

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

COMMENTS OF TERRESTAR NETWORKS INC.

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COMMENTS OF TERRESTAR NETWORKS INC.

TerreStar Networks Inc. ("TerreStar") hereby comments on the Further Notice of Proposed Rulemaking in the above-captioned proceedings.¹

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

SUMMARY OF ARGUMENT

Applying equitable principles to the financial consequences of delays in BAS relocation. TerreStar supports revisiting the regulatory framework for BAS relocation in light of the many changes that have occurred since the Commission adopted a BAS relocation plan. TerreStar opposes applying traditional *Emerging Technologies* cost-sharing principles to BAS relocation, however, because doing so would apply traditional principles in an untraditional setting and would mean that as between Sprint and TerreStar the entire financial consequences of the delay in BAS relocation would fall on TerreStar.

Rather, the Commission should modify its cost-sharing rules for BAS based on the equities of the circumstances. Numerous factors, including the pivotal role that Sprint played in the development and implementation of the BAS relocation plan, make it inequitable for the MSS licensees to bear financial responsibility for the consequences of BAS relocation delay. In light of these factors, the 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.

Eligible relocation expenses. 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's rationale for this cost-sharing principle remains as valid today as when the Commission established it in 2004.

Which MSS licensee(s) Sprint approaches. The Commission should not permit Sprint to seek more than a *pro rata* share of eligible BAS relocation expenses from each MSS licensee. If Sprint could seek both MSS licensees' *pro rata* shares from one of the MSS licensees, it would unfairly shift the risk of collection from Sprint, which took on the risk when it agreed to pay up front for BAS relocation, to the MSS licensee.

Documentation of Sprint's expenses. 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.

Timing of MSS reimbursement payments. MSS reimbursement payments should be due at the conclusion of the true up period to ensure there is a comprehensive accounting. The BAS relocation accounting process does not lend itself to a market by market approach, because Sprint's annual external audit provides data on total expenses, rather than by market; some of Sprint's expenses span multiple markets; and there may be overarching legal issues concerning reimbursement that should not have to be litigated piecemeal.

BAS/MSS coordination. TerreStar continues to believe, based on the technical studies it has submitted in this proceeding, that it is feasible for 2 GHz MSS systems and BAS stations to share spectrum during the completion of the BAS relocation process. However, TerreStar has no objection to the procedure the Commission adopted in the R&O, under which MSS entrants will be required to successfully coordinate any operations in nonrelocated markets with BAS incumbents in those markets prior to beginning service, so long as: (1) BAS licensees are required to coordinate in good faith; and (2) appropriate measures are adopted to provide an incentive for completing BAS relocation.

Primary/secondary status. Nonrelocated BAS incumbents should 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. Implementing this measure would give BAS incumbents a meaningful incentive for completing BAS relocation and would give important recognition to the needs of new entrants to provide service in the 1990-2025 MHz 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.

A. Unique Circumstances Continue To Characterize BAS Relocation.

The BAS relocation process is one of a kind. BAS relocation is one of a series of interlocking regulatory pieces involving Sprint, MSS licensees,² broadcasters, public safety licensees, spectrum reconfiguration, digital conversion, multiple frequency bands, a true up, anti-windfall payments, and a complex and overlapping set of responsibilities.

The Commission recognized when it adopted rules for relocating BAS stations that it was faced with “unique circumstances.”³ For that reason, the BAS relocation plan that the Commission adopted departed in multiple respects from band clearing procedures that the Commission has instituted in other contexts. Among other things, “the Commission modified the traditional *Emerging Technologies* cost-sharing policy that new entrants who ultimately benefit from the spectrum cleared by the first entrant share bear the cost of reimbursing the first entrant for that benefit.”⁴ Instead of the traditional cost-sharing policy, the Commission provided that Sprint, which committed to paying up-front the cost

² TerreStar’s wholly-owned subsidiary, TerreStar License Inc., holds a letter of intent authorization (call sign S2633) to serve the United States via the TerreStar-1 MSS satellite.

³ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 MHz and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Memorandum Opinion and Order, 20 FCC Rcd 16015 at ¶ 113 (2005) (“800 MHz MOO”).

