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February 24, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: *Ex Parte* Presentation
File Nos. 47-SAT-WAIV-97; 548-SSA-97(50); 1281-DSE-P/L-96 (Call Sign E960327); ITC-95-341; IB Docket No. 96-111, CC Docket No. 93-23, RM-7931; CC Docket No. 87-75; IB Docket No. 95-41; 730-DSE-P/L-98; 647-DSE-P/L-98; 1217-SSA-98

Dear Ms. Salas:

On Tuesday, February 23, 1999, Lon Levin, AMSC Vice President and Regulatory Counsel, along with Bruce Jacobs and Stephen Berman of Fisher Wayland (AMSC's outside regulatory counsel), met with Fern Jarmulnek, Cassandra Thomas, and Tom Tycz, of the International Bureau to discuss the Commission's strategy and goals for coordinating AMSC's access to L-band spectrum.

We discussed the Commission's historic support for AMSC gaining access to a minimum of 10 MHz, the failure of the coordination process to achieve this goal to date, and the adverse impact on achieving the goal of access to 10 MHz if the Commission unilaterally grants authority to foreign-licensed systems to provide service in the United States. With respect to these last points, AMSC reiterated its view that the Mexico City Memorandum of Understanding, while it permitted the regional systems to begin operating and provided a possible means to achieving eventually the goal of access to 10 MHz, it has not led to the realization of that goal.

We also discussed the impact on the coordination process of the WTO basic telecom agreement, in particular the extent to which the Commission's decision that its licensee needs access to 10 MHz is fully supportable since it was based on the Commission's best judgment of how to manage the L-band spectrum, without any motivation to restrict market entry or deny

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national treatment. Other WTO member countries will have to make a similarly strong case concerning the legitimacy of their spectrum management decisions if they attempt to use those decisions to restrict the licensing of U.S. or other systems. Trade disputes over the legitimacy of spectrum management decisions may be inevitable, but the U.S. will not have helped its position in those disputes if it unilaterally cedes spectrum to foreign system operators at the expense of incumbent licensees whose licenses are based on the Commission's legitimate spectrum management policies.

At the meeting, AMSC distributed copies of: (I) a letter from one of its customers expressing concern that Commission grant of applications to use foreign-licensed L-band systems would adversely impact access by the customer to L-band spectrum and (ii) excerpts from the Commission's briefs to the U.S. Court of Appeals in the challenges to AMSC's license, in which the Commission reiterated its finding that there was only sufficient spectrum for it to license a single MSS system in the L-band and that 10 MHz was the minimum amount of spectrum needed for the MSS system to be economically viable.

Two copies of this notice for each of the above-captioned proceedings are being submitted to the Secretary of the FCC in accordance with the Commission's Rules. Please direct any questions regarding this matter to the undersigned.

Very truly yours,

Lon C. Levin

cc: Daniel Connors
Karen Gulick
Linda Haller
Ari Fitzgerald
Fern Jarmulnek
Paul Misener
Peter Tenhula
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February 18, 1999

By Hand Delivery

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
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Re: Ex Parte Presentation in
SatCom Systems, Inc., File Nos. 647-DSE-P/L-98, 1217-SSA-98
TMI Communications and Company, L.P., File No. 730-DSE-P/L-98

Dear Ms. Salas:

Stratos Global Corporation ("Stratos") and its wholly-owned subsidiary Marine Satellite Services, Inc. ("MSSI") urge the Commission to ensure the continued access of American Mobile Satellite Corporation ("AMSC") to L-band spectrum in the United States. MSSI recently entered an agreement with AMSC under which it agreed to become a major distributor of AMSC services, to purchase a substantial number of minutes of AMSC service annually on a take-or-pay basis, and to assume responsibility for performance under certain existing AMSC's reseller contracts. Collectively, these obligations involve investments and expenditures of millions of dollars and represent a major commitment by Stratos to expanding AMSC service. Stratos and other companies investing time and money in developing and distributing services over the AMSC system must be assured that AMSC will have continued, long-term access to sufficient spectrum to provide a stable environment for continued investment.

