

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

In the Matter of)	
)	
Flexibility for Delivery)	IB Docket No. 01-185
of Communications by)	
Mobile Satellite Service Providers)	
in the 2GHz Band, the L-Band, and the)	
1.6/2.4 GHz Band)	
)	
Amendment of Section 2.106 of the)	ET Docket No. 95-18
Commission's Rules to Allocate Spectrum)	
at 2GHz for Use by the Mobile Satellite)	
Service)	

REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC.

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November 13, 2001

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Pursuant to the Commission's August 17, 2001, Notice of Proposed Rulemaking ("NPRM"),^{1/} AT&T Wireless Services, Inc. ("AWS") hereby submits its reply comments in the above-captioned proceeding. AWS strongly supports reallocation of mobile satellite service ("MSS") spectrum for terrestrial use so long as that spectrum is licensed via auction open to all interested bidders.

INTRODUCTION AND SUMMARY

The comments filed in this proceeding demonstrate that granting MSS operators free terrestrial authorizations would disserve the public interest and violate the Communications Act. Such a giveaway also is unlikely to achieve the objective of bolstering the financial viability of MSS service in rural areas. As many commenters point out, permitting only MSS operators to take advantage of a terrestrial allocation would create overwhelming incentives for those

^{1/} *In the Matter of Flexibility for Delivery of Communications by Mobile Satellite Serv. Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite*

providers to abandon their satellite operations and concentrate on the more lucrative terrestrial market. If the Commission decides to allocate MSS frequencies for terrestrial use, the public interest would be best served by the distribution of licenses via an auction open to all bidders.

The main proponents of permitting MSS systems to utilize an “ancillary terrestrial component” (“ATC”) – New ICO Global Communications (“New ICO”) and Motient Services, Inc. (“Motient”) – acknowledge that their terrestrial and satellite systems would not be “integrated” in any true sense of the word. Nonetheless, they contend that the Commission can curb the companies’ natural economic inclinations to migrate away from satellite service by adopting layers of regulatory safeguards aimed at ensuring that terrestrial service remains ancillary. The implementation and oversight of such rules would impose enormous burdens on the Commission, however, and in the end they would not be enforceable. If and when satellite coverage drops below the required threshold or a satellite fails completely, it would be unrealistic to expect the Commission to revoke an MSS provider’s authorization and potentially terminate service to thousands of terrestrial-only customers.

Notably, a wide range of commenters express concerns about the detrimental effect that grant of the ATC proposals would have on the public interest. Even several MSS operators strongly oppose ATC systems, arguing that it would significantly disadvantage all but one or two well-connected MSS providers who are not likely to maintain satellite operations. As these commenters point out, any new investment directed to MSS operators would be a result of the windfall they get from the issuance of free terrestrial licenses, and all such funding would be funneled solely toward that aspect of the business. At best, the Commission would create a new

Serv., IB Docket No. 01-185, ET Docket No. 95-18, *Notice of Proposed Rulemaking*, 16 FCC Rcd 15532 (2001) (“NPRM”).

terrestrial carrier that entered the market with a significant and unfair advantage over competitors that compensated the public for their spectrum.

The signal coverage problems ATC proponents allege they face in urban areas and inside buildings do not justify a free terrestrial license. Such problems can be solved easily through partnerships with commercial mobile radio service (“CMRS”) providers. New ICO’s and Motient’s unsupported claims that such arrangements have not worked well in the past provide no justification for the free grant of terrestrial rights they now seek.

If New ICO and Motient want to participate in the terrestrial market, they should be required to bid at auction for the licenses to do so. Notwithstanding the ATC proponents’ claims, there is no evidence that Congress intended for the Open-Market Reorganization for the Betterment of International Telecommunications Act’s (“ORBIT’s”) limited exemption from competitive bidding for *satellite* services to be expanded to permit MSS operators to compete as *terrestrial* licensees. Indeed, except in rare circumstances not applicable here, Section 309(j) of the Communications Act demands the use of auctions for mutually exclusive CMRS license applications.

