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March 20, 2006

BY HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
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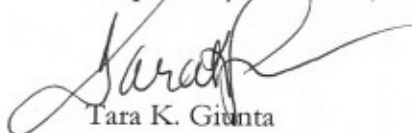
Re: Opposition of AfriSpace, Inc. to Request to Modify *Ex Parte* Status
IBFS File No. SAT-LOA-20050311-00061

Dear Madame Secretary:

Transmitted herewith, on behalf of AfriSpace, Inc. ("AfriSpace"), is an Opposition to Request to Modify *Ex Parte* Status.

In the event that the Commission or its staff should have any questions concerning this filing, kindly refer them to the undersigned counsel for AfriSpace.

Respectfully submitted,



Tara K. Giunta
of PAUL, HASTINGS, JANOFSKY & WALKER LLP
Counsel for AfriSpace, Inc.

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Federal Communications Commission
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Policy Branch
International Bureau

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

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MAR 20 2006

Federal Communications Commission
Office of Secretary

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

SAT-LOA-20050311-00061

**OPPOSITION OF AFRISPACE, INC. TO
REQUEST TO MODIFY *EX PARTE* STATUS**

AfriSpace, Inc. ("AfriSpace") hereby submits its opposition to the Request to Modify *Ex Parte* Status (the "Request to Modify") filed by Ondas Media, S.A. ("Ondas") on March 10, 2006. As shown below, Ondas is seeking to modify the *ex parte* status of this proceeding from "restricted" to "permit-but-disclose" in order to circumvent the Commission's procedural requirements and manipulate Commission processes for its own competitive reasons. Ondas's most recent filing reflects its desperate attempt to pervert the Commission's rules and procedures in order to effect the delay it intended when it filed its Application for Review which, as set forth in our Opposition thereto, was procedurally flawed and substantively without merit. This filing is even more reprehensible in light of the fact that one of Ondas's founders and principals is an experienced FCC attorney¹ who has surely known all along what is required under Commission

¹ While entities appearing before the Commission generally provide details as to their ownership and control, Ondas has been remarkably silent on these issues other than making a vague reference to an allegedly "significant" investment by bankrupt auto parts manufacturer Delphi. Interestingly, one of Ondas's attorneys, Robert A. Mazer, also is a board member and co-founder of Ondas. See "Ondas Media – Board of Directors," <http://www.ondasmedia.com/directors.htm> (last visited March 20, 2006), and *Space News*, 10 March 2006. This may explain the lengths to which Ondas and its attorneys are going to create obstructions for AfriSpace, since Mr. Mazer's role in this proceeding goes beyond merely that of objective outside counsel.

rules and procedures if Ondas truly wished to obtain an FCC license – and knew what it was required to present to the Bureau if Ondas truly had a technical argument to make. The fact that a person with many years of experience as an FCC attorney is a principal of Ondas clearly shows that Ondas’s actions constitute an intentional manipulation and abuse of the Commission’s procedures for potential competitive gain, not an inadvertent act by an ill-informed foreign company.

AfriSpace expects that the Commission will see through the so-called “public interest” considerations raised by Ondas, which are a thin disguise for Ondas’s true motivation—namely, to abuse the Commission’s processes and procedures for the sole purpose of potential competitive gain. Contrary to the ill-founded arguments raised by Ondas, the public interest will be served by a prompt denial of both the Request to Modify and Ondas’s specious Application for Review (the “Review Request”). To grant the Request to Modify would encourage any entity to use the Commission as a tool for competitive reasons. If the Commission grants the instant request, it will open the door to numerous presentations to Commission staff by competing experts over a period of several months, and would waste the resources of both AfriSpace and the Commission. A denial of the Request to Modify would serve the public interest by allowing AfriSpace to move forward with the preparation and launch of AfriStar-2 and improve service to its customers, and also would send a clear signal to Ondas and other similarly-situated entities that would seek to undermine the integrity of the Commission’s procedures for competitive reasons.

I. Ondas Has Not Met its Burden of Showing that a Change in *Ex Parte* Status is in the Public Interest

The Commission has previously recognized that expanding the types of proceedings that are subject to “permit-but-disclose” procedures could “create the appearance of unfairness,”² and therefore requires that a party seeking to change the *ex parte* status of a proceeding demonstrate, by a preponderance of the evidence, that such a change would be in the public interest.³ In the Request to Modify, Ondas argues that the public interest will be served “if *ex parte* presentations are permitted by interested members of the public and their engineering consultants,” but fails to provide any credible evidence to support this assertion.⁴ In so doing, Ondas apparently confuses its own interests with the public interest, and woefully fails to meet its burden of proof.

