

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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| In the Matter of |) | |
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| Improving Public Safety Communications in the 800 MHz Band |) | WT Docket 02-55 |
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| Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels |) | |
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| 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 |
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| 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 |
| |) | |

To: The Commission

**REPLY COMMENTS OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC. AND
THE NATIONAL ASSOCIATION OF BROADCASTERS**

In these reply comments to the Commission’s *Further Notice of Proposed Rulemaking* (“*FNPRM*”) in the above-referenced proceedings, the Association for Maximum Service Television, Inc. (“*MSTV*”)¹ and National Association of Broadcasters (“*NAB*”)² object

¹ *MSTV* is a nonprofit trade association of local broadcast television stations committed to achieving and maintaining the highest technical quality for the local broadcast system.

² *NAB* is a nonprofit trade association that advocates on behalf of free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

to the efforts of TerreStar Networks Inc. (“TerreStar”) and New DBSD Satellite Services G.P. (“ICO”) to obtain primary status prematurely on Broadcast Auxiliary Service (“BAS”) Channels 1 and 2 in uncleared markets. Such a move would degrade the public’s access to local news, weather, emergency reports, sports, and other information made possible by the BAS operations of local television stations.³ To address these public interest harms, MSTV and NAB urge that the Commission continue to recognize the primary status of BAS licensees in markets that have not been cleared.

I. TERRESTAR AND ICO WOULD INAPPROPRIATELY BENEFIT FROM BESTOWAL OF PRIMARY STATUS IN MARKETS THAT THEY HAVE FAILED TO CLEAR PRIOR TO THE SUNSET DATE.

At the outset, MSTV and NAB agree with the comments of Sprint Nextel that “MSS operators . . . have made virtually no effort to participate in the BAS relocation, notwithstanding their independent obligation to relocate BAS incumbents.”⁴ Against the backdrop of this record, TerreStar and ICO ask the Commission to bestow upon them “primary” status in uncleared BAS markets in less than six months — notwithstanding the Commission’s recent decision to maintain December 9, 2013 as the date on which the MSS entrants’ relocation obligations will sunset.⁵ Such action would allow TerreStar and ICO to interfere with BAS operations even if a market remains uncleared despite the good-faith efforts of the affected BAS licensees. The viewing public would suffer in the form of reduced news coverage, while

³ As the Commission has observed, the broadcast auxiliary service is “a critical part of the broadcasting system by which information and entertainment are provided to the American public.” Improving Public Safety Communications in the 800 MHz Band, *Report and Order and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 02-55, ET Docket Nos. 00-258 and 95-18, FCC 09-49, at ¶ 47 (rel. June 12, 2009) (“*R&O/O-FNPRM*”).

⁴ Comments of Sprint Nextel Corp. at 3 (filed July 14, 2009) (“Sprint Nextel Comments”).

⁵ See *R&O/O-FNPRM* at ¶ 42.

TerreStar and ICO would be rewarded inappropriately for their decision to sit out the BAS relocation since obtaining their licenses eight years ago.

TerreStar attempts to justify its failure to participate in the BAS relocation on the unfounded claim that it was “discourage[d]” from doing so by Sprint Nextel.⁶ Yet as Sprint Nextel, MSTV and NAB have previously explained, “The notion that Sprint Nextel somehow ‘occupied the field’ of BAS relocation and squeezed out ICO and TerreStar from the process is ludicrous.”⁷ The MSS entrants accepted the obligation to relocate BAS licensees to the digital band plan when they obtained their licenses in 2001, over three years *before* the Commission’s decision to include Sprint Nextel in the BAS relocation process.⁸ Once Sprint Nextel accepted the obligation to relocate BAS licensees, it made “every effort possible” to accommodate ICO and TerreStar, as described more fully in the joint comments of Sprint Nextel, MSTV, NAB and the Society of Broadcast Engineers filed on March 19, 2009.⁹ Most importantly, the Commission made clear in 2004 that “MSS licensees will retain the option of accelerating the clearing of . . . markets so that they could begin operations before Nextel has completed nationwide clearing”; yet as the Commission noted in the *R&O/O*, five years later Sprint Nextel remains the “sole” new entrant “actively undertaking [BAS] relocations.”¹⁰

⁶ Comments of TerreStar Networks Inc. at 14 (filed July 14, 2009) (“TerreStar Comments”).

⁷ See Reply Comments of Sprint Nextel Corp., MSTV, NAB and SBE at 10-11 (filed March 19, 2009).

⁸ See TMI Communications and Co., Ltd. Partnership, Letter of Intent to Provide Mobile-Satellite Service in the 2 GHz Bands, *Order*, 16 FCC Rcd 13808, 13817 at ¶ 7, n.23 (2001) (granting 2 GHz authorization to TerreStar’s predecessor); ICO Services Ltd., Letter of Intent to Provide Mobile-Satellite Service in 2 GHz Bands, *Order*, 16 FCC Rcd 13762, 13766 at ¶ 8 n.31 (2001).