⁴ FNPRM, ¶ 79.

of BAS relocation, could not seek reimbursement from MSS licensees who entered the 2 GHz band after the end of the 36-month transition period for 800 MHz.⁵

As is often the case with unique matters, things have not proceeded as planned. In key respects, BAS relocation has departed radically from what the Commission envisioned when it adopted a relocation plan. For example:

- **Timing.** Based on information provided by Sprint and the broadcasters, the Commission adopted a plan under which BAS relocation would be completed in 30 months.⁶ This schedule, it was believed, would enable the 2 GHz MSS licensees to commence nationwide service after launching their satellites.⁷ Under the revised procedure the Commission adopted in the R&O, however, BAS relocation instead will span a period of 59 months, which is nearly double the original 30-month schedule.
- **Cost.** Sprint estimated that its combined band clearing and relocation costs would be \$2.184 billion.⁸ This amount plus the \$2.059 billion value of the spectrum Sprint was giving up fell well short of the \$4.86 billion value the Commission ascribed to the 1.9 GHz spectrum Sprint is receiving.⁹ So it was thought that Sprint would need to make an “anti-windfall” payment to the U.S. Treasury.¹⁰ In these circumstances, there would have been no financial benefit to Sprint, which had committed to funding the up

⁵ 800 MHz MOO at ¶ 113.

⁶ *Improving Public Safety Communications in the 800 MHz Band; 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; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 4393 at ¶ 12 (2008) (“2008 BAS Reconsideration Order”).

⁷ 2008 BAS Reconsideration Order at ¶ 14.

⁸ See FNPRM, ¶ 75 & n. 173.

⁹ See FNPRM, n. 173.

¹⁰ FNPRM, ¶ 75.

front costs associated with BAS relocation, in seeking reimbursement from the MSS licensees for a portion of these costs.¹¹ Sprint now estimates, however, that its expected relocation costs will be so large that it will not need to make an anti-windfall payment.¹² This means that Sprint's original estimates were off by more than \$600 million.

- **Final accounting.** The six-month true up process that would close the books on BAS relocation expenses and relocation reimbursement claims was supposed to begin on June 26, 2008, at the conclusion of the 800 MHz transition.¹³ Delays have been so significant, however, that over a year later "there is no future date certain for completing either the 800 MHz rebanding or the true up."¹⁴

These unanticipated developments add to the unusual nature of BAS relocation. They inject an element of unpredictability to what was already an unprecedented set of circumstances. Uniqueness, therefore, continues to characterize BAS relocation.

B. The Commission Should Not Apply Traditional Cost-Sharing Principles to a Unique Process.

In the R&O and FNPRM, the Commission is endeavoring to adjust its regulatory framework in light of the "many changes involving the 1990-2025 MHz band"¹⁵ that have occurred. TerreStar supports this effort.

¹¹ Any MSS reimbursement would have reduced, dollar for dollar, the band clearing and relocation expenses for which Sprint could take credit in the true-up process, and thereby would have increased, dollar for dollar, the anti-windfall payment Sprint would owe.

¹² See FNPRM, ¶ 76.

¹³ 2008 BAS Reconsideration Order at ¶ 16.

¹⁴ FNPRM, ¶ 80.

¹⁵ R&O and FNPRM, ¶ 3.

TerreStar respectfully disagrees, however, with one element of the Commission's tentative approach. In the FNPRM, the Commission has proposed to apply traditional *Emerging Technologies* cost-sharing principles to BAS relocation,¹⁶ thereby requiring that the two MSS licensees reimburse Sprint for 100% of a *pro rata* share of eligible reimbursement expenses. TerreStar opposes this approach, because it would revert to traditional principles for a process that was untraditional at its inception and has become even less traditional over time.

The potential consequences for TerreStar of applying traditional principles would be significant. Under the rules the Commission previously adopted, Sprint could not have sought *pro rata* reimbursement from TerreStar for eligible BAS relocation expenses unless TerreStar entered the 2 GHz MSS band prior to the June 26, 2008, conclusion of the 36-month transition period for the 800 MHz band. TerreStar had not come remotely close to entering the band as of that date, so it would not have been required to reimburse Sprint for any relocation expenses. If the rules are now modified to reflect traditional *Emerging Technologies* cost-sharing principles, however, then TerreStar would become responsible for 100% of a *pro rata* share of eligible reimbursement expenses. According to estimates provided by Sprint, TerreStar's liability in these circumstances could be \$100 million or more.¹⁷

¹⁶ See FNPRM, ¶ 82.

¹⁷ See, e.g., Sprint's Complaint to Enforce Orders of the Federal Communications Commission, Civil Action No. 1:08cv651 (E.D. Va., June 25, 2008) at 11.

C. Multiple Equitable Factors Favor Making Sprint Financially Responsible For The Delay In BAS Relocation.

Rather than reverting to traditional cost-sharing principles in an untraditional setting, the Commission should modify its cost-sharing rules for BAS based on the equities of the circumstances. Taking equities into account is the fairest approach, and a fundamental principle of administrative law is that agencies should strive for fair results, not arbitrary ones.