In order to maintain the availability of the AMSC system to customers like Stratos, the Commission should ensure that AMSC has continued access to sufficient

spectrum in the L-band. Consequently, the Commission should not grant the above-referenced applications of other L-band operators until such access is ensured.

Sincerely,

Alfred M. Mamlet

Counsel for Stratos Global Corporation and Marine Satellite Services, Inc.

cc: Regina Keeney
Tom Tycz
Fern Jarmulnek
Linda Haller
Phil Malet
Lon Levin
Bruce Jacobs
Greg Staple

From FCC brief, filed June 11, 1990 in the following case:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 88-1009, et al.

AERONAUTICAL RADIO, INC., et al.,

Appellants- Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,

Appellee-Respondents

AMERICAN MOBILE SATELLITE CORP., INC., et al.,

Intervenors

ORAL ARGUMENT SCHEDULED
SEPTEMBER 18, 1990

BRIEF FOR APPELLEE-RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 88-1009, et al.

AERONAUTICAL RADIO, INC., et al.,

Appellants-Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,

Appellee-Respondents

AMERICAN MOBILE SATELLITE CORP., INC., et al.,

Intervenors

ON APPEALS FROM AND PETITIONS FOR REVIEW OF ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

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oil and gas, mining, fishing and logging, as well as the air transport industry. See NPRM, 50 Fed. Reg. 8149 (1985) at n.1 & ¶4 (J.A. 1).

The specific concept of a mobile satellite service was proposed by the National Aeronautics and Space Administration (NASA) in a 1982 rule making petition that sought to have the FCC establish a commercial land mobile satellite service and to allocate spectrum for that service. See [NASA Pet.] J.A. 171. Based on experiments that NASA had conducted using its Advanced Technology Satellite in the late 1960s and 1970s, NASA urged the creation of the new satellite service to provide land mobile communications services to remote and sparsely populated areas and to provide new land mobile services to industry and other groups whose communications needs were not being met by existing technologies.

The Commission received extensive comment in response to NASA's proposal. In addition, two companies, Mobile Satellite Corporation (Mobilesat) and Skylink Corporation, filed applications for developmental MSS licenses. The developmental applications served to delineate further some of the possibilities of MSS services. In particular, Mobilesat proposed that the Commission make the new mobile satellite service generic, i.e. that MSS encompass land mobile, maritime mobile and aeronautical mobile services.

2. The Notice of Proposed Rule Making

After reviewing the rule making and license proposals, and the public comments in response to them, the Commission issued a Notice of Proposed Rule Making proposing to allocate spectrum and to adopt licensing procedures, along with other rules and policies, in order to establish a mobile satellite service. See NPRM, 50 Fed. Reg. 8149 (J.A. 1). Due to the shortage of available spectrum and the need for the

system to have adequate spectrum to keep its rates competitive with other technologies, the Commission proposed to license only one MSS system. Ibid.

To expedite initiation of this new service and to provide a framework for the establishment of governing policies and rules, the Notice invited interested parties to file applications for authority to construct, launch and operate a mobile satellite system simultaneously with the filing of comments on other issues raised in the Notice. NPRM at ¶¶49-52 (J.A. 12); see also 23. Voluminous comments were filed addressing all issues raised in both the frequency allocation and licensing portions of the rule making proceeding. In addition, twelve entities filed applications propos-ing mobile satellite systems. Extensive pleadings assessing those applications also were filed.

B. THE SPECTRUM ALLOCATION ISSUES

1. The Spectrum Allocation Proposal

The Commission tentatively found in the NPRM that a need for a mobile satellite service had been demonstrated by the studies and surveys conducted by NASA and the two applicants and that there was a substantial demand for the new service. NPRM at ¶8 (J.A. 3-4). The Commission agreed with the supporters of MSS that the "social value" of the service was "compelling," citing in particular its unique ability to serve rural areas and to provide emergency and disaster communications where none otherwise would be available. The Commission found that even if the market projections had been less persuasive, there nonetheless

would be sufficient reason to establish the new service. Id.[4] In addition, the Commission noted that other countries were taking steps to establish MSS systems of their own. Id. at ¶6 (J.A. 3).

