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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Authorization of 2 GHz Mobile Satellite Service Applications and Letters of Intent (See Appendix)
IB Docket No. 99-81

Dear Chairman Powell:

AT&T Wireless Services, Inc., Cingular Wireless LLC, Sprint PCS, and Verizon Wireless urge the Commission to defer the grant of the above-referenced applications and Letters of Intent until after public comment is sought and received on the implications of the March 8, 2001 *ex parte* filing of New ICO Global Communications Holdings Ltd. ("New ICO").

The statements contained in New ICO's March filing and in subsequent filings demonstrate that the Mobile Satellite Service ("MSS") landscape and service has dramatically changed from the MSS that was originally envisioned by applications and Letters of Intent filed nearly four years ago, and that the MSS services as applied for may not be viable. Worse, what New ICO has declared it wants authority to build – an unprecedented combination of satellite and terrestrial service – is at odds with its own original application and the FCC's rules. Accordingly, grant of the applications at this time is precluded by statute and Commission procedure. Moreover, grant of the subject applications would be fundamentally unfair to other potential terrestrial users of the MSS spectrum. If the Commission determines that the spectrum is suitable for terrestrial services, it must make that spectrum available to all interested users, and must auction it pursuant to Section 309(j) of the Communications Act. Action on these applications should be – and must be – deferred until the broad spectrum policy and license processing issues raised by New ICO's filings are addressed, if the Commission is to discharge properly its statutory duties.

In its March *ex parte* filing, New ICO asserts that its use of an "ancillary" terrestrial component ("ATC") for its MSS system would "allow the 2 GHz MSS service itself… to become a viable enterprise."[1] Indeed, New ICO bluntly asserts that "[w]ithout ATC, 2 GHz MSS systems are simply not economically viable."[2] And New ICO threatens that further "investment simply cannot be justified unless the Commission provides 2 GHz MSS licensees" with a terrestrial component.[3] New ICO continues this theme in a May *ex parte* filing,

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1 *See Ex Parte* Filing of New ICO, filed March 8, 2001 at 2.
2 *Id.* at 16.
3 *Id.* at 6.

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explaining that its new proposals – which New ICO describes as "modifications" to the original applications – will "give 2 GHz MSS operators a fair opportunity to prove their systems and business plans."[4] In light of these recent developments and admissions, the parties respectfully submit that grant of any 2 GHz MSS application or Letter of Intent would violate the Communications Act, the Commission's rules, and well-settled Commission policy.

First, granting the applications would be fundamentally at odds with the FCC's obligations to manage effectively the radio spectrum. As the Commission knows, the overall demand for wireless services, and, accordingly, new spectrum allocations, has increased exponentially. Indeed, the Commission currently has before it numerous proposals for the allocation of 3G spectrum for advanced wireless services. If, as New ICO now suggests, MSS is no longer viable as a satellite service, the Commission must consider whether reallocation of this spectrum better suits public requirements. Any authorization of MSS in light of this new information would be counter to that public interest obligation. In this regard, it is important that the Commission respond to the petition for rule making submitted by CTIA – before, not after, it grants any of the 2 GHz MSS authorizations.[5]

Through its *ex parte* presentations, New ICO has raised critical questions concerning the overall viability of MSS, which the Commission must address before acting on any of the pending applications. In New ICO's assessment, MSS as an independent business is not economically viable. Fundamental policy and spectrum management obligations require the Commission to ensure that scarce electromagnetic spectrum be carefully managed and authorized. This is particularly true of spectrum below 3 GHz that might be used to accommodate third generation ("3G") advanced mobile services or to accommodate those systems that might be displaced from other 3G bands. To do otherwise would take an ostrich-like approach of licensing services where available evidence indicates those services are simply not viable, and where there are critical unmet needs for spectrum. That approach would be particularly invalid here where New ICO has itself warned the Commission that it will require a radically different grant in order to serve the public.

Second, since New ICO's submissions reflect a fundamental amendment to its original application and Letter of Intent, the Commission is required to seek public comment on New ICO's amended proposal. There can be no question that New ICO's latest request represents a substantial departure from its original application and representations to the Commission. Indeed, before March, no mention was made of any terrestrial component – now claimed to be necessary for MSS operators' "economic viab[ility]" – in any of New ICO's prior filings or, notably, in the March 1998 public notice accepting New ICO's Letter of Intent for filing.[6] To the contrary, New ICO consistently asserted that its system would utilize the existing PCS/cellular

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4 *See Ex Parte* Filing of New ICO, filed May 24, 2001 at 2 [emphasis added].