The Commission should not put at risk the future success of the auction process by giving away scarce bandwidth to an industry that has demonstrated no ability to use it efficiently. If MSS is not viable without such unfair subsidies, then it is time for the Commission to consider whether reallocation of the bands and auction to entities that can put the spectrum to its highest and best use is a preferable policy.

I. THE GRANT OF EXCLUSIVE TERRESTRIAL RIGHTS TO MSS LICENSEES WOULD NOT BENEFIT CONSUMERS OR PROMOTE SATELLITE COMPETITION

The MSS providers proposing that the Commission grant them the exclusive right to use MSS spectrum for terrestrial use justify their demands for such an extraordinary gift of an ever

more scarce national resource on the ground that such action is necessary to ensure the viability of MSS operators and, thereby, their supposedly unique ability to provide service to rural and other underserved areas.^{2/} Neither of these justifications is valid. The requested spectrum grant would merely address the symptoms of the proponents' economic distress rather than curing its cause – lack of adequate consumer demand for their services and faulty business plans.

Moreover, even if such a subsidy ensured the survival of specific ATC carriers, it would hasten the demise of MSS itself by reducing or eliminating MSS providers' incentives to provide satellite service through the introduction of the opportunity to move from the difficult MSS market to the far more lucrative terrestrial wireless market. Under either scenario, the spectrum subsidy would not achieve its desired result of fostering service to rural and other underserved communities.

To the extent that any improvement in service to such consumers could be achieved through the dual use of spectrum, partnerships between MSS providers and terrestrial wireless providers licensed via auction offer a more efficient and fair way to meet this objective than would conferral of a spectrum subsidy upon entities that have demonstrated their inability to utilize the spectrum already allocated to them.

^{2/} See Letter from Lawrence H. Williams, New ICO Global Communications (Holdings) Ltd. to FCC Chairman Michael Powell, Mar. 8, 2001, at 1-2 (“New ICO Letter”) (“[D]ue to the failures of early MSS projects and the instability of the telecom and satellite financial markets,” the viability of the MSS industry “is in dire jeopardy”) (emphasis omitted); *id.* at 3-4 (describing the financial woes of various MSS providers); *id.* at 1-2 (noting importance of MSS to rural and underserved communities); *In the Matter of Motient Servs. Inc. and Mobile Satellite Ventures Subsidiary, LLC for Assignment of Licenses and Authority to Launch and Operate a Next-Generation Mobile Satellite Serv. Sys.*, File No. SAT-ASG-20010302-0017, at 12-14 (filed Jan. 16, 2001) (“Motient Application”) (asserting that MSS is vital to improving communications services in rural and underserved communities and that a satellite-only mobile communications business is not viable).

A. MSS Providers' Proposals Would Not Increase Service Options for Rural and Other Underserved Areas

The record in this proceeding strongly supports the conclusion that allowing “ancillary” use of MSS spectrum for terrestrial wireless service would hinder the Commission’s ultimate goal of ensuring that the needs of rural and underserved communities are adequately served.^{3/} Rather than transforming a foundering industry into a healthy one and thereby ensuring the provision of MSS service to needy communities, as ATC proponents contend their proposals would do, a spectrum subsidy would hasten the demise of MSS and any purported benefits that such service offers to rural and underserved communities.

Many commenters – notably including a number of MSS companies and users – recognize the substantial danger to the continued viability of MSS that granting MSS providers an exclusive right to use MSS spectrum for terrestrial service would present. Such commenters explain that, should MSS providers be allowed to use MSS spectrum for terrestrial wireless service, strong economic incentives would compel such providers to minimize or abandon the MSS component of their “integrated” systems in favor of the terrestrial market.^{4/} Inmarsat, for

^{3/} New ICO asserts that the Digital Audio Radio Services (“DARS”) proceeding provides a precedent for the ancillary use of spectrum in aid of satellite communications that supports authorizing MSS operators to use MSS spectrum for terrestrial wireless use. *See* New ICO Comments at 28. New ICO might be right if the service that it was proposing could reasonably be characterized as ancillary to its supposedly primary MSS service. As discussed more fully below, however, the terrestrial wireless service proposed by New ICO and Motient would not merely supplement satellite service through the use of terrestrial repeaters (*i.e.*, no terrestrial origination of signals) as was the situation in the DARS proceeding, but would instead constitute a largely independent service that would provide the bulk of the supposedly “integrated” systems’ profits and would in all likelihood ultimately replace the MSS aspect of the systems entirely.

