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

In the Matter of the Applications of	)	
	)	
SatCom Systems, Inc.	)	
	)	
For Blanket Authorization to operate up to	)	
25,000 mobile satellite earth terminals (METs)	)	
through Canadian-licensed satellite MSAT-1 at	)	File Number: 647-DSE-P/L-98
106.5 degrees W.L., in frequency bands	)	IBFS File Number:
1631.5-1660.5 MHz (transmit) and	)	SES-LIC-19980310-00272E9808159
1530-1559 MHz (receive) throughout	)	
the Continental United States, United States	)	
territories, Alaska, and Hawaii	)	
	)	
TMI Communications and Company, L.P.	)	
	)	
For Blanket Authorization to operate up to	)	
100,000 mobile satellite earth terminals (METs)	)	File Number: 730-DSE-P/L-98
through Canadian-licensed satellite MSAT-1 at	)	IBFS File Number:
106.5 degrees W.L. in frequency bands	)	SES-LIC-19980330-00339E980179
1631.5-1660.5 MHz (transmit) and	)	
1530-1559 MHz (receive) throughout the	)	
Continental United States, United States	)	
territories, Alaska, and Hawaii	)	
	)	
SatCom Systems, Inc.	)	File No. 1217-SSA-98
	)	
For Special Temporary Authority to Provide	)	
Mobile Satellite Service Through The	)	
Canadian-Licensed MSAT-1 Satellite	)	

ORDER AND AUTHORIZATION

Adopted: November 12, 1999 **Released:** November 30, 1999

By the Commission: Commissioner Furchtgott-Roth issuing a statement.

I. Introduction

1. By this action, we grant SatCom Systems, Inc. (SatCom) and TMI Communications and Company, L.P. (TMI) blanket authority to operate mobile earth terminals (METs) to provide mobile satellite service (MSS) in the United States via a Canadian-licensed satellite, subject to conditions. SatCom and TMI's METs will operate in portions of the L-Band

spectrum.[1] Grant of these applications will serve the public interest by facilitating increased competition in the mobile satellite services market, which will provide U.S. consumers and users, including various federal and state governments and agencies, businesses and individual consumers additional service options as well as other benefits of competition such as lower prices, innovation, and improved service.[2]

II. Background

A. The Applications

2. On March 10, 1998, SatCom, a U.S. company, filed an application for blanket authorization to operate up to 25,000 METs in the United States for communication with the Canadian satellite, MSAT-1. MSAT-1 is a geostationary satellite licensed by the Canadian government that currently operates at 106.5^0 W.L.[3] SatCom proposes to operate in the 1530-1559 MHz and 1631.5-1660.5 MHz frequency bands. Pursuant to this authority, SatCom would provide circuit-switched mobile telephone services and packet-switched data services to land vehicles, maritime and aeronautical vessels, and temporary fixed stations.

3. On March 30, 1998, TMI, a Canadian Company, filed an application for blanket authorization to operate up to 100,000 METs to communicate with the MSAT-1 satellite.[4] TMI proposes to operate in the 1530-1559 MHz and 1631.5-1660.5 MHz frequency bands.[5] Pursuant to this authority, TMI would provide circuit-switched mobile telephone services and packet-switched data services to land vehicles, maritime and aeronautical vessels, and temporary fixed

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[1] The "L-Band" is a general designation for frequencies from 1 to 2 GHz. In this *Order and Authorization*, however, the term "L-Band" denotes only the 1545-1559 MHz and 1646.5-1660.5 MHz frequency bands ("upper L-band") and the 1525-1530 MHz, 1530-1544 MHz, and 1626.5-1645.5 MHz frequency bands ("lower L-band"). The United States is the only country that distinguishes between the "upper" and "lower" L-band.

[2] The Commission's regulatory policies for licensing providers of domestic service using non-U.S. licensed satellite systems are based on the goals of promoting competition in the United States and in foreign markets. *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Service in the United States*, Report and Order, 12 FCC Rcd 24094 (1997), appeal docketed, *ComSat Corp. v. FCC*, No. 98-1001 (D.C. Cir. filed Jan.12, 1998) ("*DISCO II Order*") at ¶¶ 39-40.

[3] In the Matter of the Application of SatCom Systems, Inc. for Blanket Authorization to operate up to 25,000 METs, File No. 647-DSE-P/L/-98 ("SatCom Application"). MSAT-1 is operated by TMI.

[4] In the Matter of the Application of TMI Communications and Company, L.P. For Blanket Authorization to Operate Up to 100,000 METs, File No. 647-DSE-P/L/-98 ("TMI Application").

[5] SatCom and TMI state that pursuant to Commission's rules, they will not operate in the 1544-1545 MHz and 1645.5-1646.5 MHz bands that are limited in the United States exclusively for use for distress and safety communications. *See* 47 C.F.R. § 2.106 nn.727A, 734B.

stations.[6]

4. AMSC Subsidiary Corporation (AMSC), which the Commission licensed in 1989 to operate a mobile satellite system in the upper L-band, filed a Petition to Deny both the SatCom and TMI applications.[7] AMSC argues that the Commission should not permit foreign licensed L-band mobile satellites to serve the United States until AMSC has successfully coordinated sufficient L-band spectrum for its system. Space System License, Inc., (SSL) a wholly owned subsidiary of Motorola Inc., filing jointly with Iridium LLC, (SSL/Iridium), Globalstar, L.P., and Norcom Networks Corporation (Norcom) argue that the Commission should not permit foreign-licensed satellite systems to operate in the "lower" L-band until the Commission lifts the "freeze" it imposed in 1996 on applications for this band.[8] In response, both SatCom and TMI state that they would not object to an initial license grant for operating authority solely in the "upper" L-band.[9] SSL/Iridium also requests that if we were to grant the SatCom and TMI applications, we require SatCom and TMI to coordinate out-of-band interference with its licensed "Big LEO" Iridium system,[10] while Norcom requests that we require TMI to provide satellite capacity on MSAT-1 at non-discriminatory rates.[11]

5. In addition, in April 1999, the Federal Bureau of Investigation (FBI) filed Petitions to Defer and Request for Imposition of Conditions on both applications.[12]

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[6] On August 25, 1998, the International Bureau modified the *ex parte* status of the SatCom and TMI application proceeding from restricted to "permit-but-disclose." Public Notice, Report No. SPB-136.

[7] AMSC Subsidiary Corporation Petition to Deny Application of SatCom Systems Inc. (filed April 24, 1998) ("AMSC Petition to Deny SatCom"); AMSC Subsidiary Corporation Petition to Deny Application of TMI Communications and Company, L.P. (filed May 29, 1998) ("AMSC Petition to Deny TMI").

[8] GlobalStar, L.P. Petition to Deny TMI's application at 6-9 (filed May 29, 1998) ("GlobalStar Petition to Deny TMI"); Space System License, Inc. and Iridium LLC Petition to Deny or Defer TMI's application at 2-4 (filed May 29, 1998) ("SSL/Iridium Petition to Deny TMI"); Norcom Networks Corporation Petition to Defer and Request for Imposition of Conditions on TMI's application at 4-9 (filed May 29, 1998) ("Norcom Petition on TMI's application"); Reply of Globalstar, L.P. to Opposition to Petitions to Deny filed by SatCom (filed June 4, 1998) ("GlobalStar Reply to SatCom"); Space System License, Inc. and Iridium LLC Reply to the Opposition to Petitions to Deny filed by SatCom at 2-4 (filed June 4, 1998) ("SSL/Iridium Reply to SatCom's Opposition").

[9] *Ex parte* Letter to Magalie Roman Salas, Secretary, Federal Communications Commission from Gregory C. Staple, Counsel for TMI (December 4, 1998); *Ex parte* Letter to Magalie Roman Salas, Secretary, Federal Communications Commission from Gregory C. Staple, Counsel for SatCom (December 4, 1998).

[10] SSL/Iridium Petition to Deny SatCom at 5 and Appendix 1; SSL/Iridium Petition to Deny TMI at 5-6.

[11] Norcom Petition on TMI's application at 12-15.

[12] FBI Petition to Defer and Request For Imposition of Conditions on TMI's application (filed April 7, 1999); FBI Petition to Defer and Request For Imposition of Conditions on SatCom application (filed April 16, 1999).

Accompanying the respective Petitions were Motions for Leave to File Late Pleadings.[13] In response, TMI and Satcom filed Oppositions to both the FBI's Motion and the FBI's Petition.[14] The FBI filed Replies to the Oppositions.[15] The FBI, however, reached agreement with TMI in October 1999 and filed a conditional withdrawal of its Petition to Defer and Request for Imposition of Conditions.[16]

6. On February 10, 1998, the International Bureau granted SatCom's request for special temporary authority (STA) to conduct limited technical trials until September 26, 1998 using up to thirty METs.[17] SatCom currently is conducting commercial trials for up to 500 terminals under an STA granted July 17, 1998.[18] The International Bureau granted the STAs without prejudice to Commission action on SatCom's underlying application for regular authority. To this end, the International Bureau required SatCom, as a condition of its STA to conduct commercial trials for 500 METs, to inform customers that it is operating under temporary authority and would be required to terminate operations in the event the Commission denied its underlying application. Globalstar filed a Petition for Reconsideration of the STA for commercial trials and AMSC filed a Motion for Stay and an Application for Review of the STA.[19]

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[13] FBI Motion for Leave to File Late Pleading on the TMI application (filed April 7, 1999); FBI Motion for Leave to File Late Pleading on the SatCom application (filed April 16, 1999). We find that it is in the public interest to grant the FBI's Motions to File Late Pleadings.

[14] TMI's Opposition to FBI's Motion for Leave to File Late Pleading (filed April 19, 1999); SatCom's Opposition to FBI's Motion for Leave to File Late Pleading (filed April 26, 1999).

[15] FBI Reply to TMI Opposition (filed April 27, 1999).

[16] FBI Withdrawal of Petition to Defer the SatCom application (filed October 6, 1999).

[17] Letter from Steven B. Sharkey, Chief, Satellite Engineering Branch, Satellite and Radiocommunication Division, International Bureau, to Gregory C. Staple, Counsel for SatCom (February 10, 1998); *see also* Letter from Steve B. Sharkey, Chief, Satellite Engineering Branch, Satellite and Radiocommunication Division, International Bureau, to Gregory C. Staple, Counsel for SatCom, L.L.P. (June 26, 1998).

[18] *SatCom Systems, Inc.,* 13 FCC Rcd. 13507 (Int'l Bur. 1998). This authority was extended twice and expires on February 5, 2000. *See* SES-STA-19981218-02052 and SES-STA-19990730-01309.

[19] SSL/Iridium filed comments in support of the Petition for Reconsideration. SatCom filed Oppositions to all of these pleadings. Globalstar and AMSC filed replies to SatCom's Oppositions. On August 25, 1998, the International Bureau also modified the *ex parte* status of the SatCom STA proceeding from restricted to "permit-but-disclose. Public Notice, Report No. SPB-136.

B. Current L-Band Licensee

7. AMSC is the only U.S. system currently authorized to provide domestic L-band service in the United States.[20] AMSC was formed as a consortium of all qualified applicants that had filed MSS space station applications in response to a 1985 cut-off notice.[21] In developing licensing rules for this new service, the Commission determined that the available spectrum could support only one U.S. space station licensee and directed the qualified applicants to form a consortium.[22] In 1989, the Commission granted AMSC authority to construct, launch, and operate a three-satellite geostationary-satellite MSS system to operate in 28 megahertz (14 megahertz in each transmission direction) of L-band spectrum.[23] AMSC was authorized to operate in the "upper" portion of the L-band only, specifically the 1545-1559 MHz and 1646.5-1660.5 MHz bands, subject to international coordination. AMSC currently operates one satellite, AMSC-1, at 101^0 W.L.

C. L-Band Coordination Agreement

8. The L-band is comprised of 66 megahertz (33 megahertz in each transmission direction). In the North America coverage area,[24] five operators, including AMSC, currently provide service in the L-band.[25] In accordance with the provisions of the Radio Regulations of the International Telecommunication Union (ITU), operators of satellite systems are required to coordinate their spectrum use to prevent interference to, and receive protection from, other systems.[26] International coordination of the L-band frequencies has been difficult because the

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[20] Comsat Corporation, the U.S. signatory to Inmarsat, however, was authorized to provide Aeronautical Mobile Satellite (Route) Service and Aeronautical Mobile-Satellite Service to aircraft in international flight in the United States. *See* 13 FCC Rcd 211155 (1998).

[21] *See Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services*, Notice of Proposed Rulemaking, 50 Fed. Reg. 8149 (Feb. 28, 1985).

[22] *Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services,* Second Report and Order, 2 FCC 2d 485 (1987).

[23] *Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service, Memorandum Opinion Order and Authorization*, 4 FCC Rcd 6041 (1989); 7 FCC Rcd 266 (1992) (remand decision); *aff'd sub nom. Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275 (D.C. Cir. 1993) ("AMSC Authorization").

[24] The North America coverage area includes all of North America and surrounding water areas, up to twelve miles off-shore.

[25] The five operators are: AMSC; MSAT; Solidaridad, a Mexican-licensed operator; TM Sat, a Russian licensed operator; and Inmarsat Ltd., a United Kingdom operator.

[26] *See generally* International Telecommunication Union's Radio Regulations Article S9 (1998 edition).

stated requirements of the five systems involved in the coordination, which included their domestic requirements, far exceed the 66 megahertz of spectrum available. In June 1996, in Mexico City, after seven years of negotiations, the operators recognized that they would not be able to reach a long-term coordination agreement that would accommodate their business plans. Their respective administrations (the United States, Canada, Mexico, Russia, and Inmarsat)[27] developed and agreed upon a unique framework to facilitate annual and dynamic spectrum assignment agreements among the operators.[28] The operators then signed a one-year agreement that would be revisited annually based upon current and projected traffic levels of each system ("annual operator-to-operator agreement"). The 1996 operator-to-operator agreement provided each system with an amount of spectrum based upon its current and projected near-term traffic requirements. Thus unlike most international coordinations that create permanent assignments of specific spectrum, here the operators' assignments could change from year to year based on their marketplace needs. Significantly, each of the five operators received less spectrum than it had requested for its system, for its long-term use, and in some cases, less spectrum than it had been authorized to use by its respective administration. By agreement of the operators, the actual amount of spectrum and the frequencies that each party has coordinated and is able to use is confidential.

