

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

In the Matter of)	
)	
Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Assignor)	File Nos. SES-ASG-20010504 00896
)	ITC-ASG-20010504-00302
)	ISP-PDR-20010510-00025
and)	ULS-0000449956
)	41-EX-AL-2001
Telenor Satellite Mobile Services, Inc. and Telenor Satellite, Inc., Assignee)	42-EX-AL-2001
)	43-EX-AL-2001
)	44-EX-AL-2001
Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, Experimental Licenses, and Earth Station Licenses)	
)	
and)	
)	
Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act)	
)	

ORDER

Adopted: January 23, 2002

Released: January 24, 2002

By the Chief, International Bureau:

I. INTRODUCTION

1. By this Order, we deny a motion submitted to the Commission by the Litigation Recovery Trust (LRT) on December 23, 2001,¹ requesting a stay of the Commission’s Order and Authorization issued on December 18, 2001 in the above-captioned matter.² For the reasons discussed below, we conclude that LRT has not met the legal standards for a stay.

II. BACKGROUND

2. On December 18, 2001, the Commission granted the applications filed by Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, together with

¹ Litigation Recovery Trust, Motion for Stay, December 23, 2001 (*LRT Motion for Stay*).

² See Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, (Assignor) and Telenor Satellite Mobile Services, Inc. and Telenor Satellite, Inc., (Assignee) Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, Experimental Licenses, and Earth Station Licenses and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, *Order and Authorization*, FCC 01-369, rel. December 18, 2001 (*Comsat–Telenor Order*).

Telenor Satellite Services Holdings, Inc. and Telenor Satellite Inc. (Telenor Satellite) (collectively, Applicants) to assign various satellite earth station licenses, private land mobile radio licenses, experimental licenses, and Section 214 authorizations held by Comsat Corporation, through its business unit Comsat Mobile Communications to Telenor Satellite.³ The Commission found that the assignment was in the public interest pursuant to review under Sections 214(a) and 310(d) of the Communications Act of 1934, as amended (the Act).⁴ In addition, pursuant to review under Section 310(b)(4) of the Act,⁵ the Commission found that it would not serve the public interest to prohibit the proposed indirect foreign ownership of the licenses by Telenor Satellite in excess of the 25% foreign ownership benchmark.

3. On December 23, 2001, LRT submitted a Motion for Stay of the *Comsat-Telenor Order* pending reconsideration and any court reviews.⁶ In its motion, LRT claims that there is new evidence relevant to the issue of government funded cross subsidization of Telenor's operations and seeks to stay the Commission's *Comsat-Telenor Order* under the standards set forth in *Virginia Jobbers*, as modified in *Holiday Tours*.⁷ On January 9, 2002, the Applicants filed an opposition to LRT's motion for stay, arguing that LRT failed to meet the standards for a stay, and thus, the Commission should deny LRT's request.⁸ On January 11, the merger of Comsat Mobile Communications and Telenor was completed.⁹

III. DISCUSSION

4. In evaluating petitions for stay of Commission orders, we use the four-prong test articulated in *Virginia Jobbers*, as modified in *Holiday Tours*.¹⁰ Under this test, a stay is warranted if the moving party can demonstrate that (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay. For the reasons discussed below, we conclude that LRT has not met the legal standards for a stay.

1. LRT Is Not Likely to Prevail on the Merits

5. In support of its contention that it is likely to succeed on reconsideration, LRT claims: (1) that the Commission exceeded its jurisdiction by failing to present any interpretation of the Act that

³ *Id.* The assignment also included a license held by Comsat General Corporation, a subsidiary of Comsat Corporation.

⁴ 47 U.S.C. §§ 214(a) and 310(d).

⁵ 47 U.S.C. § 310(b)(4).

⁶ *LRT Motion for Stay* at 4. In its Motion for Stay, LRT states that it submitted a Motion for Reconsideration separate from its Motion for Stay.

⁷ *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) (*Virginia Jobbers*); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) (*Holiday Tours*).

⁸ Telenor Satellite Services Holdings, Inc., Telenor Satellite, Inc. and Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Opposition To Motion For Stay, January 9, 2002 (*Applicants' Opposition to Stay*).