^{4/} *See* Inmarsat Ventures PLC (“Inmarsat”) Comments at 26-27 (noting that the overwhelming number of Motient’s potential subscribers to its “integrated” system would come from urban areas served by the terrestrial portion of the network and that such an imbalance in the importance of the satellite and terrestrial components would lead to abandonment of MSS in favor of nationwide cellular service); Iridium Satellite LLC (“Iridium”) Comments at 2, 8

example, explains that if the ATC proposals are granted, the beneficiary of the grant, “with potentially millions of handsets concentrated in urban and suburban areas, would likely evolve into yet another nationwide terrestrial mobile phone company.”^{5/} Similarly, the Wireless Communications Division of the Telecommunications Industry Association points out that New ICO’s technical proposal clearly demonstrates that it “intends to simply segregate [the] terrestrial

(asserting that grant of New ICO’s ATC proposal would result “in the *de facto* reallocation of [MSS] spectrum for terrestrial use, by ICO and its affiliate Nextel” and that “[a]s a practical matter, the ICO satellite system will be ancillary to the Nextel terrestrial network, regulatory constraints notwithstanding”); Boeing Comments at 7 (“[p]ermitting MSS operators to offer ancillary terrestrial services opens the door to potential abuse” including abandonment of the MSS component of the terrestrial component of any supposedly “integrated” network); American Petroleum Institute (“API”) Comments at 5 (voicing concerns that, in the absence of effective government oversight, MSS providers could phase out their satellite services in favor of terrestrial wireless service); Rural Cellular Association Comments at 2-3 (noting that the proposed ATC service would “would use a physically separate network” that “would operate in a manner similar to a cellular or PCS system” and “would act as a substitute for satellite-delivered service”); Cingular Wireless and Verizon Wireless (“Cingular/Verizon Wireless”) Joint Comments at 15-16 (asserting that terrestrial wireless service would not be ancillary to MSS); Comtech Mobile Datacom Corp. (“Comtech”) Comments at 5 (asserting that the Commission must clearly define “ancillary” so that terrestrial service does not outstrip the supposedly primary MSS service); Mobile Satellite Users Association Comments at 5 (warning against the possibility of terrestrial use overtaking MSS use so that it becomes the “tail wagging the dog”); Cellular Telecommunications and Internet Association (“CTIA”) Comments at 6 (contending that the proposed ATC service would not be ancillary and any such system adopted by the Commission must be strictly controlled in order to avoid terrestrial service from supplanting MSS); Association for Maximum Service TV and NAB (“AMSTV/NAB”) Comments at 15 (asserting that the Commission must ensure that terrestrial service is only used as “fill-in” capacity to MSS and that the integrated service fulfills its intended function of providing service in underserved areas); Society of Broadcast Engineers (“SBE”) Comments at 2-3 (arguing that it would be unfair to allow MSS providers to offer terrestrial service when CMRS providers had to pay billions of dollars for spectrum to be used for the same purpose and that if such a proposal is adopted strong restrictions must be established to ensure that the service remains ancillary); Telenor Broadband Services (“Telenor”) Comments at 8 (contending that allowing terrestrial wireless service will harm MSS); Wireless Communications Division of the Telecommunications Industry Association (“WCD-TIA”) Comments at 3 (asserting that New ICO’s proposal to offer ancillary services within the MSS band is simply a way to replace its satellite network with terrestrial operations); Stratos Mobile Networks (USA) LLC and MarineSat Communications Network, Inc. (“Stratos”) Comments at 10 (contending that ancillary terrestrial service will only result in deployment of terrestrial mobile service in the MSS band and not enhancement of MSS).

