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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
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Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum At 2 GHz for Use By The Mobile-Satellite Service	))))	ET Docket No. 95-18

EMERGENCY PETITION FOR FURTHER LIMITED RECONSIDERATION

BT North America Inc., Hughes Space and Communications International ("Hughes"), ICO Services Limited, Telecommunicaciones de Mexico and TRW Inc. (collectively "Petitioners"),[1] through counsel and pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, submit this emergency petition for further limited reconsideration in response to the Federal Communications Commission's ("FCC" or "Commission") November 25, 1998 Memorandum Opinion and Order ("*MO&O*" or "*2 GHz MO&O*") in the above-captioned proceeding.[2]

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[1] ICO Services Limited filed with the Commission a Letter of Intent on September 26, 1997, indicating its intention to provide mobile satellite service ("MSS") in the U.S. market through one or more service partners and seeking access to spectrum in the 2 GHz frequency band. The other Petitioners listed above are investors in ICO and constituent members of the ICO USA Service Group ("IUSG"), which is investigating the provision of ICO MSS in the United States.

ICO Services, a company established under the laws of England and Wales, is a wholly owned subsidiary of ICO Global communications (Holdings) Limited, which is the ultimate parent of a wholly owned group of companies (referred to herein collectively as "ICO") that is developing a satellite system for the provision of MSS.

[2] *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18 (Nov. 27, 1998) ("*MO&O*").

I. INTRODUCTION

In its March 1997 First Report and Order and Further Notice of Proposed Rulemaking ("*First R&O*" and "*FNPRM*") in this proceeding, the Commission, recognizing that broadcasting incumbents in the 1990-2025 MHz frequency range likely would have to relocate by 2000, asked if new broadcast auxiliary service ("BAS") licenses[3] for those frequencies should be frozen, or whether the new licenses issued after the *First R&O* should be subject to a condition that the incumbent pay for its own relocation expenses.[4] The MSS Coalition filed comments recommending that the Commission conditionally approve new BAS licenses issued after the *First R&O* and *FNPRM* to require the incumbents to pay for their own relocation expenses.[5] The MSS Coalition fully briefed and supported its position in its comments filed in this proceeding.

In its November 1998 *MO&O*, the Commission affirmed its decision to require mobile satellite service ("MSS") providers to pay to relocate, to the extent required, both incumbent BAS licensees in the 1990-2025 MHz bands and fixed service ("FS") licensees in the 2165-2200 MHz frequency bands. The *MO&O*, however, fails to address the issue of a license freeze or conditions for BAS licenses in the 1990-2025 MHz frequency range. Nowhere in the *MO&O* does the Commission consider the MSS Coalition's arguments and make a reasoned decision regarding this issue.

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[3] BAS also refers to other services authorized to use the 2 GHz band -- local television transmission service ("LTTS") and cable television relay service ("CARS"). *See MO&O* at n.4.

[4] *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, 12 FCC Rcd 7388, 7417-18 (1997) ("*First R&O and FNPRM*").

[5] Further Comments of the MSS Coalition at 16. (The MSS Coalition consists of Celsat America, Inc., COMSAT Corporation, Hughes Space and Communications International, ICO Global Communications, and Personal Communications Satellite Corporation.)

By failing to address this issue, the Commission encourages new BAS licensees to enter these frequencies, with the expectation that MSS providers will pay to relocate them in 2000 when the frequency band becomes available for MSS use. The Commission's failure to address this critical issue therefore would subject MSS providers to even more needless expense and further complicate the transition process for the MSS uplink.

Such a result is entirely inconsistent with the Commission's general policy, as well as the Commission's Emerging Technologies policy, of easing new entrants' relocation burden by freezing or conditioning licenses of incumbent services. In numerous proceedings involving the transitioning of incumbents out of assigned spectrum, the Commission has either elected to discontinue licensing incumbent users or condition licenses with the requirement that the licensee pays its own relocation expenses. The Commission's failure to do so here is arbitrary and capricious and must be remedied as soon as possible.

The Commission has disparately applied its Emerging Technologies policies.[6] Although the Commission placed conditions on new FS applications in the 2165-2200 MHz frequency bands as part of its Emerging Technologies rules, in this case, the Commission applies the Emerging Technologies policies to MSS providers but fails to condition or freeze new BAS licenses. The Commission's failure to apply uniformly its Emerging Technologies policies, so as to include BAS licenses, is an abuse of its discretion.

