

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

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Federal Communications Commission
Office of Secretary

In the Matter of)

Stratos Communications, Inc.)
Application for Title III Blanket License)
to Operate Mobile Earth Terminals with)
Inmarsat 4F2 at 52.75°W)

) File No. SES-LFS-20050826-01175
) File No. SES-AMD-20050922-01313

Stratos Communications, Inc.)
Application for Section 214 Authorization)
to Operate Mobile Earth Terminals with)
Inmarsat 4F2 at 52.75°W)

) File No. ITC-214-20050826-00351

To: International Bureau

MOTION TO STRIKE PORTIONS OF THE MSV PETITION

Stratos Communications, Inc. ("Stratos") urges the Bureau to strike the Petition to Hold in Abeyance Or To Grant With Conditions ("MSV Petition") filed by Mobile Satellite Ventures Subsidiary LLC ("MSV") on October 28, 2005 against the above-captioned applications (collectively "the Stratos BGAN Applications"). The Bureau should strike those portions of the MSV Petition, which rely on confidential material that MSV refuses to provide to Stratos even pursuant to a protective order. Since Stratos is not able to respond effectively to the MSV Petition, any reliance by the Bureau on this confidential information and redacted arguments would violate Stratos' due process rights and the Administrative Procedures Act.¹

¹ Concurrently with this Motion to Strike, Stratos is filing an Opposition to the MSV Petition based on the non-redacted portions of that pleading. See Stratos Opposition (filed Nov. 10, 2005). By filing a response, Stratos in no way is conceding that it is being afforded an adequate opportunity to effectively respond to the MSV Petition. Further, to the extent that

On August 26, 2005, Stratos filed an application for a blanket license to operate 20,000 mobile earth terminals (“METs”) with Inmarsat’s Broadband Global Area Network (“BGAN”) and an application for Section 214 authority to offer the BGAN service. Stratos seeks authority to access the new Inmarsat 4F2 satellite, licensed by the United Kingdom at 52.75° W.L. and successfully launched into orbit on November 8, 2005. The BGAN service will allow U.S. consumers to obtain an enhanced Mobile Satellite Services (“MSS”) offering at much higher data transmission speeds than current MSS product offerings.

On October 28, 2005, MSV filed the MSV Petition against the Stratos BGAN Applications. Significant portions the MSV Petition are redacted from the public version of the pleading, including Discussion Sections I² and II,³ and the first argument in Section III.⁴ In addition, the Background section of the MSV Petition contains substantial redactions.⁵ MSV has sought confidential treatment of this material because of its purported relationship to the Mexico City Memorandum of Understanding for L-band operations.⁶ While Stratos has attempted to obtain from MSV a confidential non-redacted version of the MSV Petition and has offered to

Stratos is given access to the confidential portions of the MSV Petition at a later date, Stratos reserves the right to amend its Opposition as necessary.

² See MSV Petition at 6-9.

³ See MSV Petition at 9-10.

⁴ See MSV Petition at 10-11 (argument regarding replacement satellites).

⁵ See MSV Petition at 4-5.

⁶ See Letter from Jennifer A. Manner to Marlene H. Dortch, Re: Petition of Mobile Satellite Ventures Subsidiary LLC to Hold in Abeyance or to Grant with Conditions Application of Stratos Communications Inc., File No. SES-LFS-20050826-01175, File No. SES-AMD-20050922-01313, File No. ITC-214-20050826-00351 (Oct. 28, 2005).

enter into a confidentiality agreement and/or protective order to do so, MSV has refused to provide Stratos with a complete version of the MSV Petition.⁷

The MSV Petition has substantial redactions throughout that go to the heart of its arguments against the Stratos BGAN Applications. Stratos cannot even guess as to the basis for some of these arguments. For example, in arguing that BGAN terminals are more likely to cause harmful interference in the L band, MSV states that “BGAN terminals operating with Inmarsat 4F2 will use wide band carriers that [remainder of sentence redacted].”⁸ Similarly, MSV claims that “Stratos states that Inmarsat 4F2 will have inefficient global L band beams, [rest of sentence and footnote redacted].”⁹ It is simply not possible for Stratos to effectively respond to such arguments and other parts of the MSV Petition without knowing what specific assertions MSV is making against the Stratos BGAN Applications.