and satellite components of its operations to provide terrestrial services to urban areas and satellite service to rural areas.”^{6/} Although some commenters dismiss this concern as farfetched, in another band in which the Commission recently granted licensees flexibility to provide mobile service, a major operator immediately announced that it would add no new fixed wireless customers, and analysts believe that the company’s fixed wireless division could shut down entirely in favor of the newly authorized and more profitable mobile offering.^{7/}

It is undisputed that the terrestrial portion of the supposedly “integrated” proposed systems would provide most of the subscribers and profits.^{8/} Nor has there been any rejoinder to evidence that the satellite component of the networks, while providing little independent economic upside, would impose staggering costs upon MSS providers.^{9/} It is also clear that the two systems would work largely independent of each other and that customers could and would use the terrestrial wireless portion of the purportedly integrated system without ever touching the satellite portion of the network.^{10/} The resulting dramatic imbalance in the profitability of the

^{5/} Inmarsat Comments at 27.

^{6/} WCD-TIA Comments at 2.

^{7/} *See Sprint To Terminate ION Efforts; Announces Additional Actions to Improve Competitive Positioning and Reduces Operating Costs in FON Group*, Sprint Press Release (Oct. 17, 2001); Jennifer Beauprez, *Sprint To Idle 6,000, Ditch ‘Net Growth, Telecom Shakeout Reaches 3rd Largest Long Distance Firm*, Denver Post, Business Sec., Oct. 18, 2001.

^{8/} *See* New ICO Letter at 1-6; Motient Application at ii-iii, 12-13; Inmarsat Comments at 26.

^{9/} *See* New ICO Comments at 40-42 (noting that MSS providers pay enormous up-front costs in order to develop and maintain their satellite systems); Motient Application at 11 (stating that “[t]he commercialization of space is inherently risky and expensive”).

^{10/} *See* NPRM ¶ 11 (noting that under New ICO’s proposal “it appears that the MSS operator would assign separate channels to the terrestrial and satellite portions of the network to meet traffic demands and that a call could originate and terminate on one part of the network (e.g., terrestrial) without being carried on the other part of the network (e.g., satellite)"); New ICO Letter at Appendix B 3-4, 6-7; WCD-TIA Comments at 2; Cingular/Verizon Wireless Joint

two, easily separable network segments would create compelling economic incentives for MSS providers to transition away from MSS to terrestrial wireless service as their primary or sole offering.

Nor would the “series of regulatory firewalls” proposed by the Commission to restrain these economic imperatives ultimately be effective.^{11/} As noted by one of the MSS providers opposing the ATC proposals, “no combination of restraints will prevent a given MSS licensee with a substantial incentive and capability to maximize its terrestrial service offerings from doing so.”^{12/} Despite baldly asserting that the Commission can sufficiently blunt these strong economic interests and prevent abuse, ATC advocates have failed to provide any persuasive solutions to the many difficulties stemming from the creation of the entirely new regulatory system necessary to prevent companies from acting in what -- absent such regulation -- would constitute the most economically efficient manner.^{13/}

Particularly noteworthy is the failure of MSS proponents to explain how the Commission, in the unlikely event that it could establish a mechanism for determining when the terrestrial component of the two systems moves from “ancillary” to “primary” status, would retrieve spectrum from entities failing to comply with its requirements. The Commission’s experiences in attempting to reclaim spectrum for regulatory noncompliance clearly demonstrate the

Comments at 16 (“New ICO has demonstrated that in order to offer such so-called ‘ancillary’ terrestrial services, it would have to segment its terrestrial and satellite operations.”).

^{11/} Iridium Comments at 7.

^{12/} *Id.* at 7-8.

^{13/} Such regulatory difficulties would include adequately defining the nature of “ancillary” terrestrial wireless service, drafting rules sufficiently precise to prevent gaming of the system while flexible enough to cover the wide variety of companies and technologies that might be used to take advantage of options to provide a purportedly integrated service, and diverting the administrative and industry resources necessary to establish and implement such a new regulatory system. *See* AWS Comments at 6.

difficulties it would have in retrieving mis-utilized MSS spectrum.^{14/} Moreover, even if the Commission could find some consistently effective mechanism by which to extinguish the spectrum privileges of those who fail to maintain MSS as their primary service, ATC proponents provide no solutions to the problems customers of those companies would face if and when their providers' ability to offer service is eliminated for noncompliance with the Commission's rules. Nor do they adequately justify the heavy burdens that the creation, implementation, and enforcement of such a new regulatory scheme would impose upon the Commission.

