

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

In the Matter of)	
)	
Improving Public Safety Communications in the 800 MHz Band)	WT Docket No. 02-55
)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels)	
)	
Amendment of Part 2 of the Commission's Rules To Allocate Spectrum Below 3 GHz for Mobile And Fixed Services to Support the Introduction Of New Advanced Wireless Services, Including Third Generation Wireless Systems)	ET Docket No. 00-258
)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service)	ET Docket No. 95-18
)	
Application for Review of Grant of ATC authority to New ICO Satellite Services G.P.)	File No. SES-LIC-20071203- 01646 SES-AMD-20080118-00075 SES-AMD-20080219-00172 Call Sign: E070272

REPLY COMMENTS OF TERRESTAR NETWORKS INC.

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On July 14, 2009, TerreStar Networks Inc. ("TerreStar") filed comments addressing the Further Notice of Proposed Rulemaking in the above-captioned

proceedings.¹ TerreStar hereby replies to the other comments that were filed in response to the FNPRM.²

SUMMARY OF ARGUMENT

Applying equitable principles to the financial consequences of delays in BAS relocation. In these reply comments, TerreStar directs the Commission's attention to multiple factors, including the pivotal role that Sprint played in the development and execution of the plan for relocating BAS stations, suggesting as an equitable matter that Sprint, rather than the MSS licensees, should be responsible for most or all of the financial consequences of delays in BAS relocation. TerreStar notes that Sprint has taken no responsibility for these delays, notwithstanding Sprint's acknowledgement in prior filings that its squabbles with the broadcasters had made relocation fall "far behind schedule" and notwithstanding the fact, as reflected in Sprint's filings with the Commission, that Sprint targeted relocation dates for over 70 markets that were after the deadline established by the Commission. Moreover, Sprint's and MSTV/NAB's attempts to lay the blame for relocation delays on TerreStar and DBSD, based on what they characterize as a lack of effort by those companies, are grossly unfair because they were insistent that TerreStar's participation in BAS relocation would lead to forum shopping and delay completion of that process.

¹ Further Notice of Proposed Rulemaking ("FNPRM") and Report and Order and Order ("R&O"), FCC 09-49 (June 12, 2009).

² Comments were filed by Sprint Nextel Corporation ("Sprint"), The Association for Maximum Service Television, Inc. ("MSTV")/ The National Association of Broadcasters ("NAB"), and New DBSD Satellite Services G.P. ("DBSD").

Procedures for reimbursement of BAS relocation expenses. TerreStar and Sprint agree that reimbursement payments should not be due Sprint has provided appropriate documentation for its reimbursement claims and the deadline for completing BAS relocation has arrived. To maintain this comprehensive approach, the deadline for reimbursement should be extended if the deadline for BAS relocation is extended. Accounting for BAS relocation expenses should continue to be part of the six month true-up process to ensure that Sprint does not reap a windfall. Whether this accounting is part of the true-up or not, moreover, the MSS licensees should have six months to review Sprint's documentation and to contest inappropriate claims.

Eligible relocation expenses. In seeking to change the rules so that the costs associated with smaller market BAS relocation expenses would become subject to reimbursement, Sprint is mistakenly equating a coordination requirement with a requirement to relocate. What the Commission adopted in the R&O is a coordination requirement. What the Commission did in 2004 in classifying smaller market relocation expenses was based on a relocation requirement, not a coordination requirement. The Commission's 2004 rationale remains valid today because the status of the relocation requirements for smaller markets is unchanged. Making the change proposed by Sprint, moreover, impermissibly would constitute retroactive rulemaking.

Which MSS licensee(s) Sprint approaches. Sprint's proposal that it be permitted to collect the entire MSS share of reimbursable expenses from either MSS licensee conflicts with Sprint's commitment to pay up-front for all costs of BAS relocation. Given Sprint's up-front payment commitment, it should not be permitted to shift the risk of collection to an MSS licensee.

Primary/secondary status. As of February 9, 2010, BAS incumbents should become secondary in the 1990-2025 MHz band and Sprint, MSS, and AWS entrants should become primary. MSTV/NAB's opposition to this plan overlooks the need to provide an incentive for BAS licensees to complete the relocation process and fails to recognize the considerable operational flexibility BAS stations will continue to enjoy if they are secondary. The time has come to establish a date certain for removing primary BAS operations from the MSS portion of the 2 GHz band.

