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Before the
Federal Communications Commission
Washington, D.C. 20554

AUG 1 2 2002

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

ORDER

Adopted: July 31, 2002 **Released: August 2, 2002**

By the Commission:

I. INTRODUCTION

1. By this Order, and effective immediately, we suspend for one year, until September 6, 2003, the expiration date for the initial two-year mandatory negotiation period for Phase 1 of the 2 GHz band relocation plan between Mobile-Satellite Service (MSS) and Broadcast Auxiliary Service (BAS),[1] adopted in the *Second Report and Order and Second Memorandum Opinion and Order* (*Second Report and Order*) in this proceeding.[2] The provisions of the initial Phase 1 mandatory negotiation period will remain in effect for the duration of this suspension. We retain the option to shorten or lengthen this suspension as circumstances warrant.

II. BACKGROUND

2. In the *Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order* in this proceeding, we allocated 70 megahertz of spectrum for MSS in the 2 GHz band.[3] In the *Second Report and Order*, we adopted relocation procedures for incumbent BAS facilities at 1990-2025 MHz and incumbent Fixed Service (FS) facilities at 2165-2200 MHz. This relocation plan was modeled after the Commission's earlier *Emerging Technologies* policies in ET Docket No. 92-9,[4] and requires

[1] BAS spectrum in the 2 GHz band is also authorized for use by the Cable Television Relay Service (CARS) and the Local Television Transmission Service (LTTS). *See* 47 C.F.R. §§ 74.602, 78.18(a)(7), 21.901(b). As in previous actions in this proceeding, we will refer to these services collectively as BAS, and all proposals and decisions apply to CARS and LTTS in the band, as well as to BAS.

[2] *See 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, *Second Report and Order and Second Memorandum Opinion and Order*, 15 FCC Rcd 12315 (2000), *recon. pending*. *See* 47 C.F.R. §§ 74.690(e)(1); 78.40(f)(1).

[3] *See 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, *Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order*, 13 FCC Rcd 23949 at ¶11 (1998).

[4] *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies (Emerging Technologies)*, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule* Making, 7 FCC Rcd 6886 (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

(continued....)

MSS entrants to provide comparable facilities to BAS and FS incumbents that are relocated prior to the sunset dates specified in the *Second Report and Order*.[5] The BAS relocation plan calls for a two-phase relocation, each phase beginning with a two-year mandatory negotiation period that will clear the lowest BAS channel then in use in the top 30 Nielsen Designated Market Areas.[6] In the event that an agreement for relocation is not reached by the end of a particular negotiation period, the MSS licensee(s) have the option of relocating BAS incumbents involuntarily.[7] The initial, two-year mandatory negotiation period for Phase 1 commenced upon Federal Register publication of the *Second Report and Order* on September 6, 2000, and is due to expire on September 6, 2002.[8] As we stated in the *Second Report and Order*, it remains a primary goal to ensure that the transition causes the minimum possible disruption to BAS operations.[9]

3. Subsequent to adoption of the *Second Report and Order*, we initiated several major rule makings that propose, or seek comment on, alternative uses and new allocations in portions of the 2 GHz band now allocated for MSS. For example, in IB Docket No. 01-185, we are seeking comment on proposals that would allow MSS licensees to provide ancillary terrestrial component ("ATC") operations in the 2 GHz MSS band.[10] In ET Docket No. 00-258, we are seeking comment on proposals to support the introduction of new advanced wireless services, including Third Generation ("3-G") wireless systems in spectrum below 3 GHz, including some of the MSS spectrum in the 2 GHz band.[11] In WT Docket No. 02-55, we are exploring various options to improve public safety communications in the 800 MHz band that could include relocating incumbent 800 MHz services to the current MSS allocation in the 2 GHz band.[12] In each of these dockets, we have sought comment on what changes might be needed to the BAS

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(1994); *Second Memorandum Opinion and Order*, 9 FCC Rcd 7797 (1994); *aff'd Association of Public Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996).

[5] *See Second Report and Order*, 15 FCC Rcd 12315 at ¶50 and ¶80.

