

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

In the Matter of	)	File No. EB-07-IH-9075
	)	
SkyPort Global Communications, Inc.	)	NAL Acct. No. 200932080006
	)	
Apparent Liability for Forfeiture	)	FRN No. 0011544913

**ORDER OF FORFEITURE**

Adopted: March 27, 2009

Released: March 30, 2009

By the Chief, Investigations and Hearings Division:

**I. INTRODUCTION**

1. In this Order of Forfeiture, we assess a monetary forfeiture of \$3,000 against SkyPort Global Communications, Inc. (“SkyPort”), licensee of an international section 214 authorization and two earth stations, and its ultimate controlling affiliate, Balaton Group, Inc. (“Balaton”). Following the Notice of Apparent Liability that the Commission’s Enforcement Bureau (“Bureau”) issued on November 5, 2008,<sup>1</sup> we find that SkyPort and its affiliates willfully and repeatedly violated the Commission’s rules by engaging in unauthorized transfers of control. Specifically, we find that SkyPort and its affiliates violated section 214 of the Communications Act of 1934, as amended (the “Act”), and sections 25.119 and 63.24 of the Commission’s rules<sup>2</sup> by consummating *pro forma* transfers of *de jure* control of SkyPort and its two international satellite earth station authorizations to one of its existing minority shareholders.

**II. BACKGROUND**

2. Section 214 of the Act requires telecommunications carriers to obtain a certificate of public convenience and necessity from the Commission before constructing, acquiring, operating or engaging in transmission over lines of communication, or before discontinuing, reducing or impairing service to a community.<sup>3</sup> In accordance with sections 63.12 and 63.18 of the Commission’s rules, any international carrier seeking authorization for such activities pursuant to section 214 of the Act, including any transfer of control of facilities, must obtain approval from the Commission.<sup>4</sup> In particular, pursuant to section 63.24 of the Commission’s rules,<sup>5</sup> a transfer of control of an international section 214 authorization

<sup>1</sup> See *SkyPort Global Communications, Inc.*, Notice of Apparent Liability for Forfeiture, DA 08-2457 (rel. Nov. 5, 2008) (“*Skyport NAL*”).

<sup>2</sup> 47 U.S.C. § 214; 47 C.F.R. §§ 25.119, 63.24.

<sup>3</sup> See 47 U.S.C. § 214(a).

<sup>4</sup> 47 C.F.R. §§ 63.12, 63.18. Certain kinds of applications, including the one at issue here, are subject to streamlined procedures under these provisions. Cf. 47 C.F.R. § 63.03 on streamlined procedures for domestic section 214 authorizations.

<sup>5</sup> 47 C.F.R. § 63.24.

requires application to, and approval from, the Commission. A licensee engaging in a substantial transfer of control of a section 214 authorization needs prior authorization from the Commission,<sup>6</sup> whereas a licensee engaging in a *pro forma* transfer does not, although the latter must notify the Commission of the transfer within 30 days thereafter.<sup>7</sup>

3. The Commission employs a public interest standard under section 214(a) of the Act that involves the examination of the positive and negative public interest impact of a proposed transaction. For transfer of control of an international section 214 authorization, the Commission defines control to include “actual working control in whatever manner exercised and is not limited to majority stock ownership.”<sup>8</sup> “Control” also includes direct or indirect ownership or control, such as through intervening subsidiaries.<sup>9</sup> The Commission further defines a transfer of control of an international section 214 authorization as a transaction in which the authorization continues to be held by the same entity, but where there is a change in the entity or entities that control the authorization holder.<sup>10</sup> A change from less than 50 percent ownership to 50 percent or more ownership shall always be considered a section 214 transfer of control.<sup>11</sup> Because the issue of control inherently involves issues of fact, it must be determined on a case-by-case basis and may vary with the circumstances presented by each case.<sup>12</sup>

4. Authorizations for operation and transfer of satellite earth stations require an application and approval process pursuant to 47 C.F.R. Part 25,<sup>13</sup> similar to that in 47 C.F.R. Part 63 described above for international section 214 authorizations.<sup>14</sup> This includes special provisions for transfer of control pursuant to section 25.119 of the rules,<sup>15</sup> similar to section 63.24 of the rules for transfer of control of international section 214 authorizations discussed above.<sup>16</sup> Unlike section 214 authorizations, transfer of control of international satellite earth station authorizations must be approved by the Commission in advance, even for *pro forma* transfers of *de jure* or *de facto* control.<sup>17</sup> In addition, there is a 30-day

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<sup>6</sup> See 47 C.F.R. § 63.24(e).

