

May 27, 2005

Filed Electronically

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Redistribution of Surrendered 2 GHz MSS Spectrum*

Dear Ms. Dortch:

Enclosed please find an *ex parte* presentation concerning the request of TerreStar Networks Inc. (“TerreStar”) and TMI Communications and Company Limited Partnership (“TMI”) for redistribution of spectrum surrendered recently by certain 2 GHz mobile satellite service (“MSS”) licensees. This presentation is being filed to show that even if Section 25.157(g) does not apply to 2 GHz MSS,¹ the Commission has ample authority to redistribute surrendered spectrum without seeking further comment.

Respectfully submitted,

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*TMI Communications and Company Limited
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cc: ET Docket No. 00-258; IB Docket Nos. 99-81, 02-34, 00-248

¹ See Letter from Gregory C. Staple, Vinson & Elkins, Counsel for TMI and Jonathan D. Blake, Covington & Burling, Counsel for TerreStar to Marlene H. Dortch, Secretary, FCC (filed May 24, 2005) (discussing the application of the spectrum redistribution procedures of Section 25.157(g) to the 2 GHz MSS “NGSO-like” band).

Redistribution of Surrendered 2 GHz MSS Spectrum

Relying on its announced policy of redistributing MSS spectrum on a case-by-case basis, its statutory authority, the record it has compiled over the past six years, and well-established principles of administrative law, the Commission may redistribute surrendered MSS spectrum to the remaining 2 GHz licensees without seeking further comment.¹ Following is a description of the Commission's legal basis for such action, concluding with suggested content for two related Public Notices.

Administrative Law:

In its January 2003 *AWS Order*, the Commission declined to establish a prospective rule concerning redistribution of surrendered 2 GHz MSS spectrum. Instead, it adopted a policy under which it would "evaluate whether to redistribute such spectrum or make it available to new entrants after achievement of each of our system implementation milestones."² With that policy decision, the Commission put the public on notice that it would redistribute surrendered MSS spectrum through informal procedures on a case-by-case basis – outside of a notice-and-comment rulemaking and the procedures it entails. The Commission was free to do so under the Administrative Procedure Act ("APA").³ The Courts have long provided the Commission considerable leeway to order its own docket and to determine the manner in which it will conduct its business.⁴

In reviewing informal actions taken pursuant to such a policy (often termed "informal adjudications"), some courts have found that the APA "does not require *any* notice to interested parties."⁵ Even when a court has required *some* minimum notice of an "informal adjudication," it has made clear that a petitioner "may only challenge the agency procedures if the procedures violated constitutional norms of procedural due process."⁶ In essence, when an

¹ TMI/TerreStar maintain that, alternatively, the Commission may apply the spectrum redistribution procedures of Section 25.157(g) to the 2 GHz MSS "NGSO-like" band. *See* Letter from Gregory C. Staple, Vinson & Elkins, Counsel for TMI and Jonathan D. Blake, Covington & Burling, Counsel for TerreStar, to Marlene H. Dortch (filed May 24, 2005); Comments of CTIA, IB Docket No. 02-34, at 6-8 (filed June 3, 2002).

² *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*, 18 FCC Rcd 2223, 2240 (2003) ("AWS Order").

³ *Central Texas Telephone Co-op., Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) (citations omitted) ("Agencies often have a choice of proceeding by adjudication rather than rulemaking ... Orders handed down in adjudications may establish broad legal principles.").

⁴ *See, e.g., USTA v. FCC*, 359 F.3d 554, 587 (D.C. Cir. 2004).

⁵ *Keystone Shipping Co. v. United States*, 801 F.Supp. 771, 785 (D.D.C. 1992) (emphasis added) (holding that agency had no obligation to provide notice that it was considering removal of trading restrictions on vessel despite competitors' interests in maintaining that restriction).