⁹ *See Telenor Completes Acquisition of Comsat Mobile Communications From Lockheed Martin* (press release), January 14, 2002, at <http://press.telenor.com/PR/200201/845097_5.html>.

¹⁰ *See supra* note 7.

would establish its authority to authorize the assignment of licenses to a company that is 79% owned and controlled by a foreign government; (2) violated the notice and comment requirements of the Administrative Procedures Act (APA) by modifying an existing rule; and (3) acted arbitrarily and capriciously by failing to present any rationale for its departure from established Commission policy.¹¹ In addition, LRT claims that it has new evidence, separately submitted in its Motion for Reconsideration,¹² concerning a contract recently secured by Telenor to provide communication services to the North Atlantic Treaty Organization (NATO) that raises questions regarding cross subsidization. According to LRT, it obtained information that Telenor underbid the incumbent carrier by some \$8 million.¹³ If its assumptions are correct, LRT contends that Telenor's bid raises questions concerning subsidization of Telenor's business operations by the Kingdom of Norway.¹⁴

6. In evaluating whether LRT is likely to succeed on the merits, the Commission need not find that LRT's success is absolutely certain or without doubt; it need only find that LRT has made a substantial case.¹⁵ Our review of LRT's Motion for Stay, however, finds that although LRT has made allegations it has not provided sufficient evidence to raise serious issues that might warrant further deliberation or investigation.

7. With respect to LRT's assertion that the Commission exceeded its jurisdiction, Section 310(b)(4) of the Act prohibits grant of licenses to "any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned...by a foreign government" but only if the Commission finds that such a prohibition would be in the public interest.¹⁶ In this case, the Commission made no such finding and thus the decision was well within its statutory jurisdiction. The decision was also in keeping with past precedent. The Commission undertook a comprehensive review of jurisdictional issues related to foreign ownership and the proper relationship between the different subsections of Section 310 of the Act in the *VoiceStream/Deutsche Telekom Order*.¹⁷ After extensive analysis of the legislative history and congressional policies underlying Sections 310(a) and 310(b) of the Act, the Commission ultimately concluded that Section 310(b)(4) was designed to address indirect foreign ownership and control situations that were not covered by the prohibitions of Section 310(a) or 310(b)(1)-(3).¹⁸ The *Comsat-Telenor Order* followed the precedent established in the *VoiceStream/Deutsche Telekom Order*, and properly examined the indirect foreign ownership issues under Section 310(b)(4).¹⁹ In addition, the Commission conducted a general public interest review of the

¹¹ *LRT Motion for Stay* at 8-9.

¹² *See supra* note 6.

¹³ *LRT Motion for Stay* at 4.

¹⁴ *Id.* at 4-5.

¹⁵ *See, e.g., Holiday Tours*, 559 F2d at 843-844.

¹⁶ 47 U.S.C. § 310(b)(4).

¹⁷ *See Application of VoiceStream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and for Declaratory Ruling Pursuant to Section 310 of the Communications Act, Memorandum Opinion and Order*, 16 FCC Rcd 9779, 9789 (2001) (*VoiceStream/Deutsche Telekom Order*).

¹⁸ *Id.* at 9799-9800. The Commission concluded that its jurisdiction over proposed transfers or assignments of control that involve indirect foreign ownership interests in a common carrier licensee is properly asserted under Section 310(b)(4).

competitive effect of the transaction under Sections 310(d) and 214(a) of the Act.²⁰ Thus, we find no merit in LRT's contention that the Commission acted outside its jurisdiction.

8. Further, we find no merit in LRT's claim that the Commission violated notice and comment requirements of the APA. Under the APA, a substantive rule is invalid if not promulgated in accordance with proper notice and comment requirements.²¹ The legal standard that governs our review of proposed assignments and transfers of licenses and authorizations is whether the proposed transaction will serve the public interest.²² The Commission placed the proposed transaction on public notice and sought comment from interested parties on whether the proposed transaction would serve the public interest.²³ The Commission received comments from interested parties, including LRT, and based its *Comsat-Telenor Order* on consideration of a full and complete record.²⁴ As we stated above, the Commission appropriately examined the assignment under Section 310(b)(4), as well as Section 310(d) and Section 214(a), and its *Comsat-Telenor Order* is consistent with the statute and previous decisions concerning the assignment or transfer of common carrier licenses involving indirect foreign ownership.²⁵ Thus, we find unpersuasive LRT's assertions that the Commission violated the APA and acted arbitrarily and capriciously by failing to provide a rationale for its decision.