The Commission proposed to allocate frequencies for mobile satellite service based on projected need for at least 20 MHz of spectrum to accommodate mobile satellite service in the long term.[5] See NPRM at ¶¶ 9-16 (J.A. 4-6). Some of the frequencies that the Commission proposed to allocate for MSS had been allocated in 1973 exclusively to the Aeronautical Mobile Satellite (R) Service (AMSS(R)) for a satellite system to provide air traffic control and other vital communications services related primarily to overseas air traffic.[6] This project, known as Aerosat, ultimately failed to secure adequate financing and the satellites were never constructed.[7] As a result of subsequent allocation decisions, when the Commission began this proceeding 28 MHz remained in this particular part of the spectrum that was allocated to AMSS(R) but

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4 The Commission focused on the value of MSS for providing land mobile service to rural areas, but also cited estimates of the service's value to the aviation industry, and specifically Mobilesat's proposal to provide both aviation safety and airline passenger telephone service as part of a generic mobile satellite service. See NPRM at ¶4 (J.A. 2).

5 The Commission proposed to reallocate some frequencies in the 800-900 MHz UHF frequency bands reserved for land mobile use, along with additional frequencies from another portion of the spectrum generally referred to as the "L-band." See NPRM at ¶¶ 9-16 (J.A. 4-6).

6 See Report & Order, Docket 19547, 38 Fed.Reg. 5562, 5581-83 (1973). AMSS(R) is a mobile satellite service in which mobile stations are located on board aircraft. The spectrum is reserved for aeronautical communications of enroute flights related to the safety and regularity of flight. See Report and Order, 2 FCC Rcd 1825, 1865 n.115 (1986) ("Allocation Order") (J.A. 27, 67).

7 NPRM at ¶ 17 (J.A. 6-7); see also Aerosat Fate Clouds Joint U.S./USSR Effort, Aviation Week, June 27, 1977, at 17.

had set aside primarily for AMSS(R).

Second, ARINC proposed to include airline passenger telephone service on its satellite system. Under the Commission's allocation scheme, such non-safety related aviation communications may only be offered as an MSS service. See 2 FCC Rcd at 5991 (J.A. 94). The 10 MHz allocated to AMSS(R) on a primary basis would be assigned to a new, separate system only if such a system were dedicated exclusively to AMSS(R) communications. The Commission invited ARINC to file again if it was willing to revise its application to propose an "AMSS(R)[-only application] at any time." See ibid.; see also 4 FCC Rcd at 6070 (J.A. 116). ARINC never refiled its application.

4. The AMSC Mobile Satellite System

In an August 1989 order, the FCC authorized American Mobile Satellite Corp. (AMSC) to construct, launch and operate a mobile satellite system to provide MSS common carrier communications services.[19] The AMSC system, as approved by the Commission, will use all 28 MHz of the spectrum allocation to provide a wide range of mobile communications services to land mobile, maritime mobile and aeronautical mobile users. The AMSC system will include the capability to control the distribution of channels on the system to provide the priority and preemptive access necessary to aviation safety communications and required by the Commission's spectrum allocation decision. See Consortium Authorization

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19 AMSC is a consortium made up of eight applicants that submitted MSS proposals in April 1985. 4 FCC Rcd at 6042, 6043 (J.A. 120, 121). The consortium was formed in response to policies adopted by the Commission in this proceeding as discussed in the subsequent section of this counterstatement.

Order, 4 FCC Rcd at 6054 (J.A. 132).

In response to AMSC's 1988 amended application (see 4 FCC Rcd at 6069 (J.A. 115)), the Commission found that the public interest would be served by authorizing AMSC to provide both MSS and AMSS(R) services on one satellite system.[20] The Commission noted that one generic mobile satellite system was one of the options left open in its allocation proceeding. The Commission concluded that a single MSS/AMSS(R) system would ensure efficient use of the spectrum, promote safety and introduce new services to the public in a timely manner.