<sup>7</sup> See 47 C.F.R. §§ 63.24(f)(1)-(f)(2).

<sup>8</sup> See 47 C.F.R. § 63.09(b). Cf. 47 C.F.R. § 63.03, note 1, regarding domestic section 214 authorizations.

<sup>9</sup> See 47 C.F.R. § 63.09(b).

<sup>10</sup> See 47 C.F.R. § 63.24(c).

<sup>11</sup> See *id.*

<sup>12</sup> 47 C.F.R. § 63.24(d). Note 1 states:

The factors relevant to a determination of control in addition to equity ownership include, but are not limited to the following: power to constitute or appoint more than fifty percent of the board of directors or partnership management committee; authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensee; ability to play an integral role in major management decisions of the licensee; authority to pay financial obligations, including expenses arising out of operations; ability to receive monies and profits from the facility's operations; and unfettered use of all facilities and equipment.

See also 2000 Biennial Regulatory Review, Report and Order, 17 FCC Rcd 11416, 11419 n. 18 (2002) (describing these factors as indicia of “*de facto* control”). Note 2 to section 63.24(d) lists several types of structural business changes that are presumptively *pro forma*, some of which are comparable to the transfer here involving Balaton and SkyPort.

<sup>13</sup> See 47 C.F.R. Part 25.

<sup>14</sup> See 47 C.F.R. Part 63.

<sup>15</sup> See 47 C.F.R. § 25.119.

<sup>16</sup> See 47 C.F.R. § 63.24.

<sup>17</sup> See 47 C.F.R. § 25.119(d)-(f).

notification requirement after the transfer similar to the requirement for international section 214 authorizations.<sup>18</sup> Transfer of control is defined as a change in the party controlling the licensee or the controlling ownership interest of the licensee.<sup>19</sup>

5. The facts and circumstances surrounding this case are set forth in the *SkyPort NAL* and are summarized here.<sup>20</sup> SkyPort Global Communications, Inc., licensee of an international section 214 authorization and two earth stations, is a Houston-based global provider of managed, secure broadband satellite and terrestrial telecommunications services.<sup>21</sup> In early 2006, SkyPort was acquired by Balaton Group, Inc., a Canadian private equity firm specializing in turnarounds of distressed businesses, and it received authorization for these transfers of control in August 2006.<sup>22</sup> At that time, Balaton was led by Robert Kubbernus as President and a member of the Board and was owned 30 percent by Kubbernus and, in other non-controlling percentages, by four other investors.<sup>23</sup>

6. In July 2006, the five owners began a process of reorganization intended to leave Kubbernus with complete control as the sole shareholder, Chief Executive Officer (“CEO”), and Chairman of the Board (“COB”) of Balaton. SkyPort and its affiliates state that, pending consummation of the reorganization, Kubbernus assumed complete control of SkyPort regarding the composition of the Board, status of senior executives, major management decisions, and payment of major financial obligations.<sup>24</sup> On April 11, 2007, the Balaton reorganization was consummated and Kubbernus became the sole shareholder and COB of Balaton and continued as its CEO. He also continued as COB of SkyPort. SkyPort and its affiliates did not file any applications with the Commission at that time relating to the reorganization.<sup>25</sup> SkyPort and its affiliates note that they did not have regulatory counsel at the time and did not understand that the reorganization affected transfers requiring prior or subsequent approval because SkyPort remained the licensee, Balaton remained the majority shareholder of SkyPort, Kubbernus remained in day-to-day control and he continued to be compensated based on SkyPort’s performance rather than his equity share.<sup>26</sup>

7. In August 2007, the new regulatory counsel for SkyPort and its affiliates discovered the undisclosed reorganization and informed the Commission of that fact in the middle of September 2007.<sup>27</sup> SkyPort and its affiliates thereupon filed an application on September 24, 2007 for approval *nunc pro*

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<sup>18</sup> See 47 C.F.R. § 25.119(f).

