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August 10, 2010

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: WT Docket No. 02-55; ET Docket Nos. 00-258 & 95-18;
File Nos. SES-T/C-20091211-01575, SES-T/C-20091211-01576,
SAT-T/C-20091211-00144
Ex Parte Presentation

Dear Ms. Dortch:

On August 9, 2010, Lawrence Krevor and Trey Hanbury of Sprint Nextel Corporation (Sprint Nextel) and Gina Keeney and Charles Logan of Lawler, Metzger, Keeney & Logan, LLC, Sprint Nextel's outside counsel, met with Paul de Sa, Chief of the Commission's Office of Strategic Planning and Policy Analysis, concerning the above-referenced proceedings.

During the meeting, the representatives of Sprint Nextel summarized points made in Sprint Nextel's prior filings in these proceedings. Sprint Nextel explained that the issue before the Commission is straightforward: Sprint Nextel has spent approximately $750 million in completing the relocation of 2 GHz Broadcast Auxiliary Service (BAS) licensees, and under bedrock cost-sharing principles that date back to the 1990s, TerreStar Networks Inc. (TerreStar) and ICO Global Communications (Holdings) Limited (ICO) must reimburse Sprint Nextel for their fair share of these relocation costs. Any other result would be inequitable and contrary to well-established precedent. Sprint Nextel pointed out that the failure to enforce the TerreStar and ICO reimbursement obligations would undermine the integrity of the Commission's cost-sharing principles and discourage future new entrants from relocating incumbent licensees from reallocated spectrum bands, including the 500 MHz of spectrum the Commission seeks to reallocate for mobile broadband services. Sprint Nextel urged the Commission to conclude its pending rulemaking proceeding expeditiously and re-affirm TerreStar's and ICO's reimbursement obligations. Sprint Nextel also emphasized that the Commission should

first issue its decision and clarifications in the long-pending BAS relocation Further Notice of Proposed Rulemaking and then apply any such rules to the pending DBSD transfer-of-control applications.[1] Finally, we provided Mr. de Sa a copy of the attached chronology.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, a copy of this letter is being filed electronically in the above-referenced dockets.

Sincerely,

/s/ *Charles W. Logan*
Charles W. Logan

cc: Paul de Sa

Attachment

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[1] *Improving Public Safety Communications in the 800 MHz Band*, Report and Order and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 7904 (2009) ("*BAS Relocation Report & Order and Further Notice*").

August 2010

Chronology of MSS Licensee Reimbursement Obligation

The following is a chronology of key FCC decisions and developments related to the obligation of TerreStar Networks Inc. (TerreStar) and ICO Global Communications (Holdings) Limited (ICO) to reimburse Sprint Nextel Corporation (Sprint Nextel) for their *pro rata* share of the cost of clearing Broadcast Auxiliary Service (BAS) licenses from the 1990-2025 MHz band.

One Consistent, Overarching Principle Throughout This Chronology

TerreStar and ICO's reimbursement obligation derives from a principle that has remained consistent throughout the time period covered by this chronology, and which has been emphasized by both the FCC and the federal courts:

> "A guiding principle for relocation is that those entrants that benefit from cleared spectrum have an obligation to shoulder their portion of the costs to relocate incumbent operations. We fully intend to apply that principle [to TerreStar and ICO]." (FCC *2009 Order and Further*[1])

> "From a non-legal, just a very simple, old-fashioned approach, putting aside all the requirements and technicalities of the law, if Sprint has paid out hundreds of millions of dollars to clear this bandwidth from which the two defendants will ultimately . . . benefit and if the basic principle within the FCC is that there is a concept of fair reimbursement when subsequent licensees first enter into bandwidth that somebody else has cleared for them, then just from a basic what's fair and what's right standpoint, there ought to be some way of coming to some practical resolution." (U.S. District Judge Leonie M. Brinkema, U.S. District Court for the Eastern District of Virginia, Aug. 29, 2008[2])

