

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Public Safety Communications in the 800 MHz Band)	WT Docket 02-55
)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels)	
)	
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)	ET Docket No. 00-258
)	
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
)	

OPPOSITION TO SUPPLEMENTAL JOINT REQUEST

NEW ICO SATELLITE SERVICES G.P.

Cheryl A. Tritt
Phuong N. Pham
Morrison & Foerster LLP
2000 Pennsylvania Ave., NW, Suite 6000
Washington, D.C. 20006

Its Counsel

Suzanne Hutchings Malloy
Senior Vice President, Regulatory Affairs
Peter A. Corea
Senior Regulatory Counsel
815 Connecticut Avenue, N.W., Suite 610
Washington, D.C. 20006
(202) 330-4005

March 9, 2009

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. BACKGROUND	2
III. GRANT OF THE JOINT REQUEST IS UNWARRANTED ABSENT COMMISSION ACTION TO MITIGATE THE HARM CAUSED BY THE BAS RELOCATION DELAYS.....	4
A. The Requested Extension Would Delay MSS Entry By Nearly Two Years And Likely Longer	5
B. The Requested Extension Would Ignore MSS Interests And Undermine The Commission’s Policy Goal Of Ensuring Timely MSS Entry	8
IV. SPRINT’S EFFORTS TO CHANGE THE COST-SHARING RULE SHOULD BE REJECTED.....	10
V. CONCLUSION.....	16

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Public Safety Communications in the 800 MHz Band)	WT Docket 02-55
)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels)	
)	
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)	ET Docket No. 00-258
)	
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
)	

OPPOSITION TO SUPPLEMENTAL JOINT REQUEST

I. INTRODUCTION AND SUMMARY

New ICO Satellite Services G.P. (“ICO”), in response to the Commission’s public notice released on February 27, 2009,¹ opposes the supplemental joint request (“Joint Request”) filed by Sprint Nextel Corporation (“Sprint”), the Association for Maximum Service Television, the National Association of Broadcasters, and the Society of Broadcast Engineers (collectively, the “Sprint/BAS Parties”), unless certain prerequisites are met. The Joint Request seeks a waiver of the Commission’s rules to further extend the original September 2007 broadcast auxiliary service

¹ See FCC Public Notice, Office of Engineering and Technology Declares Sprint Nextel, Inc. Request for a Waiver of the 2.0 GHz BAS Relocation Deadline to Be A “Permit-But Disclose” Proceeding for Ex Parte Purposes, DA 09-468 (Feb. 27, 2009).

(“BAS”) clearing deadline until February 7, 2010.² Before the Commission rules on the Joint Request, it should expedite consideration of its pending rulemaking to eliminate the “top 30 market rule”³ and allow mobile satellite service (“MSS”) operators to initiate service.⁴ In addition, the Commission should reject Sprint’s request for further relief of its obligations through modification of the BAS cost-sharing rules.

II. BACKGROUND

On March 5, 2008, the Commission waived until March 5, 2009, the deadline by which Sprint is required to complete BAS relocation.⁵ In doing so, the Commission granted an 18-month extension of the original September 7, 2007, relocation deadline, rather than the 29-month extension initially requested by the Sprint/BAS Parties.⁶ The Commission found that a 29-month extension is “not warranted” and “would delay the ability of MSS operators to provide commercial service until long after their satellite systems are expected to be operational.”⁷ The Commission further found that the “inability of MSS systems to begin operation under the current rules until the top 30 markets are cleared, the enormous up-front build and launch costs that make rapid initiation of income-producing service vital to the success of a satellite venture, and, in the case of TerreStar, the potential public safety benefits associated with its federal

² See Supplemental Joint Request Concerning BAS Relocation of Sprint Nextel Corporation, National Association of Broadcasters, Association for Maximum Service Television, Inc. and Society of Broadcast Engineers (Feb. 12, 2009) (“Joint Request”).

³ 47 C.F.R. § 74.690(e) (requiring the relocation of BAS licensees in the top 30 markets and all fixed BAS links before MSS can begin operations).

⁴ See *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 4393 (2008) (“BAS Order” or “FNPRM”).

