

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

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

To: The Commission

**OPPOSITION TO MOTION FOR STAY OF
MANDATORY NEGOTIATION PERIOD**

New ICO Global Communications (Holdings) Ltd. ("New ICO"), by its attorneys and pursuant to Section 1.45(d) of the Federal Communications Commission's ("FCC" or "Commission") rules,¹ opposes the Motion for Stay of Mandatory Negotiation Period ("Motion"), filed jointly by the National Association of Broadcasters and Association for Maximum Service Television, Inc. (collectively, "Broadcasters") on October 22, 2001, in the above-captioned proceeding.² The Motion is procedurally defective, otherwise lacks merit and should be dismissed.

Broadcasters request the Commission to suspend the mandatory negotiation period that became effective more than a year ago pursuant to the Commission's 2 GHz mobile satellite service ("MSS") allocation order.³ In the *2 GHz Relocation Order*, the

¹ 47 C.F.R. § 1.45(d).

² The Broadcasters' Motion essentially is a request to reconsider or waive an already effective rule, rather than a request to stay the effectiveness of the rule. In an abundance of caution and for procedural purposes only, New ICO is filing this Opposition within the 7-day filing period required for requests for stay or other temporary relief under Section 1.45(d) of the FCC's rules.

³ *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz by the Mobile Satellite Service*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd 12315 (2000) (the "*2 GHz Relocation Order*").

Commission ordered a two-year mandatory negotiation period to determine the allocations of relocation costs between new entrant MSS licensees and Broadcast Auxiliary Service (“BAS”) incumbents operating at frequencies within the 1990-2008 MHz band in the 30 largest television markets.⁴ This mandatory period was effective as of September 6, 2000, 30 days after publication of the *2 GHz Relocation Order* in the Federal Register.⁵ Because the FCC’s relocation rules already have become effective, and the initial mandatory relocation period commenced more than a year ago, the Broadcasters’ Motion is untimely and must be dismissed or denied. Even if the Commission were to consider this procedurally defective request -- which it should not -- the Motion falls far short of the rigorous standard for grant of stay.⁶

⁴ MSS uplink frequencies are allocated between 1990-2025 MHz now used by, among others, broadcasters for auxiliary broadcasting links.

⁵ *2 GHz Relocation Order*, 15 FCC Rcd at 12331.

⁶ As important, Broadcasters have raised identical issues in their comments in the Commission’s pending 3G rulemaking proceeding. *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258 (the “3G Rulemaking”). See Joint Comments of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters, *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258 (filed Oct. 22, 2001) (“Broadcasters’ Joint Comments”). The Commission presumably will address the issues raised in the Broadcasters’ Joint Comments when it determines whether and how the reallocation of any 2 GHz spectrum for terrestrial advanced wireless services would affect existing 2 GHz relocation rules. The Commission should not expend valuable resources to rule upon the issues raised in the Broadcasters’ Motion until it adopts an order in the 3G Rulemaking.

1. Commission Rules And Precedent Bar The Broadcasters' Motion

Broadcasters request stay of a rule that was given technical and operational effect more than a year ago. Section 1.429(k) of the Commission's rules provides that stays are intended to prevent rather than to interrupt or suspend the operation of a rule.⁷ The Commission has clarified that stays will not be given retroactive effect, explaining that "stays are not intended to 'reverse, annul, undo or suspend what has already been done'" and has declined to grant a stay that would "not *preserve* the *status quo* . . . but instead would actually *reverse* it."⁸ In this case, grant of the Broadcasters' Motion would achieve the same unlawful result -- reverse the *status quo*, rather than *preserve* it.⁹

2. Broadcasters Fail To Meet The Four-Pronged Test For Grant Of Stay

In any event, Broadcasters not only fail to demonstrate good cause for a suspension of the negotiation period, they do not even attempt to make such a showing. Section 1.429(k) of the Commission's rules provides that the Commission may stay an order only upon a showing of "good cause."¹⁰ The Commission evaluates whether good cause exists under the standard set forth in *Virginia Petroleum Jobbers Ass'n*,¹¹ as

⁷ Specifically, that section provides that "upon good cause shown, the Commission will stay the effective date of a rule pending a decision on a petition for reconsideration." 47 C.F.R. § 1.429(k).

⁸ *Smaller Market UHF Television Stations Group*, Memorandum Opinion and Order, 81 FCC 2d 429, 436 (1980) (citations omitted).

