



June 7, 2005

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

Re: **EX PARTE**
IB Docket Nos. 99-81 & 02-34;
TMI Request for Redistribution of 2 GHz MSS Spectrum

Dear Ms. Dortch:

ICO Satellite Services G.P. submits this response to certain filings by CTIA – The Wireless AssociationTM (“CTIA”), dated May 19 and June 1, 2005, regarding a request by TMI Communications and Company Limited Partnership (“TMI”) and its affiliate, TerreStar Networks Inc. (“TerreStar”), for redistribution of 2 GHz mobile satellite service (“MSS”) spectrum.¹ Specifically the Commission should reject as contrary to Commission rules and policies CTIA’s assertions that the spectrum redistribution rule set forth in Section 25.157(g) of the Commission’s rules does not apply to 2 GHz MSS, and that the Commission is required to initiate a rulemaking proceeding to consider reallocating any abandoned 2 GHz MSS spectrum.²

Both Section 25.157(g) and the order adopting the rule undisputedly require redistribution of abandoned spectrum with respect to all “NGSO-like” services, including 2 GHz MSS. Specifically, Section 25.157(g) states that “[i]n the event that an applicants’ [sic] license is cancelled for any reason, the Commission will redistribute the bandwidth allocated to that applicant equally among the remaining applicants ... unless the Commission

¹ See Letter from Diane Cornell, CTIA, to Marlene H. Dortch, Secretary, FCC (May 19, 2005) (“CTIA May Letter”); Letter from Diane Cornell, CTIA, to Marlene H. Dortch, Secretary, FCC (June 1, 2005) (“CTIA June Letter”).

² See CTIA May Letter at 2-3; CTIA June Letter at 1-3.

determines that such a redistribution would not result in a sufficient of licensees remaining to make reasonably efficient use of the frequency band.”³ Additionally, the *Satellite Licensing Reform Order* provides that “[i]f a licensee loses or terminates its license, we will probably reassign the spectrum assigned to that licensee equally among the remaining licensees.”⁴ Nothing in the text of Section 25.157(g) or the *Satellite Licensing Reform Order* suggests that the Commission intended to carve out an exception for 2 GHz MSS.

Although CTIA cites language from the *Satellite Licensing Reform NPRM* to suggest that the redistribution rule does not apply to 2 GHz MSS,⁵ the Commission cannot give any weight to a mere notice of proposed rulemaking, which has no binding effect and cannot override the plain language of the Commission’s rules and underlying order. To the extent that CTIA argues that Section 25.157(g) is defective because insufficient notice was given, it should have challenged the rule in a timely filed petition for reconsideration. Because neither CTIA nor any other party sought reconsideration of the redistribution requirement,⁶ the Commission cannot modify the requirement to exclude 2 GHz MSS without initiating a new rulemaking proceeding.⁷

Contrary to CTIA’s contention, redistributing abandoned spectrum is not merely a presumption that requires the Commission to engage in a full notice-and-comment proceeding.⁸ Rather, redistribution is a requirement that is triggered if “a sufficient number of licensees remain[] to make

³ 47 C.F.R. § 25.157(g).

⁴ *Amendment of the Commission’s Space Station Licensing Rules and Policies*, 18 FCC Rcd 10760, ¶ 61 (2003) (“*Satellite Licensing Reform Order*”).

⁵ See CTIA June Letter at 1 (citing *Amendment of the Commission’s Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking, 17 FCC Rcd 3847, ¶ 54 (2002) (“*Satellite Licensing Reform NPRM*”).

⁶ ICO sought reconsideration of the Commission’s presumption that three satellite licensees are sufficient to make reasonably efficient use of a frequency band, but did not challenge the redistribution requirement itself. See *ICO Global Communications (Holdings) Limited Petition for Reconsideration*, Dkt Nos. 02-34 & 02-248 (Sept. 26, 2003).

⁷ See *Sioux Valley Rural Television, Inc. v. FCC*, 349 F.3d 667, 677 (D.C. Cir. 2003) (because a challenge alleging that the Commission failed to comply with notice-and-comment requirements was not raised in a timely filed petition for reconsideration, “the Commission did not abuse its discretion in dismissing this challenge as untimely”).

