

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

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

ORDER

Adopted: September 4, 2003

Released: September 5, 2003

By the Chief, Office of Engineering and Technology:

INTRODUCTION

1. By this Order, and effective immediately, we suspend for 60 days, until November 4, 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 This mandatory negotiation period was originally adopted in the *Second Report and Order and Second Memorandum Opinion and Order (Second Report and Order)* in this proceeding,² and later extended until September 6, 2003, in a subsequent *Order (Suspension Order)*.³ The mandatory negotiation period will continue to remain in effect for the duration of this suspension or until otherwise modified by Commission action. We retain the option to shorten or lengthen this suspension as circumstances warrant.

BACKGROUND

2. This action only relates to 35 megahertz of spectrum, currently used by BAS licensees, in the 1990-2025 MHz band. In 1997, the Commission reallocated this spectrum, paired with 35 megahertz in the 2165-2200 MHz band used by Fixed Service (FS) licensees, for MSS, effective January 1, 2000.⁴ In the *Second Report and Order*, it adopted relocation procedures for incumbent licensees in these bands. The relocation plan was modeled after the Commission's earlier *Emerging Technologies* policies in ET

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 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 also 47 C.F.R. §§ 74.690(e)(1); 78.40(f)(1).

³ 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, *Order*, 17 FCC Rcd 15141 (2002).

⁴ 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, *First Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 7388 (1997)

Docket No. 92-9,⁵ and requires MSS entrants to provide comparable facilities to BAS and FS incumbents that are relocated prior to specified sunset dates.⁶ The BAS relocation plan calls for a two-phase relocation, each phase beginning with a two-year mandatory negotiation period.⁷ 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.⁸ 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 was due to expire on September 6, 2002.⁹ The *Suspension Order* extended this date by one year, to September 6, 2003.

3. Recently, the Commission adopted decisions that will permit alternative uses and new allocations in portions of the 2 GHz band that had been allocated for MSS. In a *Third Report and Order, Third Notice of Proposed Rulemaking, and Second Memorandum Opinion and Order* in ET Docket No. 00-258, it reallocated a portion of this spectrum in order to provide for new Fixed and Mobile services, including Advanced Wireless Services (AWS).¹⁰ In a *Report and Order and Notice of Proposed Rulemaking* in IB Docket No. 01-185, it permitted MSS licensees to provide ancillary terrestrial component (ATC) operations in the 2 GHz MSS band.¹¹ The Commission has not yet adopted any

⁵ 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 (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).

⁶ See *Second Report and Order*, 15 FCC Rcd at 12332 and 12341, ¶¶ 50 and 80.

⁷ *Id.*, 15 FCC Rcd at 12338-39, ¶¶ 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.*, 15 FCC Rcd at 12328, ¶ 38, citing 47 C.F.R. § 101.73.

⁸ *Id.*, 15 FCC Rcd at 12331, ¶ 48.

⁹ *Id.*, 15 FCC Rcd at 12339, ¶ 72. See also 47 C.F.R. § 74.690(e)(1). (We note that this sub-section of our Rules 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*, 15 FCC Rcd at 12326, ¶ 30. The expiration of the mandatory negotiation period for FS licensees is based on the initiation of relocation negotiations between FS and MSS licensees; because this event that has not yet taken place, we need not modify the timeline for FS-MSS negotiations at this time. *Second Report and Order*, 15 FCC Rcd at 12343, ¶ 86.

¹⁰ Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Service to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ET Docket No. 00-258, *Third Report and Order, Third Notice of Proposed Rulemaking, and Second Memorandum Opinion and Order*, 18 FCC Rcd 2223 (2003), *recon. pending (AWS Third R&O)*.

