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

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MAR 27 2006

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)

IB File No. SAT-LOA-20050311-00061

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Federal Communications Commission
Office of Secretary

Received
MAR 29 2006

Policy Branch
International Bureau

To: Office of the Secretary
Attn: Commission

**ONDAS REPLY TO OPPOSITION TO REQUEST
TO MODIFY EX PARTE STATUS**

The long and shrill Opposition filed by AfriSpace, Inc. ("AfriSpace") brings to mind a familiar refrain: "The lady doth protest too much, methinks".¹ The Commission should ask itself why AfriSpace thought it necessary to docket an eight page pleading filled with vitriol, *ad hominem* charges and sour rhetoric to oppose Ondas' brief request to derestrict the type of satellite licensing proceeding that is routinely subject to *ex parte* presentations. Just what is AfriSpace seeking to hide from the FCC?

If the application for AfriStar-2 was lawfully processed and granted by the Bureau, why should AfriSpace be overly concerned if the FCC – and especially those Commissioners who are new to the agency – are afforded a face-to-face opportunity to meet with interested parties and familiarize themselves with the facts in order to pass on Ondas' Application for Review. The answer, we suspect, is that AfriSpace actually has little faith in the underlying merits of its position. Thus, the last thing it wants is for the Commission to undertake a careful and informed review of the engineering and legal judgments made by the Bureau in granting the license for

¹ William Shakespeare, Hamlet, Act III, Sc. 2, Line 242.

AfriStar-2.² That is also apparent from AfriSpace's Opposition which carefully avoids discussing the fundamental issue on review -- namely, Ondas' unrebutted engineering affidavit showing that AfriStar-2 was not the only other BSS (sound) satellite that could operate on a non-interference basis with AfriStar-1. That is why the Bureau erred in waiving the standard NGSO-like processing rules for the non-replacement satellite service proposed by AfriStar-2.

AfriSpace's silence on this key issue coupled with its strident rhetoric about peripheral matters is telling. It is clear that AfriSpace wants to prevent the Commission from learning anything more about the facts of this case lest that jeopardize the irregular license it was granted for AfriStar-2 which, as noted, authorized AfriSpace to provide a new (i.e., non-replacement) European satellite radio service outside of the FCC's standard NGSO-like licensing process.

The Commission should not accommodate AfriSpace's wishes. Rather it should grant Ondas' Pending Request and, as in past satellite licensing dockets, permit all interested parties to meet with the Commission and its staff so that the agency has a first hand opportunity to review relevant information.³

I. Ondas has met the Standard For Modifying the *Ex Parte* Status of this Proceeding.

Under Section 1.1200(a) of its Rules, the Commission is authorized to modify the *ex parte* status of a proceeding “[w]here the public interest so requires.”⁴ While there is no formal test for what constitutes the “public interest,”⁵ the Commission itself (or through a Bureau) regularly modifies the *ex parte* status of satellite licensing proceedings like this because they

² AfriSpace, Inc., *Order and Authorization*, 21 FCC Rcd 17, DA 06-4, released January 3, 2006 (“*AfriStar-2 Order*”).

³ See, e.g., *Skybridge L.L.C.*, 13 FCC Rcd 11076, 11076 (Int’l Bur. 1998); *EchoStar Satellite Corp.*, 15 FCC Rcd 13797 (Int’l Bur. 2000).

⁴ 47 C.F.R. § 1.1200(a).

⁵ AfriSpace erroneously asserts that a party seeking to derestrict a proceeding must show that the public interest will be served by “a preponderance of the evidence.” However, the case cited by AfriSpace, *AT&T Corp. v. Business Telecomm, Inc.*, 16 FCC Rcd 18159 (2001), does not stand for that proposition. There, the agency declined to derestrict a docket largely because it involved a formal complaint proceeding. See note 11 *infra*.

