. in its position as the assignee of the rights,

duties, and obligations arising from the contract at issue in this case formed between Mission Holdings, Inc. and Defendant.

FACTS

6. In connection with a bankruptcy proceeding in the Southern District of New York, substantially all of the assets of Verestar, Inc., the bankruptcy debtor, were offered for sale at an auction scheduled to occur on or about March 30, 2004.

7. The assets were divided into eight (8) "asset pools" on which bidders could submit bids. The asset pools are described in the document attached hereto as Exhibit "A," which is incorporated herein by reference as though fully set forth.

8. Plaintiff desired to acquire the assets consisting of the asset pools denominated as Asset Pool Five, "Brewster Teleport," and Asset Pool Six, "Cedar Hill Teleport," which included the Texas Video Network (hereinafter "Brewster/Cedar Hill Teleports"). Generally, teleports are the ground-based side of satellite networks that receive signals from orbiting satellites and then transmit those signals to locations throughout the world. Plaintiff wanted to purchase the Brewster/Cedar Hill Teleports primarily to acquire the established business operations of those teleports that included, *iner alia*: (a) the established relationships that both of the operations making up those asset pools had with customers of teleport services; and (b) the talent and experience of the management and employees of both operations.

9. With the encouragement of the auction company, Plaintiff began to contact other bidders about combining bid efforts.

10. On March 29, 2004, Plaintiff contacted Defendant through its representative Brent Brun, who is the Vice President of Product Management and Lead Generation for Defendant. Brun confirmed Defendant's earlier letter delivered to the other auction bidders that it was interested in acquiring all of the Verestar assets *other than* the Brewster/Cedar Hill Teleports that Plaintiff wished to acquire, thereby making a strategic relationship between Plaintiff and Defendant beneficial to both parties.

11. Accordingly, the parties entered into a Memorandum of Understanding, a true and correct copy of which is attached hereto as Exhibit "B" and incorporated herein by reference as though fully set forth (hereinafter the "MOU"). In the MOU, the parties agreed to "work cooperatively" to purchase "the Verestar assets." The parties further expressed their collective goal, specifically, that "Mission Holdings will offer to purchase Asset Pool 5, Brewster, and Asset Pool 6, Ceder Hill (including the Texas Video Network). SES Americom will offer to purchase the remaining Asset Pools."

12. During the course of the auction on March 30, 2004, Plaitniff and Defendant initially bid jointly per the parties intent as expressed by the MOU. However, in a stated move to successfully conclude the auction, Defendant's representatives stated to Plaintiff that Defendant was going to begin to bid on all of the Verestar assets at substantial increments. At that point, Plaintiff and Defendant entered into a contract wherein Plaintiff agreed to purchase the Brewster/Cedar Hill Teleports for a fixed sum of $1.5 million, which included up to $200,000.00 of "cure costs" (hereinafter the "Agreement"). Later that day, Defendant made an offer of $25 million for all of the

Verestar assets on the condition that such bid would conclude the auction. The Defendant's bid was accepted.

13. During the hours while Defendant's ultimate winning bid was pending approval by the Board of Directors of Defendant, Brun again confirmed the Agreement that Defendant would sell the Brewster/Cedar Hill Teleports to Plaintiff for a fixed sum of $1.5 million. Later that same evening, after securing approval of the Defendant's Board of Directors, Brun again confirmed the Agreement and instructed Plaintiff's representatives at the auction to call Brun the next day so that the parties could begin to document the Agreement.

14. In the following days, Defendant, through Brun and Pete Gutsafson, an employee of Defendant, consistently reaffirmed the Agreement to sell the Brewster/Cedar Hill Teleports to Plaintiff. In fact, Defendant provided wiring instructions to Plaintiff, through which Plaintiff wired its $100,000 escrow deposit to Defendant that had been earlier agreed upon on or about March 31, 2004.

15. Despite repeated assurances by Defendant that it would honor its Agreement, on May 13, 2004, Dean Olmstead, the Chief Executive Officer and President of Defendant, stated in a telephone conference with Plaintiff's representatives, (a) that Defendant was "taking the position" that it had no legal obligation to sell Plaintiff the Brewster/Cedar Hill Teleports, but (b) that Defendant would sell the Cedar Hill Teleport to Plaintiff.

