



September 9, 2008

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room TW-A325  
Washington, D.C. 20554

Re: **EX PARTE**  
WT Docket No. 02-55; ET Docket Nos. 00-258 and 95-18

Dear Ms. Dortch:

New ICO Satellite Services G.P. (“ICO”) submits this response to Sprint Nextel’s (“Sprint”) request, filed in WT Docket No. 02-55 on June 25, 2008, seeking so-called “housekeeping” adjustments to the deadlines and procedures tied to the June 26, 2008, deadline for completing reconfiguration of the 800 MHz band, including true-up and cost sharing obligations associated with broadcast auxiliary service (“BAS”) clearing.<sup>1</sup>

ICO opposes any modification to the June 26, 2008 deadline to the extent it relates to the BAS relocation cost-sharing mechanism the Commission established in 2004 and further clarified in its recent order granting Sprint’s extension of time to complete BAS clearing.<sup>2</sup> Sprint’s request would undermine the Commission’s policy goal of striking a balance that does not unreasonably burden either Sprint or MSS licensees.<sup>3</sup> A grant of Sprint’s request that does not make clear that the BAS relocation reimbursement rules are unchanged would relieve Sprint of risks it knowingly assumed in exchange for valuable 2 GHz spectrum, shifting to MSS operators additional consequences of Sprint’s failure to complete its reconfiguration responsibilities in a timely manner. ICO urges the Commission to clarify that it will not modify the June 26, 2008 date for the sunset of the reimbursement obligation of MSS operators.

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<sup>1</sup> See Letter from Lawrence R. Krevor, Sprint, to Marlene H. Dortch, FCC, WT Dkt. No. 02-55, at 1 (June 25, 2008) (“Sprint Letter”).

<sup>2</sup> See *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice Of Proposed Rulemaking, 23 FCC Rcd 4393, ¶ 16 n.34 (2008) (“2008 800 MHz MO&O”).

<sup>3</sup> See *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, ¶ 261 (2004) (“800 MHz Order”).

## I. Sprint's Request is Procedurally Defective

To begin, the Commission should reject Sprint's request as procedurally defective because it constitutes an untimely filed petition for reconsideration of the Commission's August 2004 *800 MHz Order*.<sup>4</sup> The Commission in fact affirmed on reconsideration its limitations on the reimbursement obligation of 2 GHz mobile satellite service ("MSS") operators,<sup>5</sup> and Sprint did not seek reconsideration of either the initial order or the order on reconsideration within the required filing periods.<sup>6</sup>

As it did with its 30-month BAS reconfiguration license condition, Sprint has waited until the eve of the end of the 36-month reconfiguration period to seek relief from its license conditions, without regard for the impact of its last-minute request on the Commission or on affected parties. Sprint's requests (and its latest foray into Federal Court) are a procedurally defective and unwarranted attempt to renegotiate the terms of its deal for 10 megahertz of nationwide 1.9 GHz spectrum.

## II. The Commission Should Reject Sprint's Request to Renegotiate its Spectrum Deal at MSS Expense

Due to the unique nature of Sprint's spectrum acquisition and reconfiguration commitments, the Commission in August 2004 rejected open-ended BAS relocation cost sharing requirements and expressly adopted significant limitations on the scope of the BAS reimbursement obligation for MSS licensees. First, the Commission limited the cost-sharing obligation so that it applies only to MSS licensees that "enter the band prior to the end of [the 36-month 800 MHz band reconfiguration] period."<sup>7</sup> Second, the Commission limited the amount Sprint would be entitled to seek to recover to the actual costs it incurred "for clearing the top thirty markets and relocating all fixed BAS facilities" and to "an MSS licensee's *pro rata* share of the 1990-2025 MHz spectrum."<sup>8</sup> Third, the Commission further limited the amount of Sprint's reimbursement to "eligible clearing costs incurred during the 36-month reconfiguration period."<sup>9</sup> In adopting these

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<sup>4</sup> See *Improving Public Safety Communications in the 800 MHz Band*, Third Memorandum Opinion and Order, 22 FCC Rcd 17209, ¶ 9 (2007) ("*2007 800 MHz MO&O*") (rejecting Sprint's request to redefine a benchmark in the 800 MHz band reconfiguration process as a procedurally defective, untimely filed petition for reconsideration).

<sup>5</sup> See *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 20 FCC Rcd 16015, ¶¶ 112-13 (2005) ("*2005 800 MHz MO&O*").

