

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

In the Matter of)	
)	
Amendment of the Commission's Space Station Rules and Policies)	IB Docket No. 02-34
)	
Mitigation of Orbital Debris)	IB Docket No. 02-248

To: The Commission

**PETITION FOR RECONSIDERATION OF ICO GLOBAL COMMUNICATIONS
(HOLDINGS) LIMITED**

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
I. INTRODUCTION.....	1
II. THE COMMISSION UNLAWFULLY ADOPTED AN ARBITRARY NGSO SPECTRUM CAP WITHOUT NOTICE.....	3
III. THE NGSO SPECTRUM CAP HAS NO BASIS IN LAW OR POLICY.....	5
IV. THE COMMISSION’S SPECTRUM CAP PRESUMPTION CONTRAVENES THE STATED POLICY GOALS OF THE ORDER.....	7
V. CASE-BY-CASE REVIEW OF SATELLITE MARKETS IS MORE EFFECTIVE IN PROMOTING COMPETITION THAN IMPOSING AN ARBITRARY SPECTRUM CAP.....	9
VI. AT A MINIMUM, THE COMMISSION SHOULD CLARIFY AND LIMIT THE SCOPE OF THE NGSO SPECTRUM CAP.....	11
VII. CONCLUSION	12

SUMMARY

Without notice and contrary to precedent and policy, the Commission imposed an arbitrary spectrum cap on licensees of non-geostationary satellite orbit (“NGSO”) and NGSO-like systems. The *Order* in this proceeding finds that if a satellite licensee loses or terminates its license, its spectrum will likely be redistributed among the remaining licensees in the relevant NGSO frequency band, provided that there are three or more licensees remaining in that band. If, however, there are only three licensees in the band and one of them loses its license, the Commission will not redistribute the spectrum between the two remaining licensees, but will reassign the spectrum to new applicants, or reallocate the spectrum for other services.

The Commission presents this limitation as a presumption that three is the ‘correct’ number of competitors in any frequency band. Its ostensible goal in employing this presumption is to ensure adequate MSS competition, balancing a desire to promote multiple service providers with quickly bringing spectrum into use. This presumption applies, however, irrespective of the size of the allocated frequency band or of any assessment of competition from licensees in other frequency bands allocated to the same or similar satellite services.

ICO seeks reconsideration and clarification of this rule, which amounts to a spectrum cap on licensees of NGSO-like systems, on several grounds. First, the Commission’s action violates statutory requirements for notice of its intent to impose a spectrum cap, and as a result has neither a record nor comments of the parties on which to base this portion of the *Order*. Second, the Commission’s reasoning for adopting the spectrum cap is deeply flawed. Third, the spectrum cap directly contradicts the Commission stated policy goals for revising its satellite licensing rules and procedures.

Rather than imposing an arbitrary spectrum cap, the Commission could more effectively advance its objective of ensuring full competition and preventing anti-competitive conduct by

maintaining a case-by-case review of satellite markets and individual satellite transactions.

Finally, even if the NGSO spectrum cap were deemed to legitimately serve the policies set forth in the Commission's *Order*, the Commission must clarify that an NGSO-like licensee may otherwise acquire additional spectrum in its frequency band by assignment or transfer of control of a separate license in that band.

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ICO Global Communications (Holdings) Limited (“ICO”) submits this Petition for Reconsideration of the Commission’s First Report and Order in the above-captioned proceeding,¹ pursuant to Section 1.429 of the Commission's rules.²

I. INTRODUCTION

ICO generally supports the Commission’s adoption of rules for streamlining the satellite licensing process. ICO believes that those rules will encourage more rapid deployment of satellite services to the public. Constructing and launching a satellite system is an extremely complex undertaking, and as such requires flexibility to respond to the evolving markets for satellite services. The rules adopted in the *Order* address, for the most part, reflect the need for

¹ *Amendment of the Commission’s Space Station Licensing Rules and Policies*, 18 FCC Rcd 10760 (2003) (“*Order*”).