⁹ *Cf. Matter of Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 5384, 5385 (1989) (Commission would consider motion for stay filed three weeks after rules regarding price cap rates had technically taken effect, because the rates would not be operational for another month).

¹⁰ *See* 47 C.F.R. § 1.429(k).

¹¹ *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958).

explained in *Holiday Tours, Inc.*¹² In order to meet the stringent *Holiday Tours* standard, Broadcasters must demonstrate (1) that they are likely to prevail on the merits of the underlying petition; (2) that they will suffer irreparable harm if a stay is not granted; (3) that no other interested parties will be harmed if a stay is granted; and (4) that the public interest favors grant of a stay.¹³ Broadcasters fail to establish even one of these four factors.

First, although Broadcasters filed a joint petition for reconsideration of the 2 GHz *Relocation Order*, they did not seek reconsideration of the two-year mandatory negotiation period that they now seek to stay.¹⁴ Thus, there is no relevant underlying petition upon which Broadcasters must show they will prevail. Broadcasters base their motion instead on the dubious premise that developments in the marketplace and Commission proposals in ancillary dockets “provide strong support for staying the mandatory negotiation deadlines.”¹⁵ This “strong support” amounts to mere guesswork. Broadcasters speculate that “[p]otential MSS entrants facing far lower than expected demand are not going to be in a position to commit funds to BAS incumbents.”¹⁶ Conjecture about the possible effects of market conditions, potential entrants, and

¹² *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

¹³ *See id.* at 843 (citation omitted).

¹⁴ *See* Petition for Partial Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, ET Docket No. 95-18 (filed Sept. 6, 2000).

¹⁵ Broadcasters’ Motion at 2.

¹⁶ *Id.* at 3.

concurrent proceedings does not demonstrate a likelihood of success on a meritorious petition.

Second, Broadcasters do not (and cannot) claim that they will be irreparably harmed absent a stay. Bare allegations of what is likely to occur in the marketplace and in ancillary Commission proceedings are of no value because the relevant question is whether the harm will in fact occur.¹⁷ Each of Broadcasters' assertions amounts to nothing more than a bare allegation of future harm, contingent on hypothetical events and unsupported by evidence.¹⁸

Third, Broadcasters have not demonstrated that grant of the Motion favors the public interest. In the *2 GHz Relocation Order*, the Commission determined that the mandatory negotiation period served the twin goals of providing early access to spectrum for MSS providers, while maintaining the integrity of the BAS system.¹⁹ Broadcasters' suggestion that the mere possibility that a new relocation plan adopted in the 3G Rulemaking might require modifications to the current plan does not come close to demonstrating that the public interest favors suspending the existing plan.

Moreover, Broadcasters also incorrectly assume that the public interest would not be harmed "[b]ecause there appears to be little or no progress toward developing operational MSS systems."²⁰ In fact, New ICO has invested billions of dollars to develop its MSS constellation, launch an initial satellite and otherwise continue to meet its

¹⁷ *Cable & Wireless Communications, Inc.*, 8 FCC Rcd 2206, 2207 n.10 (1993).

¹⁸ *See Big Valley Cablevision, Inc.*, 85 FCC 2d 973, 979 (1981).

¹⁹ *See 2 GHz Relocation Order*, 15 FCC Rcd at 12331.

²⁰ *See Broadcasters' Motion* at 5.

construction benchmarks.²¹ New ICO and other 2 GHz MSS licensees have made such substantial expenditures partly in reliance on the FCC's relocation plan, which offers some regulatory certainty as to when the licensees can access their authorized spectrum. Granting the stay request before any decision has been made in the 3G Rulemaking could jeopardize the ability of 2 GHz MSS licensees to launch service expeditiously and recoup the investments made to date. Thus, Broadcasters' Motion fails the fourth prong of the *Holiday Tours* standard for grant of stay.

²¹ For example, New ICO's shareholders have already invested fully \$3.7 billion for the global network New ICO plans to deploy, and have committed another \$1.4 billion to vendors.

3. Conclusion

For the foregoing reasons, the Commission should deny Broadcasters' procedurally and substantively deficient Motion.

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October 29, 2001

Certificate of Service

I, Theresa L. Pringleton, do hereby certify that I have on this 29th day of October, 2001, had copies of the foregoing **OPPOSITION TO MOTION FOR STAY OF MANDATORY NEGOTIATION PERIOD** delivered by electronic mail to the following:

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