DISCUSSION

I. IT WOULD BE INEQUITABLE FOR THE MSS LICENSEES TO HAVE TO BEAR BY THEMSELVES THE FINANCIAL CONSEQUENCES OF THE DELAY IN BAS RELOCATION.

In light of the fact that key elements of BAS relocation have departed from what the Commission envisioned when it adopted a relocation plan, TerreStar has supported the Commission's proposal in the FNPRM to reexamine the cost-sharing principles established in 2004. Fairness dictates that this reexamination take into account equitable factors associated with the changed circumstances.³

As discussed in TerreStar's comments, applying traditional *Emerging Technologies* cost-sharing principles would be inequitable, because doing so would, as between Sprint and TerreStar, make the entire financial consequences of BAS relocation delay fall on TerreStar.⁴ Terrestar demonstrated that Sprint should bear most or all of these financial consequences, because of multiple equitable factors, including the pivotal role that Sprint played in the development and execution of the plan for relocating BAS stations.⁵ TerreStar showed that at a minimum it should not have to reimburse Sprint for BAS relocation expenses accruing after September 7, 2007, when BAS relocation was

³ See TerreStar Comments at 9.

⁴ TerreStar Comments at 8-9.

⁵ TerreStar Comments at 9-17.

supposed to have been completed, or for relocation expenses Sprint can get credit for in the true-up process.⁶

Sprint is silent as to these equitable factors. Sprint takes no responsibility in its comments for any delays, notwithstanding the fact that it developed the BAS relocation timetable adopted by the Commission and it maintained that relocation could be completed before MSS systems needed to begin service.⁷ Sprint makes no mention of its battles with the broadcasters in the early going that, in a filing with the Commission, Sprint acknowledged had led to BAS relocation falling “far behind schedule.”⁸ Sprint also conveniently leaves out the fact, as reflected in filings with the Commission, that it targeted relocation dates for over 70 markets that were after the deadline established by the Commission.⁹

Sprint and MSTV/NAB attempt to lay the blame for relocation delays on TerreStar and DBSD based on what they characterize as a lack of effort by those companies.¹⁰ These statements are grossly unfair, because Sprint told TerreStar in no uncertain terms that it did not want or need TerreStar’s assistance.¹¹ Sprint and the broadcasters, moreover, were insistent that TerreStar’s participation in the process would lead to forum shopping and delay completion of BAS

⁶ TerreStar Comments at 17-18.

⁷ See TerreStar Comments at 10.

⁸ See TerreStar Comments at n. 31, citing Sprint’s March 2006 status report.

⁹ See TerreStar Comments at 15-16.

¹⁰ See, e.g., MSTV/NAB Comments at 3-4; Sprint Comments at 3-4, 18.

¹¹ See TerreStar Comments at 11.

relocation.¹² Given this history, Sprint's complaints about the adequacy of TerreStar's efforts should be viewed as *post hoc* rationalizations made by Sprint in an attempt to deflect responsibility for relocation delays.

In sum, multiple equitable factors support making Sprint, not TerreStar, bear responsibility for most or all of the financial consequences arising from the delay in BAS relocation.

II. ELEMENTS OF SPRINT'S REIMBURSEMENT PROPOSALS ARE UNWARRANTED.

In its Comments, TerreStar called for a comprehensive approach to reimbursement of eligible BAS relocation expenses. Rather than addressing reimbursement on a market-by-market basis, TerreStar proposed that any reimbursement payments from MSS licensees be due at a single point in time after Sprint has appropriately documented all of its eligible reimbursement expenses.¹³

Sprint also has suggested that reimbursement issues be addressed comprehensively. Under Sprint's proposal, reimbursement of eligible expenses for all markets would not be due until the scheduled date of completion for BAS

¹² See TerreStar Comments at 11-12.

¹³ TerreStar Comments at 20-23.

relocation has arrived and Sprint has provided audited financial statements covering its BAS relocation expenses.¹⁴

Although TerreStar and Sprint both favor a comprehensive approach, rather than a market-by-market approach, there are key differences in the parties' proposals. For the reasons stated below, the elements of Sprint's plan that depart from what TerreStar has proposed are unwarranted.

