

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

RECEIVED

FEB - 2 2006

In the Matter of)
)
SkyWave Mobile Communications, Corp.)
Application for Modification of Blanket)
License to Operate Mobile Earth Terminals)
with Inmarsat 4F2 at 52.75° W)
)

Federal Communications Commission
Office of Secretary

File No. SES-MFS-20051207-01709
(Call Sign E030055)

RECEIVED

FEB 08 2006

To: International Bureau

Satellite Division
International Bureau

MOTION TO STRIKE PORTIONS OF THE MSV PETITION

SkyWave Mobile Communications, Corp. ("SkyWave") urges the Bureau to strike the Petition to Hold in Abeyance ("MSV Petition") filed by Mobile Satellite Ventures Subsidiary LLC ("MSV") on January 20, 2006 against the above-captioned application ("the SkyWave Modification Application"). The Bureau should strike those portions of the MSV Petition, which rely on confidential material that MSV refuses to provide to SkyWave even pursuant to a protective order. Since SkyWave is not able to respond effectively to the MSV Petition, any reliance by the Bureau on this confidential information and redacted arguments would violate the Communications Act, the Administrative Procedures Act, and SkyWave's due process rights.¹

¹ Concurrently with this Motion to Strike, SkyWave is filing an Opposition to the MSV Petition based on the non-redacted portions of that pleading. See SkyWave Opposition (filed Feb. 2, 2006). By filing a response, SkyWave is in no way conceding that it is being afforded an adequate opportunity to effectively respond to the MSV Petition. Further, to the extent that SkyWave is given access to the confidential portions of the MSV Petition at a later date, SkyWave reserves the right to amend its Opposition as necessary.

I. BACKGROUND

On December 7, 2006, SkyWave filed an application to modify its existing authority to operate mobile earth terminals to provide Inmarsat D+ service in order to add the new Inmarsat 4F2 satellite located at 52.75° W.L. as a point of communication. SkyWave seeks authority to access the new Inmarsat 4F2 satellite, licensed by the United Kingdom at 52.75° W.L. in order to continue to provide authorized Inmarsat services, which it has been providing to consumers in the U.S. for approximately two years. Inmarsat will be transitioning the Inmarsat D+ service from the third generation satellite at 54° W.L. to the new Inmarsat 4F2 satellite.

On January 20, 2006, MSV filed the MSV Petition against the SkyWave Modification Application. Significant portions the MSV Petition are redacted from the public version of the pleading, including Discussion Section I² and the Background section.³ MSV has sought confidential treatment of this material because of its purported relationship to the Mexico City Memorandum of Understanding for L-band operations.⁴ SkyWave has not been given access to this redacted material. SkyWave understands that in a related proceeding, Stratos Communications, Inc. ("Stratos") attempted to obtain from MSV a confidential non-redacted version of the MSV Petition to Hold in Abeyance or Grant with Conditions the Stratos BGAN Applications and offered to enter into a confidentiality agreement and/or protective order to do

² See MSV Petition at 8-19.

³ See MSV Petition at 1-8.

⁴ See Letter from Jennifer A. Manner to Marlene H. Dortch, Re: Petition of Mobile Satellite Ventures Subsidiary LLC to Hold in Abeyance Applications of SkyWave Mobile Communications, Corp., File No. SES-MFS-20051207-01709 (Call Sign E030055) (Jan. 6, 2006).

so. MSV refused to provide Stratos with a complete version of that petition.⁵ SkyWave has no reason to believe that MSV will provide SkyWave with a complete non-redacted version of the MSV Petition now.

II. RELIANCE ON CONFIDENTIAL INFORMATION WITHHELD FROM SKYWAVE WOULD VIOLATE THE COMMUNICATIONS ACT

The Communications Act provides that “[t]he applicant shall be given an opportunity to file a reply [to a petition against its application].”⁶ However, it is impossible for SkyWave to effectively reply to claims made by MSV against the SkyWave Application because the MSV Petition has substantial redactions throughout that go to the heart of its arguments against the SkyWave Application. For example in Discussion Section I, the MSV Petition provides: [Redaction of two and half lines of text] (i) it is not replacing another satellite; (ii) it will cause greater interference to other L band operators, even when being used exclusively to provide earlier-generation services; and (iii) it will require greater protection from other L band operators, even when being used exclusively to provide earlier-generation services.”⁷ Similarly, MSV claims that “SkyWave states that Inmarsat 4F2 will have inefficient global L band beams, [rest of sentence and footnote redacted].”⁸ It is simply not possible for SkyWave to effectively respond to such arguments and other parts of the MSV Petition, as is its right under the

⁵ See File Nos. SES-LFS-20050826-01175, SES-AMD-20050922-01313, and ITC-214-20050826-00351, Motion to Strike Portions of the MSV Petition, Declaration of Marc A. Paul (filed: Nov. 10, 2005).

⁶ 47 U.S.C. § 309(d)(1).

⁷ MSV Petition at 9-10 (citations omitted).

⁸ MSV Petition at 10. In addition, the footnote associated with this sentence is redacted as well.

Telecommunications Act, without knowing what specific assertions MSV is making against the SkyWave Application.