“raise complex policy and technical issues.”⁶ Significantly, a recent review of the FCC’s records by undersigned counsel reveals that between January 25, 2006 and March 22, 2006, the Bureau derestricted approximately 30 satellite licensing dockets in order to facilitate resolution of the complex issues involved.⁷

Ondas has clearly demonstrated that this docket is analogous. The Bureau’s grant of the AfriStar-2 application raises interrelated procedural, legal, and policy questions concerning (i) the Bureau’s authority to waive the processing procedures for NGSO or NGSO-like satellites without prior public notice; (ii) the engineering standard for determining whether a proposed BSS (sound) system will interfere with a previously licensed BSS (sound) satellite; and (iii) whether the Bureau’s decision not to invite competing applications in the AfriStar-2 docket prejudged the international coordination process.⁸ These issues extend beyond the current

⁶ See, e.g., *Public Notice*, Rep. No. SAT-00125 (Int’l Bur., Oct. 30, 2002) (modifying *ex parte* status for ICO and Lockheed Martin proceedings); *Public Notice*, “Lockheed Martin Corp., Regulus, LLC, Comsat Corp., and Comsat Government Services, Inc. Seek FCC Consent for Transactions,” Rep. No. SPB-139 (Int’l Bur. Oct. 23, 1998); *Public Notice*, “Applications and Letters of Intent Filed by Nine Parties to Launch and Operate Systems to Provide Mobile Satellite Service in the 2 GHz Band,” Rep. No. SPB-132 (Int’l Bur., July 29, 1998) (modifying *ex parte* status of 2 GHz MSS license applications to permit-but-disclose); *Public Notice*, Rep. No. SES-00590 (Int’l Bur. March 25, 2004) (modifying the *ex parte* status of DIRECTV’s Blanket Receive Only Earth Station Application to provide DBS service to the U.S. market in BSS spectrum); *Public Notice*, Rep. No. SAT-00201 (Int’l Bur. March 19, 2004) (modifying the *ex parte* status of DIRECTV’s STA request to relocate the DIRECTV 5 satellite). *Public Notice*, DA 06-377 (OET February 17, 2006) (modifying the *ex parte* status of Inmarsat’s application for a new station in the Experimental Radio Service); *Skybridge L.L.C.*, 13 FCC Rcd 11076, 11076 (Int’l Bur. 1998); *EchoStar Satellite Corp.*, 15 FCC Rcd 13797 (Int’l Bur. 2000).

⁷ See *Public Notice*, Report No. SES-00805 (March 22, 2006); *Public Notice*, Report No. SES-00803 (March 15, 2006); *Public Notice*, Report No. SES-00794 (February 15, 2006); *Public Notice*, Report No. SES-00793 (February 8, 2006); *Public Notice*, Report No. SES-00789 (January 25, 2006).

⁸ In regard to the international coordination issue, AfriSpace confuses the main point previously made by Ondas. The *AfriStar-2 Order* prejudged Ondas for at least three reasons. First, any Ondas BSS (sound) system must now avoid interfering with the augmented AfriStar-2 service footprint rather than merely a replacement footprint equivalent to that of AfriStar-1. Second, the Bureau’s action prevented Ondas from seeking a U.S. license to operate a European satellite radio service in the same band for the non-replacement service area proposed by AfriStar-2, even though AfriSpace apparently will use but one-third of the spectrum it has requested in Europe. As a result, it also appears that the ability of Ondas to operate a Spanish licensed Highly Elliptical Orbit (HEO) BSS (sound) system for Europe will be adversely impacted. That is because the U.S. may now contend, in informal coordination talks or otherwise, that any such satellite will interfere with AfriStar-2 whereas, in fact, the two systems can co-exist by, for example, operating on different frequencies (i.e., there is no valid engineering ground for the U.S. to protect AfriStar-2’s operations across the full 1452-1492 MHz BSS (sound) band).

proceeding and it is important that the Commission provide an adequate opportunity for all interested parties to explain their position before it makes its decision.

AfriSpace, however, ignores the substantial precedent cited by Ondas and instead argues that Ondas only cited Bureau level cases.⁹ This argument is merely a distraction. It is commonplace for the Commission to derestrict proceedings before it by permitting the Bureau to do so on delegated authority and this is routinely done by a grant-stamp. For example, in March of 2003, the Commission (through the Bureau) derestricted a satellite licensing proceeding that was in front of the Commissioners on an Application for Review.¹⁰ The derestriction was accomplished by grant-stamp because it was not controversial and it gave the Commission the opportunity to familiarize itself with the complex and novel issues involved.¹¹

II. Derestricting This Docket Need Not Delay Any FCC Action And Is Essential To Familiarize New Commissioners With The Complex Satellite Licensing Issues Involved.

AfriSpace is also wrong in suggesting that permitting *ex parte* submissions in this docket will unfairly delay the Commissioner's deliberations. On the contrary, given the complex issues involved, *ex parte* presentations are much more likely to facilitate Commission action than to postpone it. This is especially so given that two of the five Commissioners who are likely to act on Ondas' application will be new to the Commission and may not be familiar with the case law or procedures upon which the Bureau's decision is predicated. Surely AfriSpace is not

⁹ Opposition at p. 7.