² 47 C.F.R. § 1.429.

more flexible and less restrictive satellite licensing procedures, as advocated by ICO in its comments on the notice of proposed rulemaking (“*NPRM*”)³ in this proceeding.⁴

ICO fully supports the policies underlying the rules ultimately adopted in the *Order*: swift licensing and use of satellite spectrum, preferably via reliance on market forces. For example, the *Order* at last makes rules for satellite licensing consistent with broader Commission precedent by eliminating the anti-trafficking rules for satellite services.⁵ ICO agrees on the whole with the Commission’s conclusion that the new procedures will allow it to issue satellite licenses significantly more quickly, and will allow satellite operators to begin operating sooner than under our current satellite licensing procedures.⁶

ICO strongly objects, however, to the portion of the *Order* that places a spectrum cap on NGSO-like licensees by presuming that each frequency band must maintain no fewer than three competitors. In effect, each licensed NGSO-like system will be limited to the spectrum available in one-third of its operating frequency band. Should fewer than three licensees remain in the band after a license cancellation, the Commission would begin a new processing round from which those systems would be barred. The Commission explicitly reserves the option to initiate

³ *Amendment of the Commission’s Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking, 17 FCC Rcd 3847 (2003) (“*NPRM*”).

⁴ See Comments of ICO Global Communications (Holdings) Limited at 1-2, *Amendment of the Commission’s Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking, 17 FCC Rcd 3847 (2003) (“*ICO’s Comments*”). (“It is arbitrary and inefficient rules to put satellite licensees and license applicants in a regulatory box designed to freeze in time the business plans and market status quo that exist at the time a license application is filed. Market conditions and satellite services evolve over time, and licensees must be allowed to react accordingly.”)

⁵ *ICO’s Comments* highlight that the anti-trafficking rules for satellite services were incompatible with the Commission’s established policies of alleviating spectrum scarcity and increasing spectral efficiencies, which seek to “allow market forces to direct the distribution of spectrum resources among specific users and uses.” See *ICO’s Comments* at 2; *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, 15 FCC Rcd 24178, 24181 ¶10 (2000) (“*Secondary Markets*”).

⁶ *Order*, 18 FCC Rcd at 10881 ¶331.

a proceeding reallocate the band to other services, since it reasons that in any case fewer than three licensees are not “...sufficient to make reasonably efficient use of the frequency band.”⁷

This rule is based upon deeply flawed analysis, ignores factors deemed relevant to satellite licensing decisions under Commission precedent, and directly contradicts policies on which the Commission bases its *Order*. Accordingly, the Commission should reconsider this rule.

II. THE COMMISSION UNLAWFULLY ADOPTED AN ARBITRARY NGSO SPECTRUM CAP WITHOUT NOTICE

Without seeking public comment, the Commission unexpectedly and arbitrarily adopted a spectrum cap rule that prohibits NGSO-like applicants and licensees from obtaining more than one-third of the spectrum in any frequency band allocated for satellite service.⁸ Stated simply, the rule dictates that no NGSO-like licensee will be assigned more than one-third of any satellite frequency band.⁹ Should license cancellations leave fewer than three licensees in the band, the Commission will review consider a new processing round, and may review the original satellite service spectrum allocation.

⁷ 47 C.F.R. § 25.157(g)(3).

⁸ Specifically, new Section 25.157(g) of the Commission’s rules states:

In the event that an applicants’ [sic] license is cancelled for any reason, the Commission will redistribute the bandwidth allocated to that applicant equally among the remaining applicants whose licenses were granted concurrently with the cancelled license, *unless* the Commission determines that such a redistribution would not result in a sufficient number of licensees remaining to make reasonably efficient use of the frequency band....There is a presumption that three satellite licensees in a frequency band are sufficient to make reasonably efficient use of the frequency band.