The Administrative Procedures Act (“APA”) governs Stratos’ rights in an adjudicative proceeding like a license application.¹⁰ The APA clearly provides that a “party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”¹¹ The Commission has held that the “Administrative Procedures Act and the Due

⁷ See attached Declaration of Marc A. Paul.

⁸ MSV Petition at 7.

⁹ MSV Petition at 8.

¹⁰ Under the APA, license applications are subject to the hearing procedures outline under the Act. See 5 U.S.C. § 558(c). See also *International Record Carriers’ Scope of Operations in the Continental United States Including Possible Revisions to the Formula Prescribed Pursuant to Section 222 of the Communications Act*, Memorandum Opinion and Order, 5 F.C.C.2d 183, 185, ¶ 5 (1976) (“However, that case dealt specifically with applications under Section 309 of the Act for broadcast licenses of which Congress has defined to be adjudication.”).

¹¹ 5 U.S.C. § 556(d).

Process Clause of the Constitution generally entitle parties in administrative proceedings to have access to the documents necessary for effective participation in those proceedings.”¹² This general principle clearly applies in the context of Title III license applications.¹³

In those unusual cases where a party has not made confidential material available to other parties in a proceeding subject to a protective order,¹⁴ the Commission has struck such

¹² *In the Matter of Open Network Architecture Tariffs of Bell Operating Companies*, Order, 10 FCC Rcd 1619, 1621, ¶ 13 (1995). See also *In re applications of Mobile Communications Holdings, Inc. and ICO Global Communications (Holdings) Limited for Transfer of Control; Constellation Communications Holdings, Inc. and ICO Global Communications (Holdings) Limited for Transfer of Control*, Disclosure Order, 18 FCC Rcd 133, 134, ¶ 5 (2003) (“The Commission has inferred from judicial precedent that petitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications ...”).

¹³ See *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24837, ¶ 33 (1998) (Specifically, the Commission indicated “that petitioners to deny generally must be afforded access to all information submitted by licenses that bear upon their applications.” While the Commission was addressing information supplied by the applicant for a Title III license, the rationale is equally applicable to information supplied to challenge a license application.) See *In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, Report and Order, 10 FCC Rcd 7486, 7508, ¶¶ 43 (1995) (“*CPUC Report and Order*”) (holding petitioner and challengers to the same standard as far as access to confidential information).

¹⁴ Confidential material in Commission proceedings is usually made available to parties subject to a protective order. There are numerous examples of the use of protective orders in Commission proceedings. See, e.g., *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelpia Communications Corp., Assignor and Transferor to Time Warner Cable, Inc. and Comcast Corp., Assignees and Transferees*, Order Adopting Protective Order, 20 FCC Rcd 10751 (2005). The Commission has recognized that “release of confidential information under a protective order or agreement can often serve to resolve the conflict between safeguarding competitively sensitive information and allowing interested parties the opportunity to fully respond to assertions put forth by the submitter of confidential information.” *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd 12406, 12424, ¶ 36 (1996). In the absence of a protective order or giving Stratos access to the confidential version of the MSV Petition, Stratos will not have “the opportunity to fully respond” to the claims of MSV.

material from the record.¹⁵ In this regard, the current situation is similar to the confidentiality issues raised when the California Public Utilities Commission (“CPUC”) petitioned the Commission to maintain rate regulation authority over CMRS carriers. In that case, the CPUC sought to strike a study submitted by a CMRS carrier that purported to demonstrate, based on confidential data not provided to the CPUC, a correlation between regulation and CMRS pricing in California. The CPUC claimed that it had “effectively been denied its opportunity to respond to the new study and data.”¹⁶ The Commission agreed and held that the “study relies on materials not made part of the record or provided to other parties, and to that extent will not be considered.”¹⁷

If anything, Stratos’ inability to review a complete version of the MSV Petition, presents a more serious impediment to Stratos’ ability to prepare a meaningful response than the difficulties faced by the CPUC as a result of not having access to the underlying data for a study. At least the CPUC knew what claims were being made against its petition and could present its own evidence to counter those claims. Here, Stratos does not know all of the specific arguments being made against its application and thus has no effective way to respond to them.¹⁸

¹⁵ See *CPUC Report and Order*, 10 FCC Rcd at 7506-7508, ¶¶ 38-44.