9. Finally, we find that the unsubstantiated allegations offered by LRT concerning a contract that Telenor obtained through a bidding process to provide communications services to NATO is not sufficient to indicate that LRT may likely succeed in a reconsideration proceeding. LRT makes these allegations apparently to claim cross subsidization of Telenor's operations by the Norway government and, thus, counter the Commission's findings that the assignment of licenses to Telenor will not harm competition.²⁶ While LRT alleges cross subsidization, it provides no support of this claim other than the fact of a contract itself. It does not demonstrate how Telenor would gain any competitive advantage in the United States from this situation or how this situation might otherwise enable Telenor to harm competition in the United States.²⁷ We therefore find LRT's claim vague and unsupported by evidence.

¹⁹ See *Comsat-Telenor Order* at paras. 21-36.

²⁰ *Id.* at paras. 37-41, 52-53.

²¹ 5 U.S.C. § 553(b) and (d). For purposes of the APA, "substantive rules" requiring notice and comment are those that effect change in existing law or policy or which affect individual rights and obligations. See, e.g., *Paralyzed Veterans of America v. West*, 138 F.3d 1434 (1998).

²² See, e.g., 47 U.S.C. §§ 310, 214. The rules implementing these statutory provisions are set forth in 47 C.F.R. Parts 25, 63, 101.

²³ See Public Notice, Report No. SPB-169, May 25, 2001.

²⁴ Along with other parties, LRT participated in this proceeding and submitted written comments, which were considered by the Commission in reaching its decision. See, e.g., *Provisional Petition to Deny and Petition for Protective Orders*, Litigation Recovery Trust, June 22, 2001 and *Reply to Opposition to Petition to Deny*, LRT, July 19, 2001.

²⁵ See, e.g., *VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd 9779.

²⁶ In response, the Applicants argue that there is no such subsidization of Telenor by the government of Norway and that any implication by LRT that the bid was in some way illegal or anti-competitive is false and without any foundation. See *Applicants' Opposition to Stay* at 4.

²⁷ LRT states only that it "received a disturbing report" from an unidentified source that Telenor secured the NATO contract "by underbidding the incumbent carrier by some \$8 million" and that "[a]ssuming the incumbent

As such, we find that LRT has not made a sufficient showing that would tend to rebut the presumption of pro-competitive entry into the U.S. market by WTO members.²⁸

10. In sum, we find LRT's procedural arguments and proffered evidence unpersuasive and insufficient to reverse the Commission's ruling. Accordingly, we find that LRT is not likely prevail on the merits in a petition for reconsideration.

B. LRT Will Not Suffer Irreparable Harm in the Absence of a Stay

11. LRT has also not satisfied the second prong of *Virginia Jobbers*, which requires that the movant make a showing that it will be irreparably harmed if the stay is not granted. LRT maintains that without the stay (1) the public interest in maintaining a policy against assignments and/or transfers of U.S. licenses to companies controlled and owned by a foreign government would be irreparably harmed; and (2) LRT and others "will not be able to bring a lawsuit to recover their economic losses when the Commission's Order is ultimately overturned" because Comsat will cease to exist.²⁹ The question of harm to others is not relevant to the query under this prong of *Virginia Jobbers*. LRT must demonstrate the irreparable harm that it alleges will befall LRT.

12. Under *Virginia Jobbers*, the courts and the Commission require the alleged harm to the movant to be "both certain and great; ... actual and not theoretical."³⁰ Further, the movant must substantiate the claim that the irreparable is likely to occur.³¹ LRT makes allegations of damages but does not specify their nature, stating only the possibility that it will not be able to bring a lawsuit against Comsat "when the Commission's Order is ultimately overturned."³² Because the harms alleged by LRT lack the requisite certainty, we find that LRT fails to make a showing of irreparable harm sufficient to satisfy the *Virginia Jobbers* test.³³

C. Grant of a Stay May Cause Harm to Third Parties

13. Further, we find that LRT has not met the third prong of *Virginia Jobbers*. Contrary to LRT's assertion that a grant of a stay would cause no harm to Telenor and Comsat,³⁴ the Applicants

carrier, based on its past experience in providing communications services to NATO, bid at or close to the market price for the services and facilities offered" this should raise immediate concerns of cross subsidization by the government of Norway. See *LRT Motion for Stay* at 4-5.