As stated above, if BAS relocation had been completed on time TerreStar's liability for BAS relocation expenses would have been \$0. If as a result of the delays in BAS relocation TerreStar were to become responsible for 100% of a *pro rata* share of eligible relocation expenses, then as between Sprint and TerreStar the entire financial consequences of BAS relocation delay would fall on TerreStar. That outcome would be equitable only if TerreStar were solely responsible for the delay. As is well known, however, Sprint, not TerreStar, played the pivotal in the development and execution of the plan for relocating BAS stations. It is only fitting, therefore, that Sprint bear all or¹⁸ a substantial portion of the financial consequences of the delay.

Multiple equitable factors support this outcome. For example:

¹⁸ TerreStar previously has presented equitable factors that would support continuing to apply the original reimbursement rules under which TerreStar, because it entered the 2 GHz band after June 26, 2008, should not have to reimburse Sprint for BAS relocation expenses. *See, e.g.*, Letter from TerreStar Networks Inc., WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18 (Sept. 8, 2008).

1. Sprint is responsible for the BAS relocation timetable and maintained that relocation could be completed before MSS systems needed to begin service. Sprint needed Commission approval for a plan under which Sprint would be given access to spectrum worth billions of dollars. If the Commission believed that BAS relocation and 800 MHz reconfiguration would be a lengthy, drawn out affair that would conflict with MSS needs, it would be less likely to approve Sprint's proposal. In this context, Sprint and the broadcasters presented 30 months as an adequate time frame for BAS relocation that would bring BAS relocation to fruition before MSS systems needed access to 2 GHz spectrum.¹⁹ Sprint also told the Commission it was "confident" that its experience in spectrum relocation would ensure that the proposed plan would be implemented successfully.²⁰

2. Sprint could have had no reasonable expectation of recouping BAS relocation expenses from TerreStar. When the Commission approved the

¹⁹ "The 30-month timeframe for relocating all BAS incumbents under the MSTV-NAB-Nextel relocation plan should ensure that the 1990-2025 MHz band is cleared nationwide before MSS entrants are ready to begin service in the 2000-2025 MHz band." BAS Relocation Schedule and Relocation Plan, filed by Nextel, at p. 7, WT Docket No. 02-55 (filed April 6, 2005) ("Consensus Plan").

²⁰ "Nextel [*i.e.*, Sprint's predecessor-in-interest] gained substantial experience in incumbent relocation following the Commission's 1995 order establishing geographic licensing in the upper 200 SMR channels. . . . Nextel is confident that the Consensus Plan can be implemented just as successfully." *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Reply Comments of Nextel Communications, Inc., WT Docket No. 02-55 at p. 33 (filed Aug. 7, 2002).

Sprint/MSTV/NAB plan for BAS relocation in August 2004,²¹ TerreStar was not required to bring its 2 GHz MSS system into operation until November 2008,²² which is months after the deadline of June 26, 2008, for triggering a reimbursement obligation. Sprint, therefore, could have had no reasonable expectation of recouping BAS relocation expenses from TerreStar, and TerreStar - and investors in TerreStar - had a justifiable expectation that TerreStar would not be required to reimburse Sprint for these relocation expenses.

3. Sprint acquiesced in the original sunset date for BAS reimbursement obligations. Sprint was well aware of the rules the Commission adopted, including the rule under which MSS licensees would have no reimbursement obligation if they entered the band after June 26, 2008. Sprint, however, did not seek reconsideration of these rules.

4. Sprint insisted on control of BAS relocation.

Sprint has repeatedly questioned in this proceeding the adequacy of TerreStar's participation in the BAS relocation process. In actuality, however, Sprint told TerreStar in no uncertain terms that it did not want or need TerreStar's assistance.²³ Sprint and the broadcasters were insistent that

²¹ See *Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969 (2004).

²² See *TMI Communications and Company, Limited Partnership and TerreStar Networks Inc.*, Memorandum Opinion and Order, FCC 04-144, ¶ 59 (June 29, 2004).

²³ It is telling that Sprint made no complaint about TerreStar's role until Sprint fell behind schedule and the adequacy of Sprint's efforts came under scrutiny. The only

TerreStar's participation in the process would lead to forum shopping and delay completion of BAS relocation.

