

March 4, 2008

*Via Electronic Filing*

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

Re: *Written Ex Parte Presentation*  
WT Docket No. 02-55; ET Docket Nos. 00-258 and 95-18

Dear Ms. Dortch:

In a recent letter filed with the Commission, New ICO Satellite Services G.P. (ICO) “supports reasonable relief” with respect to modifying the Commission’s deadline for completing the relocation of Broadcast Auxiliary Service (BAS) licensees in the 2 GHz band.<sup>1</sup> ICO further states that it does not oppose the grant of the extension request filed by the Joint Parties – Sprint Nextel Corporation (Sprint Nextel), the Association for Maximum Service Television, Inc. (MSTV), the National Association of Broadcasters (NAB), and the Society of Broadcast Engineers (SBE) – provided certain conditions are met.<sup>2</sup>

The Joint Parties appreciate ICO’s support for relief and recognize the desire of Mobile Satellite Service (MSS) licensees to commence operations in the 2 GHz band. Each of the Joint Parties has as much if not more of an incentive to complete BAS relocation as soon as possible. The record in this proceeding shows that, because of the complexities of relocating hundreds of individualized BAS systems throughout the country, BAS relocation will not be completed until August 2009 assuming no unanticipated obstacles arise. The Joint Parties will continue to work with MSS licensees to find ways to expedite the process and to minimize the impact on MSS operations.

At the same time, however, the Commission should require MSS licensees to adhere to their relocation obligations, including the obligation to contribute their *pro rata* share of relocation costs, their obligation to relocate BAS operations in the top-thirty television markets and all fixed systems nationwide, and their obligation to avoid posing an interference risk to broadcasters’ news operations. As Chairman Dingell and Congressman Upton have emphasized, the Commission’s BAS relocation procedures “should not jeopardize the ability of local stations to fulfill their primary role – to provide live local coverage of news events.”<sup>3</sup>

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<sup>1</sup> Letter from Suzanne Hutchings Malloy, ICO, to Marlene H. Dortch, FCC Secretary, WT Docket No. 02-55, at 11 (Feb. 26, 2008) (ICO Letter).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> Letter from Honorable Fred Upton and Honorable John D. Dingell to FCC Chairman Powell, at 3 (March 23, 2004).

## 1. *ICO's Waiver Request and Proposed Conditions*

ICO requests that the Commission impose four conditions on the Joint Parties.<sup>4</sup> We address each of them below.

The Joint Parties agree to work with ICO regarding its first proposed condition that would allow it to begin system testing by April 2008 in Brewster, Washington; South Easton, Massachusetts; and Ellenwood, Georgia. ICO has provided insufficient technical information about these operations to the Joint Parties. These markets will not be cleared by April, and it remains unclear how ICO proposes to coordinate with BAS licensees to avoid interference.<sup>5</sup> Nevertheless, ICO has portrayed these temporary operations as limited range, limited duration system tests that generate little risk of harmful interference to BAS. As a sign of good faith, therefore, the Joint Parties agreed to permit limited tests in these un-transitioned markets, provided that ICO cease testing in the event harmful interference occurs.<sup>6</sup>

The Joint Parties have already agreed fully to ICO's second proposed condition: the relocation of BAS incumbents in Las Vegas, Nevada and Raleigh-Durham, North Carolina to allow ICO to initiate trials in those markets this summer. The Joint Parties have made significant changes to the relocation schedule to advance these four markets. These changes have negatively impacted broadcasters in various other markets that are prepared to relocate, but the broadcasting industry has accepted these circumstances to achieve a successful industry wide relocation that fulfills the Commission's goals and also accommodates ICO. The Las Vegas transition is already complete, and the Joint Parties have agreed to transition Raleigh-Durham this summer barring unforeseen circumstances.<sup>7</sup>

The Joint Parties do not object to ICO's third proposed condition: filing monthly status reports. The Joint Parties remain committed to completing relocation consistent

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<sup>4</sup> ICO Letter at 2-3.

<sup>5</sup> Brewster, Washington is a relatively remote area and presents less of an interference risk; however, the other two markets – South Easton and Ellenwood – are very near Boston and Atlanta where BAS systems operate on a routine basis. A visit by a representative of MSTV earlier this year revealed that no antenna had been installed at the South Easton location. The Joint Parties will continue to work with ICO to determine the potential for interference at the proposed sites.