D. Lower L-Band Notice of Proposed Rulemaking

9. Although the entire L-band spectrum has been and continues to be coordinated among the five operators, certain issues remain domestically. In June 1996, the Commission issued a Notice of Proposed Rulemaking to establish rules and policies for the use of spectrum for MSS in the lower L-band.[29] In that *Notice*, the Commission acknowledged that in the course of international coordination, it became clear that the United States would not be able to secure sufficient spectrum in the upper L-band to support AMSC's system. Consequently, the United States began to coordinate spectrum in the lower L-band to make up some of the shortfall to support the U.S. system.

10. In the *Lower L-Band Notice,* the Commission recognized that when it established licensing policies for L-band MSS in 1985, it had "estimated that an MSS system would require 20 megahertz"[30] (10 megahertz in each transmission direction). The Commission further

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[27] Inmarsat has since restructured as a private company of the United Kingdom, Inmarsat Ltd. The United Kingdom has informed the Commission that it is now a party to the Mexico City Agreement. *See* Letter from Steve Jones, United Kingdom Radiocommunications Agency, to Thomas S. Tycz, Federal Communications Commission, dated August 18, 1999.

[28] *See* International Action: "FCC Hails Historic Agreement on International Satellite Coordination," News Release, Report No. IN 96-16 (June 25, 1996) ("Mexico City Agreement").

[29] *In the Matter of Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Service in the Upper and Lower L-band*, Notice of Proposed Rulemaking, 11 FCC Rcd 11675 (1996) ("*Lower L-band Notice*").

[30] *Lower L-Band Notice* at ¶ 9, *citing Amendments of Parts 2, 22, and 25 of the Commission's Rules to Allocate*

Footnote continued on next page.

recognized that based on the status of coordination negotiations, it was unlikely to coordinate more than 20 to 24 megahertz (10 to 12 megahertz, respectively, in each transmission direction) in the entire L-band and significantly less than that in the upper L-band.[31] The Commission further stated that while it cannot guarantee the outcome of international coordinations regarding the L-band spectrum, it would attempt to secure sufficient spectrum "to ensure that our licensees have a fair opportunity to compete."[32] To provide AMSC with this opportunity, the Commission proposed to modify AMSC's authorization to permit it to operate in the lower L-band spectrum coordinated for the U.S. system, without considering competing U.S. lower L-band applications for U.S. space station licenses.[33] The Commission requested comment on this proposal, as well as on whether its 1985 estimate regarding the amount of spectrum (10 megahertz in each direction) needed to operate a viable MSS system was still valid.[34] The Commission also proposed that if the United States were able to coordinate more than 28 megahertz of spectrum in the upper and/or lower L-bands, it would allow other parties to apply for assignment of the additional spectrum for U.S. space station licenses.[35]

E. World Trade Organization Agreement and DISCO II

11. The United States signed the World Trade Organization (WTO) Agreement on Basic Telecommunication Services in 1997. In the WTO Agreement, the United States committed to open its satellite market to foreign systems licensed by WTO-member countries to provide fixed and mobile satellite services (excluding direct-to-home fixed-satellite service).[36] In November 1997, we adopted the *DISCO II Order* which implements the United States' satellite commitments made under the WTO Agreement.[37] In *DISCO II*, we stated that we would

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Spectrum for and Establish Rules Pertaining to the Use of Radio Frequencies in Land Mobile Satellite Service, Notice of Proposed Rulemaking, 50 Fed. Reg. 5983 (1985).

[31] *Lower L-Band Notice* at ¶ 9.

[32] *Id*. at ¶ 14.

[33] *Id.* at ¶ 11.

[34] *Id.* at ¶ 10.

[35] *Id.* at ¶ 16.

[36] The results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS (April 30, 1996), 36 I.L.M. 336 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Agreement."

[37] *DISCO II Order*, 12 FCC Rcd 24094 (1997).

consider requests to serve the U.S. market pursuant to our public interest mandate[38] and identified public interest factors relevant to making this determination.[39]

III. Discussion

12. Consistent with *DISCO II,* in our public interest review of the TMI and SatCom earth station applications, we will take into account a number of factors, including the effect of the pending applications on competition in the United States, spectrum availability, eligibility requirements, technical requirements, and national security, law enforcement, foreign policy and trade issues, as appropriate.[40]

13. In *DISCO II*, the Commission established two procedural vehicles by which a foreign-licensed satellite could seek access to the United States. The first involved the foreign entity participating in a *space station* processing round. The Commission envisioned that this vehicle would be used in response to a Public Notice announcing a "cut-off" date for filing *space station* applications to be considered in the round.[41] Due to the difficulties in coordinating the five licensed L-band systems, the Commission does not intend to open a space station processing round to consider additional space stations in the upper L-band.

14. The second procedure by which the Commission considers requests for foreign systems to access the United States involves the *earth station* licensing process independent of a space station processing round. In *DISCO II*, the Commission said it expected this procedure would be used where an earth station in the United States seeks to access a non-U.S. satellite that "is already operating and for which the international coordination process...has been initiated."[42] This is the case here. The TMI satellite is in-orbit and operating on frequencies coordinated for the Canadian L-band MSS system. SatCom and TMI, both seek to access the TMI satellite using earth stations located and licensed in the United States. As discussed below, we find that granting these earth station applications is in the public interest. Consequently, grant of the TMI and SatCom earth station applications is consistent with the *DISCO II* framework, which was designed to consider requests for foreign access to the U.S. satellite market in a transparent and non-discriminatory fashion.

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38 47 USC at §§ 308(b), 309; *DISCO II* at¶ 158.

39 *DISCO II* at ¶ 15.

40 *See id.* at ¶ 15.

41 *Id.* at ¶ 184.

42 *Id.* at ¶ 186.

A. Competition Issues

15. The first factor in our public interest analysis is the effect foreign entry will have on competition in the U.S. satellite market. In *DISCO II*, we adopted a presumption that entry by satellite systems from WTO-member countries seeking to provide satellite services in the United States for which the United States made market access commitments will promote competition.[43] In their applications, SatCom and TMI seek to access a satellite licensed by Canada, a WTO member, to provide WTO-covered mobile-satellite services in the United States. Consequently, we presume that grant of the applications will promote competition in the United States.

16. Nevertheless, a party may seek to rebut the presumption that entry by a WTO-member satellite to provide WTO-covered service will further competition by demonstrating that entry would cause competitive harm in the U.S. satellite market.[44] In *DISCO II*, the Commission gave examples of the "exceptional" circumstances that could give rise to competition concerns including, "market concentration, discrimination, below average variable cost pricing, monopoly supply of service . . . or where the applicant has market power and could use that power to raise prices and limit output in the U.S. satellite market . . . ."[45] We also stated that where necessary to constrain the potential for anti-competitive harm in the U.S. market for satellite services, we reserve the right to attach conditions to a grant of authority, and in the exceptional case in which an application poses a very high risk to competition, to deny an application.[46]

17. AMSC contends that grant of SatCom and TMI's applications would pose a "very high risk to competition in the U.S. MSS market."[47] Specifically, AMSC alleges that TMI has received substantial subsidies from the Canadian government during the course of its development, and that this investment has significantly lowered TMI's effective capital costs.[48] As a result, AMSC claims that TMI has the ability to engage in price discrimination or below average variable cost pricing.[49] In response, SatCom and TMI claim they have not benefitted from Canadian government subsidies.[50] TMI asserts that the Canadian government did provide

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[43] *Id.* at ¶ 7 ("We adopt a presumption that entry by WTO Member satellite systems will promote competition in the U.S. satellite services market").

[44] *Id.* at ¶ 41.

[45] *Id.*

[46] *Id.* at ¶ 11 and ¶ 41.

[47] AMSC Petition to Deny SatCom at 22; AMSC Petition to Deny TMI at 17-18.

[48] *Id.*

[49] *Id.*

[50] SatCom Opposition to Petitions to Deny at 16; TMI Opposition to Petitions to Deny at 18-20.

financial support for the research and development of mobile terminals and applications, but that it provided those to independent manufacturers for development purposes, not to TMI.[51]

18. AMSC has not met its burden of proof under the *DISCO II* standard.[52] It has not demonstrated that grant of SatCom's or TMI's applications would cause competitive harm or pose a very high risk to competition in the U.S. satellite market to warrant either imposing conditions on the grants, or denial of the applications. AMSC provides no convincing evidence that TMI was subsidized by the Canadian government. AMSC merely states that it "believes that the Canadian government nurtured the project in its early stages, providing more than $2 million (U.S.) of internal funding."[53] Further, AMSC's reference to a pre-paid services agreement between the Canadian government and TMI, pursuant to which the Government paid TMI approximately $111 million in exchange for capacity on TMI's system,[54] does not convince us that the Canadian government subsidized TMI such that TMI has a competitive advantage that would require us to take account of it in our action on these applications. As TMI indicates, it is not unusual for a satellite operator to obtain commitments for use of capacity and to secure prepayment on that commitment.[55] Moreover, TMI asserts that the liability for the prepaid services is recorded on TMI's financial statements and that the Canadian government is now using the services TMI has contracted to provide.[56] AMSC also alleges that BCE, Inc., the current owner of TMI, committed $100 million to TMI's development at the time of TMI's bankruptcy reorganization in 1993 only because it would receive favorable tax treatment from the Canadian government.[57] TMI claims, however, that this tax treatment would have been available to other taxpayers in Canada.[58] Further, even if, as AMSC asserts, the Canadian government did provide substantial financial support to TMI during its developmental phase, we find that AMSC has not demonstrated that such contributions have impacted the pricing of TMI's services. Again, AMSC merely states that such contributions will allow TMI more "pricing flexibility than AMSC has."[59] AMSC does not provide any empirical evidence supporting its assertions regarding the pricing of TMI's services. AMSC's allegations, without supporting

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51 TMI Opposition to Petitions to Deny at 18-20.

52 *DISCO II Order* at ¶ 41.

53 AMSC Petition to Deny SatCom at 7.

54 *Id*.

55 TMI Opposition to Petitions to Deny at 18-19.

56 *Id.*

57 *Id*. at 8.

58 TMI Opposition to Petitions to Deny at 19.

59 AMSC Reply to Opposition of TMI at 22.

evidence, therefore, do not rise to the level of "exceptional" circumstances anticipated by *DISCO II* as a basis for denying an application based on competition grounds.

19. Norcom Networks is also concerned about possible anticompetitive effects that may result from TMI's entry into the U.S. packet data MSS market. Both Norcom and TMI own and operate Packet Data Hub stations, which are used to control mobile earth terminals and route packet data transmissions, originating from mobile earth terminals, over terrestrial networks.[60] Norcom asserts that if the Commission grants TMI's application, TMI and Norcom will be direct competitors in the provision of value-added packet data MSS and Norcom will be a potential customer of TMI for satellite capacity.[61] Specifically, Norcom contends that TMI could subsidize its satellite capacity to end-users by charging TMI competitors, in the market to provide packet data and circuit-switched MSS, "anticompetitive" prices for access to its satellite.[62]

20. Norcom, therefore, requests the Commission to condition any grant of TMI's application by requiring TMI to "disclose its cost structure for the provision of MSS satellite capacity to its own Packet Data Hub and provide Norcom with capacity on MSAT-1 at a rate equal to the transfer price at which TMI provides satellite capacity to its own Packet Data Hub."[63] Norcom asserts that such a condition is consistent with the Commission's policy of imposing reporting requirements to allow the Commission to monitor transfer pricing.[64] TMI asserts that it plans to provide only wholesale services in the U.S. market and will not compete directly with Norcom's retail services.[65] TMI further states that it plans to offer its capacity on MSAT-1 to packet data service providers separate from TMI's packet hub services, and "on a price which takes into account the reduced costs which TMI may incur from providing an unbundled offering."[66]

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[60] Norcom owns and operates a ground-based data transport system that provides value-added packet data MSS in the United States in conjunction with the AMSC-1 satellite. Norcom Petition at 2.

[61] *See* Norcom Petition at 13. Norcom and TMI own and operate the only two Packet Data Hubs capable of providing packet data MSS over satellites in North America. *Id* at n. 32.

[62] Norcom Petition on TMI's application at 14.

[63] Norcom Petition on TMI's application at 12-13; 15.

[64] *Id*. at n.33, *citing Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order, 12 FCC Rcd 23891 (1997) ¶¶ 270-292 (requiring certain foreign-affiliated carriers to file quarterly reports to allow the Commission to monitor whether the carriers are receiving preferential treatment by foreign carriers).

[65] *See* discussion *infra* at ¶¶ 44-45.

[66] TMI Oppositions to Petitions to Deny at 21.

21. Norcom has not demonstrated that TMI will set prices in a discriminatory manner. Norcom provides no justification or quantitative evidence to support its assertion that TMI will set anticompetitive prices. Instead, Norcom offers conclusory statements about alleged future behavior of TMI. Further, because TMI is not providing its services directly to end-users, it will not be competing directly with Norcom. The cases cited by Norcom are inapposite here. We find that it is not necessary to place the condition requested by Norcom on TMI's license since Norcom has not demonstrated that TMI will set prices in a discriminatory manner.

B. Spectrum Availability

22. The second public interest factor we consider here is spectrum availability. Specifically, we consider whether there is spectrum available to accommodate SatCom and TMI's earth station request. As the Commission noted in *DISCO II,* we will consider spectrum availability in determining whether to grant a non-U.S. satellite access to the U.S. market.[67] In particular, we noted that when considering earth station applications that propose to provide service in the United States using an operating non-U.S. licensed satellite, "[w]e must determine whether, and to what extent, the proposed U.S. service will impact existing operations in the United States."[68] For example, the Commission stated that "it did not expect to require existing U.S. satellite systems to change their licensed operating parameters or to decrease their capacity in order to accommodate additional non-U.S. systems."[69]

1. Contentions of the Parties

23. In their respective applications, both SatCom and TMI assert that the L-band frequencies that each proposes for service in the United States already have been coordinated for the Canadian system under the annual operator-to-operator agreement.[70] As described above, in the Mexico City Agreement, the five administrations established a framework that permitted operators to develop a plan that designated discrete portions of the L-band to each system for operation. SatCom and TMI note that in serving the United States via the earth station applications at issue here, they only will use spectrum that was coordinated for the Canadian system; they will not provide service using spectrum coordinated for the United States, i.e., the only system currently authorized for domestic service, AMSC. As a result, SatCom and TMI

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67 *DISCO II* at ¶ 149.

68 *DISCO II* at ¶ 150.

69 *DISCO II* at ¶ 147.