1990s to Present: Cost Sharing Established and Consistently Applied

In its *Emerging Technologies* proceedings in the 1990s, the FCC establishes the "cost sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for that benefit."[3] The FCC consistently applies this principle to every incumbent relocation, including the clearing of the PCS and AWS-1 bands. The FCC also applies traditional cost-sharing principles to the BAS relocation.[4]

March 14, 1997: MSS Allocation and BAS Relocation Responsibility

The FCC adopts Mobile Satellite Service (MSS) allocation for the United States and requires that BAS be relocated. The FCC states that the "cost of all steps necessary for clearing the 1990-2025 MHz band for MSS operators will be borne by MSS operators."[5]

1998-2000: FCC Imposes BAS Relocation and Reimbursement Obligations on MSS Licensees

On November 25, 1998, the FCC affirms the MSS allocation and seeks comment on proposed on rules to require MSS to relocate BAS facilities consistent with the FCC's *Emerging Technologies* policies, under which every operator in the band shares spectrum clearing costs on a *pro rata* basis.[6] On July 3, 2000, the FCC establishes the 2 GHz MSS licensee obligation to relocate BAS and also establishes the requirement that new entrants share the cost of relocating BAS incumbents.[7]

In these proceedings, ICO states 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.[8] Similarly, TerreStar's predecessor, TMI, states 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."[9]

July 17, 2001: ICO and TerreStar Obtain MSS Authorizations Conditioned on BAS Relocation and Reimbursement Obligations

The FCC authorizes ICO and TerreStar to construct, launch and operate MSS systems on the condition that they comply with BAS relocation and cost-sharing obligations.[10]

July 2001 to Present: ICO and TerreStar Take No Steps to Relocate BAS Incumbents

In 2002, the broadcast industry reports that, well into the MSS – BAS mandatory negotiation period, "there have been no substantive relocation negotiations undertaken by any MSS licensee."[11]

In subsequent years, the FCC twice finds "no evidence that any meaningful relocation negotiations" took place between MSS and BAS licensees.[12]

August 6, 2004: FCC Adopts Sprint Nextel – BAS Relocation Plan While Reiterating MSS Relocation and Reimbursement Obligations

The FCC adopts its *800 MHz Order*, including a joint Sprint Nextel – broadcast industry plan to relocate BAS licensees. The order makes clear that ICO and TerreStar have a continuing, independent obligation to relocate BAS licenses. The order also establishes that, to the extent Sprint Nextel takes the lead in the relocation, it is entitled to seek reimbursement from MSS licensees entering the band prior to the conclusion of 800 MHz reconfiguration for their *pro rata* share of the cost of relocating fixed and mobile BAS in the Top 30 markets and all fixed links in all markets.[13]

August 2004 to Present – Sprint Nextel Works Diligently with Broadcasters to Relocate BAS Licensees – With No Help From ICO and TerreStar

Following the *800 MHz Order,* Sprint Nextel works closely with the broadcast industry to relocate approximately 1000 BAS incumbents to the new 2 GHz band plan without disrupting broadcaster news operations. Sprint Nextel dedicates enormous resources to the task, with dozens of Sprint Nextel employees and hundreds of outside vendors working on outreach, the equipment inventory process, negotiating relocation agreements, the purchase order process, the installation of new BAS equipment, change orders, and a myriad of other complex tasks and challenges. Scores of broadcaster station employees also work in good faith in tackling these challenges.

Throughout this time, ICO and TerreStar decline to assist the relocation process in any fashion, notwithstanding their independent obligation to relocate BAS licensees. For example, in the fall of 2007, Sprint Nextel invite ICO and TerreStar to participate in the relocation process by providing their own negotiators, lawyers, and engineers within the existing BAS relocation structure developed by Sprint Nextel, but ICO and TerreStar decline.