[6] *Id.* at ¶¶70-74. (During "mandatory" negotiations, "an [incumbent] licensee may not refuse to negotiate and all parties are required to negotiate in good faith. Good faith requires each party to provide information to the other that is reasonably required to facilitate the relocation process." *See id.* at ¶38, citing 47 C.F.R. § 101.73.)

[7] *Id.* at ¶48.

[8] *Id.* at ¶72. 47 C.F.R. §74.690(e)(1). (We note that this sub-section contains a typographical error indicating that the initial negotiation period begins on September 6, 2010. The correct starting date, consistent with the discussion in the *Second Report and Order*, is September 6, 2000.) Phase 2 of the BAS relocation plan is not triggered until Phase 1 spectrum is no longer sufficient to meet MSS requirements. *Second Report and Order.* at ¶30.

[9] *Id.* at ¶42.

[10] *See Flexibility for delivery of communications by Mobile Satellite Service providers in the 2 GHz band, the L-Band, and the 1.6/2.4 GHz Band, ("MSS Flexibility Notice")*, IB Docket No. 01-185; ET Docket No. 95-18, *Notice of Proposed Rule Making*. 15 FCC Rcd 15532 (2001).

[11] *See 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, ("Advanced Wireless/3-G Further Notice")*, ET Docket No. 00-258, *Memorandum Opinion and Order and Further Notice of Proposed Rule* Making, ET Docket 00-258. 16 FCC Rcd 16043 (2001).

[12] *See Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channel, ("800 MHz Public Safety Notice")*, WT Docket No. 02-55, *Notice of Proposed Rule Making*, 17 FCC Rcd 4873 (2002).

relocation procedures adopted in the *Second Report and Order* should the proposals affecting the 2 GHz MSS bands be adopted.[13]

III. DISCUSSION

4. In the *Second Report and Order*, we concluded that the adopted negotiation period structure would serve our twin goals of maintaining the integrity of the BAS system operation while providing for early access to the spectrum for MSS providers.[14] We found that the BAS and MSS industries had been aware of this proceeding and closely followed its progress since 1995.[15] In addition, we noted that the spectrum became available for MSS on January 1, 2000, and that ICO had represented that it expected to be ready to begin providing service in 2002.[16] Based upon these factors, among others, we decided that the initial BAS negotiation period should commence immediately upon Federal Register publication of the *Second Report and Order*, and that a two-year duration for the initial mandatory negotiation period was appropriate.

5. As noted above, subsequent to our establishing the 2 GHz MSS band relocation plans, we specifically sought comment in the *MSS Flexibility, Advanced Wireless/3-G*, and *800 MHz Public Safety* rule making notices on whether to revise the *Second Report and Order* relocation plan based on the outcome of the proposals in those rulemakings. Because it does not appear that we will be able to act on the respective issues prior to the Phase 1 BAS mandatory negotiation deadline of September 6, 2002, we find it to be in the public interest to continue the negotiating period until we are able to fully address these relocation issues based on the extensive record that these other proceedings have generated. We further find that it is prudent and in the public interest to suspend the expiration of the initial negotiation period under the present circumstances, rather than prejudice our consideration of the relocation issues presented in the pending proceedings. Therefore, we find that the expiration date for the initial Phase 1, two-year mandatory BAS negotiation period should be suspended, effective immediately upon release of this order, for one year until September 6, 2003.[17] We retain the option, however, to shorten or lengthen this suspension as circumstances warrant while we consider further action on this matter in pending proceedings. We also emphasize that the action taken herein is an interim measure and does not prejudice further action in other proceedings. For the duration of this suspension, all other aspects of the initial mandatory BAS negotiation period will continue in force and, as a consequence, BAS incumbents will not be subject to involuntary relocation by MSS licensees in the interim. We will require MSS and BAS licensees to comply with all negotiation requirements and procedures adopted in the *Second Report and Order* that are applicable to the initial BAS mandatory negotiation period. Because we are not suspending or modifying any other aspect of the BAS or FS relocation plan, MSS and FS licensees in the

[13] *See MSS Flexibility Notice* at ¶74; *Advanced Wireless/3-G Further Notice* at ¶32-33; *800 MHz Public Safety Notice* at ¶57.