<sup>6</sup> The tests should not exceed sixty days without the Joint Parties' approval.

<sup>7</sup> Under the Consensus Plan, the Designated Market Areas (DMAs) of Charlotte, NC; Raleigh-Durham (Fayetteville), NC; and Greensboro-High Point-Winston Salem, NC should complete the BAS transition in June 2008 as ICO requests. The nearby DMAs of Columbia, SC; Charleston, SC; Greenville-New Bern-Washington, NC; Florence-Myrtle Beach, SC; and Wilmington, NC should complete transition as of August 2008. Although the Consensus Plan scheduled Charlotte, Raleigh, and Greensboro to transition in April 2008, affected licensees have indicated that live, nationwide coverage of the NCAA tournament basketball games, which rely heavily on electronic newsgathering equipment, might possibly be disrupted if these markets were transitioned in April. Accommodating this scheduling adjustment is not expected to affect the anticipated date of clearing the overall Raleigh-Durham market cluster.

with the schedule they submitted to the Commission on December 6, 2007 and will work aggressively to meet it; however, unforeseen delays may arise in these complex relocations that are beyond the Joint Parties' control. Such contingencies, if any, affect Sprint Nextel's ability to use its 1.9 GHz G Block channels just as much, if not more, than MSS services. Accordingly, while the Joint Parties will coordinate with ICO in such potential circumstances, ICO must also recognize that unforeseen and uncontrollable delays are just that – outside of the Joint Parties' control – and may adversely affect all stakeholders despite their best efforts otherwise.

The Commission, however, should not grant ICO's final proposed condition that it receive nationwide spectrum access to a portion of the BAS bands by January 2009.<sup>8</sup> Despite repeated requests, ICO has not provided sufficient technical information about its system's ability to coexist with BAS, nor has it established grounds for waiving Section 74.690(e)(1)(i) of the Commission's rules.<sup>9</sup> Indeed, the record is devoid of information that explains how ICO might share spectrum in, or geographically adjacent to, un-transitioned BAS market areas.

To obtain the outcome it seeks, the Joint Parties respectfully submit that ICO must provide some baseline showing that coexistence between its mobile terminals and BAS operation is feasible. ICO must also explain how it intends to disable individual mobile terminals in the event harmful interference does occur. ICO has not done so, and, unless and until it does, the Commission should not grant ICO's proposed fourth condition. Granting ICO's request on the present record threatens to cause grave harm to electronic newsgathering, political programming, sports coverage, and entertainment.

## **2. *ICO's Relocation and Reimbursement Obligations***

Rather than relieve ICO of any responsibility for the BAS relocation, the Commission should affirm that ICO must remain part of the solution. For years, ICO has maneuvered to expend no labor, pay no cost, and bear no interference burden in relocating BAS incumbents. ICO instead has called for broadcasters and Sprint Nextel to bear the entire burden of the complex BAS relocation process.<sup>10</sup> Any relief granted ICO must ensure that ICO shares technical information with broadcasters to determine whether coexistence is feasible and must affirm that ICO is required to pay its fair share of the cost of transitioning BAS licensees above 2025 MHz. Therefore, the Commission should deny ICO's proposed waiver of section 74.690(e)(1)(i) of the Commission's rules. Section 74.690(e)(1)(i) has served as a cornerstone of BAS relocation for nearly a decade and ICO has offered no reason to waive that provision now. To the extent the Commission contemplates granting a waiver for markets that have been cleared, such a waiver should be granted on the following conditions: (1) demonstration that ICO's proposed operations will not cause harmful interference to BAS systems,

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<sup>8</sup> ICO Letter at 3-7. The Joint Parties have already agreed to clear markets in 2008 in order to facilitate market tests, provided such use does not cause interference in uncleared adjacent markets.

<sup>9</sup> 47 C.F.R. § 74.690(e)(1)(i).

<sup>10</sup> ICO Letter at 9-10.

(2) confirmation that ICO must pay its *pro rata* share of eligible BAS relocation expenses, and (3) preservation of the underlying obligation to provide relocation compensation for BAS systems in the top thirty markets and all fixed systems that Sprint Nextel has not transitioned.