In short, not only would “[p]ermitting MSS operators to offer ancillary terrestrial services open[] the door to potential abuse”^{15/} in the form of the marginalization or even the abandonment of the precise service that the spectrum subsidy would be intended to foster, the inevitable misuse of spectrum would be very difficult, if not impossible, to remedy once the subsidy was granted.

B. Hopes of Increased Investment Are Unlikely to Materialize for Most MSS Providers, Without or Without a Terrestrial Component

The comments of the ATC proponents demonstrate that their primary motivation in urging grant of their proposals is to enable them to raise capital more easily and to protect investments already made.^{16/} Conferring free spectrum upon MSS providers, however, would simply encourage deceptive and inefficient investment in the MSS industry that would be entirely unsupported by the industry's actual economic health. Moreover, as some commenters note, grant of Motient's and New ICO's proposals is unlikely to spur any new investment in

^{14/} See *id.* at 11-13.

^{15/} Boeing Comments at 7.

^{16/} See, e.g., Globalstar Bondholders at 21 (“Grant by the Commission of ATC authority will increase the willingness of the capital markets to invest new capital in the MSS industry.”).

MSS, and if it does, it would only be available to those providers that offer terrestrial rather than satellite service.

The effect of granting the proffered ATC proposals would not be to encourage investment in *satellite* services but rather to encourage participation by investors seeking to capitalize on the free spectrum that could be used to offer national *terrestrial* wireless service.^{17/} As Iridium explains, New ICO's proposal is aimed solely at boosting the spectrum holdings of its terrestrial affiliate, Nextel, and "will all but ensure that few, if any, of the recently authorized 2 GHz MSS systems will ever be built."^{18/} According to Iridium, "[w]ithout an existing terrestrial infrastructure and customer base (such as is possessed by Nextel) or a business plan targeting a separate market niche (and supported by deep corporate 'pockets'), it is all but inconceivable that funding will be available for new MSS entrants."^{19/} Inmarsat, another MSS competitor, also points out the perverse message that grant of the ATC proposals would send to the capital markets, noting that the poor performance of MSS to date has had nothing to do with an inability to provide terrestrial service.^{20/} Like Iridium, Inmarsat states that there is no reason to believe that, as a seventh competitor in the CMRS market, terrestrial "MSS" providers would fare any better than they did as satellite operators.^{21/}

Any additional funding resulting from the Commission's grant of the ATC proposals – to the extent it would be forthcoming at all – would be prompted by, and funneled toward, those MSS providers that would be most likely to exceed the limited authority granted to them to

^{17/} See CTIA Comments at 10.

^{18/} Iridium Comments at 2.

^{19/} *Id.*

^{20/} See Inmarsat Comments at 11.

^{21/} See *id.* at 27.

provide ancillary rather than an independent, nationwide terrestrial wireless service. Indeed, approval of ATC would make compliance with any satellite coverage thresholds adopted by the Commission virtually impossible because no new investment dollars would be devoted to launching and maintaining capital-intensive satellite systems. As the foregoing demonstrates, grant of the ATC proposals would encourage abuse and undermine the development of a vibrant MSS industry. Accordingly, New ICO and Motient are incorrect that the Commission can make the findings required by Section 303(y) that the broad spectrum flexibility requested would further the public interest and would not deter investment in communications services and systems.^{22/}

C. Partnerships Between MSS and CMRS Providers Offer an Efficient Solution to MSS Signal Problems

Even assuming that allowing “ancillary” use of MSS spectrum would provide some broader benefit than propping up specific, distressed MSS providers, those benefits can be achieved in a more effective, efficient, and equitable manner than through a spectrum subsidy. As Motient has demonstrated through its past experience and various other commenters (including MSS providers) confirm, any beneficial supplementary use of terrestrial service can be obtained through partnership with terrestrial services providers.

