

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

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In the Matter of)
)
AfriSpace, Inc.)
)
Application for Authority to Launch and)
Operate a Replacement Satellite, AfriStar-2,)
at 21° E.L. and to Collocate it with AfriStar-1)

SAT-LOA-20050311-00061

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Policy Branch
International Bureau

OPPOSITION OF AFRISPACE, INC. TO PETITION TO DENY

Tara K. Giunta
J. Steven Rich
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1791

Its Attorneys

Date: May 3, 2005

SUMMARY

As AfriSpace demonstrates in its Application, the AfriStar-2 satellite should be treated as a replacement satellite in accordance with the Commission's policies as articulated in the *First Space Station Reform Order*. AfriStar-2 will be located at the same orbital location and operate on the same frequency bands as AfriStar-1. While AfriStar-2 will have a greater coverage area than AfriStar-1, this does not preclude the Commission from treating AfriStar-2 as a replacement satellite because no other satellite operators have been licensed to provide Broadcasting Satellite Service(Sound) services in the area in question, and the Commission has expressly stated that it will consider replacement satellite applications under such circumstances.

The Petition to Deny filed by Ondas Spain SL relies on a highly selective, misleading use of facts and blatant misrepresentation of FCC policies. Importantly, Ondas mischaracterizes the FCC's replacement satellite policies by equating the Commission's statement that a satellite operator will not have a replacement *expectancy* for an expanded coverage area with a policy that precludes an application for such a coverage area from being treated as a replacement satellite, despite the clear statement by the Commission to the contrary.

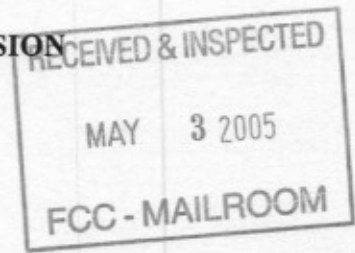
In short, Ondas is a disgruntled would-be competitor that would suddenly like to capitalize on the development of a satellite radio market by WorldSpace and others over the past fifteen years. Without any sense of irony or, more importantly, any legal or factual support, Ondas disingenuously argues that the FCC lacks jurisdiction to grant the AfriSpace application while asking for the chance to submit its own application.

For these reasons, the Commission should deny the Petition to Deny and grant the Application.

TABLE OF CONTENTS

	Page
I. THE AFRISTAR-2 APPLICATION IS CONSISTENT WITH THE FCC'S REPLACEMENT SATELLITE POLICIES.....	1
A. Ondas Shows Little Regard for the Facts	1
B. Ondas Mischaracterizes FCC Policies Concerning Replacement Satellites.....	5
II. THE FCC CAN AND SHOULD GRANT THE APPLICATION	7
III. THE AFRISPACE SERVICE IS CONSISTENT WITH BOTH ITU SPECTRUM ALLOCATION PRINCIPLES AND COMMISSION POLICIES SUPPORTING THE ISSUANCE OF LICENSES TO BONA FIDE OPERATORS	11
IV. CONCLUSION.....	13

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OPPOSITION OF AFRISPACE, INC. TO PETITION TO DENY

AfriSpace, Inc. ("AfriSpace") hereby submits its opposition to the Petition to Deny (the "Petition") filed by Ondas Spain, SL ("Ondas") against the above-referenced application (the "Application"). As shown below, the Petition presents a mishmash of self-serving, inconsistent arguments predicated on misstated and misconstrued facts. Despite the ill-founded arguments of Ondas to the contrary, AfriSpace's Application for a replacement satellite fully comports with the policies of the Federal Communications Commission ("FCC" or "Commission"), and a decision by the Commission to grant the Application is both within the FCC's authority and fully warranted here. AfriSpace therefore respectfully urges that the Commission deny the Petition for the foregoing reasons and as described more fully below.