Ondas attempts to tie its request for treatment of this proceeding as “permit-but-disclose” to the letter that AfriSpace filed on March 6, 2006.⁵ However, AfriSpace filed that letter for the purpose of bringing to the attention of the Commission new information that had come to the attention of AfriSpace’s counsel after filing the Opposition,⁶ and AfriSpace’s filing of its letter had no relation to the Commission’s *ex parte* rules.⁷ Further, that information was directly relevant to the legitimacy of Ondas’s suggestion to the Commission that it might have applied for a license itself had the Commission processed the AfriStar-2 application in a different

² *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, Report and Order, 12 FCC Rcd 7348 (1997).

³ *AT&T Corp. v. Business Telecom, Inc.*, EB-01-MD-001, 16 FCC Rcd 18159 (2001).

⁴ Request at 2.

⁵ Request to Modify at 2, citing Letter of AfriSpace, Inc. to Marlene Dortch, March 6, 2006.

⁶ Opposition of AfriSpace, Inc. to Application for Review and Request for Expedited Review, filed February 17, 2006 (the “Opposition”).

⁷ See 47 C.F.R. § 1.1202(b) (defining “*ex parte* presentation” to include a written presentation that “is not served on the parties to the proceeding”). The AfriSpace letter was served on counsel for Ondas. While Ondas may be considered a “party” to the proceeding for purposes of the *ex parte* rules, this does not mean that Ondas has satisfied the procedural or legal requirements for other purposes, such as standing. See 47 C.F.R. § 1.1202(d), Note 3.

manner.⁸ Most importantly, the relevant issue was properly before the Commission, as it had been raised by AfriSpace in the Opposition.⁹ On the other hand, Ondas now seeks authority to supplement the record with factual information that has not yet been presented to the Bureau, which it was required to do so under the Commission's rules prior to filing its Review Request.¹⁰ This further demonstrates that Ondas is abusing the Commission's processes solely for delay.

The only interest that would be served by further delaying this proceeding as requested by Ondas is Ondas's own competitive interest—as AfriSpace has previously noted, Ondas has *no satellites, no services, and no customers*;¹¹ it therefore has nothing to lose as a result of continued delays. Further, Ondas has not attempted to rebut AfriSpace's showing that Ondas has no intention of seeking an FCC license. On the other hand, AfriSpace is an FCC-licensed U.S. company that, together with its parent company and affiliates, serves over 115,000 paying subscribers and has nearly 500 employees. AfriSpace and its customers will suffer the adverse consequences of further delays in the AfriStar-2 proceeding, which is the reason why AfriSpace has requested expedited action by the Commission of the Review Request.¹² Denying both the Request to Modify and the Review Request would be consistent with the predominant policy goal underlying the *Space Station Reform* proceeding—*i.e.*, the prompt licensing of satellites in order to bring service to the public.¹³ Clearly, Ondas has not even come close to demonstrating that the public interest requires modifying the *ex parte* status of this proceeding.

⁸ See Review Request at 17.

⁹ See Opposition at 8.

¹⁰ 47 C.F.R. § 1.115(c).

¹¹ See Opposition at i.

¹² Opposition at 2.

¹³ See *Amendment of the Commission's Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking, IB Docket No. 02-34, 17 FCC Rcd 3847, ¶11 (2002)

II. The *AfriStar-2 Order* Does Not Involve Issues of First Impression

Ondas mistakenly argues that “the *AfriStar-2 Order* raises engineering issues of first impression.”¹⁴ This is absurd. The Bureau recognized in the *AfriStar-2 Order* that the engineering issues presented by the *AfriStar-2* application were substantially identical to those previously addressed by the Bureau in its recent *MSV Order*.¹⁵ Further, as noted in *AfriSpace’s* Opposition to the Review Request, the engineering case supporting the Bureau’s actions was even more compelling in the *AfriStar-2 Order* than in the *MSV Order*. While *MSV* had sought authority to provide service to an area in close proximity to its existing service area, *AfriSpace* sought authority to provide expanded service in an area that was *largely included in its existing service area, i.e., Western Europe*.¹⁶

While Ondas suggests that the *AfriStar-2 Order* is somehow unique in that it involves BSS (Sound), it provides no explanation of why an NGSO-like system that is providing BSS (Sound) should be treated differently from any other NGSO-like system. Similarly, Ondas raises concerns about “the Bureau’s ability to waive the processing procedures for NGSO for [*sic*] NGSO-like satellites without prior public notice” without acknowledging that the Bureau already has done so on several prior occasions, or indicating why prior public notice of such waivers should be required.¹⁷ Finally, Ondas argues that the *AfriStar-2 Order* “may” impact the international coordination of various BSS (Sound) systems. Under this line of reasoning, any proceeding involving a satellite whose footprint extends beyond the borders of the 48 contiguous

¹⁴ Request to Modify at 1.

¹⁵ *Mobile Satellite Ventures Subsidiary LLC*, Order and Authorization, 20 FCC Rcd 479 (2005) (“*MSV Order*”).

¹⁶ See Opposition at 19-20.

¹⁷ See Opposition at 10.

