

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
AFRISPACE, INC.	)	File No. CSS-90-017
	)	IBFS File Nos. SAT-LOA-19900723-00002;
Application for Authority to Launch	)	SAT-AMD-19990125-00016
and Operate a Satellite Sound	)	
Broadcasting Transmission System	)	

TO: The Commission

**REPLY TO RESPONSE OF WORLDSPACE,  
INC. AND AFRISPACE INC. TO THE  
COMMENTS OF AEROSPACE & FLIGHT TEST  
RADIO COORDINATING COUNCIL**

Aerospace & Flight Test Radio Coordinating Council ("AFTRCC") hereby replies to the "Response of WorldSpace, Inc. and AfriSpace, Inc. to the Comments [of AFTRCC]" in the above-captioned matter. As discussed below, the Response misstates the point of AFTRCC's objection; instead, it dwells at length on matters which are irrelevant to the central issue -- whether WorldSpace has the fitness to acquire a Commission license.

**BACKGROUND**

In its April 9 objection AFTRCC urged one very simple point, i.e. that it was premature to consider the AfriSpace application for a regular license given the questions raised as to WorldSpace's fitness in the XM Radio proceeding; rather, AFTRCC urged that action on the instant application be deferred until and unless WorldSpace had satisfactorily resolved those questions.

In support AFTRCC incorporated by reference its pleadings in the XM Radio matter. Those documents showed that WorldSpace had not only refused to re-configure its CARIBSS satellite so as to avoid interfering with U.S. flight testing, but had actually threatened to launch and operate CARIBSS regardless of the consequences to U.S. national interests. See Attachment F to AFTRCC's Petition to Deny or Defer. Further, AFTRCC demonstrated that CARIBSS' exorbitant coverage of the U.S. in the L-band, combined with WorldSpace's proposal to control XM Radio in the S-band, would position WorldSpace to provide DARS in the U.S. using two different satellites in two different bands; and that this amounted to a unilateral preemption of U.S. spectrum policy -- a policy which reserves one and only one band for DARS, namely S-band.

Based on the foregoing, AFTRCC urged that any action on the AfriSpace application be deferred until such time as WorldSpace satisfactorily resolved the questions as to its fitness.

WorldSpace's Response elaborates at great length on the control of AfriStar and its financing, e.g., that AfriSpace is in control of AfriStar, not its affiliate WorldSpace International Network, Inc. ("WIN"). The Response discusses numerous other satellite systems. It talks about other sale-leaseback arrangements approved by the Commission. It argues various benefits that it says AfriStar would provide. It spends a full 40 pages in this effort. At no point, however, does the Response come to grips with the basic point, i.e. that AfriSpace, like CaribSpace and all the other "Spaces" in the WorldSpace family, are under the de facto control of one man, Noah Samara, and that the policies Mr. Samara has pursued relative to CARIBSS necessarily reflect upon WorldSpace's qualifications to secure a regular license for AfriStar. A brief reply to additional specific points in the Response is set forth below.

### DISCUSSION

Initially, WorldSpace argues that AFTRCC's filing does not satisfy the Commission's procedural requirements on the grounds that it lacks "specific allegations of fact" or show that a grant would be "prima facie inconsistent with the public interest." Id. at note 4. However, AFTRCC's April 9 objection expressly incorporated by reference its earlier pleadings. Those pleadings were properly supported via sworn declarations and other documentation cognizable under the Commission's Rules. Indeed, it was based in large part on WorldSpace's own statements and uncontested facts. Hence, there is no basis to the procedural argument.

Insofar as the control argument is concerned, AFTRCC observed in its January 27, 1999 Consolidated Reply that WorldSpace's own press material distributed at the recent ITU Plenipotentiary Conference described Noah Samara as "Chairman and Chief Executive Officer" of the WorldSpace system including its "Network of three geosynchronous satellites launched to provide coverage that includes Africa, the Middle East, Asia, Latin America and the Caribbean" (emphasis added) -- i.e. that Mr. Samara is responsible for implementing both CARIBSS and AfriStar; that WorldSpace's own website represented that "World Headquarters" for the entire satellite system -- including "AfriSpace, AmeriSpace, AsiaSpace, and CaribSpace" -- is at 2400 N Street, N. W. in Washington -- the location of Mr. Samara's office; and that Mr. Samara has been frequently and freely quoted in the trades speaking on behalf of both AfriSpace and CaribSpace. Mr. Samara is President and the largest stockholder by far in WorldSpace (owning 41 percent with 32 others, most holding less than one (1) percent, dividing up the rest), and is also a major stockholder, directly and indirectly, in WIN. All of this is consistent with the

undenied fact that Mr. Samara conceived, has orchestrated, and continues to exercise ultimate responsibility for implementation of the AfriStar and CARIBSS (or AmeriStar) systems.<sup>1</sup>

WorldSpace argues that WIN does not currently hold ownership in WorldSpace/AfriSpace, or control the latter entities, e.g., that the four-member boards of WorldSpace and AfriSpace are separate from that of WIN, and that each is subject to "one man-one vote." *Id.* at 22. However, it is well-established that control analyses are fact-specific, i.e. that the Commission is not confined to a de jure analysis of corporate governance. Put another way, while corporate boards typically operate according to one-person, one vote, that does not mean that one person does not exercise de facto control of the corporation's affairs.