I. The AfriStar-2 Application is Consistent with the FCC's Replacement Satellite Policies

A. Ondas Shows Little Regard for the Facts

The Commission will undoubtedly reach its own conclusion concerning the numerous

factual misstatements made by Ondas, most of which do not even merit serious discussion. Nevertheless, AfriSpace takes this opportunity to clarify the record so that the Commission has a clear and accurate basis for its decision.¹

Even before launching into its self-serving arguments, Ondas demonstrates, at best, a highly selective use of facts. For example, in an attempt to justify its view that AfriStar-2 should be treated as a new satellite, Ondas characterizes the Application as a request to provide Satellite-Digital Audio Broadcasting (“S-DAB”) services to Europe.² In fact, as clearly stated in the Application, AfriSpace is seeking a license for a replacement satellite that will cover the same region as the satellite it is replacing – a region that covers far more than just Europe. Specifically, AfriSpace seeks a license for its AfriStar-2 satellite, which will be collocated with AfriStar-1 at its current orbital location of 21° E.L. and which will also operate in the frequency band allocated to Broadcasting Satellite Service (Sound) (“BSS(Sound)”) for Region 1.³ This is all in accordance with allocations by the International Telecommunication Union (“ITU”), and the U.S. Government, through the Commission, has sent a notification to the ITU to commence coordination of the AfriStar-2 satellite.⁴ AfriStar-2 will, in fact, provide service over a vast

¹ AfriSpace additionally notes for the record that it was never served with a copy of Ondas’s Petition to Deny. Only through diligent follow-up with the Commission did AfriSpace identify that a petition had indeed been filed. While clearly in violation of Section 25.154(a)(5) of the Commission’s Rules, nonetheless AfriSpace provides this comprehensive response to Ondas’s Petition.

² Petition at 1.

³ See Table of Frequency Allocations, International Telecommunications Union Radio Regulations (2001).

⁴ See Application at 1, 3.

geographic area that includes significant portions of northern Africa, the Middle East, and Europe – and not just Europe.

Ondas similarly mischaracterizes the procedural history of the AfriStar-2 application in stating that the “FCC determined that the gain contours for AfriStar-2 were quite different than AfriStar-1.” While the Commission previously assigned the AfriStar-2 application an administrative “LOA” file number reflecting a preliminary determination that AfriStar-2 would be a new satellite, the Commission returned the AfriStar-2 application *without prejudice* on an extremely minor technical violation—which had no relation to its status as a replacement satellite—and without making any determination on that point.⁵ Ondas cleverly fails to mention that the Public Notice to which it is responding now indicates that the FCC has assigned a similar file number to AfriStar-2 “without prejudice to its replacement status or waiver request.”⁶

Further, with an astonishing disregard for the facts, Ondas tries to contrast the service provided by AfriStar-2 with that provided by AfriStar-1, arguing that AfriStar-1 has “some limited spillover into southern Europe.”⁷ In fact, AfriStar-1 already provides coverage over substantial portions of Europe. As shown in the Application, the -8 dB contour of AfriStar-1 includes all of Spain, Portugal, Italy, France, and Switzerland, and partially covers other countries.⁸ Moreover, the dB contours only tell part of the story. As a result of the outstanding technological advancements developed by WorldSpace, AfriSpace’s parent, in concert with the Fraunhofer Institute of Germany, the WorldSpace receivers are capable of receiving the

⁵ See Letter to Brian Park, AfriSpace, Inc., from Fern J. Jarmulnek, Deputy Chief, Satellite Division, DA 05-601 (March 4, 2005).

⁶ Public Notice, Report No. SAT-00279 (March 18, 2005).

⁷ Petition at 2.

⁸ Application at 8.

satellite's signals beyond what the satellite's coverage pattern would imply. In fact, AfriSpace currently serves the United Kingdom through its affiliate, WorldSpace UK Ltd.⁹ Therefore, the AfriStar-1 satellite is already covering, and its receivers are picking up the satellite's signals from, substantial portions of Europe. In addition, AfriSpace has fully coordinated its operations with all administrations within its coverage area, including Europe, and has received no reports of interference.