¹⁰ See Request to Modify *Ex Parte* Status filed by TMI Communications and Company, Limited Partnership and TerreStar Networks, Inc. on March 28, 2003. This request was granted by the Commission (through the Bureau) on April 8, 2003 (IBFS Nos. SAT-LOI-19970926-00161; SAT-AMD-20001103-00158; SAT-MOD-20021114-00237; SAT-ASG-20021211-0238).

¹¹ AfriSpace claims that this proceeding should not be derestricted, but it only cites one case where the Commission denied a derestriction request. See *AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 18159 (2001). This case, however, is distinguishable because it involved a formal complaint proceeding (i.e., an adjudication docket) which are almost always restricted and the issues involved were also being litigated before the Court of Appeals. Hence, the FCC was obviously concerned that changing the *ex parte* status of the docket might prejudice one or more parties. Satellite licensing dockets, in contrast, are routinely derestricted. See notes 6 and 7 *supra*.

suggesting that these new Commissioners and their staffs should be barred from having the type of one-on-one presentations which all of their fellow Commissioners have invited from satellite parties for several years.

In any case, if Ondas' application to derestrict this proceeding is granted, Ondas will use its best efforts to promptly complete its own *ex parte* presentations, subject to the Commissioners' schedules. Assuming AfriSpace does likewise, the docket should be ripe for decision by June or July 2006 at the latest.

III. AfriSpace's *Ad Hominem* Attack Must be Stricken.

Finally, the Commission should disregard the wholly unsupported *ad hominem* attack on Ondas' non-executive Director, Robert Mazer, who also serves as one of the firm's FCC lawyers. The bald assertion that Mr. Mazer's link to Ondas "clearly shows that Ondas's actions constitutes an intentional manipulation and abuse of the Commission's procedures for potential competitive gain"¹² has no factual basis. Indeed, it is libelous and seeks to maliciously defame Mr. Mazer by falsely implying that Mr. Mazer has sought unlawfully to manipulate the FCC's processes for personal gain.¹³

The foregoing statement by AfriSpace's counsel has no place in AfriSpace's pleading. Far from casting any doubt on the character of Mr. Mazer, who has been a member in good

¹² Opposition at p. 2.

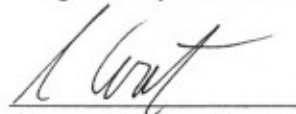
¹³ AfriSpace appears to believe that Ondas' Application for Review constitutes an abuse of the FCC's procedures and is intended solely to delay the launch of the AfriStar-2 system because (a) Ondas does not intend to file an FCC licenses application for a competing BSS (sound) system; and (b) Ondas had an obligation to present any technical objections to granting AfriStar-2 first to the Bureau. Neither allegation is valid. Whether or not Ondas intends to seek a FCC license for BSS (sound) system, which has not been decided, the enlarged (non-replacement footprint) of AfriStar-2 may adversely affect the ability of any future U.S. or non-U.S. BSS system to co-exist with AfriSpace. That plainly gave Ondas legal standing to file its Application for Review. Second, prior to granting the *AfriStar-2 Order*, Ondas had no reason to believe that the Bureau would unilaterally decide, on its own motion and without public notice, that no other BSS system could operate on an interference-free basis to AfriStar-1. Hence, Ondas had no reason to submit additional technical information. Indeed, as explained in Ondas' Application for Review, had the Bureau properly followed the NGSO-like processing rules and given Public Notice of the action it was contemplating, Ondas would have submitted the same technical information to the Bureau.

standing of the local bar for over 25 years, AfriSpace's allegation only dishonors its authors and their client.

IV. Conclusion.

For all of the above reasons, the Commission should reject AfriSpace's pernicious attempt to keep the Commission in the dark about the merits of Ondas' Application for Review. The *ex parte* status of this docket should be changed forthwith so that all the FCC's Commissioners and their staff have a full opportunity freely to discuss the underlying facts and law in this proceeding with all interested parties.

Respectfully Submitted,



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March 27, 2006

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CERTIFICATE OF SERVICE

I, Scott Woodworth, hereby certify that on this 27th day of March, 2006, copies of the foregoing "**Reply**" unless otherwise noted were sent via first-class mail, postage prepaid, to the following:

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