TerreStar had a series of meetings with Sprint beginning in the summer of 2006 to explore the extent to which TerreStar could assist with BAS relocation. Sprint advised against TerreStar becoming involved because Sprint already had agreements with most of the BAS vendors and believed it had a workable process in place for entering into frequency relocation agreements with the broadcasters. Sprint also expressed concern that adding TerreStar to the mix would give the broadcasters an opportunity to reopen relocation issues with a new party.

Although Sprint was opposed to having TerreStar play an active role, it did agree, at TerreStar's request, to hold monthly meetings focusing on overall status as well as specific details relating to transition markets and manufacturers.²⁴ TerreStar also engaged in discussions during this period with MSTV,²⁵ equipment manufacturers,²⁶ and system integrators²⁷ ; attended NAB

support Sprint has offered for its claim is a Statement of Work that Sprint prepared at TerreStar's request and was so one-sided that it provided no basis for meaningful discussions.

²⁴ These meetings continued through 2007.

²⁵ TerreStar first met with MSTV leadership to discuss BAS clearing on December 6, 2006. On February 6, 2007, TerreStar presented an overview of its MSS/ATC architecture to the MSTV Engineering Committee and solicited broadcaster perspectives on accelerating the then stalled BAS relocation process. It subsequently made presentations to the Engineering Committee on July 13, 2007, October 18, 2007, February 7, 2008, June 5, 2008 and July 10, 2008. It produced a white paper for MSTV members - *Interaction Between Broadcast Auxiliary Service (BAS) Channels A1 and A2 and Mobile*

conventions to meet with other vendors and system integrators; and sent representatives to an SBE meeting on BAS to obtain a broadcast engineering viewpoint on BAS relocation. TerreStar also has kept MSTV's Engineering Committee apprised of its network architecture and planning horizon and solicited MSTV's cooperation on multiple occasions to discuss and refine market-specific coordination protocols.²⁸ In addition, TerreStar has offered to engage in various initiatives with broadcasters to facilitate coordination.²⁹ In short,

Satellite/Ancillary Terrestrial Component (ATC) Service Licensed in the 2000-2020 MHz Band – preliminarily describing the interference expectations in the 2000 to 2020 MHz band given MSS and BAS emission characteristics. TerreStar kept MSTV informed of its operational timeline, its plan to engage consulting engineers to conduct interference analyses and the results of the bench and field analyses it conducted. TerreStar's MSTV outreach in the last year has been grounded in its engineering due diligence and has focused on manual coordination protocols and interference avoidance practices that are easily implemented by MSS and BAS licensees during the short gap between completion of the BAS migration above 2025 MHz and commercial launch of MSS. These pragmatic technically feasible solutions by which BAS licensees assigned to channels A1 or A2 could move to 12 MHz channelization and/or migrate off channels A1 and A2 with no intrusion or business impact to ENG operations.

²⁶ TerreStar visited vendor manufacturing facilities (NuComm and MRC) where it saw warehouses stacked with radios committed to Sprint. TerreStar's visits to BAS vendors largely confirmed Sprint's previous disclosure to TerreStar that it had 6,000 BAS radios under contract. Sprint had by that time locked up BAS radio manufacturing capacity in volume purchase agreements and substantially controlled the supply.

²⁷ TerreStar met twice with a system integrator (DSI Systems).

²⁸ In a June 5, 2008 TerreStar presentation to the MSTV Engineering Committee, TerreStar described several best engineering practices that would accommodate shared use of the 2000 to 2020 MHz band. MSTV has declined despite numerous requests by TerreStar to engage in substantive discussion around implementing one or more of the market-specific coexistence practices described in the exhibit that will allow BAS and mobile terminals to operate without interference in DMAs that are not cleared after TerreStar begins commercial operations.

²⁹ TerreStar offered to participate in a joint field test aimed at replicating the duTreil results using jointly developed methods of procedure, 2 GHz MSS handsets and BAS receivers. It has offered to do local broadcaster presentations describing interference avoidance options and develop a quarterly coordinated spectrum sharing plan and report for MSTV. It has offered manual backstop mechanisms such as a toll-free hotline, a web portal as a source of answers to specific BAS licensee questions, liaison between

TerreStar has made every effort to play a constructive role in BAS relocation despite the active discouragement of Sprint.

5. Sprint determined market priority. The relocation plan adopted by the Commission left it to Sprint to determine the order in which BAS markets would be cleared.³⁰ This procedure enabled Sprint to assign highest priority to markets in which it had the greatest commercial need for 1.9 GHz spectrum.

Moreover, although TerreStar identified three markets it planned to enter first because it would be conducting market trials there, TerreStar's plans had no impact on the market order as determined by Sprint. The dates by which TerreStar sought entry for two of the markets were consistent with the schedule Sprint already had developed, and at Sprint's request TerreStar changed the third market from one that would have required a change in Sprint's schedule (Dallas) to one that did not require a change (Houston).