In July 2009, the broadcast industry states:

> All of [the] progress [broadcasters and Sprint Nextel have made] has occurred in the face of the ongoing refusal of the two MSS entrants, TerreStar and ICO, to make *any* contribution – whether in the form of labor, planning, technical expertise, or financial reimbursement – to the BAS relocation. As far as the BAS relocation is concerned, TerreStar's and ICO's sole involvement has been to file comments and make *ex parte* presentations . . . in which they have lobbied the Commission repeatedly for rule changes that would excuse them from paying their fair share of BAS relocation costs prior to commencing operations.[14]

Oct. 5, 2005: FCC Reaffirms MSS Cost-Sharing and Relocation Obligations

In an order released on October 5, 2005, the FCC reiterates that, "[u]nder 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."[15] The FCC also states that "MSS licensees retain the option of accelerating the clearing of [the top 30 markets] so that they could begin operations before Nextel has completed nationwide clearing."[16]

March 7, 2006: Sprint Nextel Seeks Reimbursement from ICO and TerreStar

Consistent with the terms of the *800 MHz Order*, Sprint Nextel notifies the FCC, ICO, and TerreStar of its intention to seek reimbursement from the MSS licensees for their share of the BAS relocation costs.[17]

November 27, 2007: Sprint Nextel Agrees to Accommodate MSS Market-Prioritization Requests

At the insistence of ICO and TerreStar, Sprint Nextel agrees to accelerate the transition of 25 markets because MSS licensees identified these areas as high priorities for MSS operations. As agreed, Sprint Nextel completes the transition in these markets by no later than the summer of 2008. Accommodating these requests diverts resources from other markets and disrupts the most efficient allocation of band-clearing efforts, delaying the overall completion of BAS relocation. Accommodating the MSS licensee requests ultimately is all for naught, however, as ICO and TerreStar subsequently delay commencing their commercial operations.

February 4, 2008: FCC Reiterates ICO and TerreStar Relocation Obligations

In a February 4, 2008 order, the FCC reiterates that both "Sprint Nextel and 2 GHz MSS licensees have equal obligations to relocate the 1.9 GHz BAS incumbents."[18]

May 9, 2008: ICO MSS System Becomes Fully Operational

ICO certifies that its MSS system is fully operational on May 9, 2008.[19] ICO consequently incurs its reimbursement obligation to Sprint Nextel on that date under the tentative conclusion set forth in the Commission's *2009 Order and Further Notice.*[20]

June 25, 2008: Sprint Nextel Files Suit

Sprint Nextel files suit in U.S. District Court for the Eastern District of Virginia against ICO and TerreStar to enforce the *800 MHz Order* and to recover from ICO and TerreStar a *pro rata* share of Sprint Nextel's BAS relocation costs

August 29, 2008: Court Refers Issue to FCC and Notes Equities in Favor of Sprint Nextel

U.S. District Judge Leonie M. Brinkema denies ICO's and TerreStar's motions to dismiss Sprint Nextel's lawsuit, but refers the case back to the FCC for further resolution. Judge Brinkema notes the equities in favor of "fair reimbursement" for Sprint Nextel (see quote on page 1).

June 12, 2009: FCC Reaffirms ICO and TerreStar Obligation to Reimburse Sprint Nextel and Seeks Comment on Implementation Issues

The FCC releases its *2009Order and Further Notice,* making the following findings:

- "Successful completion of [BAS relocation] does not rest with any one party but requires the cooperation of the incumbents and all new entrants, acting in good faith, to assume responsibility for the relocation process so that all may benefit."[21]

- "When the decision was made to permit Sprint Nextel to use the 1990-1995 MHz band, no BAS licensees had yet been relocated and there was no evidence that any meaningful relocation negotiations had taken place between BAS licensees and MSS entrants. ... Sprint Nextel remains the sole entity actively undertaking [BAS] relocations."[22]

- "Sprint Nextel has made considerable progress in the BAS relocation process that has proven to be a more complex undertaking than any party may have initially anticipated."[23]