5 Petition for Rulemaking of the Cellular Telecommunications & Internet Association, filed May 18, 2001.

6 *See* Public Notice Report No. SAT-00061, "Satellite Policy Branch Information; Amendments to 2 GHz Mobile Satellite Service Applications and Letters of Intent," released November 29, 2000. *See also,* FCC file number SAT-AMD-20001103-00155.

terrestrial networks for any terrestrial component.[7] Thus, the recent filings of New ICO clearly demonstrate that the factual underpinnings of New ICO's September 26, 1997 Letter of Intent and of the public notice have been substantially altered.[8]

In effect, New ICO's latest revelations amount to a major amendment of its original application and Letter of Intent. Section 25.116(b) of the Commission's rules states that amendments are deemed "major" when, among other things, the change increases the potential for interference or the amendment is determined by the Commission to be "substantial."[9] The parties submit that the eleventh-hour addition of a heretofore un-contemplated terrestrial component is nothing if not "substantial." By New ICO's own description, this amendment is central to the viability of the enterprise. Moreover, it seems obvious that the proposed interweaving of satellite and terrestrial communications could potentially present harmful interference to adjacent channel licensees, such as those operating in the PCS band below 1990 MHz.

As with any substantial amendment, it is clear that the Commission is required by statute and its own precedent and procedures to provide public notice – and to seek public comment – before taking final action on the underlying application. MSS has been deemed a Commercial Mobile Radio Service ("CMRS") by the Commission[10] and is regulated as providing common carrier service.[11] Accordingly, MSS applications are covered by the strictures of Section 309 of the Communications Act, which requires that certain applications, shall not be "granted by the Commission earlier than thirty days following issuance of a public notice of the acceptance for filing of the application or of any substantial amendment thereof."[12]

In addition, the Commission's own rules and consistent practice require that any substantial amendment to a pending satellite application receive full public comment prior to final Commission action. For example, Section 25.151(a)(7) dictates that information deemed of public significance be placed on public notice.[13] Even in cases where the Commission has determined that minor conforming amendments are required for satellite systems, the FCC has nonetheless placed such amendments on public notice.[14] In fact, the public notice process serves the valid purpose of permitting the Commission to gather needed information on whether requested amendments or modifications to satellite systems are indeed major or minor. More fundamentally, all of these statutory and regulatory provisions are precisely aimed at preventing the sort of regulatory "bait-and-switch" which New ICO now asks the Commission to approve.

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7 *See e.g.*, FCC file number 188-SAT-LOI-97 at 12.
8 *See also*, FCC file number 188-SAT-LOI-97.
9 *See* 47 C.F.R. §§ 25.116(b) and (b)(4).
10 *See* 47 C.F.R. § 20.9(a)(10).
11 *See* 47 C.F.R. § 20.9(a).
12 *See* 47 U.S.C. § 309(b) (emphasis supplied).
13 *See* 47 C.F.R. § 25.151(a)(7).
14 *See e.g.*, Public Notice Report No. SAT-00061, "Satellite Policy Branch Information; Amendments to 2 GHz Mobile Satellite Service Applications and Letters of Intent;" released November 29, 2000.

Nor is New ICO relieved of these legal requirements by attempting to style its proposal as a "request for amendment of the 2 GHz service rules." New ICO's filing is nothing more than an attempt to modify the terms by which New ICO will deploy MSS from those originally set forth in its Letter of Intent. Indeed, despite its previous representations, New ICO says that it cannot viably provide MSS service absent employment of a terrestrial component. Although New ICO failed to submit its proposal to utilize terrestrial components as an "amendment" to its initial application, the fact remains that New ICO is seeking to amend the terms by which it will provide service. By submitting proposed modifications to its system architecture as an *ex parte* filing in a rulemaking proceeding, New ICO has essentially disregarded the Commission's application processing requirements. The Commission can not ignore the practical effect of New ICO's *ex parte* filing and sanction an end-run around its application filing procedures, simply because the document was not *labeled* as an amendment.

Third, New ICO's request would undermine the Commission's well-settled policies regarding satellite construction and build-out. In essence, New ICO now has told the Commission that it will not meet the milestones for construction of the MSS system for which it applied. To act in light of this admission would vitiate the Commission's pro-competitive construction milestone policies. Because the agency no longer employs *a priori* financial qualifications for new satellite allocations (such as 2 GHz), strict construction milestones are the sole check against warehousing of spectrum. Since New ICO has made it clear that it does not intend to build the system on file, grant of New ICO's application at this juncture simply invites inevitable delays and extensions of the milestones. In effect, the Commission will have encumbered its ability to manage effectively this spectrum and potentially will have mooted its ability to ensure that 2 GHz spectrum is rapidly and efficiently deployed to serve the public.[15]

Fourth, the present allocation for 2 GHz MSS systems does not permit domestic terrestrial use. If, as New ICO has plainly stated in its *ex parte* filings, ATC is critical to the MSS system architecture, a new allocation for terrestrial use of this spectrum is in order. Obviously, an allocation for terrestrial use of spectrum below 3 GHz is of great interest to the wireless industry. However, New ICO has proposed that the Commission authorize a system that, in its own words, is not viable. In so doing, the Commission would prejudice the outcome when it proceeds to consider whether to permit terrestrial service as the economic "engine" for that system. In effect, the Commission is being asked not only to bypass its normal allocation process but to also authorize a disabled service.