6. Sprint lacked the required sense of urgency needed to complete BAS relocation on schedule. In the early stages of what was supposed to have been a

with BAS Acceleration Teams and TerreStar's Operations staff in addition to escalation channels to senior TerreStar management.

³⁰ "[T]he Commission required Sprint ... to file a plan within 30 days of the issuance of the 800 MHz R&O stating which markets it would relocate in stage one (*i.e.* within eighteen months)." Memorandum Opinion and Order, FCC 08-73 (March 5, 2008) ("2008 MO&O"), ¶ 13. "The MSS entrants then had 30 days to review this plan and identify which of the top 30 markets they intended to invoke involuntary relocations." 2008 MO&O, ¶ 13. As it turned out, "no MSS entrant opted to invoke its [involuntary relocation] right." 2008 MO&O, ¶ 13. The Commission had envisioned this possibility, providing that if "MSS licensees choose not to trigger involuntary relocation," then Sprint "will proceed under its plan to relocate BAS incumbents." *Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969, ¶ 257 (2004).

30-month BAS relocation process, little progress was made. Sprint and the broadcasters share responsibility for this state of affairs. For example:

- Sprint and the broadcasters lost precious time fighting over the ground rules for relocation.³¹
- Six months into the relocation process, an agreement had been signed in only a single market.³²
- Sprint did not accept the Commission's band relocation order until February 7, 2005, six months after it was issued.³³
- Sprint did not provide a relocation plan until April 6, 2005, eight months after the order.³⁴
- Sprint took on the responsibility of leading the first step of the 2 GHz relocation process, which was the market kickoff.³⁵ Although the FCC issued its decision in August 2004, the first market kickoff events were not held until April 2005, and the last were not conducted until the fall of 2006.³⁶
- The first item of equipment was not ordered until November 2005, more than a year after the 2004 Order was issued.³⁷

7. Sprint targeted BAS relocation dates that were inconsistent with FCC deadlines. Despite the fact that the BAS relocation deadline, as extended in 2008,

³¹ See, e.g., BAS Relocation Status Report, ET Docket No. 02-55 (filed March 7, 2006) at p. 4 (Sprint claimed it was "far behind schedule" because BAS was demanding indemnification for tax liability and because the parties were unable to agree upon an FRA).

³² See Adrienne Kroepsch, *Sprint Nextel Emptying 2 GHz for MSS, Officials Report*, Comm. Daily, Oct. 7, 2005.

³³ Letter from Tim Donahue, President and CEO of Nextel Communications, Inc., to Michael Powell, Chairman, FCC, WT Docket No. 02-55 (filed Feb. 7, 2005).

³⁴ Nextel Communications, Inc., BAS Relocation Schedule and Implementation Plan, WT Docket No. 02-55, ET Docket No. 00-258, RM-94-98, RM-10024, ET Docket No. 95-18 (filed April 6, 2005) ("Implementation Plan").

³⁵ *Id.*

³⁶ Sprint Nextel, "NAB 2006: One Year Later; 2 GHz Relocation" (April 21-27, 2006), available at

<http://www.2ghzrelocation.com/plugin/template/broadcast/Welcome/1270> ("NAB Presentation").

³⁷ NAB Presentation at 3.

was March 5, 2009,³⁸ Sprint's "progress" reports following the MO&O uniformly showed numerous markets for which the scheduled and expected relocation months were April, June, July, or August 2009. One such report showed over 70 such markets.

8. Sprint grossly underestimated the cost of relocating BAS stations and reconfiguring the 800 MHz band. Sprint estimated that its relocation and configuration costs would be \$2.184 billion.³⁹ If Sprint's estimate had been within even \$600 million of the actual figure, Sprint would have owed an anti-windfall payment to the U.S. Treasury and there would have been no financial benefit to Sprint, which had committed to funding the up front costs associated with BAS relocation, in seeking reimbursement from the MSS licensees for a portion of these costs.⁴⁰ Coming in over budget may not be uncommon, but it would be inequitable for TerreStar to have to bear the financial consequences of Sprint's miscalculation.

9. Some delays were within Sprint's control. "Sprint did not clear all Wave 1 Channel 1-120 incumbents by the eighteen-month date as the

³⁸ Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 08-73 (March 5, 2008) at 1.

³⁹ See FNPRM, n. 173.

⁴⁰ See Section I.A, above.