⁹ See Reply Comments of Sprint Nextel Corp. et al. at 10-11, *supra* note 7.

¹⁰ See *R&O/O-FNPRM* at ¶ 28.

Moreover, the MSS entrants have already been accorded significant latitude to operate in the 2 GHz band despite their decision not to participate in the BAS relocation. Sprint Nextel, MSTV and NAB consulted repeatedly with the MSS entrants in 2007 to determine how the BAS relocation activities of Sprint Nextel and broadcasters could be adjusted and accelerated in certain markets to accommodate market-access needs of TerreStar and ICO. As a result of these efforts, Sprint Nextel and the broadcast community developed a BAS clearance plan that allowed the MSS entrants to conduct in-orbit testing and launch trial service within the timeline requested by them. Notably, neither TerreStar nor ICO contributed financially or operationally to these relocation efforts, even though the selection of markets and timing were driven by their business needs.

Similarly, on at least six occasions in 2007 and 2008, MSTV's Engineering Committee met with representatives from TerreStar to explore coordination of operations so that TerreStar could commence service in markets that were not yet cleared. These discussions were organized in anticipation of TerreStar's launch of its satellite, which then was scheduled per the terms of its license to occur by September 30, 2008. All parties, including TerreStar, participated in these efforts in good faith. Yet the discussions focused on how BAS licensees could accommodate operations by TerreStar, *not* how TerreStar would assist in clearing markets. While TerreStar makes much of its involvement in these discussions — going so far as to characterize itself as having played a “constructive role in BAS relocation” as a result¹¹ — the reality is that to date, neither TerreStar nor ICO has assisted in the actual *clearing* of even one market.

¹¹ See TerreStar Comments at 13-14 (describing TerreStar's participation in discussions to accommodate its operation in uncleared markets).

II. THE COMMISSION SHOULD MAINTAIN INCENTIVES FOR TERRESTAR AND ICO TO RELOCATE BAS LICENSEES IN ANY UNCLEARED MARKETS.

If TerreStar and ICO were granted primary status in markets that remain uncleared after February 8, 2010, they would lose virtually all incentive to fulfill their BAS relocation obligations. Such a decision would mean that the MSS entrants could commence unfettered operation in a market, thereby interfering with the newsgathering operations of local television stations without consequence. In contrast, under the rules adopted in the *R&O/O*, TerreStar and ICO have at least *some* incentive to relocate any markets that remain uncleared, as clearing is a prerequisite to their operating without coordination and offering of any Ancillary Terrestrial Component (“ATC”) service.

The record makes clear that broadcast licensees do not need the “incentive” of secondary status to complete the BAS relocation, contrary to the claims of TerreStar and ICO.¹² Even without assistance from the MSS entrants, Sprint Nextel and the broadcast community have completed relocation of 103 markets (as of June 1, 2009), and virtually every BAS licensee has executed a frequency relocation agreement with Sprint. Moreover, no BAS licensee wants to be in a position in which it must rely on TerreStar or ICO for successful relocation to the new band plan; in sharp contrast to Sprint Nextel, the MSS entrants have sought to avoid spending any resources on the BAS relocation.¹³ Notably, TerreStar and ICO do not, and cannot, offer any evidence that a BAS licensee has failed to participate in good faith in the BAS relocation.

¹² *See id.* at 25; ICO Comments at 25.

¹³ Indeed, TerreStar and ICO devote the bulk of their comments to a series of arguments that, if accepted, would allow them to shirk their obligations to reimburse Sprint Nextel for their *pro rata* share of the costs incurred by Sprint Nextel in the BAS relocation. *See, e.g.*, TerreStar Comments at 1-3 and 5-23; Comments of New DBSD Satellite Services G.P. at 1-25 (filed July 14, 2009) (“ICO Comments”). ICO also filed a petition to stay enforcement of its cost-sharing (continued...)

MSTV and NAB are optimistic that *no* markets will remain uncleared after February 8, 2010, but it is possible that circumstances outside of broadcasters' control — such as a shortage of equipment or tower personnel, or a weather emergency — will delay relocation of BAS licensees in a given market. The Commission should not impose premature, secondary status on these BAS licensees for delays that are beyond their control. Such action would unfairly penalize viewers as well, who would lose access to news, public affairs, and emergency information that otherwise would be made possible by BAS transmissions.

III. THE COMMISSION SHOULD UPHOLD ITS DECISION TO REQUIRE SUCCESSFUL COORDINATION PRIOR TO OPERATION IN UNCLEARED MARKETS.

As the Commission concluded in the *R&O/O*, “interference to nonrelocated BAS incumbents cannot be avoided if MSS is allowed to conduct unrestricted operations in uncleared markets.”¹⁴ The Commission reached this technical finding after a thorough evaluation of technical analyses authored by Hammett & Edison, Inc. (submitted by MSTV), du Treil, Lundin & Rackley, Inc. (submitted by TerreStar), and Wireless Strategy (submitted by ICO). In accordance with its technical findings, the Commission appropriately required that the MSS entrants must successfully coordinate their operations in uncleared markets.