70 SatCom Application Exhibit 2, at 1; TMI Application Exhibit 2 at 1.

contend that their proposed services will not cause harmful interference or adversely impact any existing U.S. operations.[71]

24. Under the annual operator-to-operator agreements AMSC has received access to less than 20 megahertz of L-band spectrum (10 megahertz in each transmission direction).[72] AMSC argues that no other company should be allowed to provide L-Band service in the United States until AMSC has successfully coordinated the 20 megahertz of spectrum it believes it needs to implement a viable system and which it believes the Commission "promised" it in the *Lower L-Band Notice*.[73] Specifically, AMSC is concerned that TMI will use any increase in traffic usage as a result of serving the U.S. market to negotiate additional spectrum for MSAT-1 in the annual operator-to-operator coordination negotiations.[74] AMSC asserts that this opportunity will, in turn, hinder its ability to coordinate the additional spectrum necessary to bring its assignment to 20 megahertz. AMSC further asserts that, because of the lack of available spectrum, the Commission should not find that it is in the public interest to grant the SatCom and TMI applications based on the spectrum availability policy articulated under *DISCO II*.[75] AMSC also argues that grant of SatCom and TMI's earth station applications would result in a modification of AMSC's authorization and would cause interference with AMSC's coordinated spectrum.[76]

2. Discussion

25. We find that allowing the TMI system to serve the United States in the spectrum coordinated for the Canadian L-band MSS system will not, under our *DISCO II* policies, impact AMSC's existing operations, change its licensed operating parameters, or necessarily decrease AMSC's capacity. AMSC is now operating on spectrum coordinated for the U.S. MSS system in the annual operator-to-operator agreement. TMI is now operating on spectrum coordinated for the Canadian MSS system in the annual operator-to-operator agreement. These spectrum segments do not overlap and under the current operator-to-operator agreement, the use of the respective spectrum segments by AMSC and TMI will not result in interference to the operations

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71 *Id.*

72 As noted previously, the five operators have agreed to keep the specific spectrum assignments confidential.

73 AMSC Petition to Deny SatCom at 15; AMSC Petition to Deny TMI at 9; *see also ex parte* letter to Magalie Roman Salas, Secretary, Federal Communications Commission, from Bruce Jacobs, Counsel for AMSC, dated December 1, 1998.

74 AMSC Petition to Deny SatCom at 15-17; AMSC Petition to Deny TMI at 9-11.

75 AMSC Petition to Deny SatCom at 17; AMSC Petition to Deny TMI at 11.

76 *See ex parte* Letter to Magalie Roman Salas, Federal Communications Commission, from Bruce Jacobs, Counsel for AMSC, dated November 10, 1999.

of either system. The earth station grants we issue to SatCom and TMI will allow them to provide service only on the frequencies coordinated for the Canadian system, and on which the TMI system is operating. Consequently, grant of the applications will not in any way affect AMSC's existing operations nor will AMSC's license be modified. AMSC's license continues to provide that its operations will be subject to international coordination.[77] The spectrum has been coordinated and granting these earth station applications will not alter the existing operator-to-operator agreement. The spectrum used by TMI, which has been coordinated for use by the Canadian system, is not currently available for use by the U.S. system. In addition, as discussed below, the United States will continue to pursue the coordination of additional spectrum for AMSC. Thus, the grant of the SatCom and TMI earth station applications modifies none of the terms and conditions of AMSC's license within the meaning of Section 316 of the Communications Act, 47 U.S.C. §316. Section 316 is not invoked by the grant of SatCom and TMI's earth station authorizations.[78]

26. Further, granting the SatCom and TMI earth station applications will not necessarily reduce the capacity of AMSC's system at any future time. As we have discussed elsewhere, L-band MSS systems currently operate under a unique and dynamic spectrum coordination and designation arrangement. This fluid arrangement allows segments designated for specific spectrum usage to be altered based on traffic projections. We also note that any single administration has the power to veto any coordination agreement not to its liking. The U.S. Administration has attempted to coordinate 20 megahertz of spectrum for AMSC since it began the international coordination process in 1989. It has not been able to do so -- even though the coordination process has not, to date, involved foreign L-band systems serving the United States. We have no assurance that AMSC will *ever* have access to 20 megahertz of coordinated spectrum in the L-band regardless of whether or not we allow the Canadian MSS satellite to serve the U.S. market. The only variable that may influence this procedure is AMSC's ability to attract traffic -- a variable far outside the Commission's control -- and independent of these applications.

27. Under international treaty, all satellite systems licensed by the Commission must be coordinated internationally, in accordance with the International Telecommunication Union's Radio Regulations, with satellites licensed by other countries or administrations that may be affected by the U.S. system's operations, to avoid harmful interference either to or from other countries' systems.[79] In this case, five countries -- the United States, Russia, Canada, Mexico, and the United Kingdom -- planned to implement L-band MSS systems that would serve North America. Thus, the United States was required to coordinate AMSC's operations with the

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[77] *See* discussion above at ¶ 7.

[78] Contrary to AMSC's assertions, there is also nothing in the grant of these applications that limits the number of METS that may operate in the upper L-band.

[79] *See generally* International Telecommunication Union's Radio Regulations at Article S9.

operations of these four other systems. The proposed operating bands and coverage "footprints" of those systems overlapped with AMSC's proposed operation. The Commission recognized the difficulty of this coordination in the *Lower L-Band Notice*, when it stated that the Commission "certainly cannot guarantee that other administrations will always accommodate U.S.-licensed systems. We can and should, however, take reasonable and appropriate steps to ensure that our licensees have a fair opportunity to compete."[80]

28. Throughout the years of coordination, the U.S. Administration has taken all reasonable and appropriate steps to facilitate coordination of 20 megahertz of spectrum for AMSC. AMSC is correct in noting that in 1985 the Commission estimated that an L-band MSS system would require a minimum of 20 megahertz (10 megahertz in each transmission direction) to be viable. This estimate was based upon AMSC's representations and was consistent with the amount of spectrum other administrations were seeking for their MSS systems in the L-band coordination process at that time.[81] Since the first coordination discussions were held in 1989, the goal has been to coordinate 20 megahertz of spectrum for the AMSC system. Despite its best efforts, however, the U.S. Administration has not been able to do so because there is only a limited amount of L-band spectrum (66 megahertz) available and it must be coordinated on an international basis among all five participating operators. Based on the stated spectrum requirements of each of the five operators, there simply is not enough spectrum available to satisfy all their stated requirements.

29. Furthermore, based on the experience in the L-band coordination process over the past ten years, future negotiations will continue to be characterized by excess demand for spectrum. Therefore, in order for AMSC to secure additional spectrum, another L-band system or systems would need to agree to operate using less spectrum than currently is coordinated for their systems. While AMSC may now have the traffic to support 20 megahertz of spectrum,[82] other L-band MSS operators likely will continue to attract new customers over the next few years as MSS becomes more ubiquitous. As a result, the spectrum needs of all five operators may all continue to increase, making it more difficult to secure agreement from operators to relinquish spectrum.[83] Alternatively, market forces and technological change may free up spectrum from other operators and permit AMSC to obtain 20 megahertz regardless of the SatCom and TMI earth station applications.

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[80] *Lower L-Band Notice* at ¶ 14.

[81] *Lower L-Band Notice* at ¶ 9.

[82] *See, e.g., ex parte* letter to Magalie Roman Salas, Federal Communications Commission, from Wanda K. Denson-Low, Vice President and General Counsel, Hughes Space and Communications Company, dated February 26, 1999; *ex parte* letter to Magalie Roman Salas, Federal Communications Commission, from Alfred M. Mamlet, Counsel for Stratos Global Corporation and Marine Satellite Services, Inc., dated February 18, 1999.

[83] C.E. Unterberg, Towbin projects a global MSS market value over $20 billion by the year 2005. *The Satellite Book* released February 11, 1999.

30. AMSC argues that as a means of ensuring that it secures 20 megahertz of spectrum through the coordination, we should preclude any other L-band system from serving the United States until AMSC has coordinated 20 megahertz of spectrum. In effect, AMSC claims that, in exchange for allowing a foreign L-band operator to serve the United States, we should require the foreign operator to relinquish to AMSC spectrum already coordinated under the annual operator-to-operator agreement. Put another way, AMSC requests that we keep foreign carriers out of the U.S. market long enough for AMSC to use its monopoly power over U.S. customers to increase its traffic so significantly that it justifies its increased spectrum assignment. We find that such a *quid pro quo* would be inconsistent with U.S. market access commitments in the WTO Agreement. If the United States is to obtain 20 megahertz of spectrum for its system, it should be done in the normal course of the international coordination process.

31. We appreciate AMSC's position and the difficulties it may encounter if it does not have access to 20 megahertz of spectrum. We recognize that investment in U.S. systems may be impacted if licensees and their investors do not have the necessary certainty that they will be able to coordinate sufficient spectrum to support what the licensee believes it needs to be viable. Nevertheless, pursuant to ITU treaty obligations, the Commission must condition all licenses on the outcome of the international coordination process.[84] In this case, AMSC and the U.S. Administration have made their best efforts over the last ten years to coordinate AMSC's system. The inability to secure 20 megahertz is based upon the fact that the current usage and projections of the other systems exceed the amount of spectrum available in the L-band. We note that all L-band systems are operating on less spectrum than requested. Further, our 1985 estimate concerning MSS system spectrum requirements may no longer be current.[85]

32. Significantly, nothing in this *Order and Authorization* prevents AMSC from

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[84] *See, e.g.,* AMSC Authorization at ¶ 52; *Motorola Satellite Communications, Inc. for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the 1616-1626.5 MHz Band,* Order and Authorization, 10 FCC Rcd 2268 (1995) at ¶ 31; *Teledesic Corporation Application for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the Domestic and International Fixed Satellite Service*, Order and Authorization, 12 FCC Rcd 3154 (1997) at ¶ 41.

[85] As previously noted in paragraph 10, the accuracy of our 1985 estimate is an issue in the pending *Lower L-Band Notice*. The more recently developed generation of MSS systems are operating or are licensed to operate on significantly less than 20 megahertz of spectrum. For example, "Big LEO" systems, which provide the same voice mobile satellite services that AMSC provides, are licensed to operate on the equivalent of five megahertz of spectrum. In the "Big LEO" Report and Order, the Commission concluded that four systems operating with a code division multiple access (CDMA) architecture could share 11.5 MHz of spectrum and that one system using time division multiple access/ frequency division multiple access (TDMA/FDMA) architecture could operate on 5.15 MHz of spectrum. *Amendment of Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands,* Report and Order, 9 FCC Rcd. 5936 at ¶ 44 (1994) (*Big LEO Report and Order*). We expect AMSC to take advantage of changing technology in its next generation system, enabling it to improve its service offering and make more efficient use of the spectrum assigned to it.

seeking to obtain additional spectrum for its system in the annual coordination meetings pursuant to the applicable procedures. As AMSC develops a customer-base sufficient to justify additional spectrum, AMSC will be well-positioned to make every effort to secure additional spectrum. Indeed, we encourage AMSC to continue to do so. The U.S. Administration will continue to advocate the coordination of additional spectrum for the AMSC system in the coordination process.[86]

33. Nevertheless, spectrum availability concerns here do not justify precluding SatCom and TMI from entering the U.S. market. SatCom and TMI will be permitted to provide domestic service in those portions of the upper L-band spectrum coordinated for the MSAT-1 Canadian system. Specifically, SatCom and TMI are authorized to use the spectrum in the 1545-1559 and 1646.5-1660.5 MHz bands coordinated for the TMI satellite network in the 1999 annual operator-to-operator agreement, as well as any subsequent or appropriate agreements. In the absence of any continuing operator-to-operator agreement in the L-band, SatCom and TMI's operations -- like those of AMSC -- and the other operators with overlapping North America coverage areas, will be on a non-interference basis until a future operator-to-operator agreement is reached.

34. The operator-to-operator agreement expires on December 31 each year. We understand that the operators have not as yet reached an agreement for the year 2000.[87] Without an agreement assigning each of the five systems to specific operating frequencies, all systems must operate on a non-interference basis consistent with the ITU Radio Regulations.[88] Consequently, SatCom and TMI's operations, in the absence of a continuing operator-to-operator agreement, must be conducted on a non-interference basis. Because SatCom and TMI will be providing service to customers in the United States, we will not require them to discontinue those services after December 31, 1999 if the parties cannot reach a coordination agreement. Rather, to minimize any disruption to customers, we will allow SatCom and TMI to continue to serve and acquire customers on a non-interference basis after December 31, 1999. In that event, we will require SatCom and TMI to inform its U.S. customers that service is being provided on a non-interference basis.

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[86] In granting the requested MET authorizations, the Commission does not reach any conclusion with regard to the effect of the WTO on the Mexico City Agreement.

[87] *See ex parte* letter to Magalie Roman Salas, Federal Communications Commission, from Lon C. Levin, Vice President and Regulatory Counsel for American Mobile, dated October 19, 1999, indicating that as of January 1, 2000 there is no spectrum sharing agreement among the five North American L-band MSS operators.

[88] Operations will be on a non-interference basis in accordance with 47 C.F.R § 25.111(b) and ITU Radio Regulation S4.4. In addition, in the absence of a coordination agreement among the operators, the U.S. Administration may need to take actions under its ITU obligations, ITU Radio Regulation S5.357A, to ensure the protection and continued operation of safety communications now provided in the L-band spectrum.

3. Freeze on Lower L-Band Applications

35. TMI and SatCom originally requested operating authority across the entire L-band. As previously noted, the applicants later indicated that they would not object to a grant in the upper L-band only. Because this *Order and Authorization* permits TMI and SatCom to provide service only in the "upper" L-band, we need not now address the claims by SSL/Iridium, Norcom, and GlobalStar that the TMI and SatCom applications cannot be granted due to a Commission "freeze" on applications seeking to provide MSS in the lower L-band.[89] Access to the lower L-band by SatCom and TMI will be considered in the context of the pending *Lower L-Band Proceeding*.

4. Effect on Other Potential U.S. Satellite Systems

36. Significantly, if SatCom and TMI are not permitted to use the spectrum that Canada has coordinated for its system in the upper L-band, no other provider could use that spectrum to serve customers in the United States. This arises from the United States' international treaty obligation to honor the ITU Radio Regulations. Because of these obligations, the Commission would not consider licensing a U.S. satellite to operate in spectrum being used by another Administration's satellite and that has been coordinated for use by that satellite. Given our shared geographic borders, the transmission beams of a Canadian satellite and a U.S. satellite will cover overlapping geographic areas. As a result, Canadian and U.S. satellite systems cannot operate in the same frequency bands without causing each other mutual interference. This is why the operator-to-operator coordination agreement designates each Administration's satellite to use discrete frequency bands.