- The FCC rejects MSS licensee arguments that their reimbursement obligations arbitrarily terminated on June 26, 2008 (the originally anticipated benchmark for completing 800 MHz reconfiguration), stating such arguments ignore "the stated purposes and structure of the cost-sharing principles set forth in the *800 MHz R&O* and other decisions regarding the shared responsibilities of new entrants for BAS relocation."[24]

- "Nothing in the text of the relevant orders suggests that the Commission limited the time in which Sprint Nextel could seek reimbursements from MSS entrants to provide an independent benefit to MSS entrants, *e.g.,* to subsidize them or provide them certainty about their business costs. Thus, we find that the MSS entrants'

cost sharing obligations must be interpreted in light of the unanticipated changed circumstances, and these obligations should not be tied to a deadline that is no longer relevant. In short, MSS entrants should pay a *pro rata* share of the BAS relocation costs unless doing so would allow Sprint Nextel to be reimbursed twice (by both the Treasury and the MSS and AWS-2 licensees)."[25]

The *2009 Order and Further Notice* makes clear the Commission's intent to enforce ICO and TerreStar's cost-sharing obligations, and seeks comment on the specific procedures and requirements for implementing these obligations. The FCC tentatively concludes that "an MSS entrant will have entered the band and incurred a cost-sharing obligation when it certifies that its satellite is operational for purposes of meeting its operational milestone."[26]

The *Further Notice*'s comment cycle closes in July 2009.

July 20, 2009: TerreStar Certifies Compliance with Operational Milestone

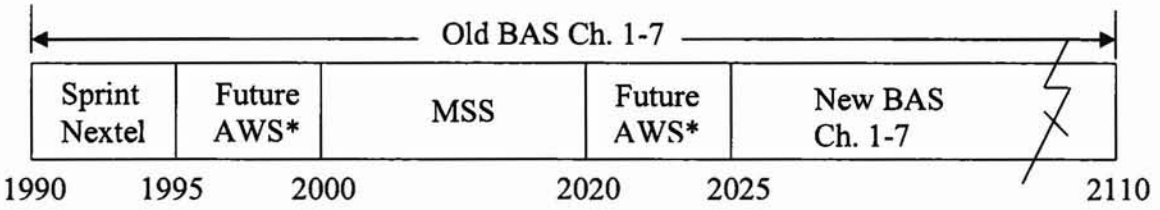
On July 20, 2009, TerreStar certifies that its satellite had become operational and thus incurs its reimbursement obligation to Sprint Nextel under the FCC's tentative conclusion in the *2009 Order and Further Notice.*[27]

July 2010: Sprint Nextel and Broadcasters Complete the BAS Relocation

Sprint Nextel and the broadcast industry relocate the last market (Anchorage) in July 2010, completing the BAS relocation throughout the country without disruption to broadcaster news operations. Overall, the process involved relocating about 1000 BAS licensees and replacing approximately 100,000 pieces of television transmission equipment. Sprint Nextel and the broadcast industry overcame numerous complexities and challenges to complete the relocation, including complex tax considerations, natural disasters and severe weather, and limited BAS equipment production lines. Although the relocation took longer than initially anticipated, the FCC issued orders extending the relocation deadline, finding "compelling" reasons for the extension and that Sprint Nextel had acted in good faith and taken all steps within its control to meet the FCC's deadlines.[28]

Sprint Nextel ends up spending approximately $750 million to complete the BAS relocation.

As a result of Sprint Nextel's efforts, 35 megahertz of spectrum in the 1990-2025 MHz band is now clear for new services. Sprint Nextel has been assigned 5 megahertz – 15% of the total cleared spectrum – while ICO and TerreStar have been assigned 20 MHz – or 57% of the total cleared spectrum. The remaining 10 megahertz – 28% of the total – is allocated to AWS. The following chart depicts the respective allocations.



*AWS = Advanced Wireless

Endnotes

[1] *Improving Public Safety Communications in the 800 MHz Band,* Report and Order and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 7904, ¶ 46 (2009) (*Order and Further Notice*).