Thus, while Ondas states that the Application is "designed to control S-DAB spectrum over Europe"¹⁰ and is "nothing more than an attempt by AfriSpace to use the FCC to get a foothold in Europe,"¹¹ the fact is that, through AfriStar-1, AfriSpace already has its feet firmly planted in Europe and has had them there for more than five years. In fact, WorldSpace and AfriSpace can and should be credited with making the business and technical case for BSS(Sound) globally – the case that Ondas is now trying to benefit from, while attempting to use the Commission's procedures to hamper AfriSpace in order to advance its own commercial ends.

Ondas similarly argues that the Application should be denied because AfriStar-2 has only "limited African coverage," and states that it is somehow "confounding" that the launch of AfriStar-2 will enable AfriStar-1 to conserve power and extend its useful life.¹² Ondas's purported inability to understand the reason for the AfriStar-2 application is nothing more than a further attempt to obfuscate. As clearly described in the Application, these are the facts: the

⁹ WorldSpace UK operates pursuant to License No. S120, issued by the Radio Authority (predecessor to Ofcom) on May 25, 2001.

¹⁰ Petition at 2.

¹¹ Petition at 3.

¹² Petition at 2.

AfriStar-1 satellite is dying. In order to preserve its life and continue service to Africa and the Middle East, AfriSpace needs to shut down one or more transponders in order to feed power to the remaining transponders.¹³ Under AfriSpace's two-phase replacement strategy, it can extend the useful life of AfriStar-1 thereby benefiting from the substantial investment in that satellite, while preserving service to all of the service areas covered by AfriStar-1: Africa, the Middle East, and Europe.¹⁴ In the second phase of AfriSpace's two-phase replacement plan, a third replacement satellite, AfriStar-3, will be launched before AfriStar-1 is fully retired from service, in order to provide service to the areas covered by the northeastern and southern beams of AfriStar-1.¹⁵ As shown in the Application, AfriSpace fully intends to continue providing coverage to its entire service region.

B. Ondas Mischaracterizes FCC Policies Concerning Replacement Satellites

Relying on a citation that is taken out of context and presented in a misleading fashion, Ondas makes a weak attempt at arguing that AfriStar-2 is not a replacement satellite. However, as explained in the Application, treating AfriStar-2 as a replacement satellite is entirely consistent with FCC policies articulated in the *First Space Station Reform Order*.¹⁶

¹³ We note that XM Radio recently received authority to launch and operate a replacement satellite due to similar technical difficulties in its existing satellites. See XM Radio, Inc., *Order and Authorization*, File No. SAT-MOD-20040212-00017, 2005 FCC LEXIS 387 (2005) ("XM Order").

¹⁴ Application at 10.

¹⁵ *Id.*

¹⁶ See Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-34, 18 FCC Rcd 10760 ("First Space Station Reform Order"), para. 258.

The FCC's policy on replacement satellites has been that "when an orbit location remains available for a U.S. satellite with the technical characteristics of the proposed replacement satellite, it will generally authorize the replacement satellite at the same location."¹⁷ The Commission has clarified that, while it requires replacement satellites to be "technically consistent with the satellites they are replacing," it does "not require replacement satellites to be technically *identical* to the existing satellite."¹⁸ In accordance with the Commission's requirements for replacement satellites, AfriStar-2 will be located at the same orbital location and operate on the same frequency bands as AfriStar-1.¹⁹ Additionally, while generally consistent with that of AfriStar-1, the coverage area of AfriStar-2 is expanded.²⁰

Ondas puts undue focus on this latter point, alleging that the Application should not be treated as a replacement satellite application because the coverage area of AfriStar-2 will be greater than that of AfriStar-1. However, the FCC stated in same paragraph of the *First Space Station Reform Order* cited by Ondas that it "*will consider replacement satellite applications that request greater coverage areas and/or extended band authority, but only if no other applicants have been licensed to provide those services.*"²¹ Ondas ignores this statement and

¹⁷ Amendment of the Commission's Space Station Licensing Rules and Policies, *First Order on Reconsideration and Fifth Report and Order*, IB Docket No. 02-34, FCC 04-147 (2004), para. 54.