III. RELIANCE ON CONFIDENTIAL INFORMATION WITHHELD FROM SKYWAVE WOULD VIOLATE THE APA

In addition to violating SkyWave's rights under the Communications Act, reliance on confidential information withheld from SkyWave would violate the Administrative Procedures Act ("APA"). The APA governs SkyWave's rights in an adjudicative proceeding like a license application.⁹ 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."¹⁰ The Commission has held that the "Administrative Procedures Act and the Due Process Clause of the Constitution generally entitle parties in administrative proceedings to have access to the documents necessary for effective participation in those proceedings."¹¹ This general principle clearly applies in the context of Title III license applications.¹²

⁹ 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.") and *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 FCC 2d 469, ¶ 67 (1981) ("Our paper [license] hearing procedures satisfy the general statutory provisions relevant to hearing procedures to be employed in adjudicative administrative proceedings as set forth in Sections 554 and 556 of the Administrative Procedure Act (APA) ...").

¹⁰ 5 U.S.C. § 556(d).

¹¹ *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*

In those unusual cases where a party has not made confidential material available to other parties in a proceeding subject to a protective order,¹³ the Commission has struck such material from the record.¹⁴ 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

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 ...”).

¹² 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).

¹³ 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; Adelphia 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 SkyWave access to the confidential version of the MSV Petition, SkyWave will not have “the opportunity to fully respond” to the claims of MSV.

¹⁴ See *CPUC Report and Order*, 10 FCC Rcd at 7506-7508, ¶¶ 38-44.

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.”¹⁵ 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.”¹⁶

If anything, SkyWave’s inability to review a complete version of the MSV Petition, presents a more serious impediment to SkyWave’s 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, SkyWave does not know all of the specific arguments being made against its application and thus has no effective way to respond to them.¹⁷

¹⁵ 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).

¹⁶ 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.

¹⁷ 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 SkyWave is able to effectively participate in this proceeding. SkyWave 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 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

The Bureau should also strike the portions of the MSV Petition that are based on confidential information not provided to SkyWave because the Bureau cannot rely on such information as a basis for its decision in the SkyWave Application. 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.¹⁸ In particular, the Federal Maritime Commission based its finding at least in part on “reliable data reposing in the files of the Commission.”¹⁹ 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.”²⁰ 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 ...”²¹

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,

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 SkyWave.

¹⁸ 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*).

¹⁹ *U.S. Lines*, at 533.

²⁰ *Id.*

²¹ *Id.*

parties to the proceeding are deprived of the “opportunities guaranteed them by statute meaningfully to participate.” SkyWave 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 SkyWave as a basis for its decision on the SkyWave Application, it is appropriate to strike those portions of the MSV Petition that rely on such information.

IV. AT A MINIMUM, THE COMMISSION SHOULD NOT RELY ON THE CONFIDENTIAL INFORMATION IN DECIDING THE SKYWAVE APPLICATIONS

In the absence of a decision to strike the portions of the MSV Petition that rely on confidential information, or to provide SkyWave 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 SkyWave. 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.²² 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.²³

²² See *Comsat Corp. et al.*, Memorandum Opinion, Order and Authorization, FCC 01-272, ¶ 106 (2001)

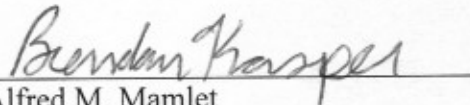
²³ See *Id.* at ¶ 107 (“In particular, one matter raised involves what appears to be a disagreement among the operators concerning both the interpretation of a provision of the Mexico City Agreement, and its utility for addressing competing spectrum requirements. We have addressed the current impasse in the operator-to-operator discussions above, and conclude that this particular disagreement does not alter our view that granting these applications would 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.”).

V. CONCLUSION

For the foregoing reasons, SkyWave respectfully requests that the Bureau strike Discussion Section I and parts of the Background section that rely on confidential information that has not been provided to SkyWave.

Respectfully submitted,

SkyWave Mobile Communications, Corp.



Alfred M. Mamlet

Marc A. Paul

Brendan Kasper

Steptoe & Johnson LLP

1330 Connecticut Avenue, NW

Washington, DC 20036

(202) 429-3000

Counsel for SkyWave Mobile Communications, Corp.

February 2, 2006

CERTIFICATE OF SERVICE

I, Brendan Kasper, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 2nd day of January, 2006, served a true copy of the foregoing Motion to Strike by first class mail, postage pre-paid (or as otherwise indicated) upon the following:

James Ball*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Cassandra Thomas*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Howard Griboff*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Fern Jarmulnek*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Stephen Duall*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Robert Nelson*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Andrea Kelly*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Scott Kotler*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Karl Kensinger*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

John Martin*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Jennifer A. Manner
Vice President, Regulatory Affairs
Mobile Satellite Ventures Subsidiary LLC
1002 Park Ridge Boulevard
Reston, Virginia 20191

Bruce D. Jacobs
David S. Konczal
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037-1128

JoAnn Ekblad*
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Keith H. Fagan
Senior Counsel
Telenor Satellite, Inc.
1101 Wootton Parkway
Rockville, MD 20852

* by Hand Delivery

John P. Janka
Jeffrey A. Marks
Latham & Watkins LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004

Diane J. Cornell
Vice President, Government Affairs
Inmarsat, Inc.
1100 Wilson Blvd, Suite 1425
Arlington, VA 22209

Brandon Kersper