Fifth, grant of New ICO's pending application and Letter of Intent would undermine long-held practices and policies for satellite services. Since the early 1980s, the Commission has considered satellite applications solely through "processing rounds," where the agency simultaneously addresses all similarly situated entities. The Commission employed this

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[15] The Commission's recent experiences in the Ka band demonstrate the folly of the approach proposed by New ICO. There, the Commission delayed imposing milestones on some Ka licensees (those seeking to use intersatellite links), resulting in near gridlock in processing the second round of Ka applicants. Grant of New ICO or other applicants seeking to deploy systems far different from their current applications invariably would cause similar delays in applying construction milestones.

approach for the 2 GHz proposals now pending.[16] Yet, New ICO and possibly two other applicants manifestly are *not* similarly situated: while others may still intend to provide mobile satellite services, New ICO pronounces MSS a failure and seeks authority to offer a different service altogether. New ICO's plan removes it from the current processing round, and should – if nothing else – trigger a new call for entities seeking licenses for combined satellite/terrestrial services.

In light of New ICO's overall assessment of the viability of MSS, it is also incumbent upon the Commission to defer action not only on the pending New ICO Letter of Intent, but also the other pending 2 GHz MSS applications and Letters of Intent. New ICO has entered into collaboration agreements with two of the other 2 GHz MSS applicants.[17] Given this linkage between three of the eight potential licensees, and the uncertainty in the business plans for the other remaining 2 GHz MSS applicants, the Commission should not authorize <u>any</u> MSS system at this time. Recent experience is an apt reminder of the potential adverse consequences, including substantial delays in providing service to the public, when licenses, even conditional licenses, are issued to applicants which later prove to be economically unsound.[18]

* * *

We respectfully urge the Commission to defer action on the subject applications and to seek further comment concerning the information provided by New ICO and to fully consider the petition for rule making submitted by CTIA. Given what the Commission now knows, any rush to grant these applications would violate well-settled principles of spectrum management as well as applicable procedures for acting on Title III license applications.

Respectfully submitted,

John T. Scott, III
Vice President and Deputy General
Counsel-Regulatory Law
Verizon Wireless
1300 I Street, NW, Suite 400-West
Washington, DC 20005
(202) 589-3760

Douglas Brandon
Vice President – External Affairs & Law
AT&T Wireless Services, Inc.
1150 Connecticut Avenue
Washington, D.C. 20036
(202) 223-9222

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16 *See* Public Notice, Report No. SPB-88, 12 FCC Rcd 10446 (1997).

17 *See Ex Parte* filing of New ICO, filed April 18, 2001 (concerning agreement with CCI International): *Ex Parte* filing of New ICO, filed April 5, 2001 (concerning agreement with Mobile Communications Holdings, Inc.

18 *See* Mobile Communications Holdings, Inc., *Memorandum Opinion and Order*, DA 01-1315 (Chief, International Bureau, rel. May 31, 2001).

Brian F. Fontes JTS
Brian F. Fontes
Vice President – Federal Relations
Cingular Wireless, LLC
1818 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 419-3010

Luisa L. Lancetti JTS
Luisa L. Lancetti
Vice President – PCS Regulatory Affairs
Sprint Corporation
401 9th Street, N.W., Suite 400
Washington, D.C. 20004
(202) 585-1923

cc: The Honorable Gloria Tristani
The Honorable Kathleen Abernathy
The Honorable Michael Copps
Peter Tenhula
Adam Krinsky
Bryan Tramont
Jordan Goldstein
Jane Mago
Dr. Robert Pepper
Donald Abelson
Thomas Sugrue
Bruce Franca
Magalie Roman Salas (for inclusion in the records of the above-referenced proceeding)
Counsel for MSS Applicants

APPENDIX

Celsat, Inc.	File Nos. 26/27/28-DSS-P/LA-97 88-SAT-AMEND-98
The Boeing Company	File Nos. 179-SAT-P/LA (16) 90-SAT-AMEND-98
Mobile Communications Holdings, Inc.	File No. 180-SAT-P/LA-97 (26)
Constellation Communications, Inc.	File No. 181-SAT-P/LA-97 (46)
Globalstar, L.P.	File Nos. 182-SAT-P/LA-97 (64) and 183 through 186-SAT-P/LA-97
Iridium, LLC	File No. 187-SAT-P/LA-97 (96)
ICO Services Limited	File No. 188-SAT-LOI-97
TMI Communications and Company, L.P.	File No. 189-SAT-LOI-97