¹⁸ Amendment of the Commission's Space Station Licensing Rules and Policies, *Notice of Proposed Rulemaking and First Report and Order*, IB Docket No. 02-34, FCC 02-45 (2002), para. 257 (emphasis in original).

¹⁹ See Application at Exhibit A, p. 12; see also 47 CFR § 25.165(e).

²⁰ See Application at pp. 8-9.

²¹ *First Space Station Reform Order*, para. 258 (emphasis added).

tries to “spin” the FCC’s determination that a satellite operator has no replacement *expectancy* for an expanded coverage area, into a policy purporting to require the treatment of such an application as an application for a new satellite. The Commission has made clear that it will consider replacement satellite applications that request greater coverage areas *if no other applicants have been licensed to provide those services*. Here, not only has no one been licensed to provide these services as required by the *First Space Station Reform Order*, no one has even applied to provide such service.²² AfriSpace should not be penalized because others, including Ondas, failed to file an application in a timely manner. To do so would undermine the first-come, first-served policy and procedures established by the Commission in the *First Space Station Reform Order*, and equally undermine the Commission’s long-held policy of facilitating the efficient and effective use of spectrum.

II. The FCC Can and Should Grant the Application

In its Petition, Ondas suggests that, if the FCC grants the Application, this will be tantamount to the FCC exercising jurisdiction over services provided in Europe.²³ Ondas argues, without any legal or factual support, that licensing AfriStar-2 “would essentially put the FCC in a position of making choices regarding European S-DAB implementation without a full record” and “will create significant jurisdictional issues between the U.S. and Europe resulting in the delay of the introduction of this important new service to European listeners.”²⁴ This is patently

²² *See id.*

²³ *See, e.g.*, Petition at 2 (stating that “the development and implementation of European S-DAB service should be governed by European regulators not the FCC”).

²⁴ Petition at 4.

absurd. As Ondas has acknowledged, the ITU, based on input from all Member States including those from Europe, has already made the decision to allocate the frequencies used by AfriStar-1 and AfriStar-2 to BSS(Sound). A decision by the FCC to license AfriStar-1 in 1999 (and now AfriStar-2) in the BSS(Sound) frequencies for Region 1, is fully consistent with that decision. Further, Ondas's argument overlooks the basic fact that FCC authorization of a satellite to serve foreign countries does not equate to FCC regulation of the services provided in those countries, jurisdiction which is both recognized by the Commission and specifically accommodated in its licensing process.²⁵

As Ondas is undoubtedly aware, FCC authorization of the launch and operation of AfriStar-2 in no way relieves AfriSpace of its obligation to provide service in compliance with applicable laws and regulations of the European Union and national governments. In fact, the AfriStar-1 license is expressly conditioned on this requirement²⁶ and AfriSpace fully anticipates, indeed welcomes, a similar condition in its AfriStar-2 license. Action by the Commission to license the AfriStar-2 satellite, similar to the AfriStar-1 satellite, will in no way diminish the

²⁵ See, e.g., AfriSpace, Inc., *Order and Authorization*, File Nos. CSS-90-017, SAT-LOA-19900723-00002, SAT-AMD-19990125-00016, 15 FCC Rcd 1632, 1637 (1999) ("AfriSpace Order") (ordering AfriSpace to "comply with the applicable laws, regulations, rules, and licensing procedures for those countries it proposes to serve").

²⁶ See *id.*; see also E-SAT, Inc., *Order and Authorization*, File Nos. 26-SAT-P/LA-95, 11-SAT-AMEND-98, 13 FCC Rcd 10859, 10873 ("E-SAT Order") (stating that the Commission would "retain jurisdiction to require E-SAT to meet its international obligations," but that "[a]ll authorizations and approvals required by another country in connection with the operation of E-SAT's Little LEO system . . . [would] remain solely within the host country's jurisdiction"); Mobile Satellite Ventures Subsidiary LLC, *Order and Authorization*, File No. SAT-LOA-20030827-00174, 2005 FCC LEXIS 172, 46 (2005) ("MSV Order") (requiring MSV "to comply with the applicable laws, regulations, rules, and licensing procedures of any countries it proposes to serve").

right of national regulators in its service area, including Europe, to regulate the provision of BSS(Sound) service within their respective jurisdictions.