<sup>19</sup> See 47 C.F.R. § 25.119(b).

<sup>20</sup> *SkyPort NAL* at 3-4, ¶¶ 5-8.

<sup>21</sup> SkyPort is a wholly-owned subsidiary of SkyComm Technologies Corporation, a holding company with no other functions and whose Board members are identical to those of SkyPort.

<sup>22</sup> See *SkyPort NAL* at 3, ¶ 5. See also Letter from Robert D. Primosch, Wilkinson Barker Knauer LLP, Counsel for SkyPort Global Communications, Inc., to Gerald Chakerian, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated March 28, 2008 (“March 28, 2008 LOI Response”) at 2-3. See also Letter from Robert D. Primosch, Wilkinson Barker Knauer LLP, Counsel for SkyPort Global Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, re: ITC-214-19990211-00083; ITC-T/C-20060407-00244, dated September 24, 2007 (“September 24, 2007 Section 214 Application”), at Ex. F.

<sup>23</sup> See March 28, 2008 LOI Response at 2.

<sup>24</sup> See *SkyPort NAL*, at 3, ¶ 6; March 28, 2008 LOI Response at 2-3; September 24, 2007 Section 214 Application at Ex. F.

<sup>25</sup> See *SkyPort NAL* at 4, ¶ 7

<sup>26</sup> March 28, 2008 LOI Response at 4-5, Inquiry 9; June 6, 2008 LOI Response at 1-2.

<sup>27</sup> *Id.*

*tunc* of the *pro forma* transfer of control of the section 214 authorization. The application was granted on November 14, 2007, without prejudice to any enforcement action in this case.<sup>28</sup> SkyPort and its affiliates filed similar applications on September 20, 2007 for Commission consent to the transfers of control of the two earth station licenses, which were granted on the same terms on November 8, 2007.<sup>29</sup>

8. On February 27, 2008, the Enforcement Bureau issued a letter of inquiry (“LOI”) to SkyPort, directing it to provide information and documents regarding, among other things, the nature of the transfers of control and the corporate structure of SkyPort and its affiliates.<sup>30</sup> SkyPort responded to the LOI on March 28, 2008 and June 6, 2008.<sup>31</sup>

9. On November 5, 2008, the Bureau issued the *SkyPort NAL*, finding that SkyPort apparently committed willful and repeated violations of section 214 of the Act and sections 25.119 and 63.24 of the Commission’s rules<sup>32</sup> and that it was apparently liable for a \$3,000 forfeiture. The *SkyPort NAL* ordered that, within 30 days of its release, SkyPort must pay the full amount of the proposed forfeiture or file a written statement seeking reduction or cancellation of the proposed forfeiture.<sup>33</sup> SkyPort has failed to either respond to the *NAL* or pay the full amount of the proposed forfeiture.

### III. DISCUSSION

10. The proposed forfeiture amount in this case was assessed in accordance with section 503(b) of the Act,<sup>34</sup> section 1.80 of the Commission’s rules,<sup>35</sup> and the Commission’s forfeiture guidelines set forth in its *Forfeiture Policy Statement*.<sup>36</sup> In assessing forfeitures, section 503(b) of the Act requires that we take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters as justice may require.<sup>37</sup> We issued a notice of apparent liability to Skyport and provided it with an opportunity to show, in writing, why no forfeiture penalty should be imposed.<sup>38</sup> Skyport did not avail

<sup>28</sup> See Public Notice, Report No. TEL-01206, DA 07-4612 (rel. Nov. 15, 2007) (File No. ITC-T/C-20070927-00392; grant of authority).

<sup>29</sup> Public Notice, Report No. SES-00981 (rel. Nov. 11, 2007) (File No. SES-T/C-20070919-01298; grant of authority for E00361); Public Notice, Report No. SES-00981 (rel. Nov. 11, 2007) (File No. SES-T/C-2007092001301; grant of authority for E050044).

<sup>30</sup> Letter from Trent B. Harkrader, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Patrick Brant, President, SkyPort Global Communications, Inc., dated February 27, 2008 (“LOI”).