See Order, 18 FCC Rcd at App. B (adopting 47 C.F.R. § 25.157(g)) (emphasis added). New Section 25.157(e) applies a similar requirement to initial processing rounds. *Id.* at App. B (adopting 47 C.F.R. § 25.157(e)).

⁹ *Id.* at 10788 ¶ 62 (“if one of [the only] three licensees [in a frequency band] were to lose its license...we could reassign the newly available spectrum to a new applicant....The existing licensees would not be allowed to apply for another license.”). This one-third spectrum cap rule applies to canceled and relinquished spectrum, as well as spectrum assigned pursuant to initial processing rounds. *Id.* at 10788 ¶¶ 61, 62. Although unclear, it arguably also applies to spectrum acquired through license assignments and transfers of control.

As adopted, the one-third spectrum cap rule bears no resemblance to any proposal raised in the NPRM resulting in the adoption of the *Order*. The Administrative Procedure Act requires the Commission to publish an NPRM containing the “terms or substance of the proposed rule” and an opportunity for public comment on the proposed rule.¹⁰ Adequate notice requires that the rule adopted must be a “logical outgrowth” of the rule proposed.¹¹ A final rule is not a logical outgrowth “when the changes are so major that the original notice did not adequately frame the subjects for discussion.”¹²

Nothing in the *NPRM* apprised the public of the Commission’s intent to impose an NGSO spectrum cap on NGSO licensees. Rather, the *NPRM* proposed “dividing” or “redistributing” spectrum among competing satellite applicants or licensees *only* under the following circumstances: (1) in a processing round;¹³ (2) under a first-come, first-served procedure where multiple applications must be considered together;¹⁴ and 3) where a license is canceled and spectrum redistribution occurs “as part of any first-come, first-served procedure.”¹⁵ The *NPRM* offered no hint that the Commission would address spectrum redistribution outside of the processing round or first-come, first-served context. Nor did it remotely suggest that the Commission would consider any spectrum cap proposal at all. The *NPRM* certainly did not suggest that a spectrum cap would be applied to license assignments or transfers of control.

¹⁰ 5 U.S.C. § 553(b)(3), (c).

¹¹ See *Nat’l Black Media Coalition v. FCC*, 791 F.2d 1016 (2nd Cir. 1986) (“*Nat’l Black Media*”).

¹² *Connecticut Light and Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 533 (D.C. Cir.).

¹³ See *NPRM*, 17 FCC Rcd at 3873-74 ¶ 78.

¹⁴ *Id.* at 3863 ¶ 46.

¹⁵ *Id.* at 3864 ¶ 48.

Although the Commission proposed to divide or redistribute available spectrum among satellite applicants and licensees, this proposal is far different from the final rule targeting NGSO-like applicants and licensees only and *prohibiting* them from acquiring more than one-third of the spectrum in a frequency band. The lack of any notice of the final rule is further evidenced by the Commission's failure to discuss or cite in the *Order* any comments in the record addressing the issue. The Commission's adoption of the NGSO spectrum cap under this circumstance is precisely the type of agency action that the courts have rejected for failure to meet the logical outgrowth requirement.¹⁶ Therefore, the Commission should reconsider its imposition of the NGSO spectrum cap.

III. THE NGSO SPECTRUM CAP HAS NO BASIS IN LAW OR POLICY

The *Order* adopted a one-third spectrum cap for NGSO-like licensees without regard to the relevant market, frequency band, or system requirements. In doing so, it purports to balance the need to quickly bring satellite spectrum into use with its desire to promote multiple service providers in each frequency band.¹⁷ This is at best, however, an *ad hoc* rationalization of an arbitrary rule. As discussed in Section IV below, the spectrum cap will significantly delay, rather than expedite, the introduction of new services. Moreover, the asserted goal of promoting multiple service providers for each satellite frequency band without regard to the relevant market is not justified.

