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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 15, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Flexibility for MSS Providers,* IB Docket 01-185; ET Docket 95-18

Advanced Wireless Services, ET Dockets 00-258, 95-18; IB Docket 99-81

2 GHz MSS Applications and LOIs, DA 01-1635, No. 188-SAT-LOI-97, *et al.*; DA 01-1631, No. 179-SAT-P/LA-97(16), *et al.*; DA 01-1632, No. 26/27/28-DSS-P-94, *et al.*; DA 01-1633, No. 181-SAT-P/LA-97(46), *et al.*; DA 01-1634, No. 183/184/185/186-SAT-P/LA-97, *et al.*; DA 01-1636, No. 187-SAT-P/LA-97(96), *et al.*; DA 01-1637, No. 180-SAT-P/LA-97(26), *et al.*; DA 01-1638, No. 189-SAT-LOI-97, *et al.*

Applications of Constellation Communications Holdings, Inc., Nos. SAT-T/C-20020718-00114, SAT-MOD-20020719-00103

Applications of Mobile Communications Holdings, Inc., Nos. SAT-T/C-20020719-00104, SAT-MOD-20020719-00105

Applications of Globalstar, L.P., No. 0104-EX-PL-2002; No. SAT-MOD-20020717, *et al.*; No. SAT-MOD-20020722-00107, *et al.*

New MSS Developments – Milestone Compliance/Modification Applications, Merger Applications and Globalstar Experimental Authorization

Dear Ms. Dortch:

On June 7, 2002, AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (jointly, the "Carriers") submitted a letter highlighting the flawed 2 GHz MSS decisionmaking process, violations of the Communications Act, and the need for consolidated action given the many interdependent issues.[1] Since then, actions by several MSS licensees have further undermined the premises on which their licenses were granted and the FCC's decision not to reexamine the original satellite-only allocation. It is now even clearer that the

[1] *See* Letter from Kathryn A. Zachem, Esq. and L. Andrew Tollin, Esq., Wilkinson Barker Knauer, LLP to Marlene H. Dortch, Secretary, FCC, in IB Docket No. 01-185 *et al.* (June 7, 2002) ("Request to Suspend Action in MSS Flex Proceeding Pending Action in Related Dockets"). Copies of the instant letter are being submitted electronically with respect to the rulemaking proceedings, and via hand delivery to the Secretary with service on all parties with respect to the application proceedings.

Commission cannot act in the *MSS Flex* docket unless and until it first revisits the satellite-only allocation decision and the MSS license grants, both of which have been pending review for some time.[2]

The new developments are summarized below:

- First, three MSS licensees have filed requests to waive or extend the supposedly "strictly enforced" MