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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
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

To: The Commission

OPPOSITION OF THE ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR"), by its undersigned counsel, pursuant to section 1.429(f) of the rules of the Federal Communications Commission ("Commission"),^{1/} hereby submits its opposition to a Petition for Further Limited Reconsideration,^{2/} and a Petition for Expedited Reconsideration,^{3/} of the above-captioned *Memorandum Opinion and Order and Order*^{4/} concerning the relocation of terrestrial fixed service ("FS") microwave licensees in the 2110-2150 MHz and 2165-2200 MHz bands.

1/ See 47 C.F.R. § 1.429(f).

2/ Petition for Further Limited Reconsideration, filed by ICO Global Communications, on January 19, 1999 ("ICO Petition").

3/ Petition for Expedited Reconsideration, jointly filed by BT North America, Inc., Hughes Telecommunications and Space Company, ICO Services Limited, Telecomunicaciones De Mexico, and TRW, Inc., on December 23, 1998 ("Expedited Reconsideration Petition").

4/ ET Docket No. 95-18, *Memorandum Opinion and Order and Order*, FCC 98-309(released November 25, 1998)("MO&O and Order").

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I. Introduction

AAR member companies employ their fixed microwave systems for the safe and efficient operations of the nation's railways. Accordingly, AAR has a vested interest in the Commission's relocation reimbursement and spectrum management policies and has been an active participant in this proceeding since its inception.^{5/} AAR urges the Commission to dismiss the ICO Petition, and deny the Expedited Reconsideration Petition now before it. The ICO Petition is procedurally infirm and must be dismissed as repetitious pursuant to Section 1.429(h)(i) of the Commission's rules. Should the Commission reach the merits of the ICO Petition it should be denied as wholly lacking any foundation in law or sound public policy. The Expedited Reconsideration Petition should be denied in that it asks the Commission to impose an overly burdensome reporting requirement on incumbent licensees that is beyond the scope of the Commission's authority to request information as controlled by the Paperwork Reduction Act of 1995.^{6/}

II. Opposition to the ICO Petition

a. The ICO Petition is Procedurally Infirm and Must be Dismissed.

The ICO Petition asks the Commission "to further reconsider and reverse its decision to impose relocation reimbursement obligations upon 2 GHz MSS providers in

^{5/} See Comments of AAR in ET Docket 95-18, RM-7927, filed March 5, 1995.

^{6/} See 44 U.S.C. chapter 35.

relation to primary terrestrial incumbent licensees. . . .”^{7/} The Commission first determined to apply its policies from the *Emerging Technologies* proceeding requiring new MSS licensees to bear the costs of relocation of FS and BAS licensees in the band in the *First Report and Order* in this proceeding.^{8/} A petition for reconsideration of that decision was filed by the MSS Coalition.^{9/} The Commission denied that petition for reconsideration in the *Memorandum Opinion and Order* and reaffirmed its decision to apply the *Emerging Technologies* relocation compensation policies in this proceeding.^{10/} The ICO Petition requests that the Commission reconsider yet again its denial of the MSS Coalition’s initial petition for reconsideration. The ICO Petition is repetitious, and, by application of the Commission’s rules and adherence to long-standing precedent, must be dismissed.

Petitions for Reconsideration of final Commission action taken in rule making proceedings are governed by Section 1.429 of the Commission’s rules, which expressly calls for the dismissal of repetitious petitions:

^{7/} ICO Petition at 3. (The ICO Petition makes the added request that the Commission “require all new BAS licenses and BAS and FS renewals issued after the release of the March 1997 *First R&O* and *FNPRM* be conditioned to require the relevant BAS and FS licensees to operate on a secondary basis and to pay for their own relocation expenses.” *Id.* Because the petition seeks reconsideration of the Commission’s relocation reimbursement policies with respect to all incumbent FS and BAS licensees, and because those incumbents licensed after March 1997 are a subset of the class of incumbents to which the petition is directed, the petition presents no new issues for the Commission to consider on a case of first impression basis.)

^{8/} See ET Docket 95-18, *First Report and Order*, 12 FCC Rcd 7388 at ¶¶ 33, 42.

^{9/} The MSS coalition consisted of several MSS applicants including ICO Global Communications.

^{10/} See *MO&O* at ¶ 13.

Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. *Except in such circumstance, a second petition for reconsideration may be dismissed by the staff as repetitious* [emphasis added].^{11/}

The *Memorandum Opinion and Order* did not modify any rules adopted in the *First Report and Order*, to the contrary, it simply affirmed long-standing policy. As a consequence there are no matters of law or policy that may be properly submitted to the Commission for reconsideration. The Commission has long held that repetitious petitions for reconsideration should be dismissed because of the burden of delay they place on Commission proceedings. In fact, the Commission highlighted this fact when the rule prohibiting repetitious petitions was adopted:

There have been instances where successive petitions for reconsideration have been filed after the initial petition for reconsideration was dismissed or denied. Since such repetitious petitions unnecessarily prolong litigation, they should be routinely dismissed.^{12/}

The Commission has consistently applied this reasoning, and does, in fact, routinely dismiss repetitious petitions for reconsideration.^{13/} Although the ICO Petition

^{11/} See 47 C.F.R. § 1.429(h)(i).

^{12/} *In the Matter of Amendment of Section 1.106(k)(3) and Part 0 of the Rules and Regulations to Provide for Staff Dismissal of Repetitious Petitions for Reconsideration*, 2 F.C.C. 2d 572 (1966). (The rules governing petitions for reconsideration in rulemaking proceedings were later separated from Section 1.106, and restated in Section 1.429, however the prohibition against repetitious petitions was carried over to the new rule. See RM-2596, *Memorandum Opinion and Order*, 57 F.C.C. 2d 699 (1975)).

^{13/} See MM Docket No. 87-1221, *Order*, 7 FCC Rcd 2954 (1992)(Dismissing a Further Petition for Reconsideration that “simply reargues [petitioners] original objection.” *id.*); MM Docket No. 90-66, *Memorandum Opinion and Order*, 12 FCC Rcd 4987 (1997)(“Inasmuch as the *MO&O* affirmed the *R&O*’s dismissal of petitioner’s [reconsideration] . . . further reconsideration on the . . . issue is clearly not warranted.”*id.*); CC Docket No. 85-166, *Order on Further Reconsideration*, 6 FCC Rcd

purports to raise new legal arguments, the relief requested is identical to that of the initial petition for reconsideration. The ICO Petition is clearly repetitious and should be dismissed.

b. The Commission's Relocation Reimbursement Policies do not Confer Property Rights Upon Incumbent Licensees

While the ICO Petition is repetitious and should be dismissed without consideration, should Commission entertain the petition and rule on the merits, the ICO Petition should be denied as wholly lacking any support in law.

The central legal argument in the ICO Petition is that the Commission's relocation reimbursement policies impermissibly vest incumbent licensees with a property right in their spectrum assignments in violation of sections 301, 304, and 309(h) of Communications Act.^{14/} The ICO Petition states:

Although the Act's broad powers permit the Commission to allocate spectrum, manage the spectrum and condition the use of the spectrum, a station license does not confer an unlimited or indefeasible property right.^{15/}

It is clear that the Commission's long-standing relocation reimbursement policies fall under its authority to 'manage' and 'condition' the use of the spectrum, and do not confer 'indefeasible' property rights. In fact, the very notion of relocation reimbursement obligations conferring an indefeasible right is oxymoronic. Reimbursement obligations

76 (1991)(Dismissing a further petition for reconsideration that "merely repeat[s] arguments raised in its initial petition for reconsideration." *id.*)

^{14/} 47 U.S.C. §§ 301, 304, 309(h).

^{15/} ICO Petition at 7.

are only triggered after the Commission decides to revoke an incumbent's license authority. The very fact that the incumbent is being forced to vacate its spectrum assignment conclusively demonstrates that its right to occupy the spectrum is expressly limited and in no way infeasible.

The ICO Petition spends a considerable amount of time reviewing past examinations of the Commission's authority to extend some limited property rights for licensees.^{16/} Although this exercise is offered as a summary of the limits on the Commission's authority, it clearly demonstrates that the Commission is well within its authority when it conditions a spectrum reallocation decision on the new entrant's obligation to reimburse incumbents for their relocation expenses.

Citing the Commission's finding that the prohibition on ownership of spectrum is no bar to the for-profit sale of Commission licenses, the ICO Petition states: "the Commission found that Congressional intent was to limit 'a licensee's long-term rights vis-a-vis the Federal Government.'"^{17/} Although this quote is offered in support of the argument that the Commission's relocation reimbursement policies confer a property right in spectrum, it actually stands for exactly the opposite proposition. The imposition of relocation reimbursement obligations on new entrants does nothing to alter the relationship between incumbent licensees and the Commission. As stated above, the very fact that incumbents are being relocated shows that the Federal Government --

^{16/} *Id* at 5-9.

^{17/} *Id* at 8 (citing *Application of Bill Welch*, 3 FCC Rcd 6502, 6503 (1988).)

through the FCC -- has surrendered none of its authority to reallocate spectrum as it sees fit in furtherance of the public interest.