¹⁶ See *In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, Motion by California to Strike Ex Parte Filings Made by Airtouch (Mar. 16, 1995).

¹⁷ See *CPUC Report and Order*, 10 FCC Rcd at 7508, ¶ 43. The Commission also struck another affidavit submitted by an expert for CTIA when CTIA failed to produce the underlying data. See *CPUC Report and Order*, 10 FCC Rcd at 7506-7507, ¶ 40.

¹⁸ Even if Inmarsat were able to review and respond to a full version of the MSV Petition, it would in no way serve to ensure that Stratos is able to effectively participate in this proceeding. Stratos can only meaningfully protect all of its interests, which may not necessarily be the same as those of Inmarsat, if it is able to review and respond to all of the arguments and supporting materials made by MSV in the MSV Petition. See *In the Matter of Instapage*

The Bureau should also strike the portions of the MSV Petition that are based on confidential information not provided to Stratos because the Bureau cannot rely on such information as a basis for its decision in the Stratos BGAN Applications. In *U.S. Lines, Inc. v. Federal Maritime Commission*, the D.C. Circuit held that the Federal Maritime Commission had improperly relied on unspecified materials known only to the Federal Maritime Commission in reaching its decision to grant exemption from antitrust laws for an anticompetitive agreement between two common carriers.¹⁹ In particular, the Federal Maritime Commission based its finding at least in part on “reliable data reposing in the files of the Commission.”²⁰ The D.C. Circuit stated that it has “required information in agency files or reports identified by the agency as relevant to the proceeding to be disclosed to the parties for adversarial comment.”²¹ Further, the court held that such requirements “ensure that parties to agency proceedings are afforded the opportunities guaranteed them by statute [APA] meaningfully to participate in those proceedings ...”²²

Networks Ltd. 's Informal Request for Retroactive Bidding Credits, 19 FCC Rcd. 20356, 20359, ¶ 10 (Wireless Telecommunications Bureau 2004) (“[T]hird party standing contravenes a basic prudential principle that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”) citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975). See also *In the Matter of Weblink Wireless, Inc., Petition for Reconsideration of DA 01-1143*, 17 FCC Rcd 24642, ¶ 14 (Wireless Telecommunications Bureau 2002). While these cases discuss third party standing, the same public policy concerns -- namely the ability of a third party to effectively protect the interests of another -- would be applicable here if the Bureau were to deem the ability of Inmarsat to respond to a full version of the MSV Petition sufficient to protect all of the interests of Stratos.

¹⁹ See *U.S. Lines, Inc. v. Federal Maritime Comm.*, 584 F.2d 519 (D.C. Cir. 1978) (“*U.S. Lines*”). See also *Air Products & Chemicals, Inc. v. FERC*, 650 F.2d 687, 698-699 (5th Cir. 1981) (following *U.S. Lines*).

²⁰ *U.S. Lines*. at 533.

²¹ *Id.*

²² *Id.*

While in the *U.S. Lines, Inc. v. Federal Maritime Commission* case, the D.C. Circuit remanded the case to the Federal Maritime Commission in part because the Federal Maritime Commission relied on information in its files not available to the parties, the rationale is equally applicable to relying on confidential information in the MSV Petition. In both cases, parties to the proceeding are deprived of the “opportunities guaranteed them by statute meaningfully to participate.” Stratos is in the same position as United States Lines -- it is not able to effectively respond to the claims in the MSV Petition. Because the Bureau cannot rely on the confidential information not subject to “adversarial comment” by Stratos as a basis for its decision on the Stratos BGAN Applications, it is appropriate to strike those portions of the MSV Petition that rely on such information.