Indeed, WCD-TIA asserts that New ICO’s ATC proposal simply mirrors network choices made by Iridium, Globalstar, and proposed by Celsat that currently use (or intend to use) dual mode handsets that can operate in the presence of a satellite signal or automatically hand off communications to a terrestrial network when the satellite signal is inadequate.^{23/} The essential difference, however, between Motient’s and New ICO’s proposals and those that have already

^{22/} 47 U.S.C. § 303(y); New ICO Comments at 29; Motient Comments at 21.

^{23/} See WCD-TIA Comments at 5-6.

been implemented or proposed is that, rather than engaging in a spectrum grab designed to facilitate the abandonment of MSS in favor of terrestrial wireless service, other companies have “partnered with terrestrial suppliers of communications services (*i.e.*, PCS or Cellular) to deploy their seamless communications networks.”^{24/}

New ICO and Motient have failed to demonstrate why such arrangements, which have already been shown to be effective, would not similarly remedy the purported problems they use to justify their ATC requests.^{25/} As Inmarsat states, MSS providers “can enter into [arrangements] with CMRS providers to create more robust service, and to provide in-building service and coverage of areas where MSS signals may be blocked by buildings or terrain.”^{26/} Moreover, contrary to Motient’s and New ICO’s assertions, the handsets currently in use in connection with such services are no more unwieldy than those that proposed by ATC proponents.^{27/}

The availability of such alternatives fatally undermines New ICO’s and Motient’s basis for asserting that they must exclusively control the terrestrial wireless segment of any integrated network and exposes their attempt to obtain precious spectrum for free for what it is - an effort to supplant their unprofitable MSS service with a vastly more lucrative terrestrial wireless service

^{24/} *Id.* See also Stratos Comments at 10 (asserting that if MSS providers want to incorporate terrestrial service in their networks, they should use dual band technology that uses spectrum allocated for terrestrial services).

^{25/} See Inmarsat Comments at 27.

^{26/} See *id.*

^{27/} See *id.* In fact, as WCD-TIA points out, if a truly integrated terrestrial/satellite system were implemented, the handsets would have the same general characteristics and form factors as those used by Iridium and Globalstar. WCD-TIA Comments at 5-6. The smaller handsets that New ICO and Motient claim their ATC plan would permit are the same as those used for CMRS today, and would be available only to the MSS providers’ terrestrial customers.

without having to bear the cost of the bidding on the spectrum necessary to provide this new service.

II. IF MSS IS NOT VIABLE, THE SPECTRUM SHOULD BE REALLOCATED AND AUCTIONED EXPEDITIOUSLY TO ALL INTERESTED PARTIES

Section 309(j) of the Communications Act demands that when mutually exclusive applications are accepted for spectrum allocated for terrestrial use, such spectrum must be licensed via competitive bidding unless the Commission determines that an auction would not be in the public interest.^{28/} As discussed above, the only legitimate public benefit rationale offered to support the proposed give-away of spectrum -- to foster MSS -- would not, in actuality, be furthered by the grant of a spectrum subsidy, and would in fact be hindered by it. All other public interest concerns militate strongly in favor of auction.^{29/}

Disregarding the Commission's and Congress's well-considered auction requirements in order to benefit particular members of a favored industry would undermine the Commission's auction regime and jeopardize investment in CMRS networks by reducing the predictability and efficiency of the Commission's licensing procedures and reducing the amount of spectrum available for terrestrial wireless use.^{30/} As AMSTV and NAB state, "[i]t would be grossly unfair and a misuse of spectrum to permit MSS operators (who have not paid for their spectrum like other providers of terrestrial services) to now use their assigned spectrum for terrestrial services

^{28/} See 47 U.S.C. 301(j)(1); 309(j)(6)(e); *Implementation of Sec. 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941 ¶¶ 4-6 (1994).

^{29/} As the Commission and Congress have clearly determined, auction is not only the most economically efficient method of licensing, it serves the important purpose of compensating the public for use of a valuable public asset.