<sup>31</sup> See March 28, 2008 LOI Response; Letter from Robert D. Primosch, Wilkinson Barker Knauer LLP, Counsel for SkyPort Global Communications, Inc., to Gerald Chakerian, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated June 6, 2008 (“June 6, 2008 LOI Response”).

<sup>32</sup> See 47 U.S.C. § 214(a); 47 C.F.R. §§ 25.119, 63.24.

<sup>33</sup> *SkyPort NAL*, at 6-7, ¶¶ 17, 19.

<sup>34</sup> See 47 U.S.C. § 503(b).

<sup>35</sup> See 47 C.F.R. § 1.80.

<sup>36</sup> See *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”).

<sup>37</sup> See 47 U.S.C. § 503(b)(2)(E).

<sup>38</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f). See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

itself of that opportunity. As discussed further below, we have examined our rules and the *Forfeiture Policy Statement*, and find no basis for cancellation of the NAL. As set forth below, we conclude, therefore, that SkyPort and its affiliates are liable for a forfeiture of \$3,000 for their willful and repeated violations of section 214 of the Act and sections 25.119 and 63.24 of the Commission's rules.<sup>39</sup>

#### A. Unauthorized Transfer of Control

11. We find that SkyPort willfully and repeatedly violated section 214 of the Act and sections 25.119 and 63.24 of our rules by engaging in unauthorized transfers of control.<sup>40</sup> Specifically, we find that SkyPort and its affiliates consummated *pro forma* transfers of *de jure* control of SkyPort to one of its existing minority shareholders in violation of Commission rules.

12. As discussed in the *SkyPort NAL*, we find that while the *de jure* nature of the change in control under these circumstances may not have required applications for a substantial change of control, it clearly did require applications for a *pro forma* change, and the failures of SkyPort and its affiliates to file such applications are willful and repeated violations of sections 25.119 and 64.24 of the Commission's rules. The claim that SkyPort and its affiliates misunderstood the necessity for a *pro forma* transfer of control of the section 214 authorization because SkyPort remained the licensee and Balaton remained the majority shareholder does not insulate them from enforcement action. Section 63.24(c) of the rules clearly states that "a transfer of control is a transaction in which the authorization remains held by the same entity, but there is a change in the entity or entities that control the authorization holder."<sup>41</sup> Here, the change in Kubbernus's share of Balaton from 30 percent to 100 percent is a *de jure* change requiring a *pro forma* application. Similar considerations apply to the failure of SkyPort and its affiliates to file applications for transfer of the two earth station licenses pursuant to section 25.119 of the rules.<sup>42</sup>

13. The Commission's grant of the *nunc pro tunc* requests for authority to transfer control of the international section 214 authorization and the two earth station licenses were granted without prejudice to enforcement action.<sup>43</sup> The record demonstrates that SkyPort and its affiliates willfully and repeatedly violated section 63.24 of the rules by not filing within 30 days after the consummation of the reorganization on April 11, 2007 a *pro forma* application for, and notification of, the transfer of *de jure* control of SkyPort and its international section 214 authorization from the Balaton minority shareholders to Kubbernus. Similarly, SkyPort and its affiliates willfully and repeatedly violated section 25.119 of the rules by not filing in advance of the consummation of the reorganization on April 11, 2007 applications for permission to transfer *de jure* control of each of SkyPort's two earth station licenses from the Balaton shareholder group to Kubbernus as sole shareholder. For these reasons, we affirm our preliminary holding in the *SkyPort NAL*.

#### B. Forfeiture

14. Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture for each violation or each day of a continuing violation, up to a statutory maximum for a single act or failure to

<sup>39</sup> 47 U.S.C. § 214; 47 C.F.R. §§ 25.119, 63.24.

<sup>40</sup> *Id.*

<sup>41</sup> 47 C.F.R. § 63.24(c).

<sup>42</sup> *See* 47 C.F.R. § 25.119.