⁵ See *BAS Order* ¶ 1.

⁶ *Id.*

⁷ *Id.* ¶ 32.

government contract obligations all serve to necessitate a quicker conclusion of the BAS relocation process.”⁸

The Commission concluded that “permitting MSS operation by [March 5, 2009] serves the public interest,” but determined that it should address the necessary rule modifications in a rulemaking proceeding.⁹ Accordingly, the Commission issued the *FNPRM*, in which it tentatively concluded to eliminate the “top 30 market” rule to permit MSS to begin offering both satellite and ancillary terrestrial component (“ATC”) services nationwide by January 1, 2009, even if BAS relocation is not completed.¹⁰

ICO launched its satellite in April 2008 and met the last milestone requirement in May 2008, yet has been barred from commencing service pending resolution of the *FNPRM*. Consequently, ICO has incurred, and continues to incur, substantial costs including operational costs, equity and borrowed capital costs, and lost revenues. Moreover, it has become impossible for MSS operators to interject themselves into the relocation process in a way that would accelerate the BAS relocation schedule.¹¹ The Commission has agreed, finding that “Sprint, despite its delays, has now substantially engaged most BAS incumbents in the relocation process, and duplicating those efforts would be enormously inefficient—not to mention

⁸ *Id.* As the Bureau has noted, ICO’s prospective MSS/ATC services also will offer substantial public safety benefits by “greatly expand[ing] the reach of devices that can enhance public safety and enable users to communicate in disaster situations when traditional cellular networks are inaccessible.” *New ICO Satellite Services G.P.*, 24 FCC Rcd 171, ¶ 8 (IB 2009).

⁹ *BAS Order* ¶ 37.

¹⁰ *Id.* ¶ 52.

¹¹ *See, e.g.*, ICO Comments on Sprint/BAS Relocation Proposal, WT Dkt. No. 02-55, at 8-9 (Dec. 19, 2007); Letter from Suzanne H. Malloy, ICO, to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 02-55, at 2 (June 14, 2007) (“ICO June 2007 Letter”); ICO Comments and Request for Expedited Relief, WT Dkt. No. 02-55, at 5 (Apr. 13, 2007) (noting impracticality of securing separate and more aggressive relocation arrangements between BAS and MSS licensees given that Sprint has already concluded relocation agreements with a number of BAS licensees, and given the current commitment of Sprint and broadcaster resources to their joint relocation plans).

counterproductive and frustrating to the BAS incumbents that have already invested substantial time and effort with Sprint.”¹²

As these delays continue, however, the measures the Commission adopted to permit launch and testing of MSS systems are inadequate to permit the initiation of service. The Commission thus tentatively concluded in its *FNPRM* that it should eliminate the top 30 market rule to permit MSS systems to begin service as soon as January 1, 2009.¹³ Grant of the Joint Request without addressing the need for timely commencement of MSS would be inconsistent with the Commission’s tentative conclusions in the *FNPRM*. The Commission should not grant the Joint Request absent a decision on the *FNPRM* to permit MSS operators to begin service even if BAS relocation is not completed.

III. GRANT OF THE JOINT REQUEST IS UNWARRANTED ABSENT COMMISSION ACTION TO MITIGATE THE HARM CAUSED BY THE BAS RELOCATION DELAYS

The Commission may waive its rules if the waiver “would not undermine the underlying policy objectives of the rule in question” and would serve the public interest.¹⁴ In granting a

¹² *BAS Order* ¶ 30 (quoting ICO June 2007 Letter at 2). When the Commission imposed BAS relocation obligations upon Sprint in August 2004, it allowed MSS licensees 30 days to review Sprint’s relocation plan and to “identify to [Sprint] and the Commission which of the top thirty TV markets and fixed BAS operations, *if any*, they intend to invoke involuntary relocation.” *Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969, ¶ 257 (2004) (“*800 MHz Order*”) (emphasis added). The Commission further granted MSS licensees the option to allow Sprint to proceed with its relocation plan and stated that “[i]f MSS licensees choose not to trigger involuntary relocation, [Sprint] will proceed under its plan to relocate BAS incumbents.” *Id.* (emphasis added). Sprint itself also acknowledged that MSS operators “may choose to let Sprint Nextel take the lead in relocating BAS licenses.” Sprint Opposition to ICO Comments and Request for Expedited Relief, WT Dkt. No. 02-55, at 5 (Apr. 26, 2007).