States could be opened to a long, drawn-out process since every such satellite “may” impact the international satellite coordination process.

Ondas suggests that unless the Bureau’s actions are reversed, they “may impact the international coordination of various (BSS Sound) systems[.]”¹⁸ However, as noted in the Opposition, the *AfriStar-2 Order* is conditioned on AfriSpace completing the international coordination process in accordance with relevant ITU rules and procedures.¹⁹ Therefore, it is difficult to see how the *AfriStar-2 Order* would in any way impact the international coordination process.

Ondas also states, incorrectly, that “all later licensed operators will be required to coordinate with AfriStar-2 as well as AfriStar-1.”²⁰ This statement evidences a lack of understanding on Ondas’s part of the ITU international coordination process. Under that process, for GEO satellites, all later-in-time satellite filings must be coordinated with prior-in-time filings. It is this ITU filing “queue,” and not the national “licensing” queue that determines who coordinates with whom. The one exception to this rule applies to the coordination of GEO satellites with Non-GSO satellites of the kind that Ondas purportedly wishes to launch – *i.e.*, a highly elliptical orbit (“HEO”) system. As noted in the Opposition, a GEO system like AfriStar-1 or AfriStar-2 is not required to coordinate with a HEO system.²¹ Instead, the ITU radio regulations simply mandate that HEO systems “shall not cause unacceptable interference” into GEO systems.²²

¹⁸ Request to Modify at 3.

¹⁹ Opposition at 22, fn. 71.

²⁰ Request to Modify at 3.

²¹ Opposition at 11, fn 33.

²² International Telecommunications Union Radio Regulations §22.2 (2001).

Therefore, any negative impact on Ondas's ability to effect international coordination would result not from the *AfriStar-2 Order*, but on Ondas's own decision to pursue a satellite system configuration that must operate on a secondary basis with respect to GEO satellite systems in the same band.

III. The Precedent Cited by Ondas Is Inapposite

Ondas correctly notes that the FCC has sometimes elected to treat licensing proceedings as "permit-but-disclose" proceedings for purposes of the *ex parte* rules.²³ However, the decisions cited by Ondas do not support the proposition that an application for review proceeding—especially one in which the party seeking review made no effort to present its engineering analyses to the delegated authority—may be treated as "permit-but-disclose" so as to allow the presentation of such analyses. In fact, *every single decision* cited by Ondas involved *bureau-level* proceedings, *i.e.*, proceedings in which factual information such as engineering data may properly be presented for the first time.²⁴ AfriSpace submits that it is not coincidental that each decision cited by Ondas that involved the need for presentations on technical matters took place at the bureau level. In fact, the decisions cited by Ondas support AfriSpace's previous observation that Ondas was required to present its engineering analyses to the Bureau,²⁵ and further illustrate the blatant attempt by Ondas's FCC counsel and co-founder to manipulate and pervert the Commission's procedures, which is most decidedly *not* in the public interest.

As much as the Commission should disregard the precedent cited by Ondas, it also should consider the precedent that granting the Request to Modify would establish. Such a

²³ Request to Modify at 3-4.

²⁴ *Id.* at fn. 6-11.

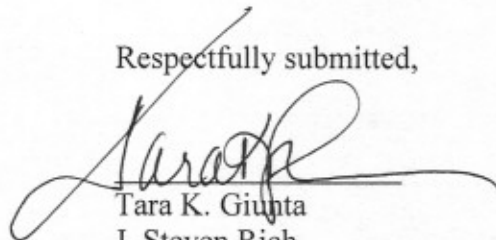
²⁵ Opposition at 14-15; *see also* 47 C.F.R. § 1.115(c) (stating that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass").

decision would eviscerate established procedures designed to protect the public interest by marginalizing the role of the Bureau and imposing inordinate demands on the resources of the Commission-level staff. Granting Ondas's Request to Modify would encourage parties (particularly would-be competitors) to remain on the sidelines throughout licensing proceedings, with the intent of restarting the procedure from the beginning if the result is one that they do not like or, in the case of competitors, in order to create further delay and impose additional costs of the Commission licensee.

VI. Conclusion

For the foregoing reasons, AfriSpace respectfully requests that the Commission deny the Request to Modify.

Respectfully submitted,



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March 20, 2006

CERTIFICATE OF SERVICE

I, Tara K. Giunta, hereby certify that on this 20th day of March, 2006, copies of the foregoing "*Opposition to Request to Modify Ex Parte Status*" unless otherwise noted were sent via first-class mail, postage prepaid, to the following:

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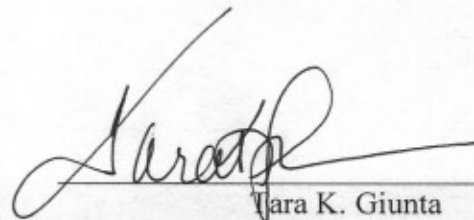
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