ICO does not deny that its BAS relocation obligations predate Sprint Nextel's obligations by several years.<sup>11</sup> Nor can ICO dispute that it has done virtually nothing to relocate BAS licensees – not a single relocation agreement signed, not a single piece of equipment ordered, not a single BAS licensee relocated.<sup>12</sup> While ICO notes that the *2004 800 MHz R&O* gave MSS licensees the option of deferring to the Sprint Nextel-BAS relocation process, the Commission made clear in that Order and again in 2005 that ICO and other MSS licensees “retain the option of accelerating the clearing of [BAS] markets so that they could begin operations before Nextel has completed nationwide clearing.”<sup>13</sup> ICO declined this option, just as it declined to contribute the resources necessary to move BAS relocation forward in the years preceding the *2004 800 MHz R&O*.

ICO's *ex parte* is the latest manifestation of its strategy of avoiding its *pro rata* share of the costs of clearing BAS licensees. Several months ago Sprint Nextel offered ICO a proposed contractual agreement that would allow ICO to directly participate in the BAS relocation framework, but ICO never responded. More recently, ICO has informed Sprint Nextel that it is “impossible to know” whether or when MSS licensees must reimburse Sprint Nextel for its *pro rata* share of BAS relocation costs, notwithstanding the clear requirements in the Commission's orders to the contrary.<sup>14</sup>

During the course of this proceeding, ICO has proposed arbitrary and unrealistic requirements on the Joint Parties, but has sought to avoid its own independent responsibilities in completing the complex task of relocating BAS licensees. The Commission should reject ICO's proposed double-standard and require ICO to adhere to its obligations, including funding its *pro rata* share of BAS relocation costs. In its letter,

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<sup>11</sup> In 2000, four years before the Commission adopted the Sprint Nextel-BAS relocation plan, the Commission adopted rules “to allow new [MSS] licensees to clear spectrum for their operations.” *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, ¶ 1 (2000) (*2000 MSS MO&O*). In 2001, three years before adoption of the Sprint Nextel-BAS plan, ICO received its MSS authorization, obligating it to clear BAS incumbents before it could commence operations. ICO argues that the Commission subsequently modified its MSS-BAS relocation rules, ICO Letter at 10 n.32, but most of these modifications were made at the behest of MSS licensees and cannot excuse ICO's almost complete lack of progress on BAS relocation.

<sup>12</sup> See Sprint Nextel Corp. Opposition to New ICO Comments, WT Docket No. 02-55, at 7-8 (April 26, 2007).

<sup>13</sup> *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, ¶ 257 (2004) (*2004 800 MHz R&O*); *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Memorandum Opinion and Order, 20 FCC Rcd. 16015, ¶ 114 (2005) (*2005 800 MHz MO&O*).

<sup>14</sup> *2004 800 MHz R&O* ¶ 261; *2005 800 MHz MO&O* ¶¶ 109-113.

ICO seeks a waiver of section 74.690(e)(1)(i) of the Commission's rules to allow it to commence operations by January 1, 2009, regardless of whether BAS licensees in the top thirty markets and fixed BAS licensees have been relocated or whether Sprint Nextel has received reimbursement for the requisite *pro rata* share of eligible BAS relocation costs. The Commission should deny ICO's request for waiver. The Commission should instead direct ICO to provide information sufficient to evaluate its technical claims and reiterate that ICO must pay its *pro rata* share of eligible BAS relocation expenses to Sprint Nextel.

### 3. *Conclusion*

The Joint Parties urge the Commission to consider that MSS interference to BAS operations will undermine the fundamental responsibility of broadcast licensees to provide coverage of local news events. Indeed, BAS and ENG operations were recognized as an important element in the FCC's emergency plans developed by the Media Security and Reliability Council. While the Joint Parties recognize the Commission's desire to encourage MSS licensees to deploy after years of delay, it should not do so at the expense of live local news coverage.

By applying a consistent set of standards and affording the parties flexibility, the Commission can promote an expeditious BAS relocation that avoids disrupting broadcasters' news operations. The Joint Parties seek to accommodate MSS needs and will continue to work with MSS licensees in relocating BAS licensees as rapidly as possible. MSS licensees, however, must provide some reasonable technical basis for operational coexistence and bear their fair share of BAS relocation costs.

Respectfully submitted,

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