¹³ *BAS Order* ¶ 40.

¹⁴ See *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, Order and Authorization, 15 FCC Rcd 3385, ¶ 14 (IB 1999); see also *Northeast Cellular Telephone Co., LP v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“*WAIT Radio*”).

waiver, the Commission may consider special circumstances, including “considerations of hardship, equity, or more effective implementation of overall policy.”¹⁵ Grant of the Joint Request is not warranted where, as here, it would undermine the Commission’s policy objectives and would not serve the public interest. The Commission should grant a waiver only in conjunction with action on the *FNPRM* to mitigate the harms resulting from extensive delays in BAS relocation.

A. The Requested Extension Would Delay MSS Entry By Nearly Two Years And Likely Longer

In adopting the original Sprint-BAS relocation deadline, the Commission expressly intended to “strike[] an appropriate balance that is not unreasonably burdensome upon [Sprint] as an entrant in the band, while also fair to the incumbents and MSS entrants.”¹⁶ The Commission contemplated that Sprint “will likely relocate most BAS licensees before MSS licensees begin operations under their milestone requirements.”¹⁷ Thus, in striking an appropriate balance of interests among MSS operators, Sprint, and BAS licensees, the Commission adopted a BAS relocation schedule that would ensure that most, if not all, BAS licensees would be relocated by the time that MSS operators are able to commence service. The Commission did not anticipate that the Sprint-BAS relocation schedule would prevent MSS operators from commencing service for any significant period of time, let alone an indefinite period of time.

Nonetheless, continued delays in the relocation process have kept ICO out of the market for close to a year, and ICO is acutely and justifiably concerned that Sprint’s progress reports indicate that BAS clearing is not on pace to be completed even by the requested February 2010

¹⁵ *WAIT Radio*, 418 F.2d at 1159.

¹⁶ *See 800 MHz Order* ¶ 252.

¹⁷ *Id.* ¶ 270.

deadline.¹⁸ During the nearly five-year period (including the 18-month extension granted to Sprint) since the Commission required Sprint to relocate BAS licensees, Sprint has cleared only 36 percent of the BAS markets covering merely one-third of the U.S. population.¹⁹ According to Sprint's progress reports, during the 10-month period from April 2008 to February 2009, the percentage of BAS licensees that have been relocated increased from 4 percent to 32 percent.²⁰ At this rate of progress, Sprint will be far from completing BAS relocation even by the requested further extension deadline of February 2010.

Sprint has explained that the multi-year delay has been caused by, among other things, weather, vendor delay, sweeps months, state contracting requirements, and the general, unanticipated complexity and difficulty of the task.²¹ Because Sprint attributes its delays to "new challenges and obstacles seeming to arise at every turn,"²² the affected parties can take no comfort that there will not be even further requests for extension in the future.

Moreover, the schedule appears to be slipping substantially even from Sprint's delayed projections. In the four months spanning October 2008 to January 2009, only 6 of the 51 markets scheduled to be cleared in those months were cleared; 45 of the 51 have been

¹⁸ This is the case even before taking into account the four-month delay of the DTV transition. *See* Letter from Trey Hanbury, Director, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Dkt. 02-55 (Nov. 26, 2008) ; Letter from Trey Hanbury, Director, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Dkt. 02-55, at 3 (Feb. 2, 2009) ("February 2009 Report").

¹⁹ *See* Joint Request at 5.

²⁰ *See* February 2009 Report, App. B at 1; Letter from Trey Hanbury, Sprint, to Marlene H. Dortch, FCC, WT Dkt. No. 02-55, App. A at 1 (Apr. 1, 2008).

²¹ *See* Joint Request at 9-18.