37. Hughes and Loral argue that a decision to grant the TMI and SatCom earth station applications, while prohibiting applications for additional U.S. space station authorizations, will favor foreign-licensed entities over U.S.-licensed entities.[90] We reject this view. As noted above, the earth station applications before us seek to communicate with a foreign-licensed satellite on spectrum that already has been coordinated for the exclusive use of that satellite. If an otherwise qualified earth station applicant filed to communicate with AMSC over spectrum coordinated solely for use by AMSC, the Commission would grant that application as well. Therefore, nothing in our decision favors foreign entities over U.S. entities with respect to earth station licenses. In addition, the Commission thus far has concluded that there is insufficient spectrum to authorize another space station to provide MSS in the L-band in U.S. coordinated

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[89] SSL/Iridium Petition at 2-4; Norcom Petition at 4-8; Globalstar Petition at 4-9.

[90] *See ex parte* Letter to the Honorable William Kennard, Chairman, Federal Communications Commission, from Michael T. Smith, Chairman and Chief Executive Officer, Hughes Electronics, dated November 3, 1999 and *ex parte* Letter to the Honorable William Kennard, Chairman, Federal Communications Commission, from Laurence Atlas, Vice President, Government Relations Telecommunications, Loral Space & Communications, dated November 3, 1999.

spectrum. This conclusion, which is based on spectrum limitations, applies equally to foreign and U.S. entities. Therefore, under the current circumstances, we would not authorize a space station provider -- foreign or U.S. -- to operate in the L-band on U.S. coordinated spectrum. Thus, the decision we reach today does not favor foreign entities.

38. If the Commission were to consider licensing another U.S. satellite, the satellite would have to operate in the spectrum licensed to and coordinated for the AMSC satellite. Given the ongoing spectrum conflicts among the five licensed satellites in the L-band, we simply cannot accommodate an additional U.S. satellite system in the upper L-band at this time. Moreover, the Commission long ago determined that there would be only one U.S. L-band satellite space station operator - AMSC.[91] Consequently, allowing the TMI MSS satellite to operate in the upper L-band in the United States will permit it to provide service to U.S. customers only on frequency bands that are designated for use by Canada. We note that SatCom and TMI have represented that they have a wide range of prospective U.S. customers, including U.S. federal and local government agencies and citizens in Alaska.[92]

C. Eligibility Requirements

39. The Commission's *DISCO II* framework requires a foreign-licensed satellite operator seeking U.S. earth station authorization to demonstrate that it meets all eligibility and operating requirements applicable to U.S. satellite and earth station operators in that particular service. SatCom and TMI both assert they are qualified to hold the blanket earth station licenses for which they have applied.

1. Legal Qualifications

40. AMSC contends that SatCom is not legally qualified to hold a Commission license because it violated the Communications Act and the terms of its Special TemporaryAuthority for technical trials by openly marketing and providing domestic commercial service in the United States.[93] AMSC states that SatCom was authorized to conduct

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[91] *See* discussion at paragraph 7.

[92] The Federal Aviation Administration, the National Oceanic and Atmospheric Administration (NOAA), the U.S. Army Corps of Engineers, the Bureau of Land Management and the U.S. Geological Survey have expressed a strong interest in accessing TMI's satellite. *See* SatCom Request to Extend Special Temporary Authority to Provide Mobile Satellite Service Through the Canadian-Licensed MSAT-1 Satellite (filed December 18, 1998); *see also ex parte* letter to Magalie Roman Salas, Federal Communications Commission, from Jeffrey L. Sheldon, Vice President and General Counsel, Utilities Telecom Council, dated April 5, 1999 and *ex parte* letter to Magalie Roman Salas, Federal Communications Commission, from Charles C. Maynard, Chief Executive Officer, U.S. Digital Communications, Inc., dated April 2, 1999.

[93] AMSC Opposition to SatCom at 11.

technical trials only, and expressly prohibited the use of the terminals "for service by any customer or clients of SatCom."[94] AMSC bases its contention on three specific instances. First, AMSC alleges a SatCom marketing representative informed AMSC's Product Manager that SatCom was authorized to provide MSS through TMI's space segment.[95] Second, AMSC alleges that a customer of one of AMSC's resellers, Skysite, requested Skysite to deactivate two mobile terminals and indicated it would be reactivating its terminals to receive service from SatCom.[96] Finally, AMSC contends that an AMSC consultant, hired to investigate SatCom's sales activities, was able to obtain a purchase contract from SatCom with the stated purpose of receiving domestic land-based or fixed site MSS, received the handset and made several calls.[97]

41. SatCom claims that it has not violated the terms of its STA and has filed three Affidavits to refute AMSC's allegations.[98] Specifically, SatCom argues that its representative may have been vague about SatCom's FCC authority, but that in any event, there has been no demonstration that TMI sold service to AMSC's employee.[99] SatCom further asserts that AMSC's ex-customer, Skysite, has been provided access to TMI as part of SatCom's technical trial.[100] Finally, SatCom claims that it received no payment from AMSC's consultant for the terminal, arguing that the terminal was an equipment purchase only to be used as part of SatCom's technical tests.

42. AMSC is correct in noting that the Commission "has traditionally dealt harshly with parties that provide unauthorized radio services to the public..."[101] However, there is nothing in the record that raises a substantial and material question of fact that SatCom has

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[94] AMSC Opposition to SatCom application at 12, *citing* letter from Steve B. Sharkey, Chief, Satellite Engineering Branch, Satellite and Radiocommunication Division, International Bureau, to Gregory C. Staple, Counsel for SatCom, (February 10, 1998).

[95] AMSC Petition to Deny SatCom at 11-12 and Exhibit B, Affidavit of Steve Yocum, AMSC Product Manager.

[96] AMSC Opposition at 11 and Exhibit C - Affidavit of Patti Aston, AMSC Senior Program Manager.

[97] AMSC Opposition at 11-12 and Exhibit D, Affidavit of William A. Sullivan.

[98] SatCom Opposition to Petitions to Deny at 4 and Exhibits 1, 2, and 3. In a May 14, 1998 letter to the Commission, in response to AMSC's Petition to Deny the SatCom application, TMI denied any knowledge of SatCom's illegal behavior, indicating that, to the best of its knowledge, SatCom's use of TMI's service was in compliance with the Commission's STA conditions. Letter to Magalie Roman Salas, Secretary, FCC, from Jennifer Perkins, Vice President, Law, TMI (May 14, 1998).

[99] SatCom Opposition to Petitions to Deny at 7.

[100] SatCom Opposition at 6 and Exhibit 1.

[101] AMSC Petition to Deny SatCom at 13, *citing Ramax Printing Service,* 69 FCC 2d 1791 (1978); *Beehive Telephone Co., Inc.* 79 FCC 2d 354 (Review Board, 1980) and *Applications of Liberty Cable Co., Inc*., 11 FCC Rcd 14122 (1996).

violated its STA and provided unauthorized services to the public on a commercial basis and would therefore lack the basic qualifications to hold or obtain an FCC license. Although we take AMSC's allegations seriously, there is no demonstrated pattern of conduct on the part of SatCom that raises a substantial and material question of fact that SatCom went beyond its authorized technical trials and would otherwise constitute grounds for denying SatCom's application. Furthermore, there is nothing in the record that indicates SatCom, as a Commission licensee, would fail to comply with Commission rules and policies in the future.

2. Financial Qualifications

43. SatCom and TMI will use the MSAT-1 satellite that is already in orbit. The purpose of the Commission's financial requirements is to ensure that a space station applicant has the financial resources to construct, launch, and operate a satellite.[102] Because the MSAT-1 satellite already is in orbit, TMI satisfies the financial requirement.

3. Regulatory Status

44. In their petitions to deny, AMSC and Globalstar assert that SatCom and TMI should be regulated as common carriers because their terminals will be used to provide service to land vehicles, maritime and aeronautical vessels.[103] In response, SatCom and TMI assert that because they will not be offering service directly to end-users but will be operating as a "carrier's carrier," they are not required to operate on a common carrier basis.[104]

45. Section 332(c) of the Communications Act requires that providers of commercial mobile radio service (CMRS) be regulated as common carriers.[105] Section 332(d)(1) of the Communications Act defines "commercial mobile service" as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such class of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission."[106] The Commission has determined that each mobile satellite service must be evaluated to determine whether the service offering is CMRS or private mobile radio service (PMRS).[107] In discussing Section 332(c)(5) of the Communications

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102 *See* 47 C.F.R.§ 25.114(c)(13).

103 AMSC Petition to Deny SatCom at 16-17; Globalstar Petition to Deny TMI at 9-10.

104 TMI Opposition to Petitions to Deny at 14.

105 47 U.S.C. § 332(c).

106 *Id.*

107 *CMRS Second Report & Order*, 9 FCC Rcd at 1457 ¶ 108. PMRS is defined as any service that does not meet the definition of CMRS or is not the functional equivalent of CMRS. *Id.* at 1447 ¶ 79.

Act, Congress indicated that the provision of earth segment capacity, either by MSS operators through their own terminals or earth stations sold by vendors, to users of CMRS shall be treated as common carriage.[108] In applying this requirement, the Commission has stated that to the extent a system or other entity provides a service to end users that meets the elements of the CMRS definition or its functional equivalent, it will be regulated as common carriage.[109]

46. Therefore, we conclude that, to the extent that the earth stations authorized by this *Order and Authorization* are used to make service available to end users -- (A) the public, or (B) such classes of users as to be effectively available to a substantial portion of the public -- for profit and for interconnection with the public switched network, the offering of user transceivers to end users must be regulated as common carriage because the service falls within the statutory definition of CMRS. Moreover, to the extent that TMI seeks to provide common carrier service, it is subject to the foreign ownership restrictions contained in Section 310(b) of the Communications Act.[110] As a result, TMI cannot provide common carrier services directly, but may offer such services through a service provider, either affiliated or unaffiliated, that meets the requirements of Section 310 of the Act. Further, provision of international CMRS using MSAT-1 by Satcom or any other service provider will require prior authorization pursuant to Section 214 of the Communications Act, which covers authorizations for international common carrier services.

4. Technical Requirements

a. Conformance with U.S. Spectrum and Use Regulations Regarding AMS(R)S

47. In the upper L-Band, mobile satellite service operators must comply with a footnote to the U.S. Table of Frequency Allocation and a provision in the ITU's Radio Regulations regarding priority and preemptive access for Aeronautical Mobile Satellite (Route) Service (AMS(R)S)[111] operating in a portion of this band.[112] In 1993, the National

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[108] *Id.* at 1457 ¶ 108 (*citing* H.R. Conf. Rep. No. 103-213, at 494 (1993)).

[109] *Id.* at 1457-58 ¶ 109.

[110] TMI in its application, identifies itself as an alien corporation or the representative of an alien corporation. TMI Application, FCC 312, Main Form at 3. SatCom in its application identifies itself as a U.S. corporation, SatCom Application, FCC 312, Main Form at 3, (questions 29-34 regarding alien ownership SatCom responds 'no').

[111] AMS(R)S is a mobile satellite service using mobile terminals on-board aircraft. This service can be used to support domestic and international air traffic, including air traffic control. The (R) indicates that the spectrum is used for aeronautical communications related to the safety and regularity of flights primarily along national and international civil air routes.

[112] Footnote US 308 to the U.S. Table of Frequency Allocations, 47 C.F.R. Section 2.106, US 308, states: "In the frequency bands 1549.5-1558.5 MHz and 1651-1660 MHz, the Aeronautical-Mobile-Satellite (R) requirements that

Footnote continued on next page.

Telecommunications and Information Administration (NTIA) and the Federal Aviation Administration (FAA) proposed a minimum set of capabilities to ensure that METs operating in the band 1545-1559 MHz and 1646.5-1660.5 MHz comply with US Footnote 308 and ITU Radio Regulation S5.357A.[113]

48. In 1999, NTIA submitted a letter to the Commission that, among other things, addressed the provision of priority and preemptive access for AMS(R)S by SatCom and TMI.[114] Specifically, in order to clarify TMI's obligations as a U.S. mobile earth terminal licensee, NTIA suggests two options concerning SatCom and TMI's respective authorizations. First, in a case where AMS(R)S is not offered and real-time preemption for AMS(R)S is not provided, NTIA notes that US footnote 308 requires that any spectrum authorized for use in the United States is on a secondary basis to AMS(R)S and proposes the Commission include an Ordering Clause in the SatCom and TMI authorizations specifically stating this.[115] As noted by AMSC in its *ex parte* letter, AMSC operates on a primary basis and as a condition of its license AMSC will provide AMS(R)S service as required.[116] AMSC, however, claims that permitting TMI to operate on a secondary basis is contrary to the Commission's rules for MSS operation in the L-band and that if TMI operates on a secondary basis, TMI's customers would have an advantage over AMSC's customers because TMI's service would not be subject to real-time preemption, as AMSC's service would.[117] TMI's operations, on the other hand, will be on a secondary basis. Thus, in the event of interference, its services may be reassigned or terminated as necessary to

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cannot be accommodated in the 1545-1549.5 MHz, 1558-1559 MHz, 1646.5-1651 MHz and 1660-1660.5 MHz bands shall have priority access with real-time capability for communications in the mobile satellite service. Systems not interoperable with the services shall operate on a secondary basis." S5.357A in the ITU's Radio Regulations has a similar priority and preemptive access requirement. We note, in addition, that in the 1545-1549.5 MHz, 1558-1559 MHz, 1646.5-1651 MHz and 1660-1660.5 MHz bands, MSS is secondary to AMS(R)S and the 1660-1660.5 MHz band is reserved for AMS(R)S with the further condition that mobile earth stations operating in these bands shall not cause harmful interference to stations in the Radio Astronomy Service.

[113] *See* Letter to Cheryl Tritt, Chief, Common Carrier Bureau, FCC, from Richard D. Parlow, Associate Administrator, Office of Spectrum Management, NTIA, and Gerald Markey, Manager, Spectrum Engineering Division, FAA, and attachment to the letter, dated January 14, 1993 ("1993 NTIA Recommendations").

[114] Letter to Roderick K. Porter, Acting Chief, International Bureau, FCC, from William Hatch, Acting Associate Administrator, Office of Spectrum Management, NTIA, dated May 27, 1999 ("NTIA 1999 Letter").

[115] NTIA 1999 Letter at 2.

[116] AMSC was authorized to provide both MSS and AMS(R)S services. *See AMSC Authorization*.