Commission required ... [and] Sprint has not asserted that all of the delays were beyond its control.”⁴¹

D. The MSS Licensees Should Not Have To Reimburse Sprint For BAS Relocation Expenses Accruing After September 7, 2007 Or For Relocation Expenses Sprint Can Get Credit For In The True-Up.

For the foregoing reasons, it would be inequitable for the MSS licensees to have to bear the full financial brunt of the delays in BAS relocation. Sprint devised the BAS relocation timetable; presented itself as sufficiently experienced in spectrum relocation matters that it could implement the timetable successfully; and insisted on and had control over the relocation process. For these and other equitable reasons, Sprint should have to bear all or a substantial portion of the financial consequences of delay in BAS relocation.

If Sprint had completed BAS relocation in a timely fashion, there would have been no relocation expenses after September 7, 2007, which marked the conclusion of the 30-month relocation period. Assuming that TerreStar is not relieved of liability for relocation expenses based on the fact that it had not entered the 2 GHz band as of June 26, 2008, therefore, as an equitable matter TerreStar should not be responsible for *pro rata* reimbursement of eligible BAS relocation expenses Sprint incurred after that date. Rather, TerreStar's *pro rata*

⁴¹ *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, Third Memorandum Opinion and Order, FCC 07-167, ¶ 14 (Sept. 12, 2007), *aff'd sub nom. Sprint Nextel Corporation v. FCC*, No. 07-1416 (D.C. Cir., May 2, 2008).

reimbursement liability should be limited to eligible expenses Sprint incurred on or before September 7, 2007.

Each MSS licensee's reimbursement liability, moreover, should be limited to a *pro rata* share of the eligible BAS relocation expenses that Sprint cannot receive credit for in the true-up process.⁴² Requiring the MSS licensees to make reimbursement payments for amounts Sprint is entitled to get credit for, dollar for dollar, in the true-up process would be contrary to the public interest, because it would not benefit Sprint but would diminish unnecessarily the funds the MSS licensees have on hand to dedicate to serving the public.

II. 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.

The Commission has tentatively concluded 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.⁴³ TerreStar supports this proposal.

As the Commission has recognized, this cost-sharing principle was "clearly established in the *800 MHz R&O* in 2004."⁴⁴ The reason that the principle was adopted, moreover, remains valid. The Commission deemed

⁴² Sprint can claim credit for up to \$4.86 billion minus the \$2.059 billion attributed to the value of the spectrum Sprint is relinquishing. See FNPRM, ¶ 75 & n. 173.

⁴³ FNPRM, ¶¶ 85-86.

⁴⁴ FNPRM, ¶ 85.

expenses associated with relocating non-fixed links outside the top 30 markets as ineligible for reimbursement because MSS licensees “were not required to relocate BAS” in these markets “before they could begin operations.”⁴⁵ That is still the case today.

Sprint questions the fairness of the relative percentages of BAS relocation expenses that it and MSS licensees are responsible for under the Commission’s definition of relocation expenses that are eligible for reimbursement.⁴⁶ These relative percentages, however, are a function of the cost-sharing principle that the Commission adopted in 2004. If Sprint had concerns about whether the principle is equitable, it should have petitioned for reconsideration at the time. Sprint has presented no basis for revisiting the Commission’s prior decision.

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

In the FNPRM, the Commission asked whether Sprint should be permitted to request reimbursement from a single MSS licensee of both MSS licensees’ *pro rata* shares of eligible reimbursement expenses on the theory that an MSS licensee obligated to pay both shares “may, in turn, seek reimbursement”

⁴⁵ FNPRM, ¶ 86.

⁴⁶ See FNPRM, ¶ 86.

from the other MSS license.⁴⁷ Permitting Sprint to proceed in this fashion would be unwarranted, and the Commission should not permit it.

The question posed by the Commission may be moot, because as the Commission has stated, “it appears that Sprint ... has asked both ICO and TerreStar to pay equal amounts of relocation costs based on their equal amount of assigned spectrum.”⁴⁸ There is no principled basis, however, for permitting Sprint to seek from an MSS licensee more than that licensee’s share of eligible reimbursement expenses. Giving Sprint this right would unfairly shift the risk of collection from Sprint, which took on the risk when it agreed to pay up front for BAS relocation, to the MSS licensee. Accordingly, the reimbursement Sprint may seek from any MSS licensee should be limited to the MSS licensee’s *pro rata* share of eligible reimbursement expenses.

IV. THE MSS LICENSEES SHOULD HAVE AN OPPORTUNITY TO REVIEW AND CHALLENGE THE INFORMATION ON WHICH SPRINT’S REIMBURSEMENT CLAIMS ARE BASED.