The very fact that incumbent licensees are being dislocated from spectrum for which they hold valid authorizations is *prima facie* evidence that the Commission's relocation reimbursement policies confer no indefeasible property right in the radio spectrum. The ICO Petition offers no controlling legal precedent or compelling factual argument to counter this plain fact, but instead relies on dissenting opinions in Commission decisions and scholarly journals to support its argument.^{18/} Such rhetorical assertions do not offer a sound legal basis upon which the Commission properly may reconsider its long-standing relocation reimbursement policies.

c. The Commission's Relocation Reimbursement Policies Serve the Public Interest and Need Not be Reconsidered

Not only is the ICO Petition procedurally infirm and unfounded in law, it presents no argument of sound public policy that compels a reconsideration of the long-standing Commission policy. The Commission has long recognized that when incumbent licensees are relocated from their existing spectrum assignments in order to accommodate new licensees, the later entrant should reimburse the incumbents for their relocation expenses.^{19/} This policy is intended to enable the new licensees to have

^{18/} See *ICO Petition*, notes 14, 28, 43, and 45.

^{19/} See, *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886, 6890 (1992), *Second Report and Order*, 8 FCC Rcd 6495 (1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993); *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994) ("*Emerging Technologies Proceeding*").

access to the spectrum in a reasonable time frame while preventing disruption to existing operations and minimizing the impact of relocation on the incumbents.^{20/}

The Commission explicitly affirmed this policy in denying the MSS Coalition's initial petition for reconsideration: "Were we to accept the MSS Coalition's position that international satellite-based systems should not have to compensate displaced incumbent users of the spectrum, all incumbents arguably could be directly, adversely impacted by such a decision."^{21/}

In summary, should the Commission not dismiss the ICO Petition as repetitious and instead address it on the merits, AAR urges the Commission to once again affirm its longstanding policy and deny the ICO Petition.

III. Opposition to the Expedited Reconsideration Petition

In a Petition for Expedited Reconsideration, several MSS applicants ("Joint Petitioners") seek reconsideration of the Commission's *Order* denying a "Request for Mandatory Submission of Information" filed by the joint petitioners. This request would have required all BAS, FS, CARS, and LTTS incumbents to provide detailed information on their facilities, including location, type of equipment, and other technical and financial data in order for MSS licensees to plan relocation strategies.

In the *Order*, the Commission correctly found that the information requested in the petition would properly be disclosed as part the relocation negotiation process, and that "the formation of regulatory policy [does not] require[] the level of detail that the

^{20/} *Id.*, *Memorandum Opinion and Order* at ¶ 2.

^{21/} *Id.* at ¶ 16.

petitioners request.”^{22/} As operators of hundreds of FS systems that have been relocated in the PCS portion of the 2 GHz band pursuant to the Commission’s *Emerging Technologies* policies, AAR’s members can confirm that good faith negotiations are the proper context for the disclosure of the information the joint petitioners request. Requiring all incumbents to gather and report at this time comprehensive financial and technical data on all of their existing systems would place an unfair and unnecessary burden on incumbent licensees without conferring any benefit that cannot be achieved through a process of good faith negotiations. The Commission was justified in denying the initial request, and should affirm its prior reasoning and deny the Expedited Reconsideration Petition.

In addition to the policy arguments that dictate a denial of the Expedited Reconsideration Petition, the Commission must examine whether it has the authority to require the submission of the information requested. Under the Paperwork Reduction Act of 1995, a Federal Agency must obtain the approval of the Office of Management and Budget (“OMB”), before it conducts or sponsors a collection of information.^{23/} As part of its request for approval from OMB, the agency must certify that the collection of information requested:

Is necessary for the proper performance of the functions of the agency, including that the information to be collected will have practical utility; [and] Is not unnecessarily duplicative of information otherwise reasonably accessible to the agency [emphasis added].^{24/}

^{22/} Order at ¶ 55.

^{23/} See 5 C.F.R. § 1320.5.

^{24/} 5 C.F.R. § 1320.9.

As noted above, in rejecting the initial request the Commission has already found that the information is not necessary for "the formation of regulatory policy."^{25/} Accordingly, the Commission has no basis upon which to make a certification to OMB for approval to request the information. It follows that, without approval from OMB, the Commission would not be authorized to make the request for information. In short, because the Commission lacks the authority to grant the relief requested, the Expedited Reconsideration Petition must be denied.

IV. Conclusion

The reallocation of the 2 GHz band promises to be successful for all parties involved so long as the Commission affirms its equitable and transparent relocation reimbursement principles adopted in the *Emerging Technologies* proceeding. Accordingly, AAR urges the Commission to dismiss the repetitious Further Petition for Reconsideration of the *Memorandum Opinion and Order*, and deny the Expedited Petition for Reconsideration of the *Order* in this proceeding.

Respectfully submitted,

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^{25/} See note 21 *supra*.

Certificate of Service

I, Helene McGrath, of the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, hereby certify that a copy of the foregoing was served this 22nd day of February, 1999, via first class mail, postage prepaid, upon the following:

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