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[6] *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies,* 7 FCC Rcd 6886 (1992) ("*First R&O and Third NPRM*"); 8 FCC Rcd 6495 (1993) ("*Second R&O*"); 8 FCC Rcd 6589 (1993) ("*Third R&O and MO&O*"); 9 FCC Rcd 1943 (1994) ("*MO&O*"); 9 FCC Rcd 7797 (1994) ("*Second MO&O*"), *aff'd, Association of Public Safety Communications Officials-Int'l. Inc. v. FCC,* 76 F.3d 395 (D.C. Cir. 1996) ("*Emerging Technologies*").

ICO expects to launch commercial service in 2000. The transition of BAS incumbents is an essential precedent to the successful launch of ICO's service. Therefore, the Commission must address and resolve this issue promptly by conditioning all new BAS licenses issued after the release of the *First R&O* and *FNPRM* to require the BAS licensees to pay for their relocation expenses. The only reasonable alternative under the Emerging Technologies policies would have been for the Commission to freeze all new BAS licenses from the date of issuance of the *First R&O* and *FNPRM.*

II. THE COMMISSION ABUSED ITS DISCRETION AND ACTED ARBITRARILY WHEN IT FAILED TO ADDRESS A KEY ISSUE IN ITS *MO&O* REGARDING TREATMENT OF NEW BAS LICENSEES

The Commission's March 1997 *FNPRM* put affected parties on notice that BAS licenses issued after its *FNPRM* would be subject to relocation after 2000 by 2 GHz MSS licensees.[7] In its *FNPRM*, the Commission specifically sought comment on whether to freeze new BAS license applications, or to condition new BAS licenses by requiring the licensees to relocate at their own expense.[8] In its November 1998 *MO&O* affirming the MSS obligation to reimburse BAS relocation, however, the FCC failed to consider comments regarding whether to freeze or condition new BAS license applications. The failure to determine how to treat new BAS applicants creates an incentive for new applicants to seek BAS licenses in the expectation that they will receive windfall reimbursement payments for upgraded facilities at the expense of MSS providers. In addition, the almost three years that will have elapsed between the issuance of the *FNPRM* and January 1, 2000 will create a significant period of time in which new BAS

[7] In fact, the initial Notice of Proposed Rulemaking in the 2 GHz proceeding, released on January 31, 1995, put new BAS licensees on notice of a proposed BAS rechannelization plan. Reply Comments of the MSS Coalition at n.32.

[8] *FNPRM*, 12 FCC Rcd at 7417-18.

applicants can take advantage of this opportunity. By creating the possibility of an increased number of BAS incumbents, the Commission has unfairly increased MSS providers' transition burden.

When the Commission adopted its Emerging Technologies policies, it acknowledged that it "must provide emerging technology licensees with a stable environment in which to plan and implement new services."[9] Although the *MO&O* affirms the Commission's decision to apply its Emerging Technologies principles to BAS licensees operating in the 1990-2025 MHz frequency bands, it neglects to address the significant question of how new BAS license applications should be processed.[10]

Well-established judicial precedent requires further Commission reconsideration of a significant issue when the agency has failed to consider it during its initial deliberations.[11] Here, the Commission failed to address its own question even though commenters such as the broadcasters and the MSS Coalition provided a full record on the issue.[12] As the Court noted in *Home Box Office*, "[a] dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."[13] In this case, the Commission itself raised a significant issue, received comments directly addressing the Commission's questions and then failed to consider these comments in the *MO&O*.

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[9] *Emerging Technologies First R&O and Third NPRM*, 7 FCC Rcd at 6891 (citing to FCC Public Notice, Two Gigahertz Fixed Microwave Licensing Policy Statement, May 14, 1992).

[10] *MO&O* at ¶12-20.

[11] *See Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983).

[12] Further Comments of the MSS Coalition at 16. Reply Comments of the MSS Coalition at 8-9 (citing MSTV Comments, SBE Comments).

[13] *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 35-36 & n.58 (D.C. Cir.) (describing significant points to be considered in rulemaking) *cert. denied*, 434 U.S. 829 (1977) ("Home Box Office").

Under similar circumstances in *Schurz Communications, Inc.*, where the FCC failed to address significant objections during a notice-and-comment-rulemaking proceeding, the United States Court of Appeals for the 7th Circuit concluded that the Commission had acted arbitrarily and capriciously and vacated the agency's order.[14] The Commission's failure to consider the treatment of new BAS applications here similarly renders its decision arbitrary and capricious.[15]