⁶ *City of St. Paul v. FAA*, No. 88-1499, slip. op. at 1 (D.C. Cir. 1989).

agency chooses to act case by case rather than by prospective rule of general applicability, the agency must merely provide “some minimum procedures” as “necessary to provide a record adequate for [a] court to perform its [judicial] review.”⁷

In the instant case, for six years the Commission has solicited and received comment concerning the appropriate allocation of spectrum to the 2 GHz mobile satellite service.⁸ A diversity of parties in the terrestrial wireless and satellite industries alike contributed to the record.⁹ Parties, such as ICO, have repeatedly stated *on the record* that the current allocation of spectrum is insufficient.¹⁰ And some two months ago, the Commission gave public notice of the Iridium and Boeing surrenders.¹¹ Accordingly, the Commission has a sufficient, publicly-available record on which to base an informal adjudicative decision to redistribute the surrendered Boeing and Iridium spectrum to the remaining 2 GHz MSS licensees. No further comment need be solicited.

Statutory Authority:

Most importantly perhaps, Section 316(a) of the Communications Act provides the Commission the right to modify “any station license ... if, in the judgment of the

⁷ *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 922 (D.C. Cir. 1982) (“The APA rulemaking requirements of notice, an opportunity for comment, and a concise general statement of basis and purpose do not extend to informal adjudication ... Yet, some minimum procedures are necessary to provide a record adequate for the court to perform its review.”).

⁸ *See, e.g.*, NPRM, *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 14 FCC Rcd. 4843 (1999); NPRM, *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*, 16 FCC Rcd 16043.

⁹ *See, e.g.*, Petition for Reconsideration of ICO Global Communications (Holding) Limited, IB Docket Nos. 02-34 & 02-248, at 7-8 (filed Sept. 26, 2003) (explaining that spectrum in the 2 GHz MSS band was assigned “with the acknowledgment that applicants’ spectrum needs may not be satisfied initially upon licensing, but with the clear expectation that the systems ultimately deployed would have access to adequate spectrum because not all licensees would ultimately build out their systems.”); Comments of Verizon Wireless, ET Docket Nos. 00-258 & 95-18, IB Docket No. 99-81, at 12-13 (filed Oct. 19, 2001) (urging that the Commission reallocate “all unassigned and abandoned spectrum” allocated to 2 GHz MSS); Comments of the Satellite Industry Assoc., ET Docket Nos. 00-258 & 95-18, IB Docket No. 99-81, at 8 (filed Oct. 22, 2001) (arguing that reallocation of 2 GHz MSS spectrum to other uses would “disserve the public interest by damaging the nascent MSS industry while providing marginal benefits for terrestrial 3G services.”); *Ex parte* presentation of CTIA, CC Docket No. 99-81, at 6 (filed Aug. 2, 2001) (arguing that “valuable MSS spectrum could be better used for other services”); Letter from Diane Cornell, CTIA to Marlene H. Dortch, Secretary, FCC, at 3 (filed May 19, 2005) (reiterating earlier claims concerning the value of 2 GHz MSS spectrum and need for the Commission to determine “the highest and best use of the abandoned spectrum.”).

¹⁰ *See, e.g.*, Letter from Mobile Communications Holdings, Inc., Constellation Communications Holdings, Inc., ICO to Marlene H. Dortch, Secretary, FCC (filed Dec. 12, 2002); Letter from ICO to Marlene H. Dortch (filed Dec. 20, 2002); Letter from ICO to Marlene H. Dortch (filed May 6, 2003).

¹¹ Public Notice, Policy Branch Information, DA 05-733 (rel. March 18, 2005) (announcing Iridium surrender); Public Notice, Policy Branch Information, DA 05-1000 (rel. April 1, 2005) (announcing Boeing surrender).

Commission such action will promote the public interest, convenience, and necessity.”¹² In so doing, only a party “who believes its license or permit would be modified” by such action has standing to object.¹³

Based on the record before it, the Commission may conclude that redistribution of the Boeing and Iridium spectrum to the remaining 2 GHz MSS licensees would serve the public interest, convenience and necessity.¹⁴ Because the Commission has already determined the parameters under which MSS licensees may occupy such spectrum without causing harmful interference to other licensees, there is no foreseeable party that would have standing to object to such minor modification of the TMI and ICO authorizations.