[14] *Second Report and Order*, 15 FCC Rcd 12315 at ¶49.

[15] *Id.* at ¶44.

[16] *Id.* at ¶¶43-44.

[17] We are making this Order effective immediately because the original deadline of September 6, 2002, for expiration of the negotiation period is imminent. We have taken similar action in the past to immediately suspend the effect of a rule pending the resolution of issues being considered in other rule makings. *See, e.g., Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, *Order*, 16 FCC Rcd 22310, (2001).

2165-2200 MHz band remain free to enter into relocation negotiations under the provisions adopted in the *Second Report and Order*.[18]

6. On October 22, 2001, the National Association of Broadcasters (NAB) and the Association for Maximum Service Television, Inc. (MSTV) filed a pleading styled "Motion for Stay of Mandatory Negotiation Period."[19] The Motion was supported in separate pleadings by the Society of Broadcast Engineers and by Cox Broadcasting, Inc. (jointly with Cosmos Broadcasting Corporation and Media General, Inc.), and was opposed by New ICO Global Communications Ltd., and the Boeing Company.[20] While NAB's pleading appears to seek a stay of the entire negotiation process delineated in the *Second Report and Order*, a subsequent *ex parte* submission by NAB appears to indicate that NAB is not opposed to the requirement for negotiation. Rather, NAB effectively requests an indefinite suspension of the timetables in the negotiation/relocation process.[21] To the extent that NAB's motion would challenge the imposition of the negotiation/relocation process delineated in the *Second Report and Order*, it must be dismissed as a late-filed Petition for Reconsideration. To the extent that it requests a suspension of the timetables in the negotiation/relocation process, we dismiss it as moot in light of our action herein. We note that opponents' substantive arguments in opposing NAB's Motion are considered and disposed of in our determination herein.

IV. ORDERING CLAUSES

7. Authority for issuance of this Order is contained in Sections 4(i), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f), and 303(r), and Section 553(d) of the Administrative Procedure Act, 5 U.S.C. § 553(d).

8. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f), and 303(r), and Section 553(d) of the Administrative Procedure Act, 5 U.S.C. § 553(d), the expiration date of September 6, 2002, for the initial two-year mandatory BAS negotiation period for Phase 1 set forth in the *Second Report and Order* in ET Docket No. 95-18 IS HEREBY SUSPENDED, effective immediately upon release of this order, for one year until September 6, 2003, consistent with the terms discussed above.

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[18] *Second Report and Order* at ¶¶75-102.

[19] *See Motion for Stay of Mandatory Negotiation Period*, filed in ET Docket 95-18, by the National Association of Broadcasters and the Association for Maximum Service Television, Inc., on October 22, 2001.

[20] *See Oppositions to Motion for Stay* filed by The Boeing Company and New ICO Global Communications Ltd., on October 29, 2001. Boeing and New ICO assert that the legal standard for granting a stay has not been met, that it is not appropriate to suspend or roll back the operation of rules already in effect, that MSS interests have spent large sums of money in reliance on the present negotiation period timetables, and, alternatively, that the motion is procedurally defective because it amounts to no more than a late-filed petition for reconsideration of the negotiation plan adopted in the *Second Report and Order*. *See also* Comments on Motion for Stay filed by Society of Broadcast Engineers, and Cox Broadcasting, Inc. (jointly with Cosmos Broadcasting Corporation and Media General, Inc.), on Nov. 30, 2001, in response to our *Public Notice* in Docket No. 95-18 (DA 01-2610), issued Nov. 8, 2001.

[21] *See Ex Parte letter dated May 3, 2002, from Mr. Jack N. Goodman, National Association of Broadcasters to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission.*

9. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f), and 303(r), the Motion for Stay of Mandatory Negotiation Period filed by the National Association of Broadcasters (NAB) and the Association for Maximum Service Television, Inc. (MSTV), is hereby DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary