

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

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| In the Matter of |) | |
| |) | |
| Improving Public Safety Communications in the 800 MHz Band |) | WT Docket No. 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 |

**REPLY COMMENTS OF SPRINT NEXTEL CORPORATION, THE
ASSOCIATION FOR MAXIMUM SERVICE TELEVISION,
THE NATIONAL ASSOCIATION OF BROADCASTERS, AND
THE SOCIETY OF BROADCAST ENGINEERS**

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I. INTRODUCTION AND SUMMARY

In this proceeding, New ICO Satellite Services G.P. (ICO) and TerreStar Networks Inc. (TerreStar) do not seriously contend that the BAS transition could have proceeded more quickly or efficiently than it has. To be sure, ICO and TerreStar feign indignation over the events that the Commission has found are beyond the control of either Sprint Nextel or the broadcasters to control. But the only quarrel ICO and TerreStar really have with a process that will leave them with access to twenty megahertz of pristine spectrum throughout the nation is that, eight years after receiving their

spectrum licenses without competitive bidding, the two operators will finally have to comply with their long-standing obligation to pay for the eligible costs of clearing the spectrum they have entered.

Sprint Nextel, the Association for Maximum Service Television (MSTV), the National Association of Broadcasters (NAB), and the Society of Broadcast Engineers (SBE) (together, the Joint Parties) have made enormous progress toward completing the BAS transition. While ICO and TerreStar have sat idle since 2001, Sprint Nextel has secured frequency relocation agreements (FRAs) with more than 99% of the nation's BAS incumbents. The broadcasters' vendors have delivered 63% of BAS licensees all of the equipment necessary to cut over to the new band plan. And 106 million people – more than one third of all Americans – now live in broadcast markets fully cleared of BAS incumbents below 2025 MHz.

At bottom, ICO and TerreStar do not object to granting the parties additional time, but simply want cost-free, immediate nationwide primary use of the 2000-2020 MHz band. The Commission must deny ICO and TerreStar's requests. First, ICO and TerreStar have long since triggered their reimbursement obligations to Sprint Nextel. Although ICO and TerreStar continue to try to interpose unrelated matters such as milestone obligations and the top thirty market rule, the facts demonstrate that each has engaged in various activities in the band that are more than sufficient to constitute band entry. To hold otherwise would in effect grant the operators cost-free use of the 2000-2020 MHz band and upend the nearly twenty years of Commission precedent that requires new entrants to pay their fair share of relocation expenses. The Commission's consistent precedent supports important public policy objectives against foisting all

relocation expenses onto the first entrant because doing so would discourage innovative deployments throughout the radiofrequency spectrum by casting a cloud over the ability of new entrants to recover relocation expenses from other licensees that will actually use the cleared frequencies. Second, precipitously granting ICO and TerreStar nationwide use of the 2000-2020 MHz band without first meeting their BAS clearing obligations would not only pose a grave risk to the ability of local broadcasters to continue to convey news, sports, weather, and safety-of-life information to the public, but also create precisely the wrong incentives for other beneficiaries of Commission spectrum reallocations to carry out their incumbent relocation responsibilities. Once ICO and TerreStar each pay their fair share of the costs Sprint Nextel has incurred in clearing their spectrum, the Joint Parties have no objection to ICO and TerreStar operating on a primary basis in the more than one-third of the country where BAS has already relocated. But until then, ICO and TerreStar, which have done nothing and spent nothing to relocate a single BAS licensee, cannot be awarded cost-free nationwide primary use of the 2000-2020 MHz band.

II. THE JOINT PARTIES HAVE DEMONSTRATED HOW UNANTICIPATED OBSTACLES AND LOGISTICAL CHALLENGES HAVE COMPLICATED THE TRANSITION PROCESS

The Joint Parties have exhaustively demonstrated how unanticipated and unavoidable challenges complicated the BAS transition process.¹ In six separate bi-

¹ Supplemental Joint Request Concerning the BAS Relocation, WT Docket No. 02-55, at 7-19 (Feb. 12, 2009) (Supplemental Request). As described in the Supplemental Request, shifting the deadline for BAS relocation to February 2010 will achieve the Commission's goal of "complet[ing] the BAS transition in a reasonable, prudent, and timely manner," and will help "ensure that the BAS transition causes the minimum possible disruption to BAS operations," consistent with the directives of both the Commission and members of Congress. *Improving Public Safety Communications in the*

monthly reports that span more than 280 pages, Sprint Nextel has explained in detail the physical and logistical challenges associated with replacing the antennas, cabling, control systems, transmitters, receivers, cameras, amplifiers and related electronic newsgathering equipment of every broadcaster in the nation. The bi-monthly reports identify, by station and market, the precise transition status of each licensee in the country and provide maps, implementation charts and a detailed explanation of impediments to continued progress toward transition. Taken together with the detailed, twenty-two page supplemental request filed in this proceeding, the record evidence supports granting in full the Joint Parties' originally requested BAS extension date of February 7, 2010.

A. Sprint Nextel Has Committed Hundreds of Millions of Dollars and Tens of Thousands of Employee Hours to Conclude the BAS Transition As Rapidly As Possible

Sprint Nextel has spent well over \$500 million in funding the upfront costs of BAS relocation and tens of thousands of employee hours in ongoing support of the transition process. Market kickoffs, inventory submissions, inventory verifications, and frequency relocation agreements are essentially complete, and Sprint Nextel and the broadcast community have made substantial gains across every remaining stage of the transition process. Indeed, as a result of Sprint Nextel's commitment and the good faith efforts of the nation's broadcast industry, 38% of all Designated Market Areas (DMAs)

800 MHz Band, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 4393, ¶ 42 (2008) (*Extension Order*); *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd. 12315, ¶ 42 (2000) (*Second MSS R&O*); see also *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd. 14969, ¶ 250 (2004) (*800 MHz R&O*).

covering more than 106 million Americans have completed the transition process and cleared the 1990-2025 MHz band for new technologies. And even in those markets yet to be transitioned, hundreds of licensees have already installed replacement BAS equipment or are actively working with vendors and manufacturers to complete the equipment delivery and installation process.

Despite widespread progress in transitioning BAS throughout every part of the nation, the Joint Parties noted – and the Commission affirmed – that several unanticipated and unavoidable developments have created delays in the BAS transition. The factors that the Commission found were beyond the Joint Parties’ individual or collective control include:

- The complexities of BAS systems, many of which became known only during Sprint Nextel's efforts to implement BAS relocation;
- The difficulty of planning relocations for systems that are often decades old;
- The limited number of BAS equipment manufacturers and their need to ramp up production to meet the unique demand on their services created by BAS relocation;
- A shortage of qualified equipment installers and tower climbers, whose schedules must be coordinated with separate work being undertaken as part of the DTV transition, and whose ability to install equipment can be hampered by weather events;
- Unexpected coordination problems between the new radio equipment and the preexisting controllers;
- Detailed tax and legal considerations that slowed initial FRA negotiations; and
- The failure of MSS licensees to conduct any meaningful negotiations or relocation activity.²

Since 2008, when the Commission first identified these sources of delay as among those beyond the Joint Parties’ control and provided additional time to complete the transition, new developments have further complicated the transition process. These include:

² *Extension Order* ¶ 31.

- Environmental hazards;
- Natural disasters;
- MSS market-prioritization demands;
- State contracting rules;
- Multiple bankruptcy filings by participating licensees;
- Federally mandated delay of the DTV transition; and
- Multiple electronic newsgathering helicopter accidents and fatalities.³

ICO and TerreStar do not seriously contest the impact of these issues on either BAS relocation progress or the compelling need for additional time to complete the transition. On the contrary, ICO concedes that the relocation delays and the Joint Parties' need for additional time is justified,⁴ and neither ICO nor TerreStar provide any evidence or specifics to dispute any of the factors identified by the Joint Parties.⁵

Instead of responding to the facts, ICO and TerreStar attempt to invent new ones. After comparing projected relocation dates against actual relocation dates, for instance, ICO and TerreStar mistakenly conclude that, because some markets have not met internal cut-over projections made almost two years ago, the entire BAS relocation process is fundamentally flawed.⁶ As the voluminous record evidence demonstrates, however, the

³ Supplemental Request at 9-19. The Joint Parties described each of these factors in considerable detail in the Supplemental Request.

⁴ Opposition to Supplemental Joint Request of New ICO Satellite Services G.P., WT Docket No. 02-55, at 7 n.24 (March 9, 2009) (ICO Opposition).

⁵ Both MSS licensees deny that the market-prioritization demands of MSS licensees caused any delay in BAS relocation. ICO Opposition at 7-8; Comments of TerreStar Networks Inc., WT Docket No. 02-55, at 4 n.5 (March 9, 2009) (TerreStar Comments). But as the Joint Parties explained in their request, completing the MSS priority markets diverted resources from DMAs in which broadcasters otherwise could have completed the relocation process on an accelerated basis, thereby delaying completion of the overall transition by several months. See Supplemental Request at 11-12. Given this reality, ICO's and TerreStar's pleadings serve as little more than disingenuous attempts to evade financial responsibility for their *pro rata* shares of eligible BAS retuning costs.

⁶ ICO Opposition at 5-8; TerreStar Comments at 9-10. Market projections are just that: projections, based on the best available data at the time. Projections do not take into

BAS transition is proceeding rapidly toward its conclusion. With more than 99% of all FRAs complete, Sprint Nextel is essentially finished with the portions of the transition over which it can exercise any real control.⁷ Moreover, approximately 63% of all BAS licensees have all of the equipment needed to convert to the new band plan, and approximately 75% of all BAS licensees have all or most of the equipment needed to convert to the new band plan. These figures are significant because if even one BAS licensee is not prepared to relocate due to undelivered equipment or the unavailability of a key vendor or virtually any other reason, the DMA or, in some case, the entire DMA cluster cannot transition to the new band plan. Thus, while ICO and TerreStar complain that “only” 38% of the market transitions are complete, the facts demonstrate that the Joint Parties and their vendors have made substantial transition progress in the rest of the country. Indeed, the record-breaking levels of BAS order fulfillment that the Joint Parties have achieved mean that 63% of all BAS licensees have transitioned or are prepared to transition when the rest of the licensees in the market are ready and able to do so. Thus, the MSS licensees’ misleading claims and false conclusions regarding the state of the BAS transition are without merit.

account the multitudinous and unavoidable factors that may create and have caused delay.

⁷ The remaining elements of the transition – equipment delivery, equipment installation, and market cut-over – depend largely on a network of small manufacturers, installers, integrators, engineers, technicians and other players to complete. The Joint Parties can, and routinely do, encourage these parties to move as rapidly as possible, but they cannot compel them to do so.

B. Granting the Joint Parties Additional Time to Conclude the Transition Will Not Harm ICO and TerreStar or Disturb Established Reimbursement Obligations

Contrary to their claims, neither ICO nor TerreStar will suffer any real harm by the Commission granting additional time to conclude the transition of the remaining DMAs.⁸ As a threshold matter, and as further discussed below, ICO and TerreStar have each entered the band and triggered their reimbursement obligations under the original June 26, 2008 date.⁹ Moreover, ICO and TerreStar have also already sought and received numerous delays of their satellite implementation milestones since 2001. After three separate milestone extensions, TerreStar is currently scheduled to launch its satellite by June 30, 2009 and to satisfy its operational milestone by August 30, 2009.¹⁰ Even assuming TerreStar meets these milestones – an uncertain assumption given the number of extensions TerreStar has sought over the years – an extension of the BAS transition deadline to February 2010 will not prejudice TerreStar. As the Commission has observed, “even once the MSS satellites are launched, the MSS systems will have to undergo a significant period of testing before ubiquitous service can be offered.”¹¹ Given TerreStar’s history of launch delays and the time it will take to test and ready its satellite system, it is entirely possible that TerreStar will not be ready to offer full nationwide

⁸ ICO Opposition at 8-10; TerreStar Comments at 3.

⁹ Although the Joint Parties did not focus on the reimbursement issue in their Supplemental Joint Request, ICO and TerreStar each attempted to re-argue the issue in their respective Opposition and Comments. ICO Opposition at 10-16, TerreStar Comments at 9-12. The Joint Parties are thereby compelled to respond, and again reject those assertions for the reasons set forth herein and in prior submissions.

¹⁰ Grant of Authority, Modification, SAT-MOD-20080718-00143 (Nov. 12, 2008) (granting TerreStar’s request to modify its 2 GHz MSS Spectrum Reservation to extend its launch milestone to June 30, 2009, and its operational milestone to August 30, 2009); Public Notice, 23 FCC Rcd. 16641 (2008) (Report No. SAT-00565, DA 08-2510).

¹¹ *Extension Order* ¶ 33.

commercial service until at least the first quarter of 2010, *after* the anticipated date for completing the BAS transition.

As for ICO, it launched its geo-stationary satellite in April 2008 and shortly thereafter certified that it had commenced satellite operations.¹² It remains unclear whether and when ICO will be in a position to begin offering its planned mobile interactive media (mim) service on a commercial basis. Notwithstanding its recent \$603 million litigation victory over Boeing,¹³ ICO has informed its investors that the company's near-term liquidity problems may constrain or prevent the company's ability to realize its deployment plans.¹⁴ In addition, ICO has entered into contracts with various vendors to continue constructing its network that include payment terms stretching into 2011 and beyond, which suggest that, even if ICO overcomes its near-term liquidity

¹² ICO Opposition at 3, 9. ICO claims that it is incurring monthly costs to operate and maintain its satellite system, but it conveniently ignores Sprint Nextel's ongoing annual loss of millions of dollars in accrued interest due to the MSS licensees' failure to meet their \$200 million MSS-BAS reimbursement obligation.

¹³ *Court Rules in Favor of ICO on Nearly All Post-Trial Motions*, Press Release, ICO Global Communications (Holdings) Limited (Mar. 2, 2009), available at: <<http://finance.yahoo.com/news/Court-Rules-in-Favor-of-ICO-bw-14509914.html>> ("As a result of the rulings, the judgment previously entered on the jury's compensatory and punitive damages verdicts against both The Boeing Company and its satellite subsidiary is now final. The final judgment amount is \$603,227,358.").

¹⁴ ICO Global Communications (Holdings) Limited, Quarterly Report (Form 10-Q), at 26 (Aug. 11, 2008) ("On March 27, 2008, ICO North America obtained the 2009 Credit Facility which subsequently closed on April 7, 2008. The 2009 Credit Facility matures on May 1, 2009 and bears interest at a rate of 12.5% per year which is payable at maturity. In June 2008, we entered into a series of securities purchase agreements with a small group of institutional investors under which we issued and sold 7.6 million shares of our Class A common stock which resulted in aggregate gross proceeds of \$27.5 million. To the extent our ARS do not become liquid, or we do not secure funding beyond the 2009 Credit Facility and our recent stock sales, we plan to significantly reduce our operating and development expenditures, which would include, among others, capital expenditures for the terrestrial network development of our MSS/ATC System, related personnel and vendor support, and other overhead.").

problems and proceeds with full scale deployment, ICO may choose not to market its full system to end users until well after the BAS transition is complete.¹⁵ Given ICO's apparent deployment schedule for its mim service network, it is uncertain when ICO will need full access to its 2 GHz frequencies. Further mitigating any potential harm is the Joint Parties' willingness to dispense with many of the strictures of the top 30 market rule and permit ICO and TerreStar to commercially operate on a primary basis in any cleared BAS market, provided they pay their fair shares of relocation expenses. This compromise is described in detail below.

In the unlikely event that extending the time allotted to conclude the BAS transition through February 2010 were to pose any real harm to either ICO or TerreStar, the blame rests entirely with the satellite licensees. Over the last nine years, neither ICO nor TerreStar have conducted a single station inventory, negotiated a single relocation agreement, paid a single vendor, or taken any other action to support or accelerate the BAS transition.¹⁶ The notion that Sprint Nextel somehow "occupied the field" of BAS relocation and squeezed out ICO and TerreStar from the process is ludicrous. As a preliminary matter, ICO and TerreStar had almost four years to clear the band without any involvement by Sprint Nextel, but did not relocate a single BAS licensee during that time. After entering the process in late 2004, moreover, Sprint Nextel made every effort possible to accommodate ICO and TerreStar. For example, Sprint Nextel met repeatedly

¹⁵ ICO Global Communications (Holdings) Limited, Quarterly Report (Form 10-Q), at 27 (Nov. 10, 2008) ("As of September 30, 2008, [ICO] had purchase obligations of approximately \$76.3 million related to [various vendor] agreements as well as other secondary agreements related to the development of [its] MSS/ATC System and ICO mim service.").

¹⁶ See, e.g., *Extension Order* ¶ 31 (finding "no record of meaningful negotiations or relocation activities having taken place between MSS and BAS at the time the Sprint Nextel relocation plan was adopted").

with TerreStar, provided TerreStar with monthly updates from its BAS fulfillment and installation database, introduced them to key suppliers and manufacturers, and at one point even loaned TerreStar sample BAS equipment for testing purposes. In 2007, Sprint Nextel went so far as to draft a formal Statement of Work that invited ICO and TerreStar to provide a team of employees made up of lawyers, engineers, and other personnel to work with other BAS relocation teams staffed by Sprint Nextel employees. Sprint Nextel offered to share its BAS relocation “playbook” with the MSS teams and also offered them office space, telecommunications facilities, and other administrative resources necessary to negotiate and draft contracts with BAS licensees and engage equipment manufacturers, installers, and other vendors. Despite these overtures, ICO and TerreStar expressed no interest in picking up a pen and participating in the transition, and rebuffed Sprint Nextel’s invitation to make a constructive contribution to BAS relocation.

The Commission has long sought to ensure that spectrum is used to serve the public as quickly as possible and has established a variety of mechanisms, such as substantial service obligations and deployment milestones, to ensure timely deployment.¹⁷ Against this backdrop, ICO and TerreStar advance the bizarre theory that

¹⁷ See, e.g., *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, 15 FCC Rcd. 16127, ¶ 6 (2000) (noting that Commission adopted two-phase BAS relocation process in order to minimize upfront costs and ensure that valuable spectrum does not lie fallow for years); *Joint Application for the Review of Constellation Communications Holdings, Inc., Mobile Communications Holdings, Inc., and ICO Global Communications (Holdings) Limited*, Memorandum Opinion and Order, 19 FCC Rcd. 11631, ¶ 2 (2004) (denying request to restore voided system authorizations due to missed milestone, as “[m]ilestone schedules are designed to ensure that licensees are proceeding with construction and will launch their satellites in a timely manner, and that the orbit spectrum resource is not being held by licensees unable or unwilling to proceed with their plans,” and “[m]ilestones ensure speedy delivery of service to the public and prevent warehousing of valuable orbit locations and spectrum, by requiring licensees to begin operation within a certain time”); see also, e.g., 47 C.F.R.

BAS transition delays already found to be beyond the Joint Parties' control and their own MSS implementation delays, somehow extinguish ICO's and TerreStar's already-triggered obligation to pay their fair share of spectrum-clearing costs.¹⁸ If the ICO-TerreStar theory were correct, the Commission would have had to ignore all of its precedent about timely deployment of services to the public as well as its traditional cost-sharing principles, and would have chosen to grant ICO and TerreStar what turns out to be a \$200 million commercial windfall for not providing service to the public. That result, which would reward even intentional non-deployment of MSS by ICO and TerreStar, is wholly at odds with Commission precedent and could not have been the Commission's intent.¹⁹

§ 24.203 (construction requirements for Personal Communications Services licensees); *Id.* § 25.143(e) (establishing reporting requirements for deployment milestones for MSS licensees in the 1.6 GHz/2.4 GHz and 2 GHz bands); *Id.* § 27.14 (substantial service and other construction requirements for Advanced Wireless Service and Wireless Communications Service licensees); *Id.* § 90.155 (construction requirements for private land mobile radio licensees).

¹⁸ See, e.g., *Extension Order* ¶ 31 (concluding that there are “many valid reasons” why the BAS transition could not be completed in the original time frame).

¹⁹ Under the MSS licensees' theory, ICO and TerreStar could win a \$200 million commercial windfall by merely “running down the clock” on their payment obligation to Sprint Nextel, by: (1) postponing MSS deployment; (2) doing nothing to assist in completing the BAS transition; or (3) taking steps without regard to their effect on transition timing. In this vein, ICO and TerreStar have six MSS implementation milestone extensions between them. They have done nothing to assist the BAS transition and ignore the well-documented complexities, from wildfires to tower climbing fatalities, which have unavoidably delayed the transition. And they pretend – despite a Commission ruling to the contrary – that their years of inaction did not complicate and delay the BAS transition. Thus, whatever conceivable interest might be furthered by extinguishing the right of a first-mover to recover expenses from later-in-time licensees, no rational basis exists for the Commission to establish an implausible regime that would reward ICO and TerreStar with a \$200 million commercial windfall for delaying MSS deployment, the BAS transition, or both.

III. THE COMMISSION SHOULD REJECT MSS LICENSEE EFFORTS TO ESCAPE THEIR PREVIOUSLY-TRIGGERED REIMBURSEMENT OBLIGATIONS

Spectrum clearing is inherently challenging. Old spectrum licenses do not neatly overlap new ones, and the process of relocating incumbent operations to alternative facilities can require years to complete. Incumbent operators come to depend on a microcosm of small, highly specialized vendors and installers that assembled facilities over a long period of time, but were ill-prepared for the wholesale replacement of the accumulated facilities. Local interdependencies emerge among incumbents as they come to rely on the same equipment, technology, and customs to prevent harmful interference among their own operations. And incumbents' incentive to service and maintain outmoded equipment begins to wane as attention and resources turn to new opportunities in other areas.

The Commission has long recognized that relocation under these circumstances entails significant costs. To mitigate these costs – and ensure the nation benefits from timely, technologically innovative, and economically dynamic new uses of spectrum – the Commission requires new entrants who benefit from the incumbent-clearing process to pay their fair share of the clearing costs. In a consistent line of rulings stretching back nearly two decades, the Commission has repeatedly endorsed this simple, equitable reimbursement policy because it understood that first-to-market licensees would not undertake the costly and time-consuming process of clearing spectrum if second-to-market licensees could simply sit back and free ride on the first-entrant's efforts.²⁰

²⁰ See, e.g., *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8825, ¶¶ 7, 69-77 (1996).

Despite the efforts by the MSS licensees to cloud their obligations, the issue before the Commission is straightforward. Like any other new entrant, 2 GHz MSS licensees are subject to the Commission's traditional cost-sharing principles.²¹ Under these longstanding principles, the first new entrant into the band that incurs costs in relocating incumbent licensees is entitled to reimbursement from subsequent new entrants for their *pro rata* share of the relocation costs.²² In the case of BAS relocation, ICO and TerreStar each owe Sprint Nextel approximately \$100 million under their cost-sharing obligations.²³

In applying the cost-sharing principles to the MSS licensees, the Commission tailored its reimbursement *procedures* to the particular circumstances raised by the 800 MHz R&O. Specifically, although a new entrant's reimbursement obligation is normally

²¹ *Extension Order* ¶ 15; *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 20 FCC Rcd. 16015, ¶ 111 (2005) ("Under the equitable reimbursement calculus, Nextel, as the first entrant, is entitled to seek *pro rata* reimbursement of eligible clearing costs from subsequent entrants, including MSS licensees.") (2005 MO&O).

²² Tellingly, both ICO and TerreStar's predecessor have approved of these principles when faced with the prospect of incurring costs as the first entrant. *See, e.g.*, Comments of TMI Communications and Company, ET Docket No. 95-18, at 2, 7 (Feb. 3, 1999) (noting that "equity requires" that entities that benefit from the clearing of BAS licensees "should . . . share in the financial burdens of the relocation of [these] licensees"); Comments of ICO Services Limited, ET Docket No. 95-18, at 14 (Feb. 3, 1999) (asserting that requiring the first new entrant to pay "full relocation costs without any reimbursement from later entering MSS providers" would "unfairly punish" the first new entrant).

²³ *See* Letter from Lawrence Krevor, Sprint Nextel, to Marlene Dortch, FCC Secretary, WT Docket No. 02-55, at 5, 9 (Oct. 8, 2008) (Sprint Nextel Oct. 8 Letter). Notwithstanding ICO's hyperbole about "open-ended costs" (ICO Opposition at 10), Sprint Nextel provided the MSS licensees detailed estimates of their share of eligible BAS relocation costs in February 2008. Sprint Nextel also offered to meet with both ICO and TerreStar to discuss the nature of the expenses and invoicing procedures, but both MSS licensees rebuffed the offer. There is nothing "open ended" about Sprint Nextel's estimates given the fact that FRAs containing detailed funding commitments have been executed with 99.2% of all BAS retunees.

subject to a ten-year sunset period, the Commission adopted a different approach for the MSS licensees, sunsetting their reimbursement obligations on the *completion* of 800 MHz reconfiguration. The Commission stated that the end of rebanding would trigger a “true-up” process to determine whether Sprint Nextel’s total 800 MHz and BAS reconfiguration costs plus spectrum contributions – minus the reimbursement Sprint Nextel receives from MSS licensees – are less than the value (\$4.86 billion) the Commission placed on the 1.9 GHz replacement spectrum received by Sprint Nextel under the *800 MHz R&O*. If the costs are less than \$4.86 billion, Sprint Nextel must make an “anti-windfall” payment to the U.S. Treasury. These “unique circumstances in Nextel’s receipt of BAS spectrum” thus prompted the Commission to tie the reimbursement sunset date to the end of 800 MHz reconfiguration.²⁴ The Commission took this step solely to promote “administrative efficiency in the accounting process,” *not* to substantively change its cost-sharing policies to confer a windfall on MSS licensees.²⁵

Although 800 MHz reconfiguration was originally scheduled to be completed by June 26, 2008, the Commission has granted hundreds of waivers to provide 800 MHz public safety licensees additional time to complete relocation,²⁶ and consequently postponed the true-up date.²⁷ It has extended the BAS relocation deadline and is considering extending it further in this proceeding. The originally scheduled sunset date

²⁴ *2005 MO&O* ¶ 113.

²⁵ *Id.*

²⁶ See Letter from Lawrence Krevor, Sprint Nextel, to Marlene Dortch, FCC Secretary, at 3-4, nn. 11-13 (June 25, 2008) (citing Commission orders waiving 800 MHz reconfiguration deadlines) (Sprint Nextel June 25 Letter).

²⁷ *Improving Public Safety Communications in the 800 MHz Band*, Fourth Memorandum Opinion and Order, 23 FCC Rcd. 18512, ¶ 1 (2008) (postponing true-up to at least July 1, 2009 and requiring the Transition Administrator to make a recommendation on when the true-up should be conducted).

for BAS reimbursement and originally scheduled anti-windfall true-up have consequently been superseded by intervening events and the Commission's decisions extending rebanding deadlines.

As Sprint Nextel has previously explained, the MSS reimbursement sunset date must continue to track the completion of 800 MHz reconfiguration, *not* the originally projected date of June 26, 2008, which is no longer operative. Maintaining the connection between the sunset date and the end of rebanding is fully consistent with the *800 MHz R&O*.²⁸ It is also necessary to preserve the value-for-value proposition underlying 800 MHz and BAS retuning that Sprint Nextel relied upon in agreeing to the Commission's proposed *800 MHz R&O* license modifications. A critical element of this proposition gave Sprint Nextel the right to seek reimbursement from MSS licensees prior to the completion of 800 MHz rebanding for the hundreds of millions of dollars Sprint Nextel is spending to clear BAS incumbents from the *MSS licensees'* spectrum.

Sprint Nextel has taken all steps within its control to complete BAS rebanding as expeditiously and efficiently as possible, and when circumstances beyond its control resulted in delays, Sprint Nextel and the broadcast industry sought an extension of the Commission's relocation schedule.²⁹ As described above, the Commission granted the extension due to events beyond Sprint Nextel's control. In stark contrast to the MSS licensees and their complete failure to comply with their relocation obligations, Sprint

²⁸ See Sprint Nextel Oct. 8 Letter at 8-10; see also *2005 MO&O* ¶ 112 (describing link between end of band reconfiguration and the reimbursement sunset date, and making no reference to "36 months" or June 26, 2008).

²⁹ The same dynamic has essentially occurred at 800 MHz, resulting in new completion timeframes and postponing the "true-up" schedule.

Nextel has fully complied with its rebanding obligations.³⁰ Notwithstanding these delays and costs,³¹ Sprint Nextel has held up its side of the deal and remains committed to seeing the process through.³²

Ultimately, however, ICO and TerreStar's arguments regarding the sunset date are beside the point. ICO and TerreStar each long ago entered the band prior to June 26, 2008 for the purposes of triggering their respective reimbursement obligations to Sprint Nextel.³³ For example, as Sprint has previously noted, ICO entered the band well before

³⁰ Indeed, it now appears that, even after being reimbursed by MSS licensees, Sprint Nextel will spend over \$2.8 billion to complete the 800 MHz and BAS relocations, which in combination with its contribution of spectrum valued at \$2 billion, will exceed the value of the spectrum Sprint Nextel received as compensation for taking on these commitments and result in Sprint owing no windfall payment. At the same time, Sprint Nextel still does not have full access to the 800 MHz and 1.9 GHz replacement spectrum because of the rebanding delays.

³¹ ICO grossly distorts the record in claiming that the *800 MHz R&O* gave Sprint Nextel "immediate" access to the 1.9 GHz replacement spectrum and that the Sprint-Nextel merger somehow affected band clearing efforts. ICO Opposition at 15-16. The merger in no way lessened Sprint Nextel's commitment to its rebanding obligations and, if anything, enhanced the company's incentive to complete the transition by adding millions of new subscribers to the books. Moreover, Sprint Nextel obviously did not receive "immediate" access to the 1.9 GHz spectrum, because the spectrum is encumbered by BAS incumbents and, thus, unavailable for use by a nationwide terrestrial carrier such as Sprint Nextel. Thus, while ICO whines about the pace of BAS relocation and invents myths to hide its failure to comply with its relocation obligations, Sprint Nextel has worked intensively and constructively to clear incumbent licensees.

³² Sprint Nextel is consequently adhering to its agreement to bear the "risk that it could end up incurring costs that are greater than the value of the spectrum rights it receives." *800 MHz R&O* ¶ 214. Sprint Nextel also, as required by the Commission, agreed to assume the risk that "implementation of the Order may be delayed by judicial review" or declared invalid, and agreed not to seek damages from the government in such an event. *Id.* ¶ 87. ICO turns these provisions in the *800 MHz R&O* on their head in arguing that Sprint Nextel somehow took the risk that MSS licensees would try to escape their reimbursement obligations by arguing that the reimbursement sunset date should no longer coincide with the actual conclusion of 800 MHz rebanding. ICO Opposition at 12. The Commission never imposed this risk on Sprint Nextel, nor has Sprint Nextel ever agreed to such an absurd result.

³³ Sprint Nextel Oct. 8 Letter at 7-8.

June 26, 2008 by launching its satellites and commencing satellite operations.³⁴

TerreStar similarly entered the band prior to June 26, 2008 through its licensing activities, system build out, testing, satellite construction and ATC operations.³⁵

Nor should the Commission give credence to ICO and TerreStar's various efforts to evade the import of their entries into the band by claiming that, in effect, none of their actual activities in the band had any possibility of amounting to band entry sufficient to trigger reimbursement obligations.³⁶ For example, TerreStar argues that its 2 GHz MSS system was not required to be fully operational until November of 2008, subsequent to June 26, 2008 date, and consequently Sprint "could have had no expectation . . . of recouping relocation expenses from TerreStar."³⁷ TerreStar's argument confuses band entry with full commercial operations, an entirely different consideration.³⁸ Moreover, TerreStar's argument regarding its milestone date for completion of its system actually provides further support for the fact that the Commission could not have intended band entry for the purposes of triggering reimbursement to mean full commercial system operations as contemplated in that November 2008 milestone deadline.

If the Commission knew that TerreStar would not engage in full commercial operations until after June 26, 2008, it reasonably must have considered "band entry" to consist of something less than full commercial operations such that TerreStar could and still would trigger its reimbursement obligations. Nowhere did the Commission state or

³⁴ *Id.*

³⁵ *Id.*

³⁶ See TerreStar Comments at 11-12, ICO Opposition at 11-13.

³⁷ TerreStar Comments at 11-12.

³⁸ See, e.g., Sprint Nextel Oct. 8 Letter at 11-12.

imply that the reimbursement requirements were inapplicable to TerreStar by dint of TerreStar's November 2008 milestone for operation certification. To the contrary, the Commission routinely discussed ICO and TerreStar together when describing the fact that only two MSS operators remained for the purposes of calculating *pro rata* reimbursements. For example, the Commission previously indicated that "the MSS licensees' *pro rata* share, collectively, represents the cost to relocate BAS incumbents from four-sevenths of the spectrum."³⁹ As further clarification, the Commission noted that "[b]ecause there are two authorized MSS systems in the 2000-2020 MHz MSS band, each MSS operator is assigned 10 MHz of spectrum. . . . The *pro rata* share of each MSS operator will be 2/7 of the total 35 megahertz of spectrum."⁴⁰ These statements make clear that the Commission crafted and released the *800 MHz R&O* and its progeny with the *pro rata* spectrum shares of ICO and TerreStar already in mind, and consequently any arguments that the operational milestones precluded triggering the reimbursement obligations related to those *pro rata* shares must give way. The Commission simply could not have drafted the *800 MHz R&O* with ICO and TerreStar in mind, and yet simultaneously understood the operational milestones to preclude the very reimbursements the Commission was establishing in the Order in explicit contemplation of those two existing MSS licensees.

ICO and TerreStar also continue to attempt to argue that the top 30 market rule, which again precludes only full commercial operations, has some bearing on the concept of band entry.⁴¹ With regard to that rule, the Commission has also made various

³⁹ *2005 MO&O* ¶ 111.

⁴⁰ *Extension Order* ¶ 16 n.36 (emphasis added).

⁴¹ *See, e.g.,* ICO Opposition at 11-12.

statements strongly indicating the rule was not intended to serve as a bar to reimbursements. For example, on December 22, 2004, TerreStar filed a “Joint Request for Clarification” of the *800 MHz R&O*.⁴² TerreStar was concerned that the reimbursement obligations to Sprint contained in the *800 MHz R&O* “makes this [BAS reimbursement] obligation open-ended because it is currently unclear when this 36-month period will commence” and claimed that “any delay in the start of the 36-month period will also move back the reimbursement cut-off date for MSS licensees.”⁴³ To assuage TerreStar’s concerns about uncertainty as to its reimbursement obligations to Sprint, the Commission stated in a subsequent order that “[t]o address potential MSS licensees’ concerns of uncertainty regarding their reimbursement obligations to [Sprint Nextel], the Commission required [Sprint Nextel] to inform the Commission and MSS licensees, *twelve months after the effective date of the 800 MHz R&O, whether or not it will be seeking reimbursement from the MSS licensees.*”⁴⁴

As the Commission noted, this 12-month reimbursement notification period coincided with Sprint’s *first* status report as to its BAS relocation efforts – well in advance of any end date for the calculation of reimbursement and well in advance of the anticipated time frame for clearing all top thirty markets.⁴⁵ In other words, the Commission authorized Sprint to notify both the Commission and ICO and TerreStar that it would seek reimbursements from each remaining MSS licensee years before they could ever have been in a position to comply with the top 30 market rule (or, as previously

⁴² Joint Request for Clarification of TMI and TerreStar, WT Docket No. 02-55 (Dec. 22, 2004).

⁴³ *Id.* at 6-7.

⁴⁴ *2005 MO&O* ¶ 113 (emphasis added).

⁴⁵ *Id.* ¶ 113 n.317.

discussed, their operational system milestones).⁴⁶ Indeed, it is particularly telling that the Commission enacted this notice requirement precisely *because* one of the current MSS licensees sought clarification as to the extent and relevant time periods for its reimbursement obligations. The Commission's response was straightforward: Sprint will (and subsequently did) notify the Commission and the MSS licensees when it intends to seek reimbursement, well in advance of the operation of any of the rules ICO or TerreStar now claim preclude reimbursement. Given that the Commission expressly authorized Sprint to notify ICO and TerreStar that it would seek reimbursements from them, and Sprint subsequently provided such notice, TerreStar's current claim that Sprint "could have had no expectation" of reimbursements is patently false.

In short, ICO and TerreStar, not Sprint Nextel, seek to change the fundamental terms of the deal by failing to comply with their obligations. They have neglected their obligation to relocate BAS licensees, having done nothing during the past nine years to help move the process forward. Now they are trying to escape their reimbursement obligation by treating the June 26, 2008 date first as if they had not already triggered their obligations, and second as if the date were relevant and immutable to the realities that

⁴⁶ In compliance with the *800 MHz R&O*, on March 7, 2006, Sprint filed and circulated a letter notifying the FCC, ICO, and TerreStar's predecessor in interest that it would seek reimbursement from both ICO and TerreStar for the clearing costs incurred related to the 1990 – 2020 MHz band. See Letter from Lawrence R. Krevor, Sprint Nextel Corporation, to Marlene H. Dortch, FCC Secretary, WT Docket No. 02-55, at 1 (March 7, 2006) ("Sprint Nextel Corporation . . . hereby informs the Federal Communications Commission . . . and Mobile Satellite Service ('MSS') licensees that it will seek reimbursement from MSS licensees for eligible costs Sprint Nextel incurs in clearing the 1990 – 2025 MHz band, as provided in paragraphs 261 and 352 of the *800 MHz R&O* Sprint Nextel is providing this notice to the two remaining MSS licensees at 2 GHz, New ICO Satellite Service G.P. and TMI Communications and Company L.P."). There is no indication from the Commission's record that ICO or TerreStar filed any objection to the transmittal of that notice.

have prompted the Commission to extend the BAS and 800 MHz relocation deadlines. Their position defies these realities and the Commission's decisions.⁴⁷

ICO and TerreStar offer no public interest rationale for tying their reimbursement sunset date to June 26, 2008, rather than the end of 800 MHz reconfiguration. Stripped of their self-serving rhetoric, the MSS licensee arguments boil down to a claim that the Commission established an arbitrary sunset date that bears no relationship to the actual rebanding process or to the Commission's reasons for altering the normal ten-year sunset date in the first instance. Although the MSS licensees may hope or claim to have an "expectation" that their unreasonable interpretation of the *800 MHz R&O* will give them a free ride to an incumbent-free 2 GHz band, their argument has nothing to do with the black-letter Commission law, the public interest or basic equitable principles.⁴⁸ The Commission adopted the *800 MHz R&O* to improve public safety communications at 800 MHz, not to give MSS licensees a multi-million dollar windfall at Sprint Nextel's expense.

Although the MSS licensees have to date refused to comply with their reimbursement obligations, Sprint Nextel, ICO, and TerreStar agree on one point: the Commission must act expeditiously to resolve this matter.⁴⁹ The Joint Parties

⁴⁷ Their position also defies the repeated efforts by MSS licensees over the years to seek extensions of their system milestones due to circumstances beyond their control. If anyone should understand that the Commission will change regulatory deadlines due to unforeseen circumstances, it should be ICO and TerreStar, who collectively have filed six requests to extend their milestones or reinstate their license based on justifications far less compelling than the reasons for extending the 800 MHz and BAS rebanding deadlines.

⁴⁸ See Sprint Nextel Oct. 8 Letter at 11-12 (rebutting TerreStar's claims regarding "settled expectations").

⁴⁹ See ICO Opposition at 16 (requesting the FCC to issue a ruling on ICO's reimbursement obligation); TerreStar Comments at 2-3, 13 (requesting favorable ruling on reimbursement issue). ICO and TerreStar thus appear to have dropped the procedural

respectfully request that the Commission affirm that (1) ICO and TerreStar have each long since entered the band and triggered their reimbursement obligations and are bound by the Commission's well-established cost sharing principles,⁵⁰ (2) that the BAS relocation reimbursement sunset date coincides with the conclusion of 800 MHz rebanding, and (3) that ICO and TerreStar must reimburse Sprint Nextel for their *pro rata* share of eligible BAS relocation costs. For the same reasons, the Commission should clarify that new entrants to the Advanced Wireless Services spectrum at 1995-2000 MHz and 2020-2025 MHz continue to have an obligation to reimburse Sprint Nextel for their *pro rata* share of BAS relocation costs through the end of the 800 MHz reconfiguration.⁵¹

IV. THE COMMISSION SHOULD ALLOW MSS LICENSEES TO COMMENCE COMMERCIAL OPERATIONS IN CLEARED MARKETS ONLY IF THEY HAVE MET THEIR REIMBURSEMENT OBLIGATIONS

In their recent filings, ICO and TerreStar argue that the Commission should (i) eliminate the top 30 market rule and (ii) allow MSS entities to commence nationwide commercial service, thereby giving MSS operators primary status in the band.⁵² Such an approach would have the unintended consequence of further delaying the BAS transition, as described below. Moreover, this approach would place the provision of live, local newscasts at risk. The Joint Parties propose a compromise solution, which would allow

objections they previously raised regarding Sprint Nextel's request for a declaratory ruling on MSS licensee reimbursement obligations. *See* Sprint Nextel Oct. 8 Letter at 12-13.

⁵⁰ *See, e.g.*, Sprint Nextel Oct. 8 Letter; Sprint Nextel June 25 Letter at 6-8.

⁵¹ *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*, Sixth Report and Order, 19 FCC Rcd 20720, ¶ 72 (2004) (requiring AWS new entrants that enter the band prior to the end of 800 MHz reconfiguration to reimburse Sprint Nextel for their *pro rata* share of BAS relocation costs).

⁵² ICO Opposition at 10, 16; TerreStar Comments at 8-9.

MSS licensees to commence full commercial operations in any markets that are cleared. Today, this amounts to well over one-third of all markets and will expand as additional markets are cleared.⁵³

While the Commission may permit MSS licensees to operate in any cleared market provided they live up to their reimbursement obligations, the Commission should not eliminate the top 30 market rule in its entirety. Pursuant to the top 30 market rule, MSS operators are required to compensate stations in the top 30 markets for vacating BAS channels 1 and 2.⁵⁴ The top 30 rule is critically important to protect live news coverage from harmful interference.⁵⁵ Preserving the rule ensures that MSS will take the necessary steps to relocate stations in the most intensively used news markets *prior to* commencing service.⁵⁶ This obligation should remain and operate independently of the relocation obligations imposed on Sprint Nextel.

Broadcast stations in uncleared markets should remain primary until their markets are cleared. In short, the primary status of broadcast electronic newsgathering (ENG) services should not be severed from their respective final relocation date. Granting MSS

⁵³ As of March 19, 2009, dozens of DMAs, including eleven of the nation's thirty largest DMAs, have been cleared. The cleared top-thirty DMAs are as follows: Chicago, IL; Washington, DC; Atlanta, GA; Houston, TX; Tampa-St. Petersburg (Sarasota), FL; Cleveland-Akron, OH; Phoenix, AZ; Orlando-Daytona Beach-Melbourne, FL; Baltimore, MD; Charlotte, NC; Raleigh-Durham (Fayetteville), NC.

⁵⁴ 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).

⁵⁵ For example, ICO has failed to disclose any of the technical details of its earth stations – thus making it impossible to fully assess the potential for interference from these operations to incumbent BAS operations. As a result, eliminating the top 30 market rule in its entirety could cause interference to broadcasters' valued BAS operations.

⁵⁶ See *Extension Order* ¶ 39; *Second MSS R&O* ¶¶ 31-35.

operations primary status for nationwide operations prior to clearing all markets will have negative unintended consequences.

First, there is a significant potential for interference to ENG services from mobile MSS transmissions that would operate in the 2000-2020 MHz portion of the BAS band. While the details of ICO's system have not been made completely available, it appears to contemplate a mobile system at fairly high power – up to 2 watts. TerreStar similarly has indicated that its handset power will be 1 watt peak. Mobile MSS transmissions at these power levels would lead to significant, intermittent interference and desensitization of a station's ENG receive sites, particularly when the mobile MSS transmitter is located near to an ENG receive site that is trying to receive a distant BAS transmission. Indeed, TerreStar's own studies indicate that the most significant level of interference would occur to the wideband analog services, which is precisely the nature of the ENG service that would remain in uncleared markets.⁵⁷

Second, according MSS operations primary status could fundamentally disrupt ENG operations across the country. ENG transmissions may interfere with the MSS transponders. This interference could occur whenever ENG trucks, at specific latitudes, were facing south when reporting the news. If BAS were relegated to secondary status, BAS transmitters would have to discontinue operations whenever the south-pointing conditions that create interference occur.⁵⁸ Similar concerns may apply for interference to the ancillary terrestrial components of MSS systems. In this way, allowing MSS

⁵⁷ See, e.g., Reply Comments of TerreStar Networks Inc., WT Docket No. 02-55, at 5-6 (May 30, 2008).

⁵⁸ Similarly, if BAS and MSS were co-primary, MSS would either have to accept harmful interference from BAS transmitters or BAS would have to forgo news, sports, and weather coverage from many points north of any given central receive location.

services to conduct nationwide operations and giving them primary status would in effect give them the right to shut down live news operations across the country. Such a result was never envisioned by the Commission, and raises significant public policy concerns.

Third, allowing MSS operations to commence nationwide commercial service and to become primary in the band prior to completing the BAS relocation process may have the unintended result of disrupting the orderly relocation process and diverting resources needed to complete the relocation towards the investigation and elimination of interference. Both the broadcast industry and Sprint Nextel have been diligent in moving this process forward. As the Joint Parties have observed throughout this proceeding and as described above, however, extension of the BAS relocation process is necessary due to, among other things, environmental hazards, industrial accidents, and unavoidable delays in the manufacture and installation of new equipment. In addition, the relocation schedule had to be adjusted in order to accommodate MSS operators' desires to test in several markets. This led to inefficiencies in distribution and installation as equipment had to be diverted to these markets and installation contracts revised. At this stage in the process, the equipment distribution and installation schedule has been established and stations have been able to work together in various markets to facilitate efficiencies, especially in the installation process. If MSS were granted "primary" status nationwide, there would be a rush on the manufacturers and installers, as each major station group or stations in large markets push to secure installation of equipment in order to protect themselves from interference or being shut off as the "secondary" service. The net result would be disruption in the schedule, leading to even further delays.

The Joint Parties recognize that, despite the MSS operators' failure to meet their relocation obligations, the Commission is eager to allow these services into the BAS band. Thus, the Joint Parties propose to allow MSS services to operate commercially in the band as a primary service, but *only* in those markets that have already been cleared, and provided that both ICO and TerreStar reimburse Sprint Nextel for their *pro rata* share of eligible BAS relocation costs. In markets that have not been cleared, these services would remain secondary to BAS services. This policy would allow MSS operators to commence commercial service in more than a third of the country immediately, with additional commercial service in the remaining markets being added on an ongoing basis. At the same time, this proposal would protect existing local news operations from interference and from being forced to terminate news coverage because of potential interference to MSS operations from ENG trucks. Importantly, this process can be achieved without abandoning the top 30 market policy. The fundamental obligation of the MSS operators to clear the top 30 markets and fixed links would remain in place.

V. CONCLUSION

The record demonstrates the diligent efforts by Sprint Nextel and the broadcast industry to expedite the BAS transition, and the Commission should grant the Joint Parties' original request to establish February 7, 2010 as the completion date for BAS relocation. The Commission should also reject the MSS licensee efforts to escape their reimbursement obligations. Consistent with the *800 MHz R&O* and its longstanding cost-

sharing principles, the Commission should affirm the obligations of ICO and TerreStar to reimburse Sprint Nextel for their fair share of BAS relocation costs.

Respectfully submitted,

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