^{30/} See Telephone and Data Systems, Inc. ("TDS") Comments at 7; AWS Comments at 8-11; CTIA Comments at 7-10.

that are not entirely related to the primary satellite service.”^{31/} Cingular and Verizon Wireless also correctly assert that the proposed authorization of terrestrial operations only to MSS providers is both contrary to Section 309(j) and fiscally irresponsible.^{32/} Through the guise of “saving MSS” the Commission should not disadvantage terrestrial competitors, who had to pay billions of dollars at auction for their spectrum, deprive U.S. citizens of compensation for a scarce public resource, and “make a mockery of the Commission’s allocation processes.”^{33/}

Nor does the ORBIT auction exemption change this result.^{34/} ORBIT provides a very narrow and well-defined exception to the Commission’s and Congress’s general practice of licensing spectrum through the competitive process of auction. The exemption, which is intended to prevent triggering worldwide auctions that would impose excessive costs and delay upon the introduction of international satellite service,^{35/} merely precludes the auction of “orbital locations or spectrum used for the provision of international or global satellite communications services.”^{36/} Clearly then, because the ORBIT exemption applies only to spectrum to be *used* for global or international satellite services, the statute has no relevance when the spectrum is to be *used* for domestic terrestrial wireless service.^{37/}

^{31/} AMSTV-NAB Comments at 16.

^{32/} Cingular/Verizon Wireless Joint Comments at 1.

^{33/} Iridium Comments at 5-6. *See also* AWS Comments at 7-11; CTIA Comments at 7; SBE Comments at 2; Cingular/Verizon Wireless Joint Comments at 11.

^{34/} Open-Market Reorganization for the Betterment of International Telecommunications (“ORBIT”) Act, 106 P.L. 180, 114 Stat. 48, *codified at* 47 U.S.C. § 765f.

^{35/} *See* AWS Comments at 16-17 (discussing relevant legislative history).

^{36/} 47 U.S.C. § 765(f).

^{37/} *See* AWS Comments at 16-18; CTIA Comments at 9.

The fact that terrestrial wireless service might share spectrum with MSS does not change this conclusion. As discussed more fully in AWS's initial comments,^{38/} the Commission has repeatedly auctioned or commenced auction proceedings for dual use spectrum^{39/} and has expressly determined that "the ORBIT Act is not a bar to auctioning licenses merely because the terrestrial service operates on the same frequencies as a satellite service."^{40/} Therefore, contrary to New ICO's assertions, "the statute does not prohibit the Commission from auctioning licenses for non-satellite services," even when the same spectrum is shared by satellite operators.^{41/} Nor can the Commission bring the type of terrestrial wireless service proposed here within the scope of the exemption by characterizing it as "ancillary" to MSS. As discussed above, and by Cingular and Verizon Wireless, "ancillary service is by definition subordinate or auxiliary to the

^{38/} AWS Comments at 16-18.

^{39/} *In the Matter of Amendment of Parts 2 and 2 of the Commission's Rules to Permit Operation of NGSO FSS Sys. Co-Frequency with GSO and Terrestrial Sys. in the Ku-Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7GHz Band by Direct Broadcast Satellite Licensees and their Affiliates and; Applications of Broadwave USC, PDC Broadband Corp. and Satellite Receivers, Ltd. to Provide a Fixed Serv. in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, RM-9147, RM-9245, *First Report and Order and Further Notice of Proposed Rule Making*, 16 FCC Rcd 4096 ¶ 326 (2000) ("Northpoint Order") (citing *Amendment to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Servs. at 24 GHz*, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16934 (2000); citing *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, *Report and Order and Second Notice Proposed Rule Making*, 12 FCC Rcd 18600 (1997) and *39 GHz Band Auction Closes*, DA 00-1035, Report No. AUC-30-E, *Public Notice*, 15 FCC Rcd 13648 (2000); *39 GHZ Report and Order*, 12 FCC Rcd 18600 (1997); *39 GHZ Report and Order*, 12 FCC Rcd 18600 (1997); *Amendment of the Commission's Rule with Regard to the 3650-3700 MHz Gov't Transfer Band*, ET Docket No. 98-237; *The 4.9 GHz Band, Transferred from Federal Gov't Use*, WT Docket No. 00-32, *First Report and Order and Second Notice of Proposed Rulemaking*, 15 FCC Rcd 20488 ¶ 20 n.64 (2000)).

