

May 19, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street Lobby, TW-A325
Washington, DC 20554

**Re: Written Ex Parte Presentation
IB Docket Nos. 99-81, 02-34 & 00-248; ET Docket No. 00-258**

Dear Ms. Dortch:

CTIA - The Wireless Association™ (“CTIA”) hereby responds to the recent letter request by TMI Communications and Company Limited Partnership (“TMI”) and its affiliate TerreStar Networks, Inc. (“TerreStar”).¹ In the Letter Request, TMI and TerreStar seek a stealth redistribution of abandoned 2 GHz MSS spectrum without the benefit of a public proceeding and pursuant to rules that do not apply to 2 GHz MSS spectrum. For the reasons set forth below, consistent with precedent, any consideration of how to treat abandoned 2 GHz MSS spectrum should be made in a public proceeding that considers its highest and best use, including reallocation to other uses.

As an initial matter, CTIA is troubled by the manner in which the Letter Request was submitted. Rather than file the request in either of the public dockets where 2 GHz MSS spectrum allocation decisions have previously been rendered,² or at a minimum with respect to the file number corresponding to the current TMI authorization,³ TMI and TerreStar did not file in *any* proceeding. Nor did they file a petition for rulemaking, which would have appeared on public notice.⁴ Instead, the request was directed solely to the Chief of the International Bureau. CTIA learned of it only through trade press. The procedural nature of the filing is particularly troubling because it calls on the Bureau Chief to essentially place his stamp of approval on a redistribution of abandoned spectrum without opportunity for public notice and comment.

The private redistribution sought by TMI and TerreStar is not even supported by the very rules and policies upon which they base their filing. TMI and TerreStar contend that abandoned spectrum must be redistributed among remaining licensees as long as three remain, under policies adopted in the *Space Station Licensing* proceeding, and can be divided between two if an extraordinary showing is made.⁵ While TMI and TerreStar attempt to use these policies to characterize their request as a small, incremental increase in spectrum, they are in reality seeking a **250%** increase in TMI’s assigned spectrum more than two years

¹ See Letter from Gregory C. Staple, Vinson & Elkins, Counsel for TMI, and Jonathan D. Blake, Covington & Burling, Counsel for TerreStar, to Donald Abelson, Chief, International Bureau, FCC (Apr. 20, 2005) (“Letter Request”). ICO Satellite Services, G.P. (“ICO”), the only other surviving 2 GHz MSS licensee, has submitted a letter expressing conditional support for the Letter Request. See Letter from Suzanne Hutchings Mallow, Senior Regulatory Counsel, ICO, to Donald Abelson, Chief, International Bureau, FCC (May 3, 2005) (“ICO Letter”).

² See *New Advanced Wireless Services, Third Report and Order*, ET Docket No. 00-258 & IB Docket No. 99-81, 18 FCC Rcd 2223, 2239-40 ¶ 32 (2003) (“AWS Third R&O”); *Establishment of Policies and Service Rules for MSS in the 2 GHz Band, Report and Order*, IB Docket No. 99-81, 15 FCC Rcd 16127, 16139 ¶ 18 (2000) (“2 GHz Order”).

³ See *TMI Communications and Company, Limited Partnership and TerreStar Networks Inc.*, File No. SAT-LOI-19970926-00161 *et al.*, 19 FCC Rcd 12603, 12622 ¶ 54 (2004) (“TMI Reinstatement Order”).

⁴ See 47 C.F.R. § 1.403.

⁵ See Letter Request at 2 n.5 & 3.

before it is even due to launch its satellite.⁶ The *Space Station Licensing* proceeding, however, made clear that these new redistribution policies (which are not automatic, as TMI and TerreStar imply, but rather a presumption) **do not even apply to 2 GHz MSS.**⁷

In the *Space Station Licensing* proceeding, the Commission proposed “a policy of redistributing the spectrum to the licensee or licensees remaining in operation . . . on a going forward basis.”⁸ However, it expressly stated that “[w]e emphasize that we are not addressing th[e] 2 GHz issue in this proceeding, nor are we addressing any similar issues raised in any proceeding in which we have issued licenses in the past.”⁹ Thus, the policies and rules cited by TMI and TerreStar are simply inapposite. They do not alter the Commission’s conclusion in the *2 GHz Order* and the *AWS Third R&O* that “we will evaluate whether to redistribute [abandoned] spectrum or make it available to new entrants after achievement of each of our system implementation milestones.”¹⁰ Nor do they alter the more fundamental conclusion in the latter decision that the Commission must consider, *inter alia*, as part of its spectrum management obligations, “the reallocation of spectrum if 2 GHz MSS licensees fail to meet their milestones.”¹¹

It has now been nearly four years since eight 2 GHz MSS systems were licensed. Only two, TMI and ICO, remain today, with three having lost their licenses for milestone noncompliance¹² and the other three having recently surrendered their licenses.¹³ Neither surviving licensee has commenced service (ICO stated it would do so in 2003¹⁴). Each of these licensees already has access to more spectrum than the 5 MHz the Commission originally found was sufficient to commence service,¹⁵ and they have the benefit of new rules which the Commission found would enable more efficient use of existing spectrum.¹⁶

⁶ As TMI itself acknowledges, it is currently authorized for 8 MHz. See Letter Request at 2 n.5; see also *TMI Reinstatement Order*, 19 FCC Rcd at 12622 ¶ 54. ICO is on notice that its 10 MHz authorization should be adjusted down to 8 MHz based on the fact that five entities survived the initial milestone review. See *id.* at 12622 ¶ 54 n.102; see also *AWS Third R&O*, 18 FCC Rcd at 2239-40 ¶ 32. Both TMI and ICO are now seeking access to 20 MHz spectrum each. See Letter Request at 1; ICO Letter at 3.