[117] AMSC *ex parte* Letter dated June 18, 1999. Stations of a secondary service shall not cause harmful interference to stations of primary or permitted services; cannot claim protection from harmful interference from stations of a primary or permitted service, but can claim protection from harmful interference from stations of the same or other secondary service(s) to which frequencies may be assigned at a later date. 47 C.F.R. §§ 2.104(d); 2.105(c)(3). We also note that in the L-band, the sharing arrangements among the satellite operators effectively gives exclusive use of parts of the frequency band to each operator.

meet U.S. AMS(R)S traffic requirements. Thus, we do not believe that the secondary status of TMI's operations will provide TMI any advantage over AMSC. We also are persuaded that the TMI network will allow U.S. traffic to be shifted in the event that spectrum used for that U.S. traffic must be reassigned to meet U.S. AMS(R)S requirements. Therefore, we adopt NTIA's proposal to clarify the operational status of SatCom and TMI as U.S. earth station licensees. In addition, we note that SatCom and TMI will not be permitted to operate in the 1558.5-1559 MHz band or the 1660-1660.5 MHz band because this band is reserved exclusively for AMS(R)S operation.

49. NTIA's second alternative with respect to TMI's application is that TMI obligate itself to be capable of offering AMS(R)S services and to implement within its network all required priority and preemption facilities for its own, and its resellers, operations in the United States.[118] NTIA notes that this will likely involve additional expense for TMI. AMSC also notes that SatCom and TMI cannot meet the Commission's technical requirements for priority and preemptive access.[119]

50. The MSAT-1 satellite that SatCom and TMI seek to access is technically similar to AMSC's satellite. We also have reviewed SatCom and TMI's application, and with the exception of two of the stated conditions, it appears they both comply with the requirements set forth by NTIA and the FAA. We note that neither SatCom nor TMI is seeking authority to provide AMS(R)S service, therefore, two of the conditions are not applicable to SatCom and TMI at this time.[120] In any event, we condition, in all other respects, SatCom and TMI's authorization the same way we conditioned AMSC's blanket license to operate up to 200,000 METs.[121] If in the future SatCom and/or TMI desire to provide AMS(R)S in the United States, they must make a full demonstration that they will meet all of the applicable U.S. requirements for AMS(R)S service.

b. Out-of-Band Emissions

51. SatCom and TMI assert in their respective applications that the level of out-of-band and spurious emissions from all METs conforms with Section 25.202(f) of the

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[118] 1999 NTIA Letter at 2.

[119] AMSC Opposition to SatCom at 18; AMSC Opposition to TMI at 11-13.

[120] The following two capabilities are not applicable to SatCom and TMI at this time: "Each MET with a requirement to handle distress and safety-related communications shall be capable of recognizing message and call priority and identification when transmitted from its associated Land Earth Station" and the requirement that "[E]ach MET with a requirement to handle distress and safety-related communication shall have the capability within the station to automatically preempt lower precedence traffic." *See* 1993 NTIA Recommendations at Attachment pages 1-2.

[121] AMSC Subsidiary Corporation For a Blanket License to Construct and Operate up to 200,000 L-Band Mobile Earth Stations, Order and Authorization, DA 95-482 (rel. March 13, 1995).

Commission's Rules, 47 C.F.R. § 25.202(f), and with the 1994 Memorandum of Understanding among the Commission, the National Telecommunications Information Administration, and the Federal Aviation Administration.[122] These levels were designed to protect the Global Navigation Satellite Systems (GNSS). SSL/Iridium claim that the proposed SatCom and TMI earth terminals may cause unacceptable interference to its MSS "Big LEO" Iridium system which operates in nearby frequencies.[123] SSL/Iridium therefore request that the Commission condition any grant of the SatCom and TMI applications on the "completion of coordination with Motorola with respect to out-of-band interference to the licensed Iridium system."[124]

52. We find that it is not necessary to impose a condition on SatCom and TMI to coordinate out-of-band interference with Iridium. For all transmissions, a limited amount of power radiates outside of the "operating" bandwidth. These "out-of-band" emissions may cause interference into another system. For this reason, the Commission has created rules to govern such emissions.[125] Moreover, SatCom and TMI have stated that in the event Iridium actually experiences interference from out-of-band emissions, they will each work with Iridium to avoid interference.[126] We also note that this Order and Authorization does not address SatCom and TMI's use of spectrum below 1631.5 MHz and that the upper edge of Iridium's frequency band is 1626.5 MHz. Therefore, we expect that this factor would further facilitate resolution of the out-of-band interference issues with respect to SatCom and TMI's operations. As a general matter, the Commission believes that issues concerning out-of-band emissions should first be addressed by the parties themselves.[127] If the parties cannot agree to a mutually acceptable solution with respect to operations, the Commission then will become involved as necessary. Of course, SatCom and TMI must comply with the Commission's rules dealing with emission limitations.[128]

53. We also note that the emissions limits proposed in the Commission's Notice of Proposed Rulemaking pertaining to emissions limits for mobile stations operating in the 1610-1660.5 MHz bands[129] are more stringent than the levels stated in SatCom and TMI's respective

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122 Application of SatCom Exhibit 2 at 2; Application of TMI Exhibit 2 at 2.

123 SSL/Iridium Petition to Deny or Defer SatCom at 5 and Appendix 1; SSL/Iridium Petition to Deny or Defer at 5-6.

124 *Id.*

125 *See* 47 C.F.R. § 25.202(f).

126 SatCom Oppositions to Petitions to Deny at 19 and Exhibit 3; TMI Oppositions to Petitions to Deny at 19 and Exhibit 3.

127 See *AMSC Subsidiary Corporation For Modification of its Blanket License to Construct and Operate 30,000 L-Band Mobile Earth Stations*, Order and Authorization, 10 FCC Rcd 9507 at ¶ 24 (1995).

128 47 C.F.R. § 25.202(f).

129 Amendment of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite

Footnote continued on next page.

applications. As a condition to this authorization, SatCom and TMI must meet whatever final requirements are eventually adopted by the Commission in that rulemaking proceeding.

c. Emergency Communications

54. AMSC also asserts that SatCom and TMI fail to demonstrate that they have any emergency communications capability.[130] As TMI correctly asserts, however, there is no requirement that MSS operators provide access to emergency communications.[131] SatCom and TMI both indicate that if the Commission eventually determines that providing access to emergency communications should be a requirement for MSS operators, they will make every effort to comply with whatever technical standards are established.[132] While we will not adopt conditions in this licensing proceeding, we strongly encourage all MSS providers to begin taking steps now to provide routing for emergency communications to appropriate public safety answering points.[133]

D. National Security and Law Enforcement Issues

55. The Executive Branch has raised concerns regarding national security and law enforcement in this proceeding. In particular, the FBI noted that SatCom and TMI's proposed use of a Canadian gateway to switch, control, and route U.S. communications must not impair the U.S. government's ability to: (1) carry out lawfully-authorized electronic surveillance of domestic U.S. calls or calls that originate or terminate in the United States; (2) prevent and detect foreign-based electronic surveillance and espionage conducted in violation of U.S. law; and (3) satisfy the National Security Emergency Preparedness and U.S. infrastructure protection requirements.

(GMPCS) Memorandum of Understanding and Arrangements and Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for Mobile and Portable Earth Stations Operating in the 1610-1660.5 MHz Band, Notice of Proposed Rulemaking, FCC 99-37 (rel. March 5, 1999).

130 AMSC Petition to Deny SatCom at 19-20; AMSC Petition to Deny TMI at 14-15.

131 *Enhanced 911 Order*, 11 FCC Rcd 18676, 18718 (1996) ("For present. . . recognize that adding specific regulatory requirements to MSS may impede the development of the service in ways that might reduce its ability to meet public safety needs . . . . Thus, while we expect that CMRS voice MSS will eventually be required to provide appropriate access to emergency services, we do not adopt schedules or other requirements for them here. . . .)*; see also The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Notice of Proposed Rulemaking, 14 FCC Rcd 4843 (1999) ("*2 GHz NPRM")* at ¶¶ 93-94.

132 SatCom Opposition to Petitions to Deny at 14; TMI Opposition to Petitions to Deny at 16.

133 *See, e.g., 2 GHz NPRM* at ¶¶ 93-94.

56. The Department of Justice (DoJ), the FBI, and TMI, however, have informed the Commission that they have reached an agreement that resolves the national security, law enforcement, and public safety issues raised in the DoJ and FBI comments in this proceeding. The DOJ and the FBI have submitted a copy of the executed agreement ("DoJ/FBI/TMI Agreement") and request that the Commission approve and adopt the Agreement and condition the TMI license on compliance with it. In brief, the DoJ/FBI/TMI Agreement provides that TMI has committed, among other actions and obligations, to establish a point of presence in the United States, and to route to that point of presence all communications traffic emanating from TMI METs to which users domiciled in the United States subscribe.

57. In *DISCO II*, we stated that "other federal agencies have specific expertise in matters that may be relevant in particular cases."[134] We also indicated that we will "[c]ontinue to accord deference to the expertise of the Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy that are relevant to an application pending before us."[135] In addition, in *DISCO II*, we stated that "[t]he Commission will make an independent decision on applications to be considered and will evaluate concerns raised by the Executive Branch agencies in light of all the issues raised (and comments in response) in the context of a particular application."[136] We note that the DoJ/FBI/TMI Agreement reflects a unique situation, and contains certain provisions that, if broadly applied, would have significant consequences for the telecommunications industry. These provisions, if viewed as precedent for other service providers and potential investors, would warrant further inquiry on our part. Therefore, this Agreement does not establish precedent for future cases. Notwithstanding these concerns about the potential implications of some provisions of this Agreement, we see no reason to modify or disturb the Agreement of the parties on this matter. If, however, pursuant to paragraphs 5.3 or 7.2 of the DoJ/FBI/TMI Agreement, a party to the Agreement seeks judicial relief for an alleged breach of paragraph 5.1(a) or (b) of the Agreement, and pursues a court order requiring that TMI immediately cease and desist from providing service through the TMI space segment and ground networking equipment, TMI must provide written notice to its customers that service may be terminated. We also note that Section 63.19 of the Commission's rules, 47 C.F.R. § 63.19, is applicable regarding discontinuance of international common carrier service.[137]

58. In accordance with the request of these parties and the discussion above, we condition our grant of TMI and SatCom's application on compliance with the DoJ/FBI/TMI

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134 *DISCO II* at ¶ 179.

135 *Id.* at ¶ 180.

136 *Id.* at ¶ 182.

137 To the extent the prospective judicial action would make it infeasible to comply with the sixty-day requirement, parties may seek a waiver(s) of the discontinuation provisions outlined in Section 63.19(a) and (b).

Agreement, a copy of which is attached hereto as Appendix A.

E. Other Issues

1. Regulatory Fees and Universal Service Contributions

59. Contrary to AMSC's claims, SatCom and TMI agree to pay any regulatory fees or universal service contributions to which its U.S. operations would be subject under the Communications Act and the Commission's Rules.[138]

2. SatCom Special Temporary Authority

60. As previously discussed, SatCom was granted special temporary authority to conduct limited technical trials from the MSAT-1 satellite pending Commission action on its underlying application. Because the Commission has found the grant of SatCom's blanket earth station application to be in the public interest, the Motion for Stay, Application for Review, and Petition for Reconsideration filed against the SatCom STA, granted for technical trials, are denied.

3. CALEA

61. Under the Communications Assistance for Law Enforcement Act (CALEA), telecommunications carriers must 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.[139] AMSC asserts that SatCom and TMI fail to provide any indication as to how they will be able to comply with CALEA.[140] Contrary to AMSC's claim, there is no requirement, however, that an applicant submit a demonstration with its earth station application concerning its ability to comply with CALEA. Further, we note that in the DoJ/FBI/TMI Agreement, TMI has agreed to address law enforcement concerns, including providing capabilities and capacity for authorized wiretaps.[141]

V. Conclusion

62. SatCom and TMI have demonstrated that their operations will be consistent with the Commission's policies permitting service in the United States over space stations licensed by foreign administrations and therefore we find that both SatCom and TMI are qualified to hold the

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138 SatCom Opposition to Petitions to Deny at 15; TMI Opposition to Petitions to Deny at 15.

139 Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

140 AMSC Petition to Deny SatCom at 20-21; AMSC Petition to Deny TMI at 15.

141 Appendix A DoJ/FBI/TMI Agreement at paragraph 3.8.

blanket earth station authorizations requested. For all of the reasons described above, we grant the earth station applications of SatCom and TMI to provide MSS service in the United States over the MSAT-1 satellite using spectrum coordinated by Canada.

VI. Ordering Clauses

63. Accordingly, IT IS ORDERED that Application File Number 647-DSE-P/L-98; IBFS File Number SES-LIC-19980310-00272E9808159 IS GRANTED and SatCom Systems, Inc. IS AUTHORIZED to operate up to 25,000 mobile earth terminals through the Canadian licensed MSAT-1 space station in the portions of the 1545-1558.5 and 1646.5-1660 MHz band coordinated for the TMI satellite network in the most recent annual L-band operator-to-operator coordination agreement, to the extent indicated herein, in accordance with the technical specifications set forth in its application and its Radio Station Authorization, and consistent with the Commission's rules. In the absence of a continuing annual L-band operator-to-operator coordination agreement, SatCom's operation in the 1545-1558.5 and 1546.5-1660 MHz bands will be on a non-interference basis until a future operator-to-operator agreement is concluded. In this instance, SatCom must notify the other four operators in these frequency bands that it will be operating on a non-interference basis. SatCom must also notify its customers that SatCom's operations are on a non-interference basis.

64. IT IS FURTHER ORDERED that Application File Number 730-DSE-P/L-98; IBFS File No. SES-LIC-19980330-00339E980179 IS GRANTED and TMI Communications and Company, L.P. IS AUTHORIZED to operate up to 100,000 mobile earth terminals through the Canadian licensed MSAT-1 space station in the portions of the 1545-1558.5 and 1646.5-1660 MHz band coordinated for the TMI satellite network in the most recent annual L-band operator-to-operator coordination agreement, to the extent indicated herein, in accordance with the technical specifications set forth in its application and its Radio Station Authorization, and consistent with the Commission's rules. In the absence of a continuing annual operator-to-operator coordination agreement, TMI's operation in the 1545-1558.5 and 1646.5-1660 MHz band will be on a non-interference basis until a future operator-to-operator agreement is concluded. In this instance, TMI must notify the other four operators in the these frequency bands that it will be operating on a non-interference basis. TMI must also notify its customers in the United States that TMI's operations are on a non-interference basis.

65. IT IS FURTHER ORDERED that the TMI Communications and Company, L.P. authorization and the license related thereto are subject to compliance with the provisions of the Agreement attached hereto between TMI and the Department of Justice and the Federal Bureau of Investigation, dated September 10, 1999, which the Agreement is designed to address national security, law enforcement, and public safety concerns of the Department of Justice and the Federal Bureau of Investigation regarding the license granted herein. Nothing in this Agreement or the Implementation Plan is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(a) and the Commission's implementing regulations.