¹⁶ For example, in *Nat'l Black Media*, the Commission proposed to apply its minority preference policy to the licensing of certain AM broadcast channels, but subsequently decided to abandon its minority preference policy. See *Nat'l Black Media*, 791 F.2d at 1019-20. The court held that the Commission failed to provide notice of its decision to abandon the minority preference policy. The court found insufficient general statements in the Commission's NPRM that final rules may be adopted "substantially as proposed...or in accordance with such variants...as [the Commission] may find preferable." *Id.* at 1022-23.

¹⁷ See *Order*, 18 FCC Rcd 10788 ¶ 62.

Although the Commission certainly should promote competition in satellite markets, there is no legal or policy basis for the Commission’s novel presumption that a competitive satellite market requires at least three licensee for any given satellite frequency band. This presumption is based solely on the Commission’s reasoning in the *EchoStar-DirecTV Order*.¹⁸ The rationale of that order, however, offers no support for the Commission’s presumption. There, the Commission considered the entire multichannel video program distribution market, which includes both direct broadcast satellite *and* cable services.¹⁹ It did not attempt to define the relevant market in terms of only satellite services in a single frequency band. Thus, to be truly consistent with the rationale of the *EchoStar-DirecTV Order*, the Commission must consider the relevant satellite market without regard to the technology deployed or specific frequencies over which services are provided.

In fact, the Commission has never defined a satellite market based on a single frequency band. The Commission has found that the relevant product market for satellite telecommunications service providers includes domestic and international telecommunications markets.²⁰ For example, in determining the relevant product and geographic markets for MSS providers, the Commission has considered the services offered in North America by MSS operators such as Inmarsat, Iridium, Globalstar, Orbcomm.²¹ These satellite services include a variety of mobile voice, data, and other services, and are offered using a number of different

¹⁸ *Id.* at 10788-89 ¶ 64 (discussing *Application of EchoStar Communications Corp.*, 17 FCC Rcd 20559 (2002) (“*EchoStar-DirecTV Order*”).

¹⁹ See *EchoStar-DirecTV Order*, 17 FCC Rcd at 20612-13 ¶ 127.

²⁰ See *Applications of Space Station System Licensee, Inc. and Iridium Constellation LLC*, 17 FCC Rcd 2271, 2286 ¶ 33 (2002).

²¹ See *Motient Services Inc. and TMI Communications and Co., LP and Mobile Satellite Ventures Subsidiary LLC*, 16 FCC Rcd 20469, 20477-78 ¶ 24 (2001).

frequency bands. In recent years, global MSS systems have faced additional competition from regional MSS operators, such as AceS (Asia) and Thuraya (Middle East). Consequently, the Commission's novel attempt to define a satellite market strictly in terms of a given frequency band is patently unreasonable and without precedent.

IV. THE COMMISSION'S SPECTRUM CAP PRESUMPTION CONTRAVENES THE STATED POLICY GOALS OF THE ORDER

The *Order* lacks a rational policy basis for using a spectrum cap presumption to determine the appropriate amount of spectrum for each licensee of an NGSO-like system, or to determine the appropriate number of competitors in the market for services provided by NGSO-like systems. In practice, each of the stated goals of the proceeding – establishing satellite licensees' operating rights clearly and quickly, greater reliance on market mechanisms, responding to technical growth in satellite design, greater flexibility in post-licensing transfers to respond to changing market demands– would be undermined by the arbitrary presumption that one-third of any given frequency band will suffice for an individual licensee and for fostering competition in the market for services provided by NGSO-like systems. The spectrum cap rule is thus radically out of step with policy imperatives of the *Order*.

The *Order* models new NGSO licensing procedures after those adopted in the 2 GHz proceeding, in which the Commission assigned spectrum using a default mechanism in order to avoid the licensing delays engendered by prolonged negotiations and detailed assessments of satellite system requirements. The procedure was not expected to result in a pre-determined number of competitors in 2 GHz band, but rather was intended to expedite licensing. Spectrum was thus assigned with the acknowledgment that applicants' spectrum needs may not be satisfied initially upon licensing, but with the clear expectation that the systems ultimately deployed would have access to adequate spectrum because not all licensees would ultimately build out

their systems. As it did in the 2 GHz proceeding, the Commission in its *Order* acknowledges the difficulty of relying upon any qualitative or quantitative measure for making spectrum assignments in a given frequency band.

The *Order*'s presumption, however, effectively concludes that limiting NGSO spectrum assignments to one-third of its frequency band will magically ensure "...that the remaining satellite licensees have not been assigned more spectrum than they need to meet their current and reasonably anticipated future customer needs." The presumption applies irrespective of the size of the allocated frequency band or of any assessment of competition from licensees in other frequency bands allocated to the same or similar satellite services.

Satellite markets, however, can and do include competitors across multiple frequency bands. For example, ICO, licensed in the 2 GHz frequency band, will operate a second-generation Medium-Earth-Orbit MSS system, building and expanding upon the kinds of applications and services currently being offered by other MEO systems operating in the 1.6/2.4 GHz band, such as Globalstar. Globalstar and Iridium compete directly in the 1.6/2.4 GHz band, offering services which were previously available only by accessing satellites operated by Inmarsat, in portions of the L-band. Each of these systems now faces competition from regional geostationary system providers offering mobile satellite services. Rather than viewing these MSS systems as competitive, the presumption adopted in the *Order* would consider these systems to be competitors serving similar markets only if they were licensed in the same frequency band, in spectrum allocated in the same processing round.

Citing the need to avoid delays in service to the public, the *Order* favors licensing procedures that clearly define spectrum rights at the time of licensing. The *Order* states, for example, that the new licensing procedures will rely on service rule proceedings to determine the

appropriate of spectrum prior to licensing.²² Yet the spectrum cap rule, if applied to every NGSO processing round, mandates that the Commission revisit spectrum issues on each and every occasion where fewer than three licensees remain in a frequency band. The delay inherent in any challenge to the Commission's spectrum cap presumption runs counter to its stated desire for clarification of licensees' operating rights at initial licensing. Taken to its logical conclusion, the allocation process would essentially begin anew if a processing round were to attract fewer than three applicants.

The *Order* further justifies the adoption of processing rounds with pre-set band-splitting mechanism for NGSO-like systems by noting that, combined with the elimination of the anti-trafficking rule, this mode of determining spectrum needs is in keeping with the Commission's reliance on market mechanisms wherever possible.²³ The process inherent in any challenge to the Commission's spectrum cap presumption, however, returns the decision of 'how much spectrum is enough' to Commission. The spectrum cap presumption, under the circumstances, amounts to a determination of the appropriate amount of spectrum and the appropriate number of competitors by government fiat, precisely the type of flawed decision-making the Commission purports to eliminate in this Order.

V. CASE-BY-CASE REVIEW OF SATELLITE MARKETS IS MORE EFFECTIVE IN PROMOTING COMPETITION THAN IMPOSING AN ARBITRARY SPECTRUM CAP

Rather than imposing an arbitrary spectrum cap on NGSO-like licensees in each satellite frequency band, the Commission could more effectively advance its objective of ensuring full competition and preventing anti-competitive conduct by maintaining a case-by-case review of

²² See *Order*, 18 FCC Rcd at 10774-75 ¶ 25.

²³ *Id.* at 10766-67 ¶ 7.

satellite markets and individual satellite transactions. In fact, imposing an NGSO spectrum cap is a complete reversal of the approach that the Commission adopted when it eliminated the spectrum cap for commercial mobile radio services (“CMRS”) in favor of a case-by-case review of license assignments and transfers.²⁴ There, the Commission concluded that in view of the robust competition in CMRS markets, maintaining strict limits on spectrum aggregation could prevent transactions that serve the public interest. The Commission further found that reliance upon a case-by-case review of CMRS spectrum aggregation transactions is sufficient to fulfill its statutory mandate “to promote competition, ensure diversity of license holdings, and manage the spectrum in the public interest.”²⁵ Imposing an arbitrary spectrum cap on highly competitive satellite markets is no more justified than it is for CMRS markets.