16. Olmstead's "position" that the Agreement did not exist was consistent with a conversation between Plaintiff's representatives and Brun, Gustafson, and another

Defendant employee, Steve Mesarick, on April 30, 2004. In that conversation, Plaintiff was informed that Defendant was going to "take the position" that no "definitive" agreement existed between Plaintiff and Defendant for the sale of the Brewster/Cedar Hill Teleports so that Defendant could obtain necessary governmental approvals on the purchase of those teleports. In fact, by check dated May 3, 2004, Defendant returned Plaintiff's $100,000.00 deposit paid on March 31, 2004. Plaintiff's representatives were also informed in the April 30, 2004 telephone call that, while Defendant intended to sell the Cedar Hill Teleport to Plaintiff after the governmental approvals were obtained, Defendant no longer intended to sell the Brewster Teleport to Plaintiff.

17. Defendant's repudiation of its obligation to sell the Brewster Teleport on April 30, 2004 had evolved from earlier discussions between representatives of Plaintiff and Defendant in which Defendant expressed hesitation about honoring the Agreement to sell Plaintiff the Brewster Teleport.

18. Initially, on or about April 19, 2004, Gustafson informed Plaintiff that Defendant had changed its "thinking" on selling the two teleports and that Defendant was "backtracking" on the sale of the Brewster/Cedar Hill Teleports. Then, on April 23, 2004, Brun clarified that the manner in which the Verestar assets had been divided created logistical issues that Brun was confident would be resolved. Brun once again reaffirmed the Agreement for the sale of the Brewster/Cedar Hill Teleports. Defendant's position again changed on April 27, 2004, when Defendant inquired whether Plaintiff would accept certain "concessions" in turn for Defendant retaining the Brewster Teleport.

As discussed above, Defendant finally began to claim it had no obligation to sell the Brewster Teleport.

19. Since May 13, 2004, Defendant has continued to disclaim the Agreement between Defendant and Plaintiff for the purchase of the Brewster/Cedar Hill Teleports, most recently on June 14, 2004 through Defendant's counsel.

20. Plaintiff has repeatedly reaffirmed its desire to complete the purchase of the Brewster/Cedar Hill Teleports and has repeatedly requested that Defendant honor its contract with Plaintiff. To date, Defendant has rejected Plaintiff's request.

FIRST CAUSE OF ACTION:
Breach of Contract

21. Plaintiff re-alleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

22. At all relevant times, Plaintiff and Defendant had a valid, binding contract, the Agreement.

23. As detailed above, Defendant breached its obligations under the Agreement.

24. All conditions precedent to Defendant's obligations under the Agreement have occurred. Plaintiff has at all times been ready, willing, and has performed its obligations under the Agreement.

25. The Brewster/Cedar Hill Teleports are have special and unique value and character and, therefore, Plaintiff has no adequate remedy at law for Defendant's breach of the Agreement. Specifically, the Brewster/Cedar Hill Teleports are unique business

operations that include, among other things, unique well-established customer relationships and management and employee talent and experience, the loss of which cannot be adequately addressed by damages. Accordingly, Plaintiff seeks specific performance of its Agreement with Defendant.

26. In the alternative, as a direct result of Defendant's breach of the Agreement, Plaintiff has suffered actual damages for which it now seeks recovery, but which are not an adequate remedy.

SECOND CAUSE OF ACTION:
Promissory Estoppel

27. Plaintiff re-alleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

28. In the alternative, Plaintiff is entitled to recovery of its damages under the theory of promissory estoppel.

29. Defendant made a promise to sell the Brewster/Cedar Hill Teleports to Plaintiff. Plaintiff reasonably and substantially relied on such promise to its detriment by, *inter alia*, expending considerable resources to organize and prepare to take over the operation of the Brewster/Cedar Hill Teleports. Plaintiff's reliance of Defendant's promise was reasonably foreseeable by Defendant because by the terms set forth by the bankruptcy court, Plaintiff's assumption of operational control of the Brewster/Cedar Hill Teleports was scheduled to occur simultaneously with the closing of the entire Verestar asset transaction, which was required to be done within 30 days after the sale of the Verestar assets was approved by the court.

30. Defendant breached its promise to sell the Brewster/Cedar Hill Teleports to Plaintiff and as a direct result of Defendant's breach of its promise, Plaintiff has suffered actual damages for which it now seeks recovery.

ATTORNEYS' FEES

31. Plaintiff re-alleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

32. Plaintiff has incurred attorney's fees and litigation expenses in seeking to enforce the Agreement.

33. Plaintiff is entitled to recover from Defendant its reasonable and necessary attorneys' fees pursuant to Section 38.001 of the Texas Civil Practice and Remedies Code.

34. Plaintiff hereby presents its claim to Defendant as required by TEX. CIV. PRAC. & REM. CODE § 38.002 and, in the event payment is not tendered within 30 days, Plaintiff requests judgment for its attorneys' fees.