The Commission recognizes that ascertaining de facto control is more complex than vote counting. *Fox Television Stations, Inc.*, 10 FCC Rcd. 8452 p. 8514 (1995). When examining de facto control the determinative question is who has the power to dominate the management of corporate affairs; this entails an inquiry into the facts unique to each circumstance. Such inquiries are resolved on a case-by-case basis. *Id.*; see also *Southwest Texas Public Broadcasting Counsel*, 49 RR 2d 156 (1981) (ascertainment of control transcends formulas, since it involves an issue of fact to be resolved by the circumstances presented). Based on the undenied facts set forth above, Mr. Samara must be viewed as being in de facto control of both the U.S. and BVI entities.<sup>2</sup>

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<sup>1</sup> The Response states at various places that all "non-U.S. assets" were transferred to WIN and at other points "all non-AfriSpace assets" were transferred. *Id.* at 21, 33. A quick review of the Amendment reveals, however, that title to AfriStar resides in WIN's wholly-owned subsidiary, WorldSpace Satellite Company, Ltd. See Attachment 8 to Amendment. It is unclear what AfriSpace assets have remained behind with AfriSpace, Inc. beyond the FCC Experimental License and a few employees. However, the question is academic since, as discussed above, Mr. Samara's ultimate responsibility comprehends both halves of the WorldSpace family, i.e. the U.S. half (where the Response says AfriStar control resides) and the British Virgin Islands half (where title to the satellite, related ground facilities, and use of the channel capacity reside).

<sup>2</sup> In passing it should be noted that WorldSpace has failed to produce the shareholder agreements, articles, by-laws and other instruments governing Mr. Samara's voting control over WorldSpace/AfriSpace. Likewise,

In any event, in choosing to sell AfriStar to WIN and lease the satellite's programming capacity back to the same entity, WorldSpace has chosen to vest legal title to, and programming responsibility over, the AfriStar satellite in the very same corporation which ultimately holds ownership of and will program CARIBSS. In other words, WorldSpace itself has elected to link the two satellites together. It would be contrary to reason to accept WorldSpace's invitation to overlook that linkage based on an argument that WIN itself does not currently own or control its affiliates WorldSpace and AfriSpace.<sup>3</sup>

Insofar as WorldSpace's public interest arguments are concerned, AFTRCC has nothing against information and entertainment for the people of Africa. However, WorldSpace would posit this as the only value to be promoted by the Commission regardless of the costs to flight safety, American jobs and, ultimately, national security.

Indeed, in the final irony, WorldSpace cites U.S. involvement in Kosovo in support of its proposal. Id. at 37. WorldSpace's tunnel vision for the consequences of its conduct is nowhere better illustrated than by this: Most of the U.S. weapons systems being used in Kosovo were tested using the L-band -- tests which would have occurred only with increased risk to test pilots, major program delays, and billions of dollars in cost overruns, were

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WorldSpace has failed to produce the transactional documents evidencing the full extent of the relationships between WorldSpace/AfriSpace, on the one hand, and WIN, on the other hand.

<sup>3</sup> WorldSpace cites Turner Broadcasting System, Inc., 11 FCC Rcd 19595 (1996) for the proposition that CARIBSS coordination is an "unrelated matter" which "should not be used to delay action on a separate pending matter". Id. at note 7. However, in Turner the Commission rejected allegations as to an applicant's fitness, not because the matters alleged had arisen in a separate context, but because they were unsupported by declaration or affidavit, were properly raised via a complaint specifically provided for under separate Commission rules (program access), and were in any event speculative. Id. at 19609-10. Here, by contrast, AFTRCC's concerns have been supported with documentary evidence, the harm is imminent, and the threat remains. And of course the Commission is the appropriate forum before which to bring matters bearing on WorldSpace's qualifications to receive a grant of the subject application.

WorldSpace to have its way as expressed in the December 22 letter to the Department of Defense (Petition to Deny or Defer, Attachment F).<sup>4</sup>

Lastly, the Response returns to its opening theme, namely that AFTRCC's objection is a "mere stalking horse for AFTRCC's true purpose". *Id.* at 39. AFTRCC's objection is no mere "stalking horse" nor does AFTRCC have a hidden purpose. On the contrary, AFTRCC believes its purpose has been perfectly clear. But lest there be any doubt on this score, let it be repeated: Our purpose is to ensure that satellite operators who threaten important national interests are not at the same time rewarded with the benefits of U.S. licenses. It concerns the most basic questions of fitness to receive a license under the "public interest, convenience, and necessity" criterion of the Communications Act. 47 U.S.C. Section 307.

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<sup>4</sup> Annex C to the Response references changes WorldSpace recently proposed to the CARIBSS satellite. While potentially positive, it is unclear when, how or whether such changes will be accomplished in a manner which resolves the concerns raised by AFTRCC.

**CONCLUSION**

For the foregoing reasons, AFTRCC urges that the subject application be held in abeyance pending a resolution of the outstanding issues raised by AFTRCC in this and the XM Radio proceedings. If the applicant should nevertheless insist on an immediate answer, the application should be denied.

Respectfully submitted,

AEROSPACE & FLIGHT TEST RADIO  
COORDINATING COUNCIL

By:



Rex D. Miller

Chair

P.O. Box 200547

Cartersville, GA 30120-9010

Of Counsel:

William K. Keane, Esq.  
Arter & Hadden LLP  
1801 K Street, N. W.  
Suite 400K  
Washington, D.C. 20006-1301

May 3, 1999

**CERTIFICATE OF SERVICE**

I, Joseph C. Fezie, hereby certify that a true copy of the attached, "Reply to Response of WorldSpace, Inc. and AfriSpace Inc. to the Comments of Aerospace & Flight Test Radio Coordinating Council", has been mailed to the following by First Class United States mail, postage prepaid, this 3rd day of May, 1999:

Tara Kalagher Giunta, Esq.  
Coudert Brothers  
1627 I Street, N. W.  
Washington, D. C. 20006

  
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Joseph C. Fezie