Under its case-by-case review of license assignments and transfers, the Commission routinely applies the public interest standard of Sections 214(a) and 310(d) of the Communications Act of 1934, as amended (“Communications Act”).²⁶ This standard requires the Commission to determine whether a license assignment or transfer of control complies with the Communications Act, other applicable statutes, and Commission rules. It also requires the Commission to “weigh the potential public interest harms of the proposed transactions against the potential public interest benefits.”²⁷ This public interest analysis includes an assessment of the competitive effects of a transaction in both the relevant product and geographic markets.²⁸ In adopting an NGSO spectrum cap for the first time, the Commission failed to offer any reasoned

²⁴ See *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668, 22693-94 ¶ 50 (2001).

²⁵ *Id.* at 22696 ¶ 55 (citing 47 U.S.C. §§ 301, 303, 309(j), 310(d)).

²⁶ See 47 U.S.C. §§ 214(a), 310(d).

²⁷ *EchoStar-DirectTV Order*, 17 FCC Rcd at 20574 ¶ 25 (2002).

²⁸ *Id.*

basis for departing from a case-by-case review approach that has been time-tested and proven to advance its competition goals over the years.

VI. AT A MINIMUM, THE COMMISSION SHOULD CLARIFY AND LIMIT THE SCOPE OF THE NGSO SPECTRUM CAP

If the Commission decides to retain the NGSO spectrum cap, it should clarify that the spectrum cap does not apply to license assignments or transfers of control of licenses. Neither the text of the *Order* nor the rule, by its terms, extends the NGSO spectrum cap to spectrum acquired through license assignments and transfers of control. ICO is concerned, however, that despite the plain language, the NGSO spectrum cap rule could be interpreted to limit licensees' ability to acquire additional spectrum in a frequency band. Applying the rule in a way that does not allow satellite licensees to aggregate spectrum would be antithetical to the policies espoused throughout the *Order*.

The requested clarification would acknowledge the efficiencies of permitting satellite licensees to access additional spectrum that is compatible with their existing system designs, while allowing the marketplace to determine the proper allocation of spectrum. It also would be consistent with the Commission's elimination of the anti-trafficking rules for satellite services.²⁹

The requested clarification would maintain the efficiency of the newly adopted licensing procedures. The Commission already can address all relevant factors (e.g., system spectrum requirements, competition in the relevant market) in a license assignment or transfer proceeding. The Commission should not needlessly extend the licensing process, either to determine whether to redistribute or reallocate spectrum or to determine whether to permit spectrum aggregation, with respect to the one or two remaining licensees that have continued to meet their milestones.

²⁹ The Commission's policies have sought to "allow market forces to direct the distribution of spectrum resources among specific users and uses." *Secondary Markets*, 15 FCC Rcd at 24181 ¶10.

In view of the above, an additional proceeding to rebut the spectrum cap presumption, separate from any assignment or transfer of control proceeding, would be at odds with efforts to craft procedures (e.g., post-licensing negotiations for NGSO-like systems) that expedite delivery of satellite service to the public.

VII. CONCLUSION

The Commission should reconsider the spectrum cap presumption adopted in the *Order*, that limits any licensee to one-third of the frequency band allocated for its NGSO-like service. It is neither consistent with the policies underlying the modified satellite licensing regime, nor supported by the record. Indeed, application of the rule would add delay, uncertainty, and redundant spectrum assignment and allocation proceeding to any NGSO satellite licensing round, eliminating any benefit for NGSO-like services otherwise gained from the *Order*'s streamlining of satellite licensing rules.

Respectfully submitted,

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