DEMAND FOR JURY TRIAL

35. In accordance with FED. R. CIV. P. 38(b), , Plaintiff hereby demands a trial by jury on all issues that are set forth in this Complaint.

WHEREFORE, Plaintiff respectfully prays that it be awarded a judgment against Defendant and that it be awarded the following relief:

(a) Specific performance of Defendant's agreement to sell the Brewster/Cedar Hill Teleports to Plaintiff for a fixed sum of $1.5 million, or in the alternative, an award of actual damages in an amount in excess of the jurisdictional minimum of this Court;

(b) An award of all reasonable and necessary attorneys' fees;

(c) An award of all court costs: and

(d) An award of such other and further relief, special or general, legal or equitable, as Plaintiffs may show themselves to be justly entitled to receive.

Respectfully submitted,

HUGHES & LUCE, LLP

BY: _____

Mark A. Shank
Texas State Bar No. 18090800
Matthew G. Nielsen
Texas State Bar No. 24032792

1717 Main Street, Suite 2800
Dallas, Texas 75201
214-939-5500 Phone
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ATTORNEYS FOR PLAINTIFF

Verestar™

Auction Pools

The Company was required to designate not more than eight asset pools in connection with the proposed sale of substantially all of its assets. The list of those asset pools appears below. Parties may submit bids on one or more of these asset pools.

1. **Verestar, Inc. – Whole Company**
   All assets included in the stalking horse bid of SkyTerra Communications, Inc. ("SkyTerra"), plus a bidder may designate additional assets that it seeks to acquire from the list of "excluded assets" in the SkyTerra proposal.

2. **Core Business**
   Includes the Alexandria, Holmdel, Brewster and Leuk Teleports and leased facilities at 60 Hudson St., NY. This asset pool does not include the broadcast businesses, among other assets.

3. **Government Contracts**
   Includes Verestar's government contracts, no assets.

Independent Teleports

4. **Alexandria Teleport**
   Includes the Alexandria Teleport and all contracts supported by Alexandria.

5. **Brewster Teleport**
   Includes the Brewster Teleport and all contracts supported by Brewster.

6. **Cedar Hill Teleport**
   Includes the Cedar Hill Teleport, the Texas Video Network and all contracts supported by Cedar Hill.

7. **Holmdel Teleport**
   Includes the Holmdel Teleport and all contracts supported by Holmdel.

8. **Leuk Teleport**
   Includes the Leuk Teleport, Verestar AG contracts and all Verestar, Inc. contracts supported by Leuk.

In addition to the eight asset pools listed above, the Company will consider separate bids for the Glenwood Teleport, which includes the teleport at Glenwood and all contracts supports by Glenwood. A separate bid for Glenwood will not be part of the SkyTerra auction process.

Exhibit A

Please direct any questions on the Verestar auction pools to Eric Thompson at Alvarez & Marsal. Eric can be reached at 571-226-5741, ethompson@alvarezandmarsal.com

MEMORANDUM OF UNDERSTANDING
Between SES Americom and Mission Holdings, Inc.

March 29, 2004

General: SES Americom and Mission Holdings have submitted separate bids for selected assets of Verestar, Inc. SES Americom and Mission Holdings wish to work cooperatively to increase their chances of completing a successful auction transaction on 3/30/2004 for the Verestar assets.

Goal: Mission Holdings will offer to purchase Asset Pool 5, Brewster, and Asset Pool 6, Cedar Hill (including the Texas Video Network). SES Americom will offer to purchase the remaining Asset Pools.

Bid Strategies: SES Americom and Mission Holdings agree to discuss bidding strategy and tactics in order to present the most attractive offer to the Verestar auctioneers. Areas of cooperation may include, but not be limited to, increasing the bid price and conforming to terms and conditions of the Verestar asset purchase agreement.

Bid Price: Mission Holdings has indicated a willingness to bid at least $1,000,000 for the two Asset Pools noted above, along with an increase to the bid on an equal percentage basis consistent with the SES Americom bid up to an undisclosed amount.

Employees: Mission Holdings will agree to offer employment to the employees associated with the two Asset Pools noted above (17 employees at Brewster and 17 employees at Cedar Hill).

Cure Liabilities Mission Holdings will agree to ~~consider~~ accept ~~the~~ of the Cure Liabilities (amount to be determined) associated with the two Asset Pools noted above, for those contracts which Mission Holdings has designated as "Designated Contracts" as defined in the Asset Purchase Agreement.

Commercial Relationship: In the event that both companies realized their goals, Mission Holdings and SES Americom agree to negotiate the terms of a definitive agreement whereby Mission Holdings will allow SES Americom to have a right of last offer for satellite space segment business that Mission Holdings plans to purchase in the future, and SES Americom will allow Mission Holdings a right of last offer for teleport services that SES Americom plans to purchase in the future from the geographic area of the Brewster and Cedar Hill teleports and that cannot otherwise be provided by an SES facility.