⁸ See CTIA June Letter at 2.

reasonably efficient use of the frequency band.”⁹ Under Section 25.157(g)(2), notice-and-comment procedures are required only “[i]n the event that the redistribution ... would *not* result in a sufficient number of licensees remaining to make reasonably efficient use of the frequency band.”¹⁰

Even assuming that the redistribution rule does not apply to 2 GHz MSS,¹¹ the Commission is not required to initiate a rulemaking to consider a further reallocation of abandoned 2 GHz MSS spectrum.¹² The Commission has full authority to redistribute spectrum among existing licensees pursuant to adjudication rather than rulemaking procedures.¹³ The use of adjudication

⁹ 47 C.F.R. § 25.157(g)(1).

¹⁰ *Id.* § 25.157(g)(2) (emphasis added). The only presumption that the Commission adopted was the “presumption that three satellite licensees in a frequency band are sufficient to make reasonably efficient use of the frequency band.” *Id.* § 25.157(g)(3). The Commission indicated that it could “initiate a second processing round or spectrum reallocation rulemaking proceeding ... where it can be shown that our presumption is incorrect that three licensees would not make reasonably efficient use of the frequency band.” *Satellite Licensing Reform Order*, ¶ 64. CTIA has not even attempted to make the requisite showing, and therefore no reallocation proceeding is warranted.

¹¹ To the extent that the Commission concludes that the redistribution rule does not apply to 2 GHz MSS because of insufficient notice, then it also must conclude that the same deficiency renders the rule inapplicable to any other “NGSO-like” services that are subject to modified processing round procedures. In the *Satellite Licensing Reform NPRM*, the Commission proposed to redistribute abandoned spectrum “as part of any first-come, first-served procedure we may adopt, on a going forward basis.” *Satellite Licensing Reform NPRM*, ¶ 48. The Commission additionally stated that “we [are not] addressing any similar [redistribution] issues raised in any proceeding in which we have issued licenses in the past.” *Id.* ¶ 48 n.54. Thus, the Commission did not expressly propose to redistribute spectrum that is subject to modified processing round procedures or that was assigned prior to the *Satellite Licensing Reform* rulemaking proceeding. The Commission, however, then proceeded to adopt a redistribution rule that applies to all “NGSO-like” services that are subject to modified processing round procedures.

¹² In fact, the Commission typically does not initiate a rulemaking to consider a wholesale reallocation of spectrum in other MSS frequency bands. For example, the Commission permits spectrum that has been abandoned by second-round licensees in the non-voice, non-geostationary MSS (“Little LEO”) to be redistributed to the remaining licensees. *See Amendment of Part 25 of the Commission’s Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, 13 FCC Rcd 9111, ¶¶ 30, 34. Additionally, when Starsys Global Positioning, a first-round licensee in the non-voice, non-geostationary MSS (“Little LEO”), surrendered its license in 1997, the Commission did not consider reallocating the returned spectrum for other services, but rather preserved the spectrum for Little LEO services. *Id.* ¶ 25.

¹³ *See Central Texas Telephone Cooperative, Inc. v. FCC*, [No. 03-1405] (D.C. Cir. 2005) (“Agencies often have a choice of proceeding by adjudication rather than rulemaking.”); *New York State Comm’n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) (“The

procedures to redistribute abandoned 2 GHz MSS spectrum is particularly appropriate given that the Commission, prior to adopting Section 25.157(g), decided to consider redistribution of the spectrum on a case-by-case basis.¹⁴

Notwithstanding Section 25.157(g), the Commission has ample authority under Section 316(a) of the Communications Act of 1934, as amended, to modify “[a]ny station license or construction permit ... if, in the judgment of the Commission such action will promote the public interest, convenience, and necessity.”¹⁵ The modification procedures under Section 316 do not require a rulemaking proceeding, but rather an adjudicatory hearing that allows only the “holder of the license or permit” and “[a]ny other licensee or permittee who believes its license or permit would be modified” to challenge the proposed modification.¹⁶

Furthermore, CTIA offers no justification for initiating a rulemaking to consider further reallocating 2 GHz MSS spectrum merely two years after the Commission reallocated nearly half of the spectrum originally allocated for 2 GHz MSS.¹⁷ The 40 MHz of spectrum that remains allocated domestically for 2 GHz MSS consists primarily of globally harmonized MSS spectrum that is in scarce supply and is critical to homeland security and emergency response providers. Under the Intelligence Reform and Terrorism Prevention Act of 2004, the Commission is directed to assess the short-term and long-term spectrum needs of emergency response providers and report its findings to Congress by December 17, 2005.¹⁸ In fulfilling its responsibilities under the Act, the Commission cannot ignore the importance of MSS to homeland security.

decision whether to proceed by rulemaking or adjudication lies within the Commission’s discretion.”).