The Commission's authorization of AMSC was conditioned on AMSC's ability to comply with the allocation requirement that AMSS(R) will have priority and immediate access to the whole bandwidth. As AMSC continues to refine its system design and begins operations, the Commission retains the jurisdiction to ensure that the system meets "reasonable and necessary technical requirements and system specifications" for AMSS(R). Consortium Authorization Order, 4 FCC Rcd at 6048; see also Second Report & Order, 2 FCC Rcd at 489; (J.A. 126, 75).

C. THE LICENSING ISSUES

1. The NPRM and the Second Report and Order

As mentioned above, the Commission was inclined at the outset of these proceedings to license only a single MSS system. This was due to

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20 The aviation parties will not be denied access to satellite capacity. AMSC's system will be operated on a common carrier basis, and ARINC or any other interested aviation entity could be a customer for or a reseller of the satellite services to be provided by AMSC. See note 21 below.

the shortage of available spectrum and the perceived need for the MSS system to have adequate spectrum to keep its rates competitive. NPRM at ¶23 (J.A. 7-8). In soliciting specific proposals it sought comment on the "desirability of the consortium approach in MSS," "the structure or format of the proposed consortium," and "whether the existence of a consortium should be mandatory." NPRM at ¶30 (J.A. 9). The Commission noted that analogous joint ventures had been established in the past. See cases cited at NPRM ¶¶28-29 & nn.59-61 (J.A. 8-9).

Irrespective of the technical design or organizational structure being proposed, the applicants were directed to provide an estimate of the cost of construction and launch, other initial expenses, and operating expenses for the first year. They were also required to document their financial ability to meet all those obligations. NPRM at Att. E, (J.A. 20)

Twelve applications offering a variety of proposals were filed by the cut-off date. Some of the applicants were small entrepreneurial companies with very limited financial resources and others had the backing of large manufacturing and service companies. See Second Report and Order, 2 FCC Rcd at 494 n.4 (J.A. 80). All of the applicants proposed systems that would cost many millions of dollars to build and operate; the proposed systems ranged in cost from $50 million to $600 million. Id. at 494 n.15 (J.A. 80).

Some of the applicants strongly supported the consortium concept, others expressed varying degrees of interest in participating in a consortium, and still others opposed the idea and requested a comparative hearing. See id. at 487, 495 ¶12 & n.22 (J.A. 73, 81). Having been advised of the competing considerations, the Commission found that, on balance, a consortium comprised of all qualified and willing

From FCC brief, filed August 28, 1992 in the following case:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 92-1046, et al.

AERONAUTICAL RADIO, INC., et al.,

Appellants- Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,

Appellee/Respondents

AMERICAN MOBILE SATELLITE CORP., et al.,

Intervenors

ORAL ARGUMENT SCHEDULED
NOVEMBER 25, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 92-1046 et al.

AERONAUTICAL RADIO, INC., et al.,
Appellants/Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,
Appellee/Respondents

AMERICAN MOBILE SATELLITE CORP., et al.,
Intervenors

ON APPEALS FROM AND PETITIONS FOR REVIEW OF
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Arinc and Omninet. As mentioned, however, this Court affirmed the dismissal of Arinc's application in ARINC. As for Omninet, it was one of the original MSS applicants, but it voluntarily dismissed its application during the rulemaking in 1987 and it did not challenge the Commission's original rulemaking and licensing decisions. After the ARINC decision, Omninet requested reinstatement of its voluntarily dismissed application, a request that the Commission denied.