Continuity of Service: Mission Holdings agrees to provide continuity of service at the Brewster and Cedar Hill teleports at current rates for customers that become the responsibility of SES Americom through this transaction.

Obligation: Each of the parties acknowledges that no contractual agreement has been reached with respect to the subject matter hereof and under no circumstances would this MOU be legally binding on or enforceable against either party and does not impose an enforceable duty to conclude any agreement or commitment without a duly authorized, definitive written agreement. The Parties agree that this MOU is non-exclusive.

Non-disclosure: Except as required by law, neither party (nor any of their respective affiliates or representatives) will make any press release or otherwise disclose to any person (other than their respective affiliates and

Exhibit B

representatives) the existence or contents of this MOU or make known any facts related to the subject matter hereof without the prior written consent of the other party.

Confidentiality: In connection with the consideration of the MOU, each party is prepared to furnish to the other certain confidential and proprietary information concerning its business and properties including third party customer information and requirements. All information shall be treated as proprietary and confidential and shall only be disclosed to personnel on a need to know basis and under no circumstances to third parties without the prior written consent of the other party. Moreover, information exchanged under this MOU may be subject to U.S. export control laws and regulations and each party agrees that such information shall not be disclosed or transferred without first obtaining approval from legal counsel from the disclosing party.

Expenses: Each party will each bear its own expenses related to the investigation, negotiation, and consummation of the subject matter set forth herein.

Effect: In the event that the parties are unable to reach agreement with respect to the subject matter herein by March ~~24~~ 31, 2004, neither party will have any liability or obligation to the other with respect to the subject matter above except (i) other written agreements between the parties then in effect, (ii) as provided in Non-disclosure and Confidentiality sections above, which provisions will survive indefinitely, or (iii) the antecedent breach of this MOU. Under no circumstances would either party be liable to the other for indirect, consequential, punitive, special or other similar damages (whether in contract, tort (including negligence), strict liability or under any theory of liability), including but not limited to loss of actual or anticipated revenues or profits, loss of business, customers or good will.

Amendments: The terms of this MOU may be modified or waived only by a separate writing signed by each of the parties that expressly modifies or waives any such term.

Applicable Law: This MOU will be construed in accordance with and governed by the laws of the State of New Jersey (without regard to the choice of law provisions thereof).

Counterparts: This MOU may be signed in any number of counterparts with the same effect as if each of the signatures were on the same agreement.

Entire Agreement: This MOU constitutes the entire understanding between the parties and supersedes all previous agreements, promises, proposals, representations, understandings, and negotiations (whether written or oral) strictly with respect to the subject matter hereof.

Cure Liability Clarification: Mission Holdings cure liability related to taxes & permits liens shall not exceed $200,000 for Brewster and Cedar Hill.

Agreed by:

Mission Holdings, Inc.		SES Americom, Inc.	
Philip J. Wise	Date	Brent C. Bruun	3/31/04 Date

representatives) the existence or contents of this MOU or make known any facts related to the subject matter hereof without the prior written consent of the other party.

Confidentiality: In connection with the consideration of the MOU, each party is prepared to furnish to the other certain confidential and proprietary information concerning its business and properties including third party customer information and requirements. All information shall be treated as proprietary and confidential and shall only be disclosed to personnel on a need to know basis and under no circumstances to third parties without the prior written consent of the other party. Moreover, information exchanged under this MOU may be subject to U.S. export control laws and regulations and each party agrees that such information shall not be disclosed or transferred without first obtaining approval from legal counsel from the disclosing party.

Expenses: Each party will each bear its own expenses related to the investigation, negotiation, and consummation of the subject matter set forth herein.

Effect: In the event that the parties are unable to reach agreement with respect to the subject matter herein by March ~~30~~ 31, 2004, neither party will have any liability or obligation to the other with respect to the subject matter above except (i) other written agreements between the parties then in effect, (ii) as provided in Non-disclosure and Confidentiality sections above, which provisions will survive indefinitely, or (iii) the antecedent breach of this MOU. Under no circumstances would either party be liable to the other for indirect, consequential, punitive, special or other similar damages (whether in contract, tort (including negligence), strict liability or under any theory of liability), including but not limited to loss of actual or anticipated revenues or profits, loss of business, customers or good will.

Amendments: The terms of this MOU may be modified or waived only by a separate writing signed by each of the parties that expressly modifies or waives any such term.