In the absence of a decision to strike the portions of the MSV Petition that rely on confidential information, or to provide Stratos with access to the confidential version of the MSV Petition, the Bureau, at the very least, should not base its decision on any confidential material presented or redacted arguments made by MSV and withheld from Stratos. Indeed, in its 2001 order granting Inmarsat access to the U.S. domestic market, MSV similarly opposed certain MSS applications, but did not disclose to those MSS applicants a confidential version of its petition because it contained information concerning the Mexico City Memorandum of Understanding.²³ In that case, the Commission appropriately did not rely on any of the confidential information as a basis for its decision on the MSS applications.²⁴


²³ See *Comsat Corp. et al.*, Memorandum Opinion, Order and Authorization, FCC 01-272, ¶ 106 (2001)

²⁴ See *Id.* at ¶ 107 (“In particular, one matter raised involves what appears to be a disagreement among the operators concerning both the interpretation of a provision of the Mexico City Agreement, and its utility for addressing competing spectrum requirements. We have addressed the current impasse in the operator-to-operator discussions above, and conclude that this particular disagreement does not alter our view that granting these applications would

For the foregoing reasons, Stratos respectfully requests that the Bureau strike Discussion Sections I and II and the first argument in Section III, and parts of the Background section that rely on confidential information that has not been provided to Stratos.

Respectfully submitted,

Stratos Communications, Inc.



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November 10, 2005

serve the public interest. Other material submitted consists of statistics concerning the number of Inmarsat A terminals in use. The information submitted does not rebut Inmarsat's showing on this issue, or the determination made above, concerning Inmarsat Standard A terminals.").

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To: International Bureau

DECLARATION OF MARC A. PAUL

I, Marc A. Paul, hereby declares as follows:

1. I am Of Counsel at Steptoe & Johnson LLP. I am one of the attorneys at Steptoe & Johnson LLP representing Stratos Communications, Inc. ("Stratos") in the above-captioned proceedings.
2. On November 1, 2005, I spoke with David S. Konczal, an attorney at Pillsbury Winthrop Shaw Pittman LLP. Mr. Konczal is one of the attorneys representing Mobile Satellite Ventures Subsidiary LLC ("MSV") in the above-captioned proceedings.
3. During this telephone conversation with Mr. Konczal, I asked if he could provide me with a non-redacted confidential version of the Petition to Hold in Abeyance or to Grant with Conditions that MSV filed on October 28, 2005 in the above-captioned proceedings ("MSV Petition"), in order to allow Stratos to prepare a complete response to the MSV

Attachment 1 to Stratos Motion to Strike

Petition. Mr. Konczal stated that it was not possible for him to provide me with a non-redacted version of the MSV Petition because the MSV Petition contained confidential information from the Mexico City Memorandum of Understanding ("Mexico City MoU") regarding L-band coordination and Stratos was not a party to the Mexico City MoU.

4. I then suggested to Mr. Konczal that the attorneys representing Stratos in the above-captioned proceedings would be willing to enter into a protective order or confidentiality agreement to obtain a non-redacted version of the MSV Petition. Mr. Konczal stated that such an agreement or protective order was not within MSV's control because of the nature of the Mexico City MoU, and he suggested that Stratos contact the Commission directly about the possibility of entering into such an agreement or protective order to obtain access to the MSV Petition in its entirety .

I, Marc A. Paul, hereby declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on November 10, 2005.



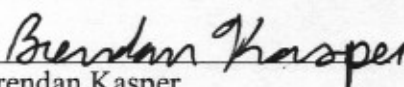
Marc A. Paul
Steptoe & Johnson LLP

CERTIFICATE OF SERVICE

I, Brendan Kasper, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 10th day of November, 2005, served a true copy of the foregoing "Motion" and "Declaration," by first class mail, postage pre-paid (or as otherwise indicated) upon the following:

<p>*James Ball International Bureau Federal Communications Commission 445 12th Street, S.W. Washington, DC 20554</p>	<p>*Andrea Kelly International Bureau Federal Communications Commission 445 12th Street, S.W. Washington, DC 20554</p>
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* Hand Delivered


Brendan Kasper