III. THE COMMISSION'S FAILURE TO FREEZE OR CONDITION BAS LICENSES IS INCONSISTENT WITH PAST POLICY

By failing to condition or freeze new BAS licenses, the Commission departed from its established policy of freezing or conditioning new applications for incumbent users whose use of the spectrum is not in compliance with an approved spectrum allocation plan. For example, the Commission concluded early on that permitting unrestricted fixed microwave growth in the 2 GHz Emerging Technologies bands would limit future use of these bands by new services.[16] Accordingly, pursuant to its Emerging Technologies policies, the Commission in 1992 required all new fixed microwave licenses in the 2 GHz band to be awarded on a secondary basis only.[17] Beginning in 1995, major extensions of existing 2 GHz microwave systems also have been treated as secondary, unless special circumstances justify primary status.[18] In order to avoid discriminatory application of its relocation policies, the Commission is now required to provide new 2 GHz MSS entrants with the same stable environment for their frequencies to be used for

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[14] *Schurz Communications, Inc.*, 982 F.2d 1043, 1050-54 (7th Cir. 1992) (FCC failed to address networks' substantial objections in rulemaking), *aff'd*, 29 F.3d 309 (7th Cir. 1994).

[15] *Id.*

[16] *Emerging Technologies Third R&O and MO&O*, 8 FCC Rcd at 6612.

[17] 47 C.F.R. § 101.147 n.(20); 7 FCC Rcd at 6891.

[18] *Id.* at 6891-92.

MSS uplink at 1990-2025 MHz as it previously applied to the 2165-2200 MHz frequencies to be used for MSS downlink frequencies.

The Commission's policy of freezing or conditioning licenses for incumbent services extends beyond Emerging Technologies spectrum. Indeed, the Commission regularly applies conditions to, or freezes, new applications when spectrum reallocation plans require the transition of incumbent users. For example, in administering both the 18 GHz and 800 MHz spectrum allocation plans, the Commission imposed a freeze on the filing of new applications during its consideration of outstanding service issues. In the FCC's recent 18 GHz NPRM to redesignate the 17.7-19.7 GHz band among several allocated services, the Commission conditioned new terrestrial fixed service applications filed and granted after the 18 GHz NPRM release date to operate on a secondary status in those bands proposed for fixed satellite service use on a primary basis.[19] Likewise, in 1995, the FCC imposed a "procedural" freeze on 800 MHz SMR applications to allow for resolution of spectrum allocation issues.[20] The Commission concluded that a freeze was warranted because of an increased demand for SMR licenses and the Commission's concern that unrestricted continued licensing of SMR providers might encroach on private radio service ("PMRS") spectrum that would not be auctioned.[21]

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[19] *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, Notice of Proposed Rulemaking, IB Docket No. 98-172 (Sept. 18, 1998) ("18 GHz NPRM").

[20] *Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz bands*, 10 FCC Rcd 7350, 7352-53 & nn.25 & 30 (1995) (citing MDS/MMDS applications freeze orders; *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963)) ("SMR Freeze Order").

[21] SMR Freeze Order at 7352-53.

The Commission, therefore, does not hesitate to freeze, or to condition, licenses when such action enhances its ability to transition incumbents and provide a more stable environment for new entrants.[22] Although the Commission has thus broadly extended freezes to new applications, renewals, extensions, amendments and modifications,[23] it fails to address MSS requests to apply similar conditions to new BAS license applications and renewals of both BAS and FS licenses.[24] In this instance, the Commission must address the full record developed on this issue and conclude that consistent application of its policy requires that all new BAS licenses and renewals issued after the release of the *FNPRM* be conditioned to require the BAS licensees to pay for their own relocation expenses.[25]

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[22] *See* FCC News Release, *Commission Proposes to Allocate the 3650-3700 MHz Band for Fixed Services; Freezes New or Major Modified Earth Station Applications*, ET Docket No. 98-237 (Dec. 17, 1998); *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 76 RR 2d 843, 844 (1987) (freezing new applications for vacant television allotments to preserve advanced television spectrum options).

[23] *See Freeze on the Filing of Applications for New Licenses, Amendments, and Modifications in the 18.8-19.3 GHz Frequency Band*, 11 FCC Rcd 22363 (1996) (freeze granted at Teledesic's request on new licenses, renewals, extensions, amendments, modifications).

[24] *First R&O*, 12 FCC Rcd at 7400-01 (LQP urges FCC to freeze immediately all BAS applications and renewals to avoid further band clearing complications).

[25] *Emerging Technologies First R&O and Third NPRM*, 7 FCC Rcd at 6891.

CONCLUSION

For the foregoing reasons, the Commission must promptly reconsider the *MO&O* and require new BAS licenses in the 1990-2025 MHz band issued after the *First R&O* and *FNPRM* and requiring relocation after January 1, 2000, be subject to a condition requiring the BAS licensees to relocate at their own expense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James S. Bucholz, do hereby certify that the foregoing **EMERGENCY PETITION FOR FURTHER LIMITED RECONSIDERATION** was delivered, via hand delivery, on this 23rd day of December, 1998, to the following:

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