2. Background: The Initial MSS Proceeding.

The FCC in 1985 proposed the establishment of a Mobile Satellite Service to exploit the unique ability of a satellite system to provide two-way mobile communications to people in rural and remote areas and during times of emergency or disaster. Notice of Proposed Rulemaking, 50 Fed. Reg. 8149, 8151-52, para. 8 (February 28, 1985) (J.A. 1, 3). Due to the limited amount of spectrum that could be allocated to the service, the costs involved in operating a mobile satellite system and the need to conduct international coordination of the system, the Commission proposed to license a single United States MSS system. 50 Fed. Reg. at 8155-56, para. 23 (J.A. 7-8). At the same time, the Commission provided notice that it might require the applicants to form a consortium. Twelve parties, including appellant Omninet, submitted applications for the MSS authorization by the April 1985 cutoff date.

Thereafter, appellant Arinc filed an application in 1986 to use the MSS spectrum for a satellite system that would provide only

that do not conform to threshold requirements established through the Commission's rulemaking authority are not entitled to a hearing. See also Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289, 1294 (D.C. Cir. 1989); Guinan v. FCC, 297 F.2d 782, 785 (D.C. Cir. 1961); Ranger v. FCC, 294 F.2d 240, 242-43 (D.C. Cir. 1961).[39]

Here, unlike a conventional broadcast case, the Commission found that because of the nature of the public interest issues involved and the substantive criteria for resolving those issues, it would not be assisted by a comparative hearing. There were no "substantial and material questions of fact to be resolved" and the Commission was able to find on the basis of the record already developed that a grant of a license to AMSC would serve the "public interest, convenience, and necessity."

Specifically, the Commission's examination of the elaborately detailed applications did not demonstrate that any of them was

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39. The concept of an "Ashbacker right to a comparative hearing" has come to be viewed in some quarters as an element of substantive due process, a part of the public interest standard that the Commission is appointed to administer. But that is not so. As several cases make clear, the Ashbacker right to a comparative hearing is an expression of procedural due process that is triggered only after the Commission has accepted timely, mutually exclusive applications that comply with applicable threshold requirements. This Court stated in ARINC that there is a presumption in favor of comparative hearings, 928 F.2d at 450, but it did not find such a hearing to be an absolute requirement. See United States v. Storer Broadcasting Co., supra, 351 U.S. at 202; LaStar Cellular Tel. Co. v. FCC, supra, 899 F.2d at 1235; Maxcell Telecom Plus, Inc. v. FCC, supra, 815 F.2d at 1555. The Ashbacker Court itself recognized that it was addressing "only a matter of procedure," 326 U.S. at 333, and that urgent circumstances were a legitimate consideration in deciding whether a comparative hearing is appropriate. Id.

superior to the alternatives,[40] and a comparative hearing almost certainly would not have yielded a licensee superior to AMSC. Tentative Decision, 6 FCC Rcd at 4911, para. 54 (J.A. 124). The crucial consideration, however, was that by the time of the remand proceedings, any licensing approach other than a consortium would "make it virtually impossible to secure sufficient spectrum with sufficient operational flexibility to support a U.S. domestic MSS." Tentative Decision at 4911, para. 53 (J.A. 124).[41]

It is important to observe in this regard that Arinc and Omninet have had a full and fair opportunity to argue the respective merits of the various proposals on the basis of the detailed applications in the record, yet they have not offered a shred of evidence that a comparative hearing would produce a net public benefit. Instead, they argue only the abstract value of a comparative hearing.[42]

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40. Globesat's application, which proposed a low-Earth orbit satellite system, was different from the others. Globesat's application did not create a material issue, however, because its proposal was "flatly incompatible" with the international coordination process then underway. Final Decision, 7 FCC Rcd at 271, para. 33 (J.A. 144).

41. It bears repeating at this point that these crucial factors are not present in conventional broadcast licensing or, indeed, in most non-broadcast licensing contexts. The ARINC Court's concern is unfounded that the Commission might generally abandon comparative hearings if the consortium decision were affirmed in this case.

42. As the Commission observed below, comparative hearings have never been used to select a licensee for a satellite service, and this Court has condoned this practice. United States v. FCC, supra, 652 F.2d at 92; Network Project v. FCC, supra, 511 F.2d at 796-97 & n.13. See Tentative Decision, 6 FCC Rcd at 4904, para. 20 (J.A. 117).