The Commission has tentatively concluded that Sprint should “be required to share with other new entrants information on the relocation costs it has incurred as documented in its annual external audit of 2 GHz band clearing expenses.”⁴⁹ TerreStar agrees.

⁴⁷ FNPRM, ¶ 87.

⁴⁸ FNPRM, ¶ 87.

⁴⁹ FNPRM, ¶ 99.

The MSS licensees' potential reimbursement liability is substantial, and the licensees should have the ability to examine in detail the basis for Sprint's reimbursement claims. Fairness requires this. Moreover, if the MSS licensees have a good faith basis for believing that some amounts claimed by Sprint are not eligible for reimbursement, the MSS licensees should have an opportunity to dispute the amounts.⁵⁰

V. MSS REIMBURSEMENT PAYMENTS SHOULD BE DUE AT THE CONCLUSION OF THE TRUE UP PERIOD.

In the FNPRM, the Commission asks "when the MSS ... entrants would owe reimbursement to Sprint."⁵¹ For the reasons discussed below, MSS reimbursement payments should be due at the end of the true-up period.

Before MSS licensees are required to make reimbursement payments, as discussed above they should be given an opportunity to examine in detail, and contest if appropriate, the documentation on which Sprint's reimbursement claims are based. This accounting process does not lend itself to a market by market approach.

⁵⁰ 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.").

⁵¹ FNPRM, ¶ 95.

First, as the Commission has recognized, “the [Sprint] annual external audit provides data on total expenses, rather than by market.”⁵² If the documentation the MSS licensees will receive is based on total expenses, then the licensees should have an opportunity to review and comment on Sprint’s reimbursement claims on a total expenses basis.

Second, some of Sprint’s expenses span multiple markets. Meaningful review of these expenses is not possible until the complete picture is in.

Third, there may be overarching legal issues concerning the expenses for which Sprint seeks reimbursement.⁵³ The MSS licensees should not have to litigate these issues on a piecemeal, market-by-market basis.

In short, a comprehensive approach is warranted. It is not possible to be comprehensive until BAS relocation is complete and Sprint’s reimbursement documentation can be examined in its entirety.

In addition, a final accounting for reimbursement of Sprint’s BAS relocation expenses is part and parcel of the true-up process. The Transition Administrator needs to know the amount of reimbursement Sprint will receive from the MSS licensees “to ensure that Sprint ... receives the proper amount of

⁵² FNPRM, ¶ 99.

⁵³ For example, as stated above it appears that Sprint is seeking reimbursement for internal expenses, which under Commission precedent are not reimbursable.

credit against the anti-windfall payment for BAS relocation.”⁵⁴ Accordingly, a proper accounting of BAS relocation expenses cannot occur until relocation is complete and the true-process is underway.

VI. BAS LICENSEES SHOULD BE REQUIRED TO COORDINATE WITH MSS LICENSEES IN GOOD FAITH.

Under the procedures the Commission adopted in the R&O, “MSS entrants will be required to successfully coordinate any operations in nonrelocated markets with BAS incumbents in those markets prior to beginning service.”⁵⁵ In addition, “an MSS entrant ... [cannot] approach the BAS incumbents in a particular market to coordinate operations until sixty days before the MSS entrant expects to provide commercial service in that market.”⁵⁶

In the FNPRM, the Commission requested comment “on whether MSS can operate on an unrestricted and secondary basis in nonrelocated BAS markets.”⁵⁷ TerreStar continues to believe, based on the technical studies it has submitted in this proceeding, that it is feasible for 2 GHz MSS systems and BAS stations to share spectrum during the completion of the BAS relocation process. TerreStar has no objection to the procedure the Commission adopted in the R&O, however, so long as: (1) BAS licensees are required to coordinate in good faith; and (2) appropriate measures are adopted, along the lines discussed in the next

⁵⁴ FNPRM, ¶ 99.

⁵⁵ R&O, ¶ 53.

⁵⁶ R&O, ¶ 55.

⁵⁷ FNPRM, ¶ 102.

section of these comments, to provide an incentive for completing BAS relocation.