Only ICO asks the Commission to eliminate the coordination requirement. It fails, however, to offer any new technical analysis or data to contradict the Commission's findings that without coordination, MSS operations will interfere with BAS equipment. For example, in the *R&O/O*, the Commission observed critically that ICO failed to test the effect of

obligations by the Commission because it has filed for bankruptcy. *See* Petition for Stay of New DBSD Satellite Services G.P. (filed July 14, 2009).

¹⁴ *R&O/O-FNPRM* at ¶ 52.

its mobile terminals on analog BAS equipment, which is the majority of equipment in uncleared markets. Rather than conduct that analysis, ICO states without meaningful elaboration that the Commission “misinterpreted” the Wireless Strategy study.¹⁵ ICO’s vague critiques of the Commission’s technical conclusions do not form a basis for eliminating the coordination requirement.

TerreStar does not oppose the coordination requirement, but makes certain misstatements about the status of coordination to date. As noted above, MSTV and its Engineering Committee worked cooperatively with TerreStar in 2007 and 2008 to discuss how TerreStar and BAS licensees in certain circumstances may coordinate operations in uncleared markets. TerreStar states that it had asked MSTV to distribute a one-page survey concerning BAS receive sites to its members, but neglects to mention that the request was made well over a year ago at a time when it was obvious that many markets would be cleared before TerreStar commenced operations.

As MSTV explained to TerreStar at the time of the request, a request that all BAS licensees complete TerreStar’s form would have been an inefficient use of resources, because TerreStar would not, in fact, need to coordinate with many of the licensees.¹⁶ This became even more apparent after the S-band reflector of the TerreStar-1 satellite was damaged early in the summer of 2008, leading TerreStar to delay launch until June 30, 2009.¹⁷ After the reflector was

¹⁵ ICO Comments at 26.

¹⁶ The *R&O/O* recognizes that “[i]f coordination takes place too early, the market may have transitioned by the time the MSS entrant actually begins providing service.” *R&O/O-FNPRM* at ¶ 55.

¹⁷ While TerreStar implies that it was unable to coordinate with MSTV, it is apparent that TerreStar’s inability to launch its satellite and commence service in 2008 made market-specific (continued...)

damaged, TerreStar ceased coordination discussions with MSTV. Throughout 2008, broadcast station engineers appropriately focused their efforts on collaboration with Sprint Nextel to advance the BAS relocation, as well as on the DTV transition. The accelerated rate of BAS clearing during the last year confirms this approach as the proper strategy. In any event, MSTV remains willing and able to assist in communication between TerreStar and BAS licensees in uncleared markets, as appropriate to facilitate coordination in the manner anticipated by the *R&O/O*.

Likewise, there is no need for the declarations sought by TerreStar with respect to the coordination activities of BAS licensees. The Commission has already made clear its expectation that BAS licensees will “act cooperatively to accommodate good faith proposals for MSS operations” and “disclose the locations of [BAS receive] sites to MSS entrants upon request in order to facilitate coordination.”¹⁸ The declarations sought by TerreStar, such as a finding that failure *for any reason* to complete TerreStar’s questionnaire constitutes “bad faith,” are unnecessary and overbroad.¹⁹ If, as occurred in 2008, TerreStar seeks information from a station that will be relocated before TerreStar begins operations in the station’s market or an adjacent market, it would be unreasonable to demand that the BAS licensee complete the questionnaire. MSTV and NAB also are concerned that TerreStar may attempt to misuse any statement concerning “good faith coordination” to ignore the clear directive of the *R&O/O* that “BAS incumbents are not expected to agree to coordination proposals that would impair their ability to meet the electronic newsgathering needs of a particular market at a particular time or that would

coordination untimely. As TerreStar acknowledges in its comments, “TerreStar had not come remotely close to entering the band” as of June 2008. *See* TerreStar Comments at 8.

¹⁸ *R&O/O-FNPRM* at ¶ 55.

¹⁹ *See* TerreStar Comments at 24.

delay the scheduled relocation of BAS.”²⁰ Particularly in light of their avoidance of involvement in the relocation process, the MSS entrants should not be allowed at this late date to set the terms of what constitutes “bad faith” on the part of BAS licensees.

²⁰ *R&O/O-FNPRM* at ¶ 55.

CONCLUSION

The proposals of TerreStar and ICO to obtain primary status and potentially evade their coordination requirements in uncleared markets would reward their ongoing failure to participate meaningfully in the BAS relocation. News coverage in uncleared BAS markets would suffer, even if the affected BAS licensees had cooperated in good faith with BAS relocation efforts. To prevent such harms, MSTV and NAB respectfully request that the Commission (1) maintain the primary status of BAS licensees in uncleared markets until the sunset date of December 9, 2013, and (2) allow MSS operations in uncleared markets only to the extent that the MSS entrant successfully coordinates its operations.

Respectfully submitted,

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