⁷ See *Space Station Licensing Rules and Policies, Notice of Proposed Rulemaking*, IB Docket Nos. 02-34 & 00-248, 17 FCC Rcd 3847, 3864 ¶ 48 & n.54 (2002) (“*Space Station NPRM*”), cited in *First Report and Order*, 18 FCC Rcd 10760, 10788 ¶ 61 (2003) (“*Space Station Order*”).

⁸ *Space Station NPRM*, 17 FCC Rcd at 3864 ¶ 48.

⁹ *Id.* at 3864 ¶ 48 & n.54 (emphasis added) (citing *2 GHz Order*, 15 FCC Rcd at 16139 ¶ 18).

¹⁰ *2 GHz Order*, 15 FCC Rcd at 16139 ¶ 18; *AWS Third R&O*, 18 FCC Rcd at 2240 ¶ 32.

¹¹ *AWS Third R&O*, 18 FCC Rcd at 2238 ¶ 29.

¹² See *Mobile Communications Holdings, Inc. and Constellation Communications Holdings, Inc.*, 18 FCC Rcd 1094 (IB 2003), *aff’d*, 19 FCC Rcd 11631 (2004), *appeal pending sub nom. ICO Global Communications (Holdings) Limited v. FCC*, No. 04-1428 (D.C. Cir. filed July 23, 2004); *Globalstar, L.P.*, 18 FCC Rcd 1249 (IB 2003), *aff’d*, 19 FCC Rcd 11548 (2004), *recon. pending*.

¹³ See Letter from Peter D. Shields, Wiley, Rein & Fielding, Counsel to Iridium 2 GHz LLC, to Marlene H. Dortch, Secretary, FCC, re: File Nos. SAT-LOA-19970926-00147 *et al.* (dated March 16, 2005); Letter from Joseph P. Markowski, Counsel for the Boeing Company, to Marlene H. Dortch, Secretary, FCC, re: File Nos. 79-SAT-P/LA-97(16) *et al.* (Mar. 28, 2005); Letter from David D. Otten, Chairman & CEO, Celstat, Inc., re: File Nos. SAT-A/O-19940408-00016/17/18 *et al.* (Apr. 12, 2005).

¹⁴ See *AWS Third R&O*, 18 FCC Rcd at 2239 ¶ 31 n.92.

¹⁵ See *2 GHz Order*, 15 FCC Rcd at 16138-39 ¶ 17 (“[O]ur experience has demonstrated that five megahertz of spectrum assigned to one system, 2.5 megahertz in either direction, is sufficient for commencement of service.”).

¹⁶ See *Flexibility for the Delivery of Communications by MSS Providers, Report & Order*, IB Docket No. 01-185, 18 FCC Rcd 1962, 1973 ¶ 18 (“We find that MSS licensees may achieve greater efficiencies in their use of assigned spectrum through MSS ATC . . .”), 1974 ¶ 20 (ATC will afford MSS operators “the ability to provide more and better services to both existing and potentially new subscribers *with the same amount of spectrum*”) (emphasis added).

The Commission should assess the future use of the 2 GHz spectrum made available by the return of several MSS authorizations in a manner consistent with its spectrum management responsibilities. The FCC has specifically acknowledged that spectrum “must be allocated and assigned in a manner that will provide the greatest possible benefit to the American public.”¹⁷ With respect to 2 GHz MSS spectrum in particular, the Commission has noted its “continuing spectrum management obligations to ensure that the spectrum is used efficiently and effectively.”¹⁸ A non-public proceeding that considers only the private spectrum claims of two licensees (TMI and ICO) is plainly contrary to these obligations. Indeed, the Commission has previously stated in an analogous MSS proceeding that “it is *appropriate to seek comment* on both the possible reassignment and possible reallocation of any returned spectrum for possible use by other services.”¹⁹

The Commission is well aware that the 2 GHz spectrum band is considered very attractive and highly valued. Given the continuing struggles of the MSS industry, it is incumbent upon the Commission to reevaluate the highest and best use of the abandoned spectrum. Under these circumstances, therefore, “it is appropriate to seek comment” on the reallocation of abandoned 2 GHz MSS spectrum “for possible use by other services.”²⁰

Pursuant to Section 1.1206 of the Commission’s rules, this letter is being filed electronically with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,
Diane Cornell
Diane Cornell

cc: Sam Feder
John Branscome
Paul Margie
Barry Ohlson
Donald Abelson
Rod Porter
Gardner Foster
Bruce Franca
Julius Knapp
David Furth
Uzoma Onyeije
Blaise Scinto
David Horowitz

¹⁷ *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, 14 FCC Rcd 19868, 19870 ¶ 7 (1999).

¹⁸ *See AWS Third R&O*, 18 FCC Rcd at 2238 ¶ 29.

¹⁹ *Review of Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit MSS Systems in the 1.6/2.4 GHz Bands, Notice of Proposed Rulemaking*, IB Docket No. 02-364, 18 FCC Rcd 1962, 2087-89 ¶¶ 261, 265 (2003) (emphasis added) (seeking comment on whether to reassign or reallocate to other uses Big LEO MSS spectrum that had become available because several systems either surrendered their licenses or failed to meet the terms of their licenses).

²⁰ *See supra* note 19 and accompanying text.