¹⁴ See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services*, 18 FCC Red 2223, ¶ 32 (“*AWS Third R&O*”) (“we will evaluate whether to redistribute [abandoned 2 GHz MSS] spectrum or make it available to new entrants after achievement of each of our system implementation milestones”).

¹⁵ 47 U.S.C. § 316(a).

¹⁶ 47 U.S.C. § 316(a)(1), (2). See *Western Broadcasting Co. v. FCC*, 674 F.2d 44, 53 (D.C. Cir. 1982) (“in enacting section 316, Congress made explicit the right of a license holder to show cause “by public hearing” why an order of modification should not issue”).

¹⁷ See *AWS Third R&O*, ¶ 28.

¹⁸ See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638, § 7502 (2004).

As the Satellite Industry Association noted, “[h]omeland security interests are using commercial satellites for critical activities such as direct and back-up communications, emergency response services, continuity of operations during emergencies, military support, and intelligence gathering.”¹⁹ In fact, the 2004 National Security Telecommunications Advisory Committee Satellite Task Force Report to the President found that the commercial satellite industry is critical to national, economic, and homeland security.²⁰ Moreover, the Commission consistently has acknowledged that MSS systems are uniquely capable of serving the needs of homeland security and emergency response providers.²¹

Since obtaining their authorizations four years ago, ICO and other 2 GHz MSS licensees have faced significant business disruptions and regulatory uncertainty regarding the amount of spectrum available to each licensee as a result of the Commission’s various decisions to reallocate spectrum and to revoke or reinstate certain 2 GHz MSS licenses. To ensure that the remaining 2 GHz MSS licensees are able to deploy services expeditiously, it is imperative that the Commission provide regulatory certainty and avoid unnecessary, protracted rulemaking proceedings that would deter capital investment and faithful execution of business plans. ICO and other MSS interests repeatedly have attested that the lack of sufficient spectrum available to MSS licensees has been a significant hindrance in attracting investment and developing strong business plans. Preserving the existing 2 GHz MSS allocation is especially important given that the resolution of pending appeals of 2 GHz MSS license cancellations could require the Commission to reinstate the licenses and further reduce the amount of spectrum available to each licensee.

¹⁹ Comments of the SIA at 7, WT Dkt. No. 05-157 (Apr. 28, 2005) (footnotes omitted).

²⁰ *Id.*

²¹ See, e.g., *Flexibility for Delivery of Communications by Mobile Satellite Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, 18 FCC Rcd 1962, 1978 ¶ 28 (2003) (MSS systems “permit law-enforcement, aid agencies and the public to communicate from remote locations on the land, on the sea or in the air through a single telephone number”); *Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Service in the Upper and Lower L-band*, Notice of Proposed Rulemaking, 11 FCC Rcd 11675, ¶ 12 (1996) (satellites “provide emergency communications to any area in times of emergencies and natural disasters”); Remarks of FCC Commissioner Michael J. Copps, SIA/SBCA Folger Library Dinner (Mar. 22, 2005) (“Over 80% of federal agencies are using satellites to communicate, from FEMA to the Coast Guard to our customs and border control agents. With satellites, our communications infrastructure is more resilient and more difficult to undermine.”).

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Accordingly, ICO urges the Commission to reject CTIA's efforts to initiate a rulemaking to consider a further reallocation of 2 GHz MSS spectrum. ICO further urges the Commission to redistribute abandoned 2 GHz MSS spectrum to the remaining licensees.

Pursuant to Section 1.1206(b) of the Commission's rules, an electronic copy of this letter is being filed.

Sincerely,

/s/ Suzanne Hutchings Malloy
Suzanne Hutchings Malloy
Senior Regulatory Counsel

cc: Karl Kensinger
William Bell