66. IT IS FURTHER ORDERED that the Petition to Adopt Conditions to Authorization and Licenses, filed by DoJ and the FBI on October 6, 1999, IS GRANTED.

67. IT IS FURTHER ORDERED that SatCom Systems, Inc. and TMI Communications and Company, L.P. must operate their respective mobile earth terminals in a full-duplex mode and have the following minimum set of capabilities to ensure compliance with US Footnote 308 to Section 2.106 of the Commission's Rules, 47 C.F.R. Section 2.106, and ITU Radio Regulation S5.357:

a. All MET transmissions shall have a priority assigned to them that preserves the priority and preemptive access given to aeronautical distress and safety-related communications sharing the band;

b. Each MET shall be assigned a unique technical identification number that will be transmitted upon any attempt to gain access to a system;

c. After a MET has gained access to a system, the mobile terminal shall be under control of a Land Earth Station and shall obtain all channel assignments from it;

d. All METs that do not continuously monitor a separate signalling channel shall have provision for signalling within the communications channel;

e. Each MET shall automatically inhibit its transmissions if it is not correctly receiving a separate signalling channel or signalling within the communications channel from its associated Land Earth Station; and

f. Each MET shall automatically inhibit its transmissions on any or all channels upon receiving a channel-shut-off command on a signalling or communications channel it is receiving from its associated Land Earth Station.

68. IT IS FURTHER ORDERED that, in accordance with US footnote 308, the operation of TMI and SatCom METs, in the bands 1545-1558.5 and 1646.5-1660 MHz, is on a secondary basis to U.S. AMS(R)S requirements of other U.S.-authorized MSS providers operating in the 1545-1559 and 1646.5-1660 MHz bands.

69. IT IS FURTHER ORDERED that, SatCom Systems, Inc. and TMI Communications and Company, L.P. will be subject to any applicable out-of-band emission standards subsequently incorporated in the FCC's rules for protection of the Global Navigation Satellite Service.

70. IT IS FURTHER ORDERED that AMSC's Application for Review and Motion to Stay of the Special Temporary Authority for Satcom Systems, Inc. ARE DISMISSED.

71. IT IS FURTHER ORDERED that GlobalStar L.P.'s Petition for Reconsideration of the Special Temporary Authority for SatCom Systems, Inc. IS DISMISSED.

72. IT IS FURTHER ORDERED that this license shall not vest in the licensee any right to operate Earth stations or use the assigned frequencies beyond the term thereof or in any manner other than authorized herein, and neither the license nor the rights granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act.

73. IT IS FURTHER ORDERED that the license term for the mobile earth terminals that are authorized by this *Order and Authorization* is for ten years.

74. IT IS FURTHER ORDERED that SatCom Systems, Inc. is afforded thirty days to decline this authorization. Failure to respond within this period will constitute formal acceptance of the authorization.

75. IT IS FURTHER ORDERED that TMI Communications and Company, L.P. is afforded thirty days to decline this authorization. Failure to respond within this period will constitute formal acceptance of the authorization.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

AGREEMENT

This AGREEMENT is made this 10th day of September, 1999, by and between, on the one hand, TMI Communications and Company, Limited Partnership ("TMI"), a Canadian limited partnership with its headquarters in Gloucester, Ontario, Canada, and, on the other hand, the United States Department of Justice (the "DoJ") and the Federal Bureau of Investigation (the "FBI") (collectively, the "Parties").

BACKGROUND

TMI is seeking a blanket authorization from the Federal Communications Commission ("FCC" or "Commission") to operate up to 100,000 satellite mobile earth terminals ("METs") through a Canadian-licensed MSAT-1 satellite and a Canadian-licensed earth station gateway located in Canada. (See FCC File No. 730-DSE-P/L-98; SES-LIC-19980330-00339 (Call Sign E980179)). Specifically, TMI seeks licensing authority to provide mobile satellite services, including circuit-switched mobile telephone service and packet-switched data services within certain frequency bands to subscribers in the United States. TMI's current network is engineered utilizing a single geosynchronous satellite and a single gateway located in Ontario, Canada, which provides all service to TMI customers. TMI's current target market is primarily fleet services including land, maritime and aeronautical vessels. TMI's voice METs cannot be readily concealed. The relatively limited number of subscribers in TMI's target market, the system architecture, the location of U.S. subscriber data in the United States, the size of the METs, and the ability to securely intercept U.S. subscribers are among the factors the U.S. Government is taking into consideration in making this Agreement.

Given the U.S. Government's strong interest in ensuring the viability, integrity, and security of U.S. telecommunications and its infrastructure, the FBI filed petitions with the FCC on April 7, 1999 and April 27, 1999, raising concerns that United States national security, law enforcement, and public safety may be adversely affected if U.S. mobile communications are switched, controlled and routed by a foreign-located satellite gateway. The petitions ask the FCC to act in the public interest by conditioning its licensing approval so as to address the FBI's national security, law enforcement and public safety concerns. This Agreement is entered into by the Parties in acknowledgment of the fact that there is a need for TMI to work closely with, and provide appropriate information and commitments to, the DoJ and the FBI in order to resolve these concerns.

PURPOSE

The Parties are entering into this Agreement to address three primary national security, public safety, and law enforcement concerns associated with the use of a foreign gateway by TMI to switch, control, or route U.S. telecommunications: (1) the ability to conduct effective and secure lawfully-authorized electronic surveillance of U.S. communications or communications that originate and/or terminate in the United States; (2) the need to prevent and detect foreign-based espionage and economic espionage and to protect the privacy of U.S. communications from electronic surveillance conducted in violation of U.S. law; and (3) the ability to assure that National Security Emergency Preparedness and U.S. infrastructure protection requirements are met.

ARTICLE I

DEFINITION OF TERMS

1.1 Definition of Terms. As used in this Agreement and the Implementation Plan, the terms below shall have the following meanings:

(a) "Classified Information" means any information that has been determined pursuant to Executive Order 12958, or any predecessor or successor order, or the Atomic Energy Act of 1954, or any statute that succeeds or amends the Atomic Energy Act, to require protection against unauthorized disclosure.

(b) "Condition to FCC Licenses" means conditions, substantially in the form of Exhibit A, to be imposed by the FCC on the license granted to TMI.

(c) "Customer Proprietary Network Information" or "CPNI" means information as defined in 47 U.S.C. § 222(f)(1).

(d) "DoJ" has the meaning given to it in the Preamble.

(e) "Domestic Telecommunication" means the provision of any Wire Communication or Electronic Communication either: (i) which is from one U.S. location (a state, district, territory, possession, commonwealth or special maritime jurisdiction of the United States) to another U.S. location; or (ii) which originate or terminate with a MET at a U.S. location.

(f) "Electronic Communication" has the meaning defined in 18 U.S.C. § 2510(12).

(g) "Electronic Surveillance" means: (i) interception of any Wire Communication or Electronic Communication as defined in 18 U.S.C. § 2510(l) and (12), respectively, and electronic surveillance as defined in 50 U.S.C. § 1801(f); (ii) access to any stored Wire Communication or Electronic Communication, as referred to in 18 U.S.C. § 2701 et seq. (and including preservation

pursuant to 18 U.S.C. § 2703(f)); (iii) acquisition of dialing or signaling information through pen register or trap and trace devices or other devices or features capable of acquiring such information pursuant to law as defined in 18 U.S.C. § 3121 et seq. and 50 U.S.C. § 1841 et seq.; (iv) acquisition of location-related information concerning a telecommunications service subscriber pursuant to Lawful Process; (v) access to Subscriber Information pursuant to the authorities identified in paragraph 1.1(r) below; and (vi) access to or acquisition or interception of communications or information as described in (i) through (v) above pursuant to U.S. state law.

(h) "FBI" has the meaning given to it in the Preamble.

(i) "FCC" has the meaning given to it in the Background. It includes any agency or instrumentality of the United States to which, in the future, all or any part of the functions or responsibilities of the FCC may be transferred or assigned.

(j) "Implementation Plan" means the TMI Confidential document titled Implementation Plan and dated September 10, 1999.

(k) "Intercept" or "Intercepted" has the meaning defined in 18 U.S.C. § 2510(4).

(l) "Lawful Process" means any orders, statutory authorizations, applications, subpoenas, certifications, or other process for any form of Electronic Surveillance authorized by U.S. Federal or state law.

(m) "MET" means a satellite mobile earth terminal that allows for the transmission or receipt of Wire Communication or Electronic Communication through the TMI Space Segment and ground networking equipment.

(n) "Non-U.S. MET" means a MET that is put into service outside the United States by an entity that is authorized to distribute or otherwise provide TMI's mobile satellite services outside the United States.

(o) "Parties" has the meaning given to it in the Preamble.

(p) "Sensitive Information" means unclassified information regarding: (i) the persons or facilities that are the subjects of Lawful Process; (ii) the identity of the government agency or agencies serving such Lawful Process; (iii) the location or identity of the line, circuit, transmission path, or other facilities or equipment used to conduct Electronic Surveillance; (iv) the means of carrying out Electronic Surveillance; (v) the type(s) of service, telephone number(s), records, communications, or facilities subjected to Lawful Process; and (vi) other unclassified information reasonably designated in writing by an authorized government official as "Sensitive Information."

(q) "Sensitive Network Position" means any position that involves access to TMI facilities, systems, or equipment that enable the employee, contractor, or other agent of TMI to monitor any Wire Communication or Electronic Communication carried via the TMI Space

Segment, including any such communications that are in electronic storage. This term excludes a position the only responsibilities of which are: (i) performing outside plant operations and maintenance functions; (ii) performing network-level monitoring without the ability to monitor the content of any Wire Communication or Electronic Communication carried via the TMI Space Segment; or (iii) monitoring telemarketing calls by TMI personnel or customer-originated calls to TMI.

(r) "Subscriber Information" means information of the type referred to and accessible subject to procedures specified in 18 U.S.C. § 2703(c) or (d) or 18 U.S.C. § 2709. Such information shall also be considered subscriber information when it is sought pursuant to the provisions of U.S. state law.

(s) "TMI" has the meaning given to it in the Preamble. It includes all successors and assigns of TMI.

(t) "TMI Space Segment" means MSAT-1 and any other satellite used by TMI to provide mobile satellite service during the term of this Agreement.

(u) "TMI U.S. POP" means the point of presence in the United States where TMI maintains a network switch.

(v) "U.S. MET" means a MET that is put into service in the United States by a party that is authorized to distribute or otherwise provide TMI's mobile satellite services in the United States.

(w) "Wire Communication" has the meaning defined in 18 U.S.C. § 2510(l).

ARTICLE II

NON-OBJECTION BY DoJ AND FBI TO GRANT OF LICENSE TO TMI

2.1 Non-Objection.

(a) Upon the execution of this Agreement and adoption by TMI of the Implementation Plan, the DoJ and the FBI shall: (i) immediately notify the FCC that, provided the FCC approves this Agreement and adopts the Condition to FCC Licenses, the DoJ and the FBI have no objection to grant of TMI's pending license application in FCC File No. 730-DSE-P/L-98; SES-LIC-19980330-00339 (Call Sign E980179); and (ii) immediately withdraw the FBI's April 16, 1999 "Petition to Defer" regarding the pending license application of SatCom Systems, Inc. (FCC File No. 647-DSE-P/L-98; SES-LIC-19980310-002272 (Call Sign E980159)).

(b) Upon FCC grant of the TMI license application described in paragraph 2.1(a) of this Agreement, subject to the Condition to FCC Licenses, the DoJ and the FBI agree not to formally or informally object to the grant of any other FCC application of TMI or any TMI service provider for

a license under Section 310 of the Communications Act of 1934, as amended, to operate METs in the United States for communications via the TMI Space Segment, provided that such application makes clear that the terms and conditions of this Agreement and the Implementation Plan shall apply to any license issued pursuant to that application. Notwithstanding the foregoing, the DoJ and the FBI may raise objections to a particular service provider if such objections are limited to concerns related to such provider or its employees and do not relate to the technical operation of TMI's network. Nothing in this Agreement shall preclude the DoJ or the FBI from opposing, formally or informally, an FCC application by TMI to transfer its license(s) to a third party, or an application by a party seeking a license to use the TMI Space Segment together with that party's own U.S. or non-U.S. network switch or ground segment.

2.2 Effective Date. Unless otherwise specified in the Agreement or Implementation Plan, the provisions of this Agreement and the Implementation Plan shall take effect on the date the FCC first adopts an order approving the pending TMI license application, and shall terminate upon the expiration of said TMI license, including any renewal term or terms, except that Section 2.1 ("Non-Objection") shall take effect immediately upon the execution of this Agreement.

ARTICLE III

GENERAL OBLIGATIONS OF THE PARTIES

3.1 Implementation Plan. Certain of the rights and obligations of the Parties are set forth in further detail in an Implementation Plan, which is consistent with this Agreement. TMI shall comply with the Implementation Plan, as it may be modified from time to time pursuant to Section 12.7.

3.2 Written Policies. The written policies and procedures of TMI regarding Electronic Surveillance shall be consistent with the provisions of this Agreement and the Implementation Plan.

3.3 Training. TMI shall instruct appropriate officials and staff as to their obligations under this Agreement and the Implementation Plan and issue annual reminders to them of such obligations.

3.4 All Reasonable Measures. The Parties shall employ all reasonable measures for the purpose of preventing violations of this Agreement and the Implementation Plan. Such measures shall take into account considerations associated with TMI’s foreign ownership as well as advances in technology and changes in how TMI conducts its business.

3.5 Contractors. TMI shall ensure that current and future contractors and contractors' employees who provide services to TMI that relate to the provisions of this Agreement, or who may have access to information covered by this Agreement, comply with the pertinent provisions of this Agreement and the Implementation Plan. The compliance of TMI's contractors will be taken into consideration by the DoJ and FBI when assessing the adequacy of TMI's compliance with this

Agreement and the Implementation Plan. If TMI learns that a contractor has violated a provision of this Agreement or the Implementation Plan, TMI will notify the DoJ and FBI promptly, and take all reasonable steps, in consultation with the DoJ and the FBI, to rectify the situation. One such step may be the termination of all contracts with that contractor.