²² *Id.* at 3.

rescheduled, most of them to March 2009, or later.²³ The schedule slippage markedly increased as the March 2009 deadline approached:

- **April 2008 Report:** 14 markets delayed (21 out of 213 transitioned)
- **June 2008 Report:** 7 markets delayed from prior report (30 out of 213 transitioned)
- **August Report 2008:** 16 markets delayed from prior report (39 out of 213 transitioned)
- **October Report 2008:** 21 markets delayed from prior report (55 out of 213 transitioned)
- **December Report 2008:** 35 markets delayed from prior report (63 out of 213 transitioned)
- **February 2009 Report:** 52 markets delayed from prior report (71 out of 213 transitioned)

Particularly troubling is the fact that Sprint goes so far to excuse its lateness that it even blames the MSS providers that have been disadvantaged,²⁴ claiming that meeting the Commission's mandated benchmark to clear MSS trial markets caused "several months" of additional delay.²⁵ This of course is untrue, and Sprint does not even attempt to provide support for its claim. In fact, clearing these markets by September 2008 was part of the Sprint/BAS Parties' plan that the Commission relied upon "to help keep the BAS transition on schedule for timely completion" in granting Sprint's waiver request.²⁶ At the same time the Commission

²³ ICO does not know how many of the scheduled and re-scheduled markets were cleared since Sprint filed its February report. Under the BAS reporting process, ICO will be unable to determine what clearing has actually occurred in February and March until Sprint files its April clearing report.

²⁴ While ICO is willing to give Sprint the benefit of the doubt that the delays are justified, Sprint persists in blaming ICO at every turn for Sprint's own failures to meet its commitments.

²⁵ At least one of the MSS high priority markets – Las Vegas – was cleared months before this benchmark was ordered. Letter from Lawrence R. Krevor, Vice President, Sprint, to Marlene H. Dortch, Secretary, FCC (Jan. 2, 2008) (notifying the Commission that the Las Vegas, Nevada market was transitioned on December 15, 2007.)

²⁶ *BAS Order* ¶ 43. Sprint also mischaracterizes the extent to which this priority clearing was done to accommodate MSS when it claims that clearing these markets allowed MSS operators to "initiate service." See Letter from Lawrence R. Krevor, V.P. - Spectrum, Sprint to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 02-55 at 2 (Oct. 8, 2008) ("Sprint October 2008 Letter").

expected the plan to serve as a useful tool to consider how successfully it is implemented in determining whether and for how long a waiver of the BAS relocation process might be extended past the beyond March 5, 2009 deadline.²⁷

Thus, as in their initial waiver request, the Sprint/BAS Parties' Joint Request offers no firm interim or final benchmarks for completing BAS relocation and no proposed additional safeguards for ensuring BAS relocation by the requested extension deadline. Rather, they merely reiterate the "tentative nature of the accelerated schedule" and the "fluid nature of [the] relocation process."²⁸ The lack of assurances that BAS relocation will be completed even by the requested February 2010 deadline makes action on the *FNPRM* particularly important.

B. The Requested Extension Would Ignore MSS Interests And Undermine The Commission's Policy Goal Of Ensuring Timely MSS Entry

The Sprint/BAS Parties offer no consideration of the impact of their requested extension on MSS entry and no proposal for mitigating the resulting substantial harm to MSS and the general public. In rejecting the Sprint/BAS Parties' original request for 29-month extension, the Commission specifically cited the "inability of MSS systems to begin operation under the current rules until the top 30 markets are cleared" and "the enormous up-front build and launch costs that make rapid initiation of income-producing service vital to the success of a satellite venture" as reasons for "necessitat[ing] a quicker conclusion of the BAS relocation process."²⁹ All of these

The Commission ordered the Sprint/BAS Parties to clear these markets merely to allow for system launch and testing. *See BAS Order* ¶ 43.

²⁷ *Id.* ¶ 36.

²⁸ Joint Request at 3.