In the R&O, the Commission emphasized the responsibility of BAS licensees “to act cooperatively to accommodate good faith proposal for MSS operation.”⁵⁸ Among other things, the Commission stated that it expects BAS incumbents to disclose the location of their BAS receive sites upon request.⁵⁹

Although TerreStar hopes that the Commission’s language will usher in a new period of cooperation, it has been frustrated to date by its inability to get even the most basic information from the broadcasters. For example, TerreStar has asked MSTV on multiple occasions to distribute the attached one-page survey to its members to solicit information concerning BAS receive sites.⁶⁰ TerreStar respectfully requests that the Commission, in the interest of facilitating coordination, declare that it would be bad faith for a broadcaster to refuse to answer TerreStar’s questionnaire. TerreStar also requests clarification that preliminary work in uncleared markets that will set the stage for coordination, such as seeking completion of the one-page survey, is not subject to the prohibition against requesting coordination more than 60 days before entering a market.

⁵⁸ R&O, ¶ 55.

⁵⁹ R&O, ¶ 55.

⁶⁰ Portions of the attached survey have been filled in with generic information to show what a completed survey would look like.

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

In the FNPRM, the Commission expressed “concern[] that some BAS licensees may not be making a good faith effort to complete the BAS transition in a timely manner.”⁶¹ The Commission, therefore sought comment on “incentives ... [it] might apply to encourage all BAS incumbents to diligently work toward completing the BAS transition so as not to delay further the introduction of new services in the band.”⁶² The Commission suggested three possible alternatives for providing the appropriate incentives.⁶³

TerreStar supports the first of the three proposed alternatives. Under this first alternative, 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, 2010.⁶⁴

Implementing this measure would give BAS incumbents a meaningful incentive for completing BAS relocation and would give important recognition to the needs of new entrants to provide service in the 1990-2025 MHz band.

⁶¹ FNPRM, ¶ 110.

⁶² FNPRM, ¶ 110.

⁶³ FNPRM, ¶ 112.

⁶⁴ FNPRM, ¶ 112.

CONCLUSION

In view of the foregoing:

- 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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EXHIBIT 1

Sample BAS Survey Form

BAS 2 GHz Facility Survey Date: 12/10/08 Submitted By: Fred Ding Rev 6/9/08

Station Call Sign: KBAS	Market/City: Any Town	State: USA	Group Organization: Cosmos Broadcasting
Local News Source: Originate	Originate: Doupoly; LMA	Net: NBC	

SBE Coordinated BAS Use/BAS Channels	Analog/ Digital	Enter X in the column and row as appropriate							Useage:Voice; Natural (Sound); Control					
		Ch A-1	Ch A-2	Ch A-3	Ch A-4	Ch A-5	Ch A-6	Ch A-7	Subcarrier 1		Subcarrier 2		Subcarrier 3	
									Freq	Use	Freq	Use	Freq	Use
1st ENG Live Channel	Analog/	X							5.8	Voice	6.2	Natural		
2nd ENG Live Channel	Analog/				X				5.8	Voice	6.2	Natural		
Helicopter ENG Channels	Digital								5.8	Voice	6.2	Natural	6.8	Control
Fix Srv:STL/TSL/Intercity 1	Analog/							X	5.8	Voice	6.2	Voice		
Fix Srv:STL/TSL/Intercity 2	Digital								X	5.8	Voice	6.2	Voice	6.8 T1
Fix Srv:STL/TSL/Intercity 3														
Fix Srv:STL/TSL/Intercity 4														
Fix Srv:STL/TSL/Intercity 5														

Sprint/Nextel Selected/Preferred Equipment Vendor		Nucom								
Station ENG Receive Sites	Site #1		Site #2		Site #3		Site #4		Station Contact	
Tower/Building	Tower		Building		Tower				Phone	Dynamo Sparks
Height AG/AMSL (ft)	1,500	2,000	300	1,200	300	350			Email	888-999-0099
Latitude	40 18' 50"		40 19' 10"		40 18' 56"				Market Contact	Bill Upstart
Longitude	75 58' 02"		75 57' 87"		75 57' 14"				Phone	800-345-6789
Street Address	10 Transmitter Rd		135 N. Main St		4500 N South St				Email	888-654-9876
Zipcode	99934		99937		99945				SBE Coordinator	Sammy Smart
Antenna Size/Type	8' Ultrascan		Nurad Horns		6' Superscan				Phone	765-987-8765
ENG Ch Received (A1-A7?)	1-7		1		1 & 4				Email	800-876-3421
Receiver Manufacturer	MRC		Nucomm		RF Central				Other Coordinator	Abbey Parks
Receiver Model	MRC-4579		N-8756		RF-9920				Phone	786-876-6543
Analog/Digital	Analog/Digital		Analog		Analog				Email	897-989-0066
Bandwidth Switch	yes		No		Yes 15 & 20 MHz					

Email responses to: replies@basclearing.com

Comments & Notes:	