¹¹ 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 Bands, IB Docket No. 01-185, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 1962 (2003), *Errata* (rel. March 7, 2003) (*ATC Report and Order*), *recon. and appeal pending*, AT&T Wireless Services, Inc and Cellco Partnership d/b/a Verizon Wireless v. FCC, No. 03-1191 (D.C. Cir. filed July 8, 2003); *Order on Reconsideration*, IB Docket No. 01-185, 18 FCC Rcd 13590 (2003) (*ATC Sua Sponte Recon*).

modifications to the existing BAS and FS relocation rules as may be necessary in light of these decisions.¹²

DISCUSSION

4. In the *Suspension Order*, the Commission noted the outstanding issues in the *MSS Flexibility Notice* and *AWS Notice* proceedings relating to use of the 2 GHz MSS band and concluded that it did not appear that we would be able to act on the respective issues prior to the Phase 1 BAS mandatory negotiation deadline of September 6, 2002. It concluded that it was in the public interest to continue the negotiating period until we were able to address these relocation issues.¹³ It also found that it was prudent and in the public interest to suspend the expiration of the initial negotiation period for one year under those circumstances, rather than prejudice consideration of the relocation issues presented in the pending proceedings. The Commission further stated that it retained the option to shorten or lengthen this suspension as circumstances warranted.¹⁴

5. In February of this year, the Commission decided to reallocate portions of the 2 GHz MSS band (in ET Docket No. 00-258) and modify the nature of permissible MSS use of the band (in IB Docket No. 01-185).¹⁵ However, it has not yet addressed the modifications to the BAS and FS relocation plan that may be necessary because of these decisions and several outstanding Petitions for Reconsideration and Clarification. Accordingly, the considerations that led the Commission to adopt the *Suspension Order* continue to apply with respect to the scheduled September 6, 2003, expiration date for the initial Phase 1 mandatory BAS negotiation period. Specifically, we find that it is in the public interest to continue the negotiating period until we address outstanding relocation issues in the band. Also, by suspending the expiration of the initial negotiation period, we will not prejudice consideration of the relocation issues still pending. For these reasons, we suspend, effective immediately upon release of this order, expiration of the initial Phase 1, two-year mandatory BAS negotiation period for 60 days, until November 4, 2003.¹⁶

¹² In both of the above-described dockets, the Commission has sought comment on what changes might be needed to the BAS relocation procedures adopted in the *Second Report and Order* should the proposals affecting the 2 GHz MSS bands be adopted. 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, IB Docket No. 01-185; ET Docket No. 95-18, *Notice of Proposed Rule Making*, 16 FCC Rcd 15532, 15561, ¶ 74 (2001); Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Service to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ET Docket No. 00-258, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd at 16057-58, ¶¶ 32-34 (2001). See also Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channel, WT Docket No. 02-55, *Notice of Proposed Rule Making*, 17 FCC Rcd 4873 (2002) (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, and seeking comment on possible modifications to our relocation procedures for the 2 GHz band)

¹³ *Suspension Order*, 17 FCC Rcd at 15143, ¶ 5.

¹⁴ *Id.*

¹⁵ *AWS Third R&O*, *supra* note 10; *ATC Report and Order*, *supra* note 11.

¹⁶ We are making this Order effective immediately because the original deadline of September 6, 2003, 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., *Suspension*

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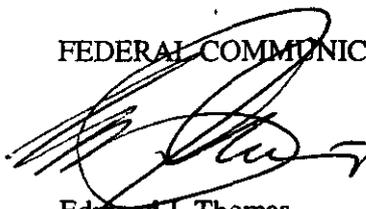
6. As in the *Suspension Order*, we retain the option to shorten or lengthen this suspension as circumstances warrant. We also emphasize that the action taken herein is interim in nature and does not prejudice further action in other proceedings. For the duration of this suspension, all other aspects 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. For the duration of the suspension, we likewise 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.

ORDERING CLAUSES

7. Authority for issuance of this Order is contained in Sections 4(i), 5(c), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303(f), and 303(r), and Section 553(d) of the Administrative Procedure Act, 5 U.S.C. § 553(d). This action is taken under delegated authority, pursuant to sections 0.31(m) and 0.241(a) of the Commission's Rules, 47 C.F.R. §§ 0.31(m) and 0.241(a).

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), Section 553(d) of the Administrative Procedure Act, 5 U.S.C. § 553(d), and sections 0.31(m) and 0.241(a) of the Commission's Rules, 47 C.F.R. §§ 0.31(m) and 0.241(a), 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 60 days until November 4, 2003, consistent with the terms discussed above.

FEDERAL COMMUNICATIONS COMMISSION



Edmond J. Thomas
Chief
Office of Engineering and Technology

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Order; 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).