²⁹ *BAS Order* ¶ 32.

considerations remain, and yet the Sprint/BAS Parties offer no attempt to resolve or even address any of them.³⁰

Further delays exacerbate the disruption to MSS planning and introduction of service to the public, and leave MSS without the ability to earn revenues to offset operating and capital costs. ICO has met all milestone requirements to construct and launch its MSS system, made all necessary arrangements for clearing fixed service links in the 2180-2190 MHz band, and spent hundreds of millions to construct, insure, launch and operate its system. Once the BAS clearing delays became known, ICO made accommodations in its testing and trial rollout in light of BAS clearing delays.³¹ Despite these accommodations, ICO continues to incur monthly costs to operate and maintain its satellite and ground networks. In total, MSS operators will have expended many hundreds of millions to deploy next-generation systems, while their ability to provide service is restricted by the top 30 market rule.³² As delays in BAS relocation continue, ICO is faced with the need to carry substantial costs while being restricted from providing commercial services. The requested delays will create additional uncertainty regarding the

³⁰ *Id.* ¶ 34 (“Because of the delay in the relocation of BAS, a new and significant element of this proceeding is the balancing of our interest in finding a means of permitting MSS operators to begin to deploy nationwide service as soon as January 1, 2009 with a realization that some unrelocated BAS operators may still be operating in the band after that date.”)

³¹ Restricting trial operations to the Las Vegas and Raleigh-Durham area is far from ideal. If ICO were permitted to operate nationwide, even prior to commencing commercial operations, ICO could be doing much more to test its satellite system and related equipment throughout the ICO G1 coverage area. *See* Sprint October 2008 Letter at 2

³² Sprint’s repeated efforts to change the cost-sharing rules are especially egregious in light of this burden. As stated in the past, ICO opposes any alteration of the BAS cost sharing rule as set-out in the 800 MHz Order. The true-up for the 1.9 GHz clearing has apparently not occurred as required last year – and Sprint has not provided any public accounting for its costs. Given the extensive delay indicated by Sprint and supported by the broadcasters – as well as reported delays in the 800 MHz re-banding process - such true-up is not expected to occur for many more months.

timing of MSS entry, hamper planning for the introduction of new satellite services, and deprive the public of the benefits offered by these services.

Grant of the Joint Request for further extension of the deadline is not warranted without measures to provide certainty and predictability regarding the date by which MSS systems may initiate service. These measures include eliminating the top 30 market rule, as the Commission proposed in the *FNPRM*, to allow MSS operators to commence service immediately. Both ICO and TerreStar have submitted detailed technical studies demonstrating that they can provide service in uncleared markets on a secondary basis without disrupting BAS operations.³³ These technical studies are uncontested.³⁴ Thus, the record developed in response to the *FNPRM* fully supports the Commission's proposal to eliminate the top 30 market rule to allow MSS operators to commence nationwide service immediately.

IV. SPRINT'S EFFORTS TO CHANGE THE COST-SHARING RULE SHOULD BE REJECTED

In filings in numerous proceedings and venues over the past year, Sprint unjustifiably has sought action to require ICO and TerreStar to pay Sprint for open-ended costs (including prospective costs) in connection with Sprint's obligation to relocate BAS incumbents from the 1.9 GHz band. Sprint has sought and received substantial relief from its 800 MHz re-banding and BAS relocation obligations, all the while seeking Commission actions that would both delay MSS operators' ability to commence service and unfairly change the reimbursement rules after

³³ See MSS-BAS Spectrum Sharing Analysis prepared by Wireless Strategy), WT Dkt. No. 02-55 (Apr. 30, 2008) (attached to ICO Comments as Annex A); TerreStar Reply Comments, WT Dkt. No. 02-55 at 5-6 (May 30, 2008).

³⁴ Neither Sprint nor the BAS Parties submitted any technical analysis to refute ICO's and TerreStar's technical studies.

the fact.³⁵ Sprint essentially asks to renegotiate the terms of its spectrum deal, and to reverse the Commission’s finding that Sprint should bear the responsibility if the deal ultimately is less favorable than anticipated for Sprint. Rather than re-writing MSS obligations, as Sprint urges, the Commission should preserve this careful balancing and affirm the risks and obligations Sprint explicitly undertook in exchange for valuable spectrum assets.

To accommodate Sprint’s unique spectrum acquisition and reconfiguration commitments, the Commission in August 2004 altered its traditional relocation cost-sharing principles and expressly adopted significant limitations on the scope of the BAS reimbursement obligation for MSS licensees. Specifically, the Commission limited the cost-sharing obligation to apply only to MSS licensees that “*enter the band* prior to the end of [the 36-month 800 MHz band reconfiguration] period.”³⁶ The Commission further limited the amount of Sprint’s reimbursement to “eligible clearing costs incurred during the 36-month reconfiguration period.”³⁷ Accordingly, as the Commission states in the *Order and FNPRM*, ICO can only *enter the band* once the top 30 markets and all fixed links have been relocated.³⁸ The Commission has tentatively concluded that it “will eliminate the top 30 market rule to allow the MSS

³⁵ Request Letter from Lawrence R. Krevor, V.P. - Spectrum, Sprint to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 02-55 (June 25, 2008) (“Sprint June 2008 Letter”) Letter; Sprint October 2008 Letter at 2, 5; Letter from Trey Hanbury, Director, Sprint to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 02-55 (Feb 26, 2009); Sprint Petition to Deny, File Nos. SES-LIC-20071203-01646 *et al.* (Apr. 4, 2008).

³⁶ *See 800 MHz Order* ¶ 261 (emphasis added). The Commission also 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.” *Id.*

³⁷ *Id.*

³⁸ *BAS Order* ¶ 39 n.120.

operators to *enter the band* in January 2009,”³⁹ but specifically declined to waive the rule pending resolution of that rulemaking proceeding.

The Commission made clear that this change from traditional cost-sharing rules intended to strike “an appropriate balance that is not unreasonably burdensome upon [Sprint] as an entrant in the band, while also fair to the incumbents and MSS entrants.”⁴⁰ The Commission specifically noted that the risks that Sprint assumed in this overall balancing.⁴¹ The Commission expressly ordered Sprint to clear the entire 1990-2025 MHz band as a condition of its 1.9 GHz spectrum rights “because it promotes responsible use by Nextel of the 1.9 GHz spectrum we are granting as part of our solution to the public safety interference problem, and because it provides a rapid and efficient band-clearing solution at 1.9 GHz that benefits all parties—Nextel, BAS, MSS, other prospective users of the band above 1995 MHz, and the public.”⁴² Now that Sprint has failed to meet dates that it proposed to the Commission, it seeks to shift the burden of delays in BAS relocation efforts to MSS operators. This effort should be rejected. Were the Commission to grant Sprint’s request, it 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 is ultimately less favorable than anticipated for Sprint.⁴³

³⁹ *Id.* ¶ 40.

⁴⁰ *800 MHz Order* ¶ 252.

⁴¹ *See id.* ¶ 87 (“[A]s a condition precedent to commencing operations with the 1.9 GHz band pursuant to any of its licenses modified pursuant to this *Report and Order*, [Sprint] shall file with the Commission an acknowledgement acceptable to the Commission [Sprint] shall acknowledge that it has accepted the risk of delay and invalidity and that, therefore, it cannot recover its costs or any damages associated with implementation or non-implementation of the *Order* from the Commission or any governmental entity.”).

⁴² *Id.* ¶ 304.

⁴³ *Id.* ¶ 214 (“[Sprint] is taking the very substantial risk that it could end up incurring costs that are greater than the value of the spectrum rights it receives. This is because we have ... imposed

Sprint failed to meet its license conditions, and after employing tactics including last minute filings and intense pressure involving the public safety re-banding, has now received limited relief under the Commission’s oversight. Sprint lightly seeks adjustment of its license conditions (both the BAS clearing and 800 MHz reconfiguration) by stating the June 26, 2008 deadline [for imposition of cost sharing on MSS operators] is based on “the Commission’s previous *assumption* that both BAS and 800 MHz relocations would be completed by June 26, 2008.”⁴⁴ This argument misrepresents the record in this matter. The 30-month and 36-month reconfiguration periods were presented to the Commission by Sprint as an inducement to enter into an unprecedented spectrum deal, worth billions of dollars. The Commission accepted this offer, and conditioned Sprint’s modified spectrum licenses on meeting these commitments – announcing that failure to meet the Commission’s conditions would subject Sprint to the possibility of substantial penalties, including revocation of Sprint’s licenses.

Sprint’s bases its bid to rework its spectrum deal on selective citations that it edits to omit pertinent – and critical – caveats. For example, Sprint states “the Commission’s traditional cost-sharing principles are applicable to the 1990-2025 MHz band” but omits from its quotations the Commission’s express statement that this scheme is *modified* due to Sprint’s unique access to 1.9 GHz spectrum.⁴⁵ The Commission’s BAS extension order full quote is as follows:

significant obligations beyond what the parties proposed to ensure that the public receives full benefit in exchange for making other spectrum available to [Sprint]).

⁴⁴ Sprint June 2008 Letter at 8 (emphasis added).

⁴⁵ See e.g., Sprint October 2008 Letter at 5. MSS rights were also detrimentally modified. To accommodate the Sprint plan, and broadcasters’ preferences, MSS was stripped of the opportunity to achieve primary status in the band – even after meeting its top 30 markets and fixed links clearing burden. The corresponding benefit to MSS was that Sprint agreed to clear BAS nationwide *within thirty months* and to pay the upfront costs for BAS relocation. *800 MHz Order* ¶ 270 (emphasis added). See also *id.* ¶ 253: The parties further contend that the thirty-month timeframe for relocating all BAS incumbents under the proposed Nextel-BAS relocation

As a general rule, the Commission’s traditional cost-sharing principles are applicable to the 1990-2025 MHz band. Under these procedures, the first new entrant into the band that incurs relocation expenses for the relocation of incumbents from portions of the band that the new entrant will not occupy is, as a general matter, eligible to obtain reimbursement from subsequent entrants in the band. *However*, the ***unique situation that led to the grant of spectrum to Sprint Nextel required the Commission to establish additional financial procedures for the band.***⁴⁶

Sprint carefully crops yet another citation to suggest that the Commission modified the MSS reimbursement sunset period solely to achieve “administrative efficiency in the accounting process.”⁴⁷ Sprint has said this repeatedly over the past year and in several different forums, each time conveniently omitting the end of the sentence, which reads in full:

The Commission decided to end the reimbursement obligations of other entrants to Nextel, and any reimbursement by Nextel to other entrants, at the end of the 800 MHz band true-up period for administrative efficiency in the accounting process ***and because of the unique circumstances in Nextel’s receipt of BAS spectrum.***⁴⁸

The Commission found that limiting the amount of Sprint’s reimbursement beyond the date specified strikes an appropriate balance that is not unreasonably burdensome on Sprint or MSS licensees. Yet Sprint’s numerous filings omit entirely that a critical component of this balance was that this date was set against Sprint’s unique spectrum deal. Sprint was immediately entitled to an unprecedented spectrum boon in return for its *commitment* to clear the bands (BAS and public safety) within certain deadlines that the company itself proposed (30 months and 36 months, respectively).⁴⁹ Now that Sprint has failed to meet these dates, it argues that it only

plan “should ensure that the 1990-2025 MHz band is cleared nationwide before MSS entrants are ready to begin service in the 2000-2025 MHz band.”

⁴⁶ *BAS Order* ¶ 15.

⁴⁷ See e.g., Sprint June 2008 Letter; Sprint October 2008 Letter.

⁴⁸ *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 20 FCC Rcd 16015, ¶ 113 (2005).

⁴⁹ Sprint’s 1.9 GHz licenses are conditioned on meeting BAS relocation obligations, from which Sprint has already sought, and partially received, relief. In December 2008, the Commission provided Sprint with partial relief of its clearing and true-up obligations for the 800 MHz band.

makes sense to have all of its other entitlements transferred forward as well, notwithstanding the injury to all of the other entities in the process.

Sprint also disingenuously suggests that MSS operators are somehow shifting costs to the “American taxpayer.”⁵⁰ Sprint’s own filings, however, indicate its total clearing costs in connection with the 800 MHz spectrum deal will be outside the range that would result in a true-up payment to the U.S. Treasury.⁵¹ The Commission found this representation to be compelling in granting Sprint relief of certain of its 800 MHz obligations.⁵²

Finally, Sprint dramatically understates the timing element of its obligations. The Commission gave Sprint immediate access to billions of dollars of 1.9 GHz spectrum in return for Sprint’s spectrum clearing commitment.⁵³ The subsequent merger of Sprint and Nextel clearly reduced Sprint’s immediate need for the 1.9 GHz spectrum – either for deployment of

The Commission did not act on Sprint’s request to modify the BAS clearing timelines or obligations at that time.

⁵⁰ See e.g., Sprint October 2008 Letter at 2.

⁵¹ In its June 25th 2008 “housekeeping” request, Sprint stated that it anticipates that it ultimately will spend more than \$2.8 billion (the minimum cash offset amount described above) in funding the 800 MHz and 1.9 GHz reconfiguration projects. It therefore is very unlikely that Sprint Nextel will owe any anti-windfall payment to the U.S. Treasury. Sprint June 2008 Letter at 7-8; Sprint Feb 27, 2009 10-K estimates 3.2 to 3.6 billion to complete. Sprint SEC Form 10-K (Feb. 27, 2009) (“Sprint Form 10-K”).

⁵² *Improving Public Safety Communications in the 800 MHz Band*, Fourth Memorandum Opinion and Order, 23 FCC Rcd 18512, ¶¶ 11-12 (2008). Sprint’s most recent 10-K filing estimates \$3.2 to 3.6 billion to complete its rebanding obligations, and reiterates that it is unlikely that it will be required to make a payment to the U.S. Treasury. Sprint Form 10-K at 8.

⁵³ See, e.g. *800 MHz Order* ¶ 222. (“We recognize that Nextel may need to apply revenues derived from 1.9 GHz service to meet its obligation to timely complete 800 MHz band reconfiguration. It can do so only if it is afforded timely and certain access to 1.9 GHz spectrum rights in exchange for vacating certain 800 MHz spectrum and assuming the cost of 800 MHz band reconfiguration. Reconfiguration of the 800 MHz band is essential to our goal of timely abating unacceptable interference to public safety, CII and other 800 MHz systems. Given the unique facts of this case, there is an inextricable connection between quick abatement of unacceptable 800 MHz interference and Nextel’s quick access to additional spectrum”).

services or for funding the 800 MHz re-banding – leading to protracted band-clearing. Sprint has exacerbated its delays by strategically waiting until the last minute to seek extensions of its deadlines. Yet at no point does Sprint acknowledge the effect of its gamesmanship on the other parties. The Commission should reject Sprint’s attempts to renegotiate the terms of its spectrum deal to its own ultimate benefit.

V. CONCLUSION

In sum, ICO requests that the Commission not grant the Sprint/BAS parties’ requested relief absent action to permit MSS to operate nationwide. Given the apparent complexity of the clearing process and related delays, the Commission should permit nationwide MSS operations independent of any further adjustments in the BAS relocation schedule in order to ensure the timely introduction of MSS. ICO therefore respectfully requests that the Commission (1) resolve the *FNPRM* to allow ICO to operate nationwide prior to providing Sprint/BAS the requested relief; (2) scrutinize the Sprint/BAS Parties clearing progress to ensure the BAS clearing process does not slip even further; and (3) permit ICO to operate on a primary basis no later than February 10, 2010. In addition, Sprint’s repeated attempts to forum shop for a favorable change to the BAS cost-sharing rule should be rebuked, and the Commission should reaffirm that ICO has not entered the band and has not triggered the cost-sharing requirements set out in the 800 MHz Order.

Respectfully submitted,

NEW ICO SATELLITE SERVICES G.P.

By: /s/ Suzanne Hutchings Malloy
Suzanne Hutchings Malloy
Senior Vice President, Regulatory Affairs
Peter A. Corea, Senior Regulatory Counsel
815 Connecticut Avenue, N.W., Suite 610
Washington, D.C. 20006
(202) 330-4005

Cheryl A. Tritt
Phuong N. Pham
Morrison & Foerster LLP
2000 Pennsylvania Ave., NW, Suite 6000
Washington, D.C. 20006
Its Counsel

March 9, 2009