<sup>43</sup> *See* Public Notice, Report No. TEL-01206, DA 07-4612 (rel. Nov. 15, 2007)(File No. ITC-T/C-20070927-00392; grant of authority); Public Notice, Report No. SES-00981 (rel. Nov. 11, 2007)(File No. SES-T/C-20070919-01298; grant of authority for E00361); Public Notice, Report No. SES-00981 (rel. Nov. 11, 2007)(File No. SES-T/C-2007092001301; grant of authority for E050044).

act.<sup>44</sup> In determining the appropriate forfeiture amount, we consider the factors enumerated in section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>45</sup>

15. The Commission’s *Forfeiture Policy Statement* and implementing rules prescribe a base forfeiture of \$1,000 for an unauthorized *pro forma* transfer of control.<sup>46</sup> In consideration of the factors enumerated in section 503(b)(2)(D) for establishing the forfeiture amount, we affirm the calculation methodology set forth in the *SkyPort NAL*. Accordingly, we find that the base forfeiture of \$1,000 against SkyPort and its affiliates for the section 214 authorization and each of the two earth station licenses is appropriate, and we assess a total forfeiture of \$3,000.

16. On October 24, 2008, SkyPort filed a Voluntary Petition under Chapter 11 of the United States Bankruptcy Code with the United States Bankruptcy Court for the Southern District of Texas.<sup>47</sup> The Commission will seek to collect the forfeiture through filing a timely claim in the bankruptcy case.

#### IV. ORDERING CLAUSES

17. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and section 1.80 of the Commission’s rules, 47 C.F.R. § 1.80, that SkyPort Global Communications, Inc., IS LIABLE FOR A MONETARY FORFEITURE in the amount of \$3,000 for willfully and repeatedly violating the Act and the Commission’s rules. For collection the Commission will file a proof of claim at the appropriate time in SkyPort’s bankruptcy action.<sup>48</sup>

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<sup>44</sup> 47 U.S.C. § 503(b)(2)(B); see also 47 C.F.R. § 1.80(b)(2); *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945 (2004). See 73 FR 44645 7/31/08 (new maxima). An unauthorized transfer of control is a continuing violation that does not end until the Commission grants a transfer of control application or other authorization. See *Ensearch Corporation*, 15 FCC Rcd 13551, 13554, ¶ 10 (2000).

<sup>45</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>46</sup> See 47 C.F.R. § 1.80; *Forfeiture Policy Statement*, 12 FCC Rcd 17087, 17113 (1997). The base forfeiture amount for an unauthorized substantial transfer of control is \$8,000. *Id.*

<sup>47</sup> The filing for bankruptcy does not necessarily preclude the imposition of a forfeiture. See 11 U.S.C. § 362(b); see also *United States v. Commonwealth Companies, Inc.*, 913 F.2d 518, 522-26 (8<sup>th</sup> Cir. 1990)(excepting from bankruptcy imposed stays, suits by government to obtain monetary judgment for past violations of the law); *Coleman Enterprises, Inc.*, 15 FCC Rcd 24385, 24389 nn.27-28 (2000), *recon. denied*, 16 FCC Rcd 10016 (2001)(noting that a bankruptcy filing does not preclude the Commission from assessing forfeitures for violations of the Act and rules). Moreover, the filing for bankruptcy does not necessarily justify an adjustment or cancellation of the forfeiture amount for a violation of the rules. See *Adelphi Communications*, 18 FCC Rcd 7652, 7654 ¶ 8 (Enf. Bur. 2003)(finding that a Chapter 11 bankruptcy filing – alone, without financial documentation – does not support an inability to pay claim and thus does not provide a basis to adjust or cancel an assessed forfeiture; see also *North American Broadcasting Co., Inc.*, 19 FCC Rcd 2754 ¶ 6 (Enf. Bur. 2004); *Pinnacle Towers, Inc.*, 18 FCC Rcd 16365, 16366-67 ¶ 7 (Enf. Bur. 2003); *Friendship Cable of Texas, Inc.*, 17 FCC Rcd 8571, 8572-73 ¶ 9 (Enf. Bur. 2002).

<sup>48</sup> See *Coleman Enterprises, Inc.* 15 FCC Rcd at 24390. See also *Commonwealth Companies*, 913 F.2d at 523 n.15.

18. IT IS FURTHER ORDERED that a copy of this ORDER OF FORFEITURE shall be sent by certified mail, return receipt requested, to Robert D. Primosch, Wilkinson Barker Knauer LLP, Counsel for SkyPort Global Communications, Inc., 2300 N Street N.W., Washington, D.C. 20037.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro  
Chief, Investigations and Hearings Division