A. The Reimbursement Deadline Should Be Extended If The BAS Relocation Deadline Is Extended.

Sprint appears to oppose extending the date by which MSS reimbursement payments are due in the event that the BAS relocation deadline of February 8, 2010 is extended again.¹⁵ If the BAS relocation and MSS payment deadlines did not operate in tandem, however, then what was supposed to have been a comprehensive approach would become a piecemeal one. The reimbursement obligation for some markets would be triggered on February 8, 2010. The reimbursement obligation for other markets would not be triggered until those markets were relocated.

The process of accounting for BAS relocation expenses nationwide does not lend itself to a market-by-market approach. As Sprint itself has recognized, it is undesirable to have a process that is subject to the "the complexities of establishing and administering a deadline for each individual market based on

¹⁴ Sprint Comments at 15.

¹⁵ See Sprint Comments at 13 n. 31.

when a market completes the transition.”¹⁶ Moreover, Sprint’s annual external audit provides data on total expenses, not market-by-market expenses,¹⁷ and some of Sprint’s expenses span multiple markets. In addition, there may be overarching legal issues concerning the expenses for which Sprint seeks reimbursement.

In short, it is not practical to have a comprehensive accounting until BAS relocation is complete and Sprint’s reimbursement documentation can be examined in its entirety. Accordingly, if the BAS relocation deadline is extended, then the deadline for MSS reimbursement payments should be extended, too.

B. Reimbursement Payments Should Not Be Due Until The End Of The Six-Month True-Up Period.

Sprint takes the position that reimbursement of eligible BAS relocation expenses should be de-linked from the true-up process the Commission has established.¹⁸ Sprint proposes instead that it be entitled to seek reimbursement from any MSS licensees and AWS licensees entering the 2 GHz band prior to a suggested sunset date of January 21, 2015.¹⁹

Sprint’s proposal would prevent implementation of one of the essential elements of the 800 MHz/2 GHz plan that the Commission adopted in 2004. Under that plan, reimbursement of relocation expenses was to be part of a six

¹⁶ Sprint Comments at 14.

¹⁷ See TerreStar Comments at 22.

¹⁸ Sprint Comments at i-ii, 5-6.

¹⁹ Sprint Comments at 7-8.

month true-up that was designed to prevent Sprint from reaping a windfall by receiving spectrum whose value is greater than the sum of Sprint's band clearing and relocation expenses and the value of the spectrum Sprint is giving up.²⁰ If reimbursement of BAS relocation expenses is divorced from the true-up process, nothing would prevent Sprint from collecting sums from MSS and AWS licensees that, when combined with the value of the spectrum Sprint has received, is more than sum total of Sprint's band clearing and relocation expenses and the value of the spectrum Sprint is giving up. The only way to ensure that Sprint cannot reap a windfall in this fashion is to have a final accounting for BAS relocation during the six month true-up.

No circumstances have changed since 2004 that would warrant giving Sprint the prospect of reaping a windfall. The final accounting for BAS relocation, therefore, should remain part of the six-month true-up process. Consequently, MSS reimbursement payments should not be due until the end of the true-up period.

²⁰ See FNPRM, ¶ 75 & n. 173.

C. A Six-Month Period Is Required For MSS Licensees To Review Sprint's Accounting And Contest Inappropriate Claims.

Under Sprint's proposal, MSS licensees' reimbursement payments would become due immediately once the BAS relocation deadline arrives and Sprint has provided audited financial statements. This proposal overlooks the need for a period during which the MSS licensees can review the financial information provided by Sprint. If the MSS licensees have a good faith basis for believing that some amounts claimed by Sprint are not eligible for reimbursement, they should have an opportunity to dispute the amounts.²¹ The MSS licensees, moreover, should not have to pay disputed amounts until any disputes are resolved.

Six months is a reasonable period for providing an opportunity to contest elements of Sprint's reimbursement claims and for resolving any disputes. And for the reasons stated above, these six months should coincide with the six month true-up period. If MSS reimbursement and the true-up period nevertheless are de-linked, however, then the payments should not be due until six months after BAS relocation is complete and Sprint has fully documented its eligible relocation expenses.

²¹ For example, some of Sprint's filings suggest that it is seeking reimbursement for internal expenses. Under Commission precedent, however, internal expenses are not reimbursable. *See, e.g., Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8825, 8848 at ¶ 42 (1996) at ¶ 42 ("We conclude that PCS licensees are not required to pay incumbents for internal resources devoted to the relocation process.").