Applicable Law: This MOU will be construed in accordance with and governed by the laws of the State of New Jersey (without regard to the choice of law provisions thereof).

Counterparts: This MOU may be signed in any number of counterparts with the same effect as if each of the signatures were on the same agreement.

Entire Agreement: This MOU constitutes the entire understanding between the parties and supersedes all previous agreements, promises, proposals, representations, understandings, and negotiations (whether written or oral) strictly with respect to the subject matter hereof.

Cure Liability Clarification: Mission Holdings agrees to cure the Dallas County Reclamation lien of $ 66,166 + the City of Irving liens totalling $ 8,086. All other cure cost ~~will~~ other than those contracts accepted shall be capped at $ 60,748

Agreed by:

Mission Holdings, Inc.

Philip J. Wise — Date: 3/30/04

SES Americom, Inc.

Brent C. Bruun — Date

PRIVATE AND CONFIDENTIAL

This document contains proprietary and confidential information of SES Americom, Inc. and shall not to be disclosed to any third party without the prior written consent of SES Americom, Inc.

United States District Court

NORTHERN DISTRICT OF **TEXAS**

SUMMONS IN A CIVIL ACTION

GWTP Investments, L.P., Plaintiff,
v.
SES Americom, Inc., Defendant

CASE NUMBER: _____

TO: (Name and Address of Defendant)
SES Americom, Inc.
by and through its registered agent
CT Corporation System
1021 Main St., Suite 1150
Houston, TX 77002

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (Name and Address)
Matthew G. Nielsen
Hughes & Luce, LLP
1717 Main St., Suite 2800
Dallas, TX 75201

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

CLERK OF COURT

CLERK

DATE

Amanda Shell

BY DEPUTY CLERK

RETURN OF SERVICE

Service of the Summons and Complaint was made by me[1]	DATE
NAME OF SERVER (PRINT)	TITLE

Check one box below to indicate appropriate method of service

☐ Served personally upon the defendant. Place where served: _____

☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left: _____

☐ Returned unexecuted: _____

☐ Other (*specify*): _____

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date Signature of Server

_____
Address of Server

[1] As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED
JUN 2 4 2004
U.S. DISTRICT COURT
Deputy

GWTP INVESTMENTS, L.P.,	§	
	§	
Plaintiff,	§	CIVIL ACTION
v.	§	NO. _____
	§	
SES AMERICOM, INC.	§	
	§	
Defendant.	§	

PLAINTIFF'S CERTIFICATE OF INTERESTED PERSONS

Plaintiff GWTP Investments, L.P. ("Plaintiff") files this Certificate of Interested Persons pursuant to Local Rule 3.1(f).

1. The following persons are known by Plaintiff at this time to be financially interested in the outcome of the present case:

a. Plaintiff and its partners, GWTP Holdings, L.L.C. (Plaintiff's general partner) and Mission Holdings, Inc. and Floyd Ganassi (Plaintiff's limited partners); and

b. Defendant SES Americom, Inc.

Respectfully submitted,

HUGHES & LUCE, LLP

BY: _____

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Texas State Bar No. 18090800
Matthew G. Nielsen
Texas State Bar No. 24032792

1717 Main Street, Suite 2800
Dallas, Texas 75201
214-939-5500 Phone
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing will be served upon Defendant SES Americom, Inc., through its registered agent for service of process in Texas, CT Corporation Systems located at 1021 Main Street, Suite 1150, Houston, Texas 77002, by certified mail, return receipt requested contemporaneously with the service of summons and civil complaint in the above-referenced matter.

Matthew G. Nielsen

CERTIFICATE OF SERVICE

I, Jennifer Short, hereby certify that a true and correct copy of the foregoing Petition to Dismiss or Deny was served this 25th day of June, 2004 via E-mail or U.S. Mail, First Class, postage pre-paid, to each of the following:

Best Copy and Printing, Inc.
Duplicating contractor
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Marilyn Simon
Federal Communications Commission
Satellite Division
International Bureau
445 12th Street, SW
Washington, D.C. 20554

David Krech
Federal Communications Commission
Policy Division
International Bureau
445 12th Street, SW
Washington D.C. 20554

Tracey Wilson
Federal Communications Commission
Competition Policy Division
Wireline Competition Bureau
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Washington, D.C. 20554

Neil Dellar
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JoAnn Lucanik
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Jeanette Spriggs
Federal Communications Commission
Satellite Division
International Bureau
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Washington, D.C. 20554

Dennis Johnson
Federal Communications Commission
Competition Policy Division
Wireline Competition Bureau
445 125th Street, SW
Washington, D.C. 20554

Jeff Tobias
Federal Communications Commission
Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau
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Jennifer Short