Ondas also erroneously states that “the Afristar-2 application presents the FCC with a novel issue” because AfriStar-2 will not serve the United States.²⁷ Given the history of SDARS/BSS(Sound), it is curious that Ondas considers the AfriStar-2 application “novel.” Even if the FCC had considered the issue novel in the 1990s when it licensed AfriStar-1, established precedent—not the least of which is the AfriStar-1 authorization—now supports such action.

In an argument that defies logic and demonstrates a fundamental misunderstanding of both international and U.S. law, Ondas suggests that the FCC should not consider the Application because WTO and *DISCO II* obligations do not apply to BSS(Sound). However, neither *DISCO II* nor U.S. obligations under WTO Agreement on Basic Telecommunications Services affect the manner in which the FCC should treat the Application nor does it impede the Commission’s jurisdiction over AfriStar-2.²⁸ The reason is simple: AfriStar-1 is a U.S.-licensed satellite, and *DISCO II* pertains to the manner in which the Commission authorizes *non-U.S. licensed satellites to provide service in the United States* in accordance with WTO obligations. Even if the FCC had no obligation to consider a BSS(Sound) application filed by a foreign-licensed entity seeking to provide service in the United States, that is not the case before the Commission.

²⁷ Petition at 6.

²⁸ See generally Amendment of the Commission’s Regulatory Policies to Allow *Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, IB No. 970223, 12 FCC Rcd 24094 (1997) (emphasis added); see also World Trade Organization, Fourth Protocol to the General Agreement on Trade in Services, S/L/20 (30 April 1996).

Interestingly, and as a window into its true intentions, Ondas states that “it would like the opportunity to submit its own application” if the FCC finds that it has jurisdiction. This reveals the self-serving nature of Ondas’ Petition. Clearly, the only reason why Ondas opposes the Application is because it did not manage to file its own application first. AfriSpace and its parent company, WorldSpace are well-known to the Commission and the Commission’s jurisdiction was clearly established in 1999 and is beyond question. What is equally beyond question is Ondas’s purpose in submitting its Petition: to try to use the Commission in an anti-competitive manner to slow AfriSpace down in order to further its own commercial objectives.

Ondas also states that the “FCC does not have any information on the service requirements, technical requirements or market needs in Europe to make a determination as to which is the superior technology.”²⁹ However, Ondas misunderstands the industrial policies of the United States and the Commission, namely that there *is* no industrial policy. As former FCC Chairman Michael K. Powell recently said with respect to the development of mobile broadband, “[w]e must allow the competitive market to determine the technology standards Our decision not to mandate a particular technology standard for wireless voice has facilitated remarkable success . . . compared to other countries where governments set the standard through industrial policy.”³⁰ Clearly, the FCC’s approach is to let the marketplace decide. Such a hands-off approach is reflected in the WorldSpace experience. WorldSpace has been working for many

²⁹ *Id.*

³⁰ Remarks of Michael K. Powell, Chairman, Federal Communications Commission at the CTIA Wireless I.T. & Entertainment Convention, San Francisco, CA, *Speech*, 2004 FCC LEXIS 6078 (Oct. 26, 2004); *see also, e.g.*, Establishment of Rules and Policies for the Digital Audio Radio Service in the 2310-2360 MHz Frequency Band, *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 95-91, 12 FCC Rcd 5754, 5795 (1995) (stating that “[i]n general, it is our policy to avoid mandating the use of one form of technology [and] [w]e conclude that it is appropriate to follow that policy here because it will allow flexibility for satellite DARS licensees in designing their satellite DARS systems”).

years to establish its technology as the superior technology – but that choice was made by the marketplace, not by a regulator.