D. Standard Procedures Should Apply If MSS Reimbursement Payments Are Not Timely Paid.

Sprint proposes that not making a reimbursement payment in a timely fashion should “should automatically result in the suspension of the MSS entity’s right to operate,” to be followed by an order that would “revoke the operator’s authorization.”²² There is no basis for this proposal.

Any failure to make a timely payment needs to be examined based on the particular facts and circumstances at play. The Commission has ample means under the Communications Act and its rules and policies for penalizing licensees that fail to comply with its dictates. There is no need to deprive customers of service automatically and to impose the harshest of penalties in the Commission’s arsenal as a matter of course for untimeliness that may be innocent or even unknowing. Rather, standard procedures for violations of a Commission’s order should apply.

²² Sprint Comments at 15.

III. RELOCATION COSTS THAT ARE ELIGIBLE FOR REIMBURSEMENT SHOULD CONTINUE TO BE LIMITED TO COSTS ASSOCIATED WITH RELOCATION IN THE TOP 30 MARKETS AND FIXED LINKS.

In its comments, TerreStar supported the Commission's tentative conclusion that the BAS relocation costs eligible for reimbursement from the MSS licensees to Sprint should continue to be limited to the cost of clearing the 30 largest markets and the cost of relocating fixed links in all markets.²³ As stated in TerreStar's comments, this cost-sharing principle was "clearly established in the 800 MHz R&O in 2004."²⁴

Sprint asserts that expenses associated with relocating BAS stations in markets below the top 30 markets and with relocating fixed links should be reclassified as eligible for reimbursement based on what it claims is a change in the facts underlying the Commission's 2004 determination. In particular, Sprint argues for a reclassification because the Commission required in the R&O that MSS licensees coordinate in smaller markets (markets 31-210) with BAS stations that have not been relocated.²⁵

Sprint's argument does not withstand scrutiny, because Sprint is mistakenly equating a coordination requirement with a requirement to relocate. What the Commission adopted in the R&O is a coordination requirement; MSS licensees must coordinate with BAS stations in smaller markets prior to

²³ TerreStar Comments at 18.

²⁴ TerreStar Comments at 18, *quoting* FNPRM, ¶ 85.

²⁵ *See* Sprint Comments at 16-18.

operating in those markets. What the Commission did in 2004 was based on a relocation requirement, not a coordination requirement. The Commission back then classified expenses associated with relocating BAS stations in smaller markets as ineligible for reimbursement based on the fact that MSS licensees “were not required to relocate BAS” in these markets “before they could begin operations.”²⁶

The Commission’s 2004 rationale remains valid today; MSS licensees still are not required to relocate BAS stations in smaller markets prior to operating in those markets. Accordingly, there is no reason to revisit the Commission’s 2004 determination.

Making the change proposed by Sprint, moreover, impermissibly would constitute retroactive rulemaking. Under the rules that were in effect when TerreStar entered the 2 GHz band, TerreStar did not have to reimburse Sprint for a *pro rata* share of the cost of relocating BAS stations in smaller markets and relocating fixed links. Under the rules that would be in effect if Sprint’s proposal were adopted, however, TerreStar would become responsible for reimbursing Sprint for a *pro rata* share of these expenses, and in Sprint’s estimation this change would increase the MSS share of relocation expenses from 27% to 57%.²⁷ Such a change would have retroactive effect because it would “attach[] new legal

²⁶ FNPRM, ¶ 86.

²⁷ See Sprint Comments at 16.

consequences to events completed before its enactment.”²⁸ And “[n]o statute authorizes the [Commission] to adopt regulations with retroactive effect.”²⁹

For all of these reasons, eligible relocation expenses should continue to be limited to costs associated with relocation in the top 30 markets and relocation of fixed links.

IV. SPRINT SHOULD NOT BE PERMITTED TO SEEK MORE THAN A *PRO RATA* SHARE OF EXPENSES FROM EACH MSS LICENSEE.

In its comments, Sprint proposes that it be permitted to collect the entire MSS share of reimbursable expenses from either MSS licensee. It would then become the responsibility of the paying MSS licensee to attempt to recoup a *pro rata* amount from the other MSS licensee.³⁰

TerreStar opposes this proposal because the proposal conflicts with Sprint’s commitment to pay up-front for all costs of BAS relocation. If adopted, the proposal would require one of the MSS licensees to front the other MSS licensee’s share of reimbursable expenses for the time between when it paid Sprint and the time, if ever, when it was able to collect from the other MSS licensee. Given Sprint’s up-front payment commitment, it should not be permitted to shift the risk of collection to an MSS licensee.