<sup>6</sup> See 47 U.S.C. § 405(a) (a "petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order ... complained of").

<sup>7</sup> See *800 MHz Order* ¶ 261.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

limitations, the Commission expressly intended to “strike[] an appropriate balance that is not unreasonably burdensome on [Sprint] or MSS licensees.”<sup>10</sup>

This balancing assumed timely clearing of BAS incumbents prior to the end of the reconfiguration period; the long delay in BAS relocation disrupted this balance by severely restricting MSS access to spectrum until BAS relocation is complete. The Commission in 2004 carefully balanced the overlapping relocation obligations of Sprint and MSS operators, minimizing disruption to BAS operations and limiting the period in which MSS operators lacked full spectrum access. MSS relocation rules before 2004 had required that all BAS operations cease once MSS cleared the top 30 and fixed BAS markets, giving MSS primary access to the spectrum and the ability to earn revenue from nationwide commercial operations while clearing was still underway. In adopting the Sprint/BAS joint relocation scheme in 2004, the Commission expected that Sprint would complete relocation at around the time MSS operators began operations, minimizing disruption to BAS operations (by keeping them primary until relocation was complete) and ensuring primary MSS access to spectrum long before the due date for reimbursement obligations. That expectation has been frustrated by the long delay in completion of BAS relocation: BAS remains primary indefinitely; MSS primary access to nationwide spectrum is delayed indefinitely;<sup>11</sup> and MSS has had (and continues to have) no ability to earn revenue prior to the due date for reimbursement obligations, or the certainty needed to plan to do so.

Grant of Sprint’s ‘housekeeping’ request, to the extent it does not make clear that the sunset date for BAS relocation reimbursement for MSS operators is unchanged, would further disrupt this balancing and would unreasonably burden MSS.<sup>12</sup> Despite becoming the first MSS operator to launch its satellite successfully and to meet the final FCC milestone requirement, ICO has been unable to enter the band because of the delays in Sprint’s relocation of BAS licensees. As a result, ICO has incurred, and continues to incur, substantial costs including operational costs, equity and borrowed capital costs, and

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<sup>10</sup> *Id.*

<sup>11</sup> As the Commission has found, MSS operators can “enter the band” only if BAS licensees in the top 30 markets and all fixed BAS links have been relocated, which will happen well after the June 26, 2008 date. *See 2008 800 MHz MO&O* ¶ 39 n.120 (“Of course, if the BAS licensees are relocated by another party, such as Sprint Nextel, then the 2 GHz MSS operators can *enter the band* since BAS in the top 30 markets and all fixed links will have been relocated. However, this has *not* occurred, and the obligation of MSS under the top 30 market rule therefore still applies.”) (emphasis added). Because BAS relocation has not been completed, MSS operators to date have not been permitted under the “top 30 market rule” to “enter the band.” *Id.* The Commission has proposed to eliminate the “top 30 market rule” to allow 2 GHz MSS operators to begin operation by January 1, 2009. *Id.* ¶ 49.

<sup>12</sup> Sprint claims this extension would simply “harmonize” its June 26, 2008 reconfiguration deadline and the expiration date of the reimbursement obligation. *See* Sprint Letter at 6.

lost revenues and profits. Extending ICO's reimbursement obligation at this late date would be unreasonably burdensome, particularly when ICO has incurred these costs without any opportunity to enter the band and recoup its costs by launching its service.

### III. Conclusion

Based upon the foregoing, ICO urges the Commission to make clear that it will not modify the June 26, 2008 date for the sunset of the reimbursement obligation of MSS operators. Sprint's request is procedurally defective and should not even be considered. Moreover, Sprint's failure to meet the June 26, 2008 reconfiguration deadline and its request for an indefinite extension of that deadline do not, and should not, alter the cost sharing mechanism established by the Commission in 2004. Otherwise, by extending the expiration date of the BAS reimbursement obligation to coincide with any extension granted for Sprint's reconfiguration deadline, the Commission would reward Sprint's failure to meet its regulatory obligations at the expense of MSS operators. More importantly, the Commission would be allowing Sprint to renegotiate the terms of its spectrum deal, reversing its earlier finding that Sprint should bear the responsibility if the deal ultimately is less favorable than anticipated for Sprint.<sup>13</sup>

Respectfully submitted,

/s/ Suzanne Hutchings Malloy

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<sup>13</sup> See 800 MHz Order ¶ 214.