^{40/} *Northpoint Order* at ¶ 326.

^{41/} *Id.*

primary service.”^{42/} Notwithstanding its name, ATC would be anything but secondary to MSS in light of the fact that it would operate in a segmented part of the band, provide the majority of subscribers and profits for MSS operators, and would almost certainly supplant MSS entirely.

Similarly, there is no basis to find that the decision of the U.S. Court of Appeals for the D.C. Circuit in *National Public Radio v. FCC*^{43/} in any way supports the conclusion that the Commission lacks the authority to auction the spectrum at issue here.^{44/} The court in that case simply held that Section 309(j)(2) of the Communications Act denies the Commission the authority to use auctions for any licenses “issued . . . for . . . [noncommercial educational broadcasters (“NCEs”)]”^{45/} As New ICO concedes, the language of Section 309(j)(2) explicitly exempts *NCEs* from Section 309(j)’s general auction requirement.^{46/} By sharp contrast, ORBIT does not excuse an entire class of *applicants* from competitive bidding. Nor, as New ICO contends, does ORBIT set aside entire *bands* of spectrum for auction-free treatment. Rather, ORBIT’s exemption is based on the *use* the applicant plans to make of the licenses. Accordingly, neither ORBIT nor *National Public Radio* imposes any restrictions on the Commission’s ability to auction any newly reallocated spectrum intended for terrestrial use.

Finally, it is necessary to consider the question posed in the NPRM: Has “too much spectrum been allocated for MSS?”^{47/} New ICO’s and Motient’s proposals provide a clear answer. MSS, as currently authorized, is not viable, and therefore the spectrum devoted to the service is unlikely to benefit the public in any reasonable timeframe. And, as the comments in

^{42/} Cingular/Verizon Wireless Joint Comments at 15.

^{43/} 254 F.3d 26 (D.C. Cir. 2001)

^{44/} NPRM, ¶ 39.

^{45/} *National Public Radio*, 254 F.3d at 227.

^{46/} New ICO Comments at n.78.

this proceeding demonstrate, even with an exclusive terrestrial allocation, it is unlikely that MSS will be able to attract necessary funding in the future. CMRS providers, in contrast, have thriving businesses and need more bandwidth. Cingular and Verizon Wireless provide evidence that “[f]or 3G purposes alone, an estimated 200 MHz of additional spectrum is needed by U.S. carriers, who have only 40-50% of the amount of spectrum as their international competitors.”^{48/} As these carriers state, “it is clear that the approximately 10-14 MHz of 2 GHz MSS spectrum ‘left-over’ following the Bureau’s licensing of 2 GHz MSS systems and under consideration for possible reallocation to 3G purposes in the *Advanced Services Further Notice* does not even begin to satisfy the recognized immediate spectrum needs of CMRS providers.”^{49/} The balance of interests in this case plainly tilts toward the *public’s* interest in fostering the highest and best use of the spectrum.^{50/} The MSS bands or, at the very least, the segmented portion of the bands that potential ATC operators propose to use for terrestrial service, should be reallocated and the licenses distributed by auction to all interested parties.

^{47/} NPRM, ¶ 28.

^{48/} Cingular/Verizon Wireless Joint Comments at 20.

^{49/} *Id.* at 22.

^{50/} See 47 U.S.C. § 303(y) (Before granting spectrum “flexibility of use,” the Commission must determine that such action would advance the public interest).

CONCLUSION

For the foregoing reasons, the Commission should deny the requests of certain MSS operators to provide terrestrial wireless services in the MSS spectrum. If the Commission determines that MSS is not viable as currently authorized, it should reallocate the spectrum and hold an auction that would be open to all interested parties, including MSS providers.

Respectfully submitted,

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I, Doreen Clay, hereby certify on this 13th Day of November, I caused copies of the foregoing “Reply Comments of AT&T Wireless Services, Inc.” to be filed in IB Docket No. 01-185 and ET Docket No. 95-18, and sent to the following by electronic mail (*) or U.S. Mail:

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