[2] *Sprint Nextel Corp. v. New ICO Satellite Services G.P., et al.,* No. 1:08cv651 (E.D. Va. Aug. 29, 2008).

[3] *2009 Order and Further Notice* ¶ 79.

[4] *Improving Public Safety Communications in the 800 MHz Band,* Memorandum Opinion and Order and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 4393, ¶ 15 (2008).

[5] *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum At 2 GHz for Use By The Mobile-Satellite Service*, 12 FCC Rcd 7388, ¶ 33 (1997).

[6] *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum At 2 GHz for Use By The Mobile-Satellite Service*, Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order, 13 FCC Rcd 23949 (1998).

[7] *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 (2000) (*2000 MSS Order*).

[8] Comments of ICO Services Limited, ET Docket No. 95-18, at 14 (Feb. 3, 1999).

[9] Comments of TMI Communications and Company, ET Docket No. 95-18, at 2, 7 (Feb. 3, 1999).

[10] *See 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 19403, ¶¶ 67, 69, 71 (2000) ("All MSS licensees who benefit from relocation of BAS are responsible for contributing, as a condition of their licenses."); *2000 MSS Order* ¶ 71 ("Subsequently entering MSS licensees . . . will, as a condition of their licenses, compensate the first entrant on a *pro rata* basis, according to the amount of spectrum the subsequently entering licensees are authorized to use.").

[11] Letter from Edward O. Fritts, National Association of Broadcasters, and David L. Donovan, Association for Maximum Service Television, Inc., to FCC Chairman Michael Powell, ET Docket No. 95-18, at 2 (June 6, 2002).

[12] *2009 Order and Further Notice* ¶ 10; *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 4393, ¶ 31 (2008).

[13] *Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, ET Docket 00-258, Report and Order*, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 ¶¶ 8-12 (2004) (*800 Order*).

[14] Comments of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters, WT Docket No. 02-55, at 3 (July 14, 2009).

[15] *Improving Public Safety Communications in the 800 MHz Band,* Memorandum Opinion and Order, 20 FCC Rcd. 18970, ¶ 111 (2005).

[16] *Id.* ¶ 114.

[17] *See* March 7, 2006 Letter from Lawrence R. Krevor, Sprint Nextel Corporation, to Marlene H. Dortch, FCC Secretary, WT Docket No. 02-55, *et al.*, at 1 ("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 Order*] … . 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. ….").

[18] *Improving Public Safety Communications in the 800 MHz Band,* Order, 23 FCC Rcd 2423, ¶ 2 (2008).

[19] On May 9, 2008, ICO certified to the Commission that "the entire ICO 2 GHz mobile satellite service system is operational" and that it has conducted two-way voice and data sessions in the 2 GHz band. Letter from Suzanne Hutchings Malloy, New ICO Satellite Services G.P., to Marlene H. Dortch, FCC Secretary, File No. SAT-LOI-19970926-00163, Final Milestone Certification and Selected Assignment Notification for Call Sign S2651, and attached Certification of Dennis Schmitt, ICO Global Communications (Holdings) Limited (May 9, 2008); *see also 2009 Order and Further Notice* ¶ 91 n.201.

[20] In the *2009 Order and Further Notice,* ¶ 91, the FCC tentatively concluded that "an MSS entrant will have entered the band and incurred a cost-sharing obligation when it certifies that its satellite is operational for purposes of meeting its operational milestone."

[21] *2009 Order and Further Notice* ¶ 4.

[22] *Id.* ¶¶ 10, 28.

[23] *Id.* ¶ 29.

[24] *Id.* ¶ 77.

[25] *Id.* ¶ 80.

[26] *Id.* ¶ 91.

[27] *See* Letter from Joseph Godles, Counsel to TerreStar License Inc., to Marlene Dortch, FCC Secretary (July 20, 2009); Public Notice, Policy Branch Information: Actions Taken, Report No. SAT-00619 (released July 24, 2009); *see also, supra,* note 20.

[28] *2009 Order and Further Notice* ¶ 17.