²⁸ *Landgraf v. USI Film Prods*, 511 U.S. 244, 269-70 (1994).

²⁹ *Jahn v. 1-800-FLOWERS.com, Inc.*, 284 F.3d 807, 810 (7th Cir. 2002).

³⁰ Sprint Comments at 19-20.

V. NONRELOCATED BAS INCUMBENTS SHOULD BECOME SECONDARY, AND SPRINT/MSS/AWS SHOULD BECOME PRIMARY, AS OF FEBRUARY 9, 2010.

TerreStar has supported the Commission's proposal under which nonrelocated BAS incumbents would become secondary in the 1990-2025 MHz band as of February 9, 2010, *i.e.*, as of the day after the deadline, as extended in the R&O, for BAS relocation to be completed, and Sprint, MSS, and AWS entrants would become primary as of February 9, 2010.³¹ MSTV/NAB claims this proposal would penalize BAS licensees unfairly and would deprive some stations of needed access to the portion of the 2 GHz band that will be allocated to MSS.³² MSTV/NAB also questions whether the MSS licensees will have any incentive to relocate BAS licensees if the proposal is adopted.³³ TerreStar has several responses.

First, MSTV/NAB fails to acknowledge the need to provide an incentive for BAS licensees to complete the relocation process. That need is the driving force behind the Commission's proposal.³⁴

Second, the Commission is not proposing to deprive BAS licensees of access to the MSS portion of the 2 GHz band as of February 9, 2010. Rather, it is proposing to make that access available on a secondary basis as of that date.

Secondary operations provide considerable opportunity for BAS licensees, and

³¹ TerreStar Comments at 25.

³² MSTV/NAB Comments at 5-7.

³³ MSTV/NAB Comments at 7-8.

³⁴ See FNPRM, ¶¶ 110-111.

Terrestar pledges to coordinate with all BAS licensees, even secondary ones, prior to relocation.

Third, the time has come to establish a date certain for removing primary BAS operations from the MSS portion of the 2 GHz band. If broadcasters could vacate their main channel analog spectrum by a date certain, which was a far more complicated task, they should be able to vacate or go secondary or digital in their BAS spectrum by a date certain, too.

Finally, ensuring that there are MSS incentives for relocating BAS stations is a non-issue. MSS licensees will continue to have appropriate incentives for relocation if BAS operations become secondary in non-relocated markets, because it will remain difficult to implement ATC in those markets while BAS stations operate there. Moreover, all but a handful of BAS licensees already have entered into frequency relocation agreements. The issue at this point, therefore, is not establishing incentives for MSS licensees. Rather, the issue is ensuring that BAS licensees, who are responsible for implementing the relocation agreements, live up to the commitments they already have made.

CONCLUSION

For the reasons stated herein and in TerreStar's comments:

- MSS licensees should not have to reimburse Sprint for BAS relocation expenses accruing after September 7, 2007, when BAS relocation was supposed to have been completed, or for relocation expenses Sprint can get credit for in the true-up process.
- BAS relocation costs that are eligible for reimbursement from MSS licensees should continue to be limited to costs associated with relocation in the top 30 markets and fixed links.
- The Commission should not permit Sprint to seek more than a *pro rata* share of eligible BAS relocation expenses from each MSS licensee.
- Sprint should be required to share with the MSS licensees information on the relocation costs it has incurred as documented in its annual external audit of 2 GHz band clearing expenses, and the MSS licensees should have an opportunity to review and challenge the information on which Sprint's reimbursement claims are based.

- MSS reimbursement payments should be due at the conclusion of the true up period to ensure there is a comprehensive accounting.
- BAS licensees should be required to coordinate in good faith.
- Nonrelocated BAS incumbents should become secondary in the 1990-2025 MHz band as of February 9, 2010, and Sprint, MSS, and AWS entrants would become primary as of February 9, 2010.

Respectfully submitted,

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