3.6 Distributors, Resellers, and Other Agents. TMI shall, in its contracts with its resellers, distributors, and all other agents (collectively "Resellers") require that such Resellers: (i) obtain reasonable evidence of each potential MET user's domicile before providing a MET to any such potential user; (ii) provide only U.S. METs to users domiciled in the United States; and (iii) only provide Non-U.S. METs to users domiciled outside the United States. TMI and its Resellers may rely on the results of a credit check or other similar verification as establishing "reasonable evidence" of the domicile of a user.

3.7 FCC Approval Required. TMI's obligations under this Agreement and the Implementation Plan shall be null and void if the FCC does not grant TMI's application for license in File No. 730-DSE-P/L-98; SES-LIC-19980330-00339 (Call Sign E980179). In addition, TMI's obligations hereunder shall be suspended for so long as the grant of said license is stayed or enjoined by the FCC or any judicial authority.

3.8 Communications Assistance for Law Enforcement Compliance. TMI agrees that it is obligated to comply with the Communications Assistance for Law Enforcement Act (47 U.S.C. § 1001 et seq.) and will timely modify the switch employed at the TMI U.S. POP or other TMI U.S. facility to provide the capabilities and capacity required for compliance with the Act.

ARTICLE IV

REPORTING, ASSISTANCE, AND ACCESS TO INFORMATION

4.1 Access to Information. In response to reasonable requests made by the DoJ or the FBI, TMI, itself or through its contractors or agents, shall provide access to appropriate information concerning technical, physical, management, or other measures and other reasonably available information needed by the DoJ or the FBI to assess TMI's compliance with this Agreement and the Implementation Plan and to protect the DoJ's and the FBI's interests.

4.2 Inspections. Upon reasonable notice and during reasonable hours, the DoJ and the FBI may visit any telecommunications facility of TMI in the United States, and may inspect any part of said TMI facility for the purpose of verifying compliance with the terms of this Agreement and the Implementation Plan.

4.3 Interviews. Upon reasonable notice from the DoJ or the FBI, TMI will make available for interview at a mutually convenient location officers or employees of TMI, and will seek to require contractors to make available appropriate personnel who are in the position to provide information to the DoJ or the FBI reasonably related to TMI's compliance with its

obligations under this Agreement or the Implementation Plan.

4.4 Reporting of Incidents. TMI shall report promptly to the DoJ and FBI any information TMI management acquires concerning activity occurring on TMI's network that objectively indicates: (i) a breach of this Agreement or the Implementation Plan; (ii) any surveillance activities not authorized by Canadian or U.S. law; (iii) Electronic Surveillance conducted in violation of U.S. Federal or state law or regulation, this Agreement or the Implementation Plan; (iv) access to or disclosure of CPNI or Subscriber Information in violation of U.S. Federal or state law or regulation, this Agreement or the Implementation Plan (except for violations of FCC regulations related to improper marketing use of CPNI); or (v) access to or disclosure of Classified Information or Sensitive Information in contravention of the requirements of section 8.4 of this Agreement.

4.5 Assistance in Investigations. TMI shall cooperate with the DoJ and the FBI in investigating, *inter alia*: (i) a breach of this Agreement or the Implementation Plan; (ii) any surveillance activities not authorized by Canadian or U.S. law; (iii) Electronic Surveillance conducted in violation of U.S. Federal or state law or regulation, this Agreement or the Implementation Plan; (iv) access to or disclosure of CPNI or Subscriber Information in violation of U.S. Federal or state law or regulation, this Agreement or the Implementation Plan (except for violations of FCC regulations related to improper marketing use of CPNI); or (v) access to or disclosure of Classified Information or Sensitive Information in contravention of the requirements of section 8.4 of this Agreement.

4.6 Summary Annual Report. On or before the last day of January of each year, the Chief Executive Officer of TMI, or a senior corporate officer of TMI designated by the Chief Executive Officer, shall submit to the DoJ and the FBI a summary report covering the preceding calendar year. The report shall include:

(a) A summary of the manner in which TMI is carrying out its obligations under this Agreement and the Implementation Plan;

(b) A summary of changes to security procedures, implemented or proposed, and the reasons for those changes;

(c) A summary of any known acts of noncompliance, whether inadvertent or intentional, with a discussion of what steps have been or will be taken to prevent such acts from occurring in the future; and

(d) Identification of issues, if any, that could affect the effectiveness or implementation of this Agreement or the Implementation Plan.

ARTICLE V

DOMESTIC TELECOMMUNICATION CONTROL FACILITIES

5.1 TMI U.S. POP.

(a) A TMI U.S. POP shall be established by TMI pursuant to the Implementation Plan by no later than two hundred ten (210) calendar days after the FCC grants TMI's license application in File No. 730-DSE-P/L-98; SES-LIC19980330-00339 (Call Sign E980179). The TMI U.S. POP shall include, but may not be limited to, a network switch which has substantially the same functions as TMI's Canadian network switch, and the TMI U.S. POP shall be connected to TMI's Canadian gateway network in such a manner as to allow for the real-time switching of communications over TMI's mobile satellite network at the TMI U.S. POP and/or TMI's Canadian network switch.

(b) Once the TMI U.S. POP is operational, and thereafter for the term of any license (including any renewal term) granted by the FCC in File No. 730-DSE-P/L-98; SES-LIC-19980330-00339 (Call Sign E980179), TMI shall make available the Electronic Communication, Wire Communication, and Subscriber Information of U.S. METs at the TMI U.S. POP.

(c) Until the TMI U.S. POP is operational TMI shall, pursuant to Lawful Process and consistent with Canadian law: (i) provide access to any Wire Communication and Electronic Communication of METs in accordance with the Implementation Plan; and (ii) make Subscriber Information for METs available in accordance with the Implementation Plan.

5.2 Emergency Preparedness. The TMI U.S. POP shall be capable of complying and configured to comply, and TMI's officials in the United States shall have unconstrained authority to comply in an effective, efficient, and unimpeded fashion, with applicable provisions of: (i) all National Security and Emergency Preparedness rules, regulations, and orders issued by the FCC under the Communications Act of 1934, as amended (47 U.S.C. § 151 et seq.); (ii) the orders of the President in the exercise of his or her authority under section 706 of the Communications Act of 1934, as amended (47 U.S.C. § 606), and under section 302(e) of the Aviation Act of 1958 (49 U.S.C. § 40107(b)); and (iii) Executive Order 11161 (as amended by Executive Order 11382).

5.3 Noncompliance. TMI acknowledges that, in and of itself, monetary relief is not an adequate remedy for a breach of paragraphs 5.1(a) and (b) of this Agreement. Therefore, in the event that any U.S. court determines that any such breach of paragraphs 5.1(a) or (b) of this Agreement has occurred, TMI hereby consents to entry or issuance of an injunction or other suitable equitable relief in favor of the United States requiring that TMI immediately cease and desist from providing Domestic Telecommunication service through the TMI Space Segment and ground networking equipment.

ARTICLE VI

ROAMER METS

Once the TMI U.S. POP is operational, TMI will, upon receipt of Lawful Process, and for the period covered by such Lawful Process, expeditiously route any Wire Communication and Electronic Communication of a Non-U.S. MET to the TMI U.S. POP pursuant to the Implementation Plan.

ARTICLE VII

USE OF NETWORK AND INFORMATION

7.1 Measures to Prevent Improper Use.

(a) TMI shall implement all reasonable and appropriate measures to prevent: (i) access to or use of TMI's equipment or facilities to conduct Electronic Surveillance in violation of U.S. law; and (ii) access to or use of CPNI or Subscriber Information in violation of U.S. law or the terms of this Agreement or the Implementation Plan.

(b) Notwithstanding any other provision of this Agreement or the Implementation Plan, under no circumstance shall TMI, its employees, or agents permit any third party access to any Domestic Telecommunication on TMI's network unless that party is an agent of the United States Government authorized by or pursuant to U.S. law to have such access or an agent of the Canadian Government authorized by or pursuant to Canadian law to have such access.

7.2 TMI acknowledges that, in and of itself, monetary relief is not an adequate remedy for a breach of paragraph 7.1(b) of this Agreement. Therefore, in the event that any U.S. court determines that any such breach has occurred, TMI hereby consents to entry or issuance of an injunction or other suitable equitable relief in favor of the United States requiring, at the option of the United States, that TMI immediately cease and desist from permitting unauthorized third persons access to any Domestic Telecommunication on the TMI network or providing any Domestic Telecommunication service through the TMI Space Segment and ground networking equipment.

7.3 Personnel Holding Sensitive Network Positions. To verify the trustworthiness of persons employed by TMI, its contractors and other agents whose positions enable them to monitor Domestic Telecommunication:

(a) TMI shall provide to the FBI the recent employment and residence history, as well as personal identifying information (including name(s), alias(es), date and place of birth, social security number, and visa and passport information), for persons who occupy Sensitive Network Positions as of the effective date of this Agreement. This requirement shall also apply to individuals who are hired to occupy, or who are transferred into, such positions after the effective date of this

Agreement. TMI shall only permit Canadian and U.S. citizens to hold such positions.

(b) Following the receipt by the FBI of the information described in paragraph 7.3(a) of this Agreement, if the FBI reasonably believes that a person is not sufficiently trustworthy to occupy a Sensitive Network Position and so notifies TMI in writing, then TMI shall take all reasonable steps, in conjunction with the FBI to resolve the matter, including, if necessary, not permitting the person to assume the position.

(c) If TMI has knowledge of adverse information material to the trustworthiness of any person who occupies a Sensitive Network Position (or if the FBI has such knowledge and so informs TMI), then TMI shall either remove the person from such position or consult with the FBI regarding the appropriateness of having such person continue in a Sensitive Network Position.

7.4 Information Storage and Access. TMI shall:

(a) comply with all FCC regulations governing access to and storage of CPNI;

(b) store and make available in the United States when the TMI U.S. POP is operational:

(i) the Subscriber Information for U.S. METs and Non-U.S. METs;

(ii) any Wire Communication received by, intended to be received by, or stored in the account of a U.S. MET (or a Non-U.S. MET that is the subject of an Electronic Surveillance request pursuant to Lawful Process), if TMI stores such communication for any reason; and

(iii) any information relating to a U.S. MET (or a Non-U.S. MET that is the subject of an Electronic Surveillance request pursuant to Lawful Process) or information relating to any communication of such METs to which the United States is entitled access pursuant to 18 U.S.C. § 2703, if TMI stores such information for any reason.

(c) make available in the United States any Electronic Communication received by, intended to be received by, or stored in the account of a U.S. MET (or a Non-U.S. MET that is the subject of an Electronic Surveillance request pursuant to Lawful Process), if TMI stores such communication for any reason.

(d) Any information that TMI stores or makes available in the United States pursuant to paragraphs 7.3(b) and (c) of this Agreement shall not be destroyed pursuant to any law except U.S. Federal or state law.

7.5 Disclosure to Foreign Governments. Except as required by Canadian court order, TMI shall not disclose, or permit the disclosure of, any information that must be made available in the United States pursuant to section 7.4 of this Agreement, including but not limited to any Electronic Communication, Wire Communication, or records relating to such communications, to any foreign government absent the express written consent of the DoJ.

ARTICLE VIII

ELECTRONIC SURVEILLANCE AND SUBSCRIBER INFORMATION

8.1 Points of Contact. In accordance with the Implementation Plan, TMI shall designate a TMI employee or employees as the point(s) of contact at its security office(s) within the United States with the authority and responsibility for carrying out Lawful Process. The points of contact will be responsible for accepting service and maintaining the security of Classified Information and any Lawful Process for electronic surveillance in accordance with the requirements of U.S. law. TMI will immediately notify in writing the DoJ and the FBI of such designation. Changes to these points of contact shall be subject to the approval of the FBI and DoJ.

8.2 Security Clearances. The points of contact shall be U.S. citizens who are eligible for appropriate U.S. security clearances. TMI shall comply with any U.S. government request that a background check and/or security clearance process be completed for a designated point of contact.

8.3 Security of Lawful Process. TMI shall protect the confidentiality and security of all Lawful Process and the confidentiality and security of Classified Information and Sensitive Information in accordance with U.S. Federal and state law or regulation and the Implementation Plan.

8.4 Classified Information and Sensitive Information. TMI shall: (i) take appropriate measures to prevent unauthorized access to data or facilities that might contain Classified Information or Sensitive Information; (ii) when the TMI U.S. POP is operational, and except in connection with the provision of locational information by a Canadian citizen pursuant to the Implementation Plan, assign U.S. citizens, who meet high standards of trustworthiness for maintaining the confidentiality of Sensitive Information, to positions that handle or that regularly deal with information identifiable to such person as Sensitive Information; (iii) specify that personnel handling Classified Information shall be eligible for and shall have been granted appropriate security clearances; (iv) provide that the points of contact described in section 8.1 of this Agreement shall have sufficient authority over any of its employees who may handle Classified Information or Sensitive Information to maintain the confidentiality of such information; and (v) specify that TMI shall maintain appropriately secure facilities (e.g., offices) for the handling and storage of any Classified Information and Sensitive Information.

ARTICLE IX

FREEDOM OF INFORMATION ACT

9.1 Marking of Information. The DoJ and the FBI shall take reasonable precautions to protect from improper public disclosure all information submitted by TMI to the DoJ and the FBI in connection with or in furtherance of this Agreement or the Implementation Plan, and clearly marked with the legend "TMI Confidential" or similar designation. Such marking shall represent to the DoJ and the FBI that the information so marked constitutes "trade secrets" and/or "commercial or financial information obtained from a person and privileged or confidential," or otherwise warrants protection within the meaning of 5 U.S.C. § 552(b)(4). For purposes of 5 U.S.C. § 552(b)(4), the Parties agree that such information is voluntarily submitted. In the event of a request under 5 U.S.C. § 552(a)(3) for information so marked, the DoJ or the FBI, as appropriate, shall notify TMI of such request and consult with it as to any contemplated release (including release in redacted form) of such information. The DoJ or the FBI, as appropriate, shall notify TMI five (5) business days in advance of any release of such information under 5 U.S.C. § 552(a)(3).

9.2 Use of Information for Government Purposes. Nothing in this Agreement or the Implementation Plan shall prevent the DoJ or the FBI from lawfully disseminating information as appropriate to seek enforcement of this Agreement or the Implementation Plan, or as otherwise necessary in furtherance of the missions, responsibilities, or obligations of the DoJ or the FBI, provided that the DoJ or the FBI shall take reasonable precautions to protect from improper public disclosure information marked as described in the preceding section; where feasible, the DoJ and the FBI will make information available for inspection rather than providing copies thereof.