Sound policy reasons also justify the Commission's continued support of AfriSpace and authorization of AfriStar-2. As the Commission has previously recognized, the benefits of the AfriSpace service include "increas[ing] the variety of programming available in areas that already have service and . . . provid[ing] service to rural areas that have previously had no programming available."³¹ AfriStar-2 will bring the same benefits to its listeners as has AfriStar-1.³²

III. The AfriSpace Service Is Consistent with both ITU Spectrum Allocation Principles and Commission Policies Supporting the Issuance of Licenses to *Bona Fide* Operators

As Ondas acknowledges in the Petition, the ITU Radio Regulations give priority to geostationary satellites over non-geostationary satellites, such as the system purportedly proposed by Ondas.³³ Therefore, even if the FCC were to grant Ondas' Petition and deny the AfriStar-2 Application, the Ondas service would still be secondary to any later-authorized geostationary BSS(Sound) service. Even more importantly, Ondas would be required to operate on a non-interference basis with AfriStar-1, which, as noted above, has been fully coordinated with no reports of interference, and which already provides service over much of the coverage

³¹ *AfriSpace Order*, *supra* note 25, at 1632.

³² See Application at 9.

³³ See Petition at 4; see also International Telecommunications Union Radio Regulations §22.2 (2001).

area that the proposed Ondas service would cover.³⁴ Ondas has not shown whether it could provide its service in a manner that would not cause interference to AfriStar-1, and indeed its fervent arguments against any additional coverage in Europe by AfriStar-2 suggest that such operation is not possible.

The FCC has repeatedly emphasized the importance of issuing licenses to entities with a genuine commitment to promptly and efficiently using scarce spectrum to provide service to the public.³⁵ AfriSpace and its parent WorldSpace, Inc. have been at the forefront of the development of BSS(Sound) since the early 1990s and have been providing such services since 1999.³⁶ WorldSpace already owns a substantially-constructed satellite, which is in storage and will soon be reconfigured, that it plans to launch pursuant to the authority sought in the Application. The Commission has established a licensing regime under which such licenses are issued on a first-come, first-served basis. To credit Ondas's arguments here and permit Ondas to file a satellite application now would both frustrate and undermine the Commission's new satellite licensing regime.

To add insult to injury, while Ondas argues that the FCC has no jurisdiction to grant the Application, it then seeks to benefit from the Commission's jurisdiction by requesting that the Commission deny the Application in order to permit Ondas to submit one! The Petition is clearly devoid of any merit on either legal or policy grounds.

³⁴ See Application at 8 (demonstrating -8 dB contours over Spain, Portugal, France, Italy, and Switzerland, and -10 dB contours over vast additional portions of Western Europe); *see also* IFIC No. 2534, International Telecommunications Union (stating that the proposed "SPAINRADIO" service would cover, *inter alia*, Spain, France, Italy, Portugal, and Switzerland).

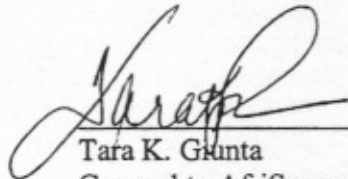
³⁵ See, e.g., *Space Station Reform Order* at 10827.

³⁶ See Application at 3.

IV. Conclusion

For the foregoing reasons, AfriSpace respectfully requests that the Petition be denied and that the Commission promptly grant the Application for the launch and operation of a replacement satellite, AfriStar-2.

Respectfully submitted,



Tara K. Granta
Counsel to AfriSpace, Inc.

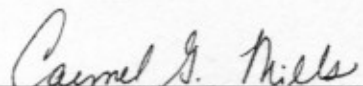
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1791

May 3, 2005

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition of AfriSpace, Inc. to Petition to Deny, was served upon the party listed below by U.S. First-Class Mail prepaid, this 3rd day of May, 2005.

Celso Azevedo
President & CEO
Ondas Spain, SL
Cascanueces 10F
Madrid 28043 SPAIN



Carmel G. Mills, Legal Secretary
Paul, Hastings, Janofsky & Walker LLP