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901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

Thomas J. Keller
(202) 371-6060

May 27, 1999

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Presentation in ET Docket No. 95-18

Dear Madam Secretary:

Enclosed is a copy of a letter to Mr. Dale Hatfield, Chief, Office of Engineering and Technology, submitted as a written *ex parte* presentation on behalf of the Association of American Railroads in the above-referenced proceeding. An identical letter was sent to the following persons in the Commission's Office of Engineering and Technology: Julis Knapp, Geraldine Matise, Sean White, and Rebecca Dorch; and to the following persons in the Commission's International Bureau: Roderick Porter, Thomas Tycz, Karl Kensinger and Linda Haller.

Please place a copy of this letter in the public file in ET Docket No. 95-18.

Respectfully submitted,

Thomas J. Keller

John M.R. Kneuer

Attorneys for the Association of American Railroads

Enclosure

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May 27, 1999

Mr. Dale Hatfield, Chief
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W.
Washington, D.C. 20554

Re: ***Ex Parte*** – ET Docket No. 95-18

Dear Mr. Hatfield:

On behalf of the Association of American Railroads ("AAR"), the undersigned respectfully submit the following response to the *ex parte* letter filed May 5, 1999, by ICO Services Limited ("ICO") in the above referenced proceeding involving use of the 2.1 GHz band by Mobile Satellite Services (MSS) proponents.[1/] Because the ICO *ex parte* letter contains new legal arguments never before raised in this proceeding, AAR feels compelled to offer this brief rebuttal to ICO's new arguments.

The legal theory behind ICO's May 5 filing is that requiring MSS systems to pay the relocation costs of incumbent licensees as a condition of U.S. market entry violates the 1967 Outer Space Treaty. To support this argument, ICO submitted a legal opinion from Dr. Ram Jakhu, an associate law professor at McGill University in Canada. Professor Jakhu's legal opinion consists of a review of the text of the 1967 Outer Space Treaty and citations to several law review articles and other scholarly works. Nowhere does Professor Jakhu cite any controlling legal authority to suggest that ICO has standing to raise any claim under this treaty, or that the treaty in any way preempts the

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1/ The ICO letter was filed in support of ICO's Petition for Further Limited Reconsideration of the *Memorandum Opinion and Order and Order*, (ET Docket No. 95-18, *Memorandum Opinion and Order and Order*, FCC 98-309 (released November 25, 1998) ("*MO&O* and *Order*")), that denied an earlier petition for reconsideration, filed by the MSS Coalition that challenged the Commission's decision to require new MSS licensees to bear the costs of relocating terrestrial fixed service ("FS") licensees in the 2110-2150 MHz and 2165-2200 MHz bands. *See* ET Docket 95-18, *First Report and Order*, 12 FCC Rcd 7388 at ¶¶ 33, 42.

United States' sovereign authority to manage the radiofrequency spectrum within its borders. Rather, Professor Jakhu's legal opinion offers three "conclusions," each of which is flawed, as explained below.

First, Professor Jakhu concludes that imposing relocation costs on non-U.S. satellite systems implies the granting of property rights in outer space. In this regard, he claims that "radio frequencies . . . used to provide satellite communication services cannot be subject to claims of sovereignty, ownership or property rights." This conclusion is untenable because it ignores completely the regulatory framework of the International Telecommunications Union ("ITU"), which does create rights and obligations for ITU member nations with respect to spectrum usage, frequency coordination, non-interference, and the like. Indeed, to accept Professor Jakhu's position would be to declare the entire ITU spectrum management regime a violation of international law.

Second, Professor Jakhu concludes that the relocation reimbursement requirement is a "discrimination against and restriction on non-U.S. satellite systems." This, of course, is factually incorrect, because the relocation reimbursement obligation applies to all MSS systems, not merely non-U.S. systems. In fact, the Commission specifically addressed this issue when it denied the MSS Coalition's initial petition for reconsideration on this matter, stating:

> Our policy with regard to MSS systems operating in the spectrum at issue in this proceeding applies equally to all licensees, **whether foreign or domestic**. . . Our *Emerging Technologies* policies require new service providers in the 2 GHz bands to compensate incumbents who are required to relocate. These policies apply **regardless of the nationality**, service, or technology of the new entrant (emphasis added).[2/]

Professor Jakhu's third conclusion is that the reimbursement requirement is contrary to "general international law" because it causes "injury" in the form of "financial burdens on accessing outer space by satellite systems of other States." This assertion is incorrect for two reasons. First, the imposition of a relocation reimbursement obligation is not an "injury" imposed on MSS operators, but rather an amelioration of the injury that would otherwise be suffered by existing, properly-licensed FS systems in the U.S. whose continued operation would be incompatible with the introduction of MSS service in the band. Second, the FCC's reimbursement obligation is not a condition to "accessing outer space," but is a prerequisite to obtaining an authorization to operate

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2/ *Memorandum Opinion and Order*, ET Docket 95-18, ¶ 15.

an MSS system in the U.S. pursuant to the FCC's licensing jurisdiction under the Communications Act of 1934, as amended.

In summary, the Commission's relocation reimbursement policy is well grounded in law and the public interest, and nothing in ICO 's most recent *ex parte* filing (or its many other submissions) offers any basis for the Commission to deviate from it. Accordingly, the Commission should disregard ICO's May 5 *ex parte* filing and dismiss its pending Petition for Further Limited Reconsideration on the grounds set forth in AAR's Opposition filed February 22, 1999.

A copy of this letter is being filed with the Office of the Secretary in accordance with the requirements of the Commission's regulations concerning *ex parte* presentations.

Respectfully Submitted,

Thomas J. Keller

John M. R. Kneuer

Attorneys for the Association of American Railroads

cc: Office of FCC Secretary (Public Docket Copies)