ARTICLE X

COST REIMBURSEMENT

Any entity which serves an Electronic Surveillance request on TMI shall in accordance with U.S. law pay TMI a fee which reimburses TMI for reasonable costs directly incurred in responding to the request. The amount of the fee shall be mutually agreed or, in the absence of an agreement, shall be resolved pursuant to the dispute mechanism in Article XI of the Agreement or, failing that, by the court which has jurisdiction over the relevant request for the Electronic Surveillance. TMI agrees that the capital expenditures and variable costs associated with the establishment and day-to-day operation of the TMI U.S. POP are the sole responsibility of TMI and that such expenditures may not be considered as part of the reasonable costs directly incurred in responding to an Electronic Surveillance request.

ARTICLE XI

DISPUTES

11.1 Informal Resolution. Except as provided in sections 5.3 and 7.2 of this Agreement, the Parties shall use their best efforts to resolve any disagreements that may arise under this Agreement or the Implementation Plan. Disagreements will be addressed in the first instance at the staff level. Any disagreement that has not been resolved at that level shall be submitted promptly to an inter-party panel of four senior officials, two from the DoJ and/or FBI and two from TMI, unless any party believes that important national interests or paramount corporate interests can be protected only by resorting to a U.S. Federal court of competent jurisdiction. If the disagreement involves Classified Information, TMI's senior official(s) shall possess the appropriate security clearances. If the disagreement involves the FBI, the FBI's senior official(s) shall be the Assistant Director of the National Security Division and/or his or her designee(s). If the disagreement involves the DoJ, the DoJ's senior official(s) shall be the Assistant Attorney General for the Criminal Division and/or his or her designee(s). The panel shall hear a presentation from each party to the dispute and then attempt to resolve the dispute. If, after the presentations, the Parties' senior officials are unable to agree, the remedies set forth in section 11.2 of this Agreement shall be available.

11.2 Enforcement of Agreement. Subject to section 11.1 ("Informal Resolution"), if any party believes that this Agreement or the Implementation Plan has been breached, that party may bring an appropriate action for judicial relief in a U.S. court of competent jurisdiction or move for relief from the FCC. Such an action may include an appropriate action for an equitable remedy or monetary damages. Any party may also seek appropriate relief for an anticipatory breach.

11.3 Forum Selection. It is agreed by and between the Parties that an action for judicial relief with respect to any dispute or matter whatsoever arising under, in connection with, or incident to, this Agreement that is not resolved under section 11.1 ("Informal Resolution") shall be brought, if at all, in and before a Federal court of competent jurisdiction in the United States, to the exclusion of the courts of any state, territory or other nation.

ARTICLE XII

MISCELLANEOUS

12.1 Right to Make and Perform Agreement. TMI warrants that, to the best of its knowledge, neither the execution of this Agreement and the Implementation Plan, nor the actions contemplated hereby, violate any provision of law or any judgment, writ, injunction, order, or decree

of any court or governmental authority having jurisdiction over it; result in or constitute a breach or default under any indenture, contract, other commitment or restriction to which it is a party or by which it is bound; or require any consent, vote, or approval that has not been given or taken, or at the time of the transaction involved, shall not have been given or taken. TMI covenants that, to the best of its knowledge, it has and will continue to have throughout the term of this Agreement the full right to enter into this Agreement and perform its obligations hereunder and that this Agreement is a legal, valid, and binding obligation of TMI enforceable in accordance with its terms.

12.2 Waiver. The failure of the DoJ or the FBI to insist on strict performance of any of the provisions of this Agreement or the Implementation Plan, or to exercise any right they grant, shall not be construed as a relinquishment or future waiver; rather, the provision or right shall continue in full force. No waiver of any provision or right shall be valid unless it is in writing and signed by the U.S. Government agency giving it.

12.3 Headings. The various headings of this Agreement and the Implementation Plan are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement or the Implementation Plan, or any provisions thereof.

12.4 Other Laws. Nothing in this Agreement or the Implementation Plan is intended to limit or constitute a waiver of: (i) any obligation imposed by U.S. Federal law or regulation on TMI, the DoJ, or the FBI or by state law or regulation on TMI; (ii) any enforcement authority available under U.S. Federal or state law or regulation; (iii) the sovereign immunity of the United States; or (iv) any authority over TMI's activities or facilities located outside the United States that the U.S. Government may possess.

12.5 Statutory References. All references to statutory provisions or to Executive Orders shall include any future amendments to such authorities.

12.6 Non-Parties. Nothing in this Agreement or the Implementation Plan is intended to confer or does confer any rights on anyone other than TMI, the DoJ, the FBI, and any other entities entitled to effect lawful Electronic Surveillance in accordance with Lawful Process.

12.7 Modification.

(a) This Agreement and the Implementation Plan may be modified only by written agreement signed by all of the Parties. Any substantial modification to this Agreement shall be reported to the FCC within thirty (30) days after approval by the Parties.

(b) The Parties agree to negotiate in good faith regarding modifications of this Agreement and the Implementation Plan as may be required:

(i) by any material changes in the U.S. national security, law enforcement, and public safety concerns and public safety laws and policies which provided the predicate for this Agreement; and

(ii) for the consistent application of U.S. national security, law enforcement and public safety laws and policies to TMI vis-a-vis other U.S. and foreign licensed mobile satellite service providers in like circumstances.

12.8 Partial Invalidity. If any part of this Agreement or the Implementation Plan is declared invalid by a court of competent jurisdiction, this Agreement and the Implementation Plan shall be construed as if such portion had never existed, unless this construction would constitute a substantial deviation from the parties' intent as reflected in this Agreement and the Implementation Plan.

12.9 Notices. With the exception of service of Lawful Process, all requests for information, visits, or interviews and all reports, notices, and proposed modifications provided under this Agreement and the Implementation Plan shall be made to the parties' designated representatives. All reports, notices and proposed modifications to the Parties under this Agreement and the Implementation Plan shall be given by: (1) registered or certified mail; (2) delivery by overnight courier (receipt requested); or (3) transmission by facsimile (confirmed by mail) addressed to the addresses shown below, or to such other addresses as the Parties may designate by agreement. The representatives shall be:

Department of Justice

Department of Justice
Assistant Attorney General
Criminal Division
Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Federal Bureau of Investigation

Federal Bureau of Investigation
Assistant Director
National Security Division
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

With a copy to:

Federal Bureau of Investigation
General Counsel
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535
Tel: (202) 324-6829
Fax: (202) 324-5366

TMI Communications and Company, Limited Partnership

TMI Communications and Company, Limited Partnership
Vice President, Law
1601 Telesat Court
Gloucester, Ontario K1B 5P4
Canada
Tel: (613) 748-8700 ext. 2268
Fax: (613) 748-8783

IN WITNESS WHEREOF, the Parties have executed this Agreement:

TMI Communications Inc.,
on behalf of TMI Communications and
Company, Limited Partnership

Date: September 10, 1999

By: _____
/s/
Laurier J. Boisvert
President and Chief Executive Officer

Department of Justice

Date: October 6, 1999

By: _____
/s/

_____
[Eric Holder, Jr.]

_____
[Deputy Attorney General]

Federal Bureau of Investigation

Date: October 6, 1999

By: _____
/s/

_____
[Larry R. Parkinson]

_____
[General Counsel]

EXHIBIT A
CONDITION TO FCC LICENSES

IT IS FURTHER ORDERED, that the authorization and the license related thereto are subject to compliance with the provisions of the Agreement attached hereto between TMI and the Department of Justice (the "DoJ") and the Federal Bureau of Investigation (the "FBI"), dated September 10, 1999, which Agreement is designed to address national security, law enforcement, and public safety concerns of the DoJ and the FBI regarding the license granted herein. Nothing in this Agreement or the Implementation Plan is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(1) and the FCC's implementing regulations.

SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: In the Matter of Applications of SatCom Systems Inc., TMI Communications and Company, L.P. and SatCom Systems Inc., File No. 647-DSE-P/L-98 et al

I support the Commission's decision today to permit another entrant into the United States satellite communications marketplace. The WTO agreement has created a solid foundation that will allow American companies to compete freely abroad and will create corresponding opportunities for American consumers to purchase the services of new domestic telecommunications providers. I write separately solely to express my continued concern about the role of other government agencies in the Commission's licensing process.[1]

It is clear that the WTO intended for national security concerns to play a role in determining whether certain markets would be opened to competition. The GATS provides for "essential security" exceptions under Articles XIV *bis*.[2] Similarly, in our DISCO II Order we assured the parties that we would "consider any such legitimate concerns [regarding national security or law enforcement] as we undertake our own independent analyses of whether grant of a particular authorization is in the public interest."[3] I believe the process here went far beyond the process envisioned by the WTO and our prior decisions.

In March 1998, two companies (one American-owned (SatCom) and the other Canadian-owned (TMI)) filed earth station applications to receive the signal of a Canadian satellite (MSAT-1). Comments were due on these applications in May of 1998. Eleven months later, the Federal Bureau of Investigation (FBI) filed its comments. The FBI then entered into seven months of "negotiations" with the applicants in order to reach a "voluntary" agreement that would place conditions on the licenses. In October 1999, the FBI withdrew its objections and requested that we incorporate the "agreement" into our approval of the license applications.

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[1] *See* Separate Statement of Commissioner Harold Furchtgott-Roth in *AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc*, IB Docket No. 98-212, FCC 99-313 (rel. October 29, 1999).

[2] It is not clear that general law enforcement issues legitimately rise to the level of "essential security." For the purposes of this Statement, however, I assume that the term subsumes the law enforcement concerns raised by the FBI. Surprisingly, the FBI also invokes the GATS exception for issues related to "any obligations under the U.N. Charter to maintain international peace and security." FBI Reply to Opposition at 7 (filed April 27, 1999). The application of that exception here seems, at best, aggressive.

[3] *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Service in the United States,* Report and Order*, 12 FCC Rcd 24094, ¶ 179 (1997)("DISCO II");* Ironically, "we emphasize[d] . . . that we expect national security, law enforcement, foreign policy and trade policy concerns to be raised in very rare circumstances. Contrary to the fears of some commenters, the scope of the concerns that the Executive Branch will raise in the context [of transfers] . . . is narrow and well-defined." *Id.* at ¶ 180.

I. A Muddled Process

I am concerned that the FCC's licensing procedure is being hijacked to achieve other agencies' public policy goals. The FBI's procedural record here is particularly unfortunate.

The Commission may well have been able to approve this application a year ago, but for the last minute epiphany of the FBI that the application raised grave national security issues. Indeed, the FBI filed its comments eleven months late. This is not a minor oversight.[4] The FBI then consumed another seven months negotiating a "voluntary" agreement with the applicants. This effectively created an 18-month freeze on our approval process. This freeze prejudices not only the notice-and-comment process, but also the parties' interest in a full, fair and prompt resolution. Moreover, an applicant's competitors now have an incentive to complicate our licensing process by utilizing other government agencies to slow down our approval. The resulting procedural morass undermines predictability and creates tremendous delays that deny American consumers' competitive service options.

II. Potentially Discriminatory Obligations

These side agreements between the private parties and the Department of Justice (DOJ) and the FBI are also potentially discriminatory. Putting aside the underlying merits of any side agreement, I am troubled by the ad hoc nature of these obligations. To the extent we have jurisdiction and "national security" issues arise, then we should promulgate generally applicable rules to address earth stations accessing non-U.S. licensed space stations. We should utilize the Administrative Procedure Act to develop a comprehensive record on these issues.[5] In fact, at least one rulemaking proceeding could have provided such an opportunity.[6] However, to date no such generally applicable rules have been proposed or adopted by the Commission.

Similarly, if the DOJ or FBI have such concerns, they should utilize their independent

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[4] The FBI asserts that it did not "become aware" of TMI's application "until the fall of 1998." FBI's Reply to Opposition at 3 (filed April 27, 1999). Even after discovery, the Bureau waited another six months to file anything at the Commission. In this regard, the FBI noted Title III's lack of a notice provision for other governmental entities (Section 214 contains such a provision). The distinct lack of such a provision further undercuts any Commission deference to these filings under Title III. Indeed, there appears to be no statutory basis for treating the FBI different than any other party to a Title III application.

[5] In this regard, I note that the application has been found to satisfy our requirements under the Communications assistance for Law Enforcement Act (CALEA). Order ¶ 61.

[6] *See Amendment of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangements and Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for Mobile and Portable Earth Stations Operating in the 1610-1660.5 MHz Band*, Notice of Proposed Rulemaking, FCC 99-37 (rel. March 5, 1999).

authority to address those issues. If they lack such authority, then the Administration should turn to Congress for the appropriate delegation of authority.

As I noted in the AT&T/BT proceeding, our Order here attempts to distance the agency from the conclusions reached and conditions advanced by the DOJ and FBI:
"We note that the Agreement reflects a unique situation, and contains certain provisions that, if broadly applied, would have significant consequences for the telecommunications industry. These provisions, if viewed as precedent for other service providers and potential investors, would warrant further inquiry on our part. Therefore, this agreement does not establish precedent for future cases." [7] Once again, the Order does not identify what is "unique" about this "situation," except that it is obvious that the agency does not want to be bound by the findings of DOJ and the FBI. I remain concerned that we are trying to have it both ways – we use our authority to impose these onerous obligations, while distancing ourselves from the outcome.

III. The FCC's Bureau for Third-Party Contract Enforcement?

Finally, as I have discussed elsewhere, this agency is on dangerous ground when it purports to play a role in the enforcement of other agency's regulatory determinations. Here the side agreement calls for the parties to seek judicial enforcement of the agreement or "move for relief from the FCC."[8] As I stated in AT&T/TCI, "we have no jurisdiction to enforce rules not promulgated under the Communications Act. . . and we cannot and should not do the enforcement work of others."9 The public would be far better served if the Commission were to decline to incorporate the side agreement into our approval order and leave the contract's enforcement to the parties and the courts.[10]

*****

I urge my fellow Commissioners, the FBI and the Department of Justice to move swiftly to remedy this ad hoc and arduous "process" for national security review by the Administration. To the extent that national security concerns warrant broadly applicable rules, I will readily support efforts to create such regulations. However, we should not continue to develop these rules "as we go along" without any of the procedural and legal protections traditionally afforded parties impacted by rulemakings. The current process does not serve the parties or the American

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7 Order at ¶ 57.

8 Appendix A, Agreement at § 11.2.

9 Separate Statement of Commissioner Harold Furchtgott-Roth, in Re: Applications for Consent to the Transfer and Control of Licenses and Section 214 Authorization from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 98-178 (Feb. 18, 1999).

10 Just as in AT&T/BT, I understand that here the incorporation of the side agreement was made an explicit condition of the withdrawal of the government parties' objections. I continue to urge the Commission to work with the other governmental parties to remove such provisions from any future side agreements.

people well.