Suggested Course of Action:

Consistent with the Commission’s policy of evaluating redistribution of surrendered 2 GHz MSS spectrum on a case-by-case basis, simultaneously issue the following:

- A Public Notice titled “Notice of Modification to 2 GHz MSS Authorizations,” which would modify the TMI and ICO authorizations to specify a selected assignment of consistent with *pro rata* redistribution of spectrum surrendered by Boeing and Iridium. The Public Notice would reference:
 - The Commission’s decision in the *AWS Order* to proceed without a prospective rule to govern redistribution of MSS spectrum but rather on a case-by-case basis.
 - The record compiled since 1999 from parties in the terrestrial wireless and satellite industries alike concerning the appropriate allocation of spectrum to the 2 GHz mobile satellite service and the reassignment of 2 GHz spectrum that is recaptured.
 - The Public Notice provided on March 18, 2005 and April 1, 2005 regarding the Iridium and Boeing surrenders, respectively.
 - A statement that the Commission has decided that, pursuant to Sections 4(i), 7(a) and 316(a) of the Communications Act, the public interest, convenience and

¹² 47 U.S.C. § 316(a).

¹³ See, e.g., *Nat’l. Broadcasting Co. v. FCC*, 362 F.2d 946, 955 (D.C. Cir. 1966) (holding that a competitor would only have standing to challenge modification to another entity’s license under Section 316 if such modification would cause “objectionable electrical interference” to the competitor.). See also *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991) (upholding a Commission decision to allow a channel swap between a noncommercial TV station and a commercial TV station without a comparative hearing or further explanation because the agency had previously explained its policy, adopted pursuant to Sections 309 and 316 of the Act, for the channel swap at issue.)

¹⁴ Sections 4(i) and 7(a) of the Act provide general support to the Commission’s action as well. See 47 U.S.C. § 154(i) & 157(a).

necessity would be best served by redistributing the recaptured Boeing and Iridium spectrum on a *pro rata* basis to the parties holding the remaining 2 GHz authorizations.

- A statement asserting that, consistent with the *AWS Order*, the Commission's current Notice does not establish any prospective rule concerning the use of additional spectrum abandoned in the 2 GHz MSS. Instead, the Commission will continue its policy of evaluating whether to redistribute such spectrum or to make it available to new entrants on a case-by-case basis. In that regard, simultaneously herewith, the Commission is issuing a separate Public Notice inviting comment on the disposition of the 2 GHz MSS spectrum recently surrendered by Celsat.
- A direction to the International Bureau to implement this decision by issuing such orders as it shall deem necessary to modify the spectrum assignments in the current authorizations of TMI and ICO in a manner that is consistent herewith.
- A second Public Notice titled "Comments Invited on Further Modification of 2 GHz MSS Authorizations."¹⁵ This Notice would announce the following:
 - The Commission has today issued a Public Notice making a minor modification to the selected assignment of the TMI and ICO authorizations, reflecting the *pro rata* redistribution of MSS spectrum surrendered by Boeing and Iridium.
 - Celsat surrendered its 2 GHz MSS authorization as of April 12, 2005.
 - An explanation of the request by TMI and ICO to have their authorizations modified to reflect *pro rata* distribution of the spectrum forfeited by Celsat.
 - The economic and technical analyses advanced by TMI/TerreStar and ICO for redistribution of the Celsat spectrum.
 - A pleading cycle under which interested parties should file comment within 30 days and reply comments 10 days thereafter.

¹⁵ Although the Commission could redistribute the Celsat spectrum as well without further comment, TMI/TerreStar recognize that the Commission may deem it appropriate to seek further comment on redistribution of surrendered spectrum when a surrender leaves less than three licensees in a given band. *See, e.g.*, 47 C.F.R. § 25.157(g).