²⁸ LRT also restates arguments it made during the course of this proceeding, however, we find that those arguments were fully considered by the Commission and do not constitute a basis for reversal of the December 18 Order and Authorization.

²⁹ *LRT Motion for Stay* at 10.

³⁰ *Telmex/Sprint Communications, L.L.C., Order*, 13 FCC Rcd 15678, 15680, citing e.g., *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

³¹ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)

³² *LRT Motion for Stay* at 10

³³ In addition, as the Applicants point out in their opposition, it is the Commission's policy generally not to intervene in contractual disputes. See *Applicants' Opposition to Stay* at 6. Further, we are not presented with facts from LRT as to its current litigation or planned litigation and any relevance to this matter.

contend that a stay would inflict significant harm on both Telenor and Comsat and cause direct injury to the Applicants.³⁵ The Applicants state that both Comsat and Telenor have expended considerable effort and resources to secure necessary approvals and have undertaken complex and costly business steps necessary to complete the transaction.³⁶ We are not convinced by LRT's bare assertion that the Applicants will suffer no harm if the stay were granted. In addition, we note that Telenor and Comsat have recently consummated the transaction,³⁷ and thus, it is likely that there would be significant additional costs and penalties if a stay were granted. For these reasons, we find LRT has failed to demonstrate that third parties would not be harmed by a stay, as required by *Virginia Jobbers*.

D. Public Interest Will Not Be Served By a Grant of the Stay

14. Finally, we find that LRT has not met the fourth prong of *Virginia Jobbers*. LRT has not shown that the public interest will be served by a grant of the stay. LRT argues that the public interest is served by preserving basic policy that prohibits indirect ownership and control of US licensee companies by foreign countries.³⁸ We disagree with LRT. Our policy concerning indirect foreign ownership of US licenses and authorizations, as set forth in the *Comsat-Telenor Order* and in previous Commission decisions, involves a public interest finding in which we weigh potential public interest benefits against potential public interest harms, considering competitive effects and other public interest factors. It does not serve the public interest, as LRT would require, simply to preclude any assignments and transfers without undertaking the requisite analysis. Moreover, our mandate under the Act clearly requires that we undertake a public interest analysis and consider these factors in making our decisions.³⁹ The *Comsat-Telenor Order* found that after careful consideration of the public interest factors consistent with statute and prior precedent, the combination of Comsat and Telenor would enhance competition and consumer choice in the global satellite telecommunications market and thereby promote wider and more varied service offerings at competitive prices for consumers in the United States and abroad.⁴⁰ LRT has provided no evidence to support reversal of that finding, and thus, granting a stay would only operate to delay the public interest benefits we articulated in the *Comsat-Telenor Order*.

IV. CONCLUSION

15. We find that LRT fails to meet the legal standards for a stay. We do not find LRT's arguments and proffer of alleged new evidence persuasive, and conclude that LRT has not shown that it is likely to prevail on the merits. We find also that LRT will not be irreparably harmed absent a stay, that the Applicants would be harmed by the grant of a stay, and that a stay would not serve the public interest.

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the Motion for Stay submitted by the Litigation

³⁴ *LRT Motion for Stay* at 10.

³⁵ *Applicants' Opposition to Stay* at 6-7.

³⁶ *Id.*

³⁷ *See supra* note 9.

³⁸ *LRT Motion for Stay* at 11.

³⁹ *See* 47 U.S.C. §§ 310(b)(4), 310(d) and 214.

⁴⁰ *See Comsat-Telenor Order* at paras. 2 and 57.

Recovery Trust in the above-captioned proceeding on December 23, 2001, IS DENIED.

17. This action is taken under delegated authority pursuant to Sections 0.51, 0.261, 0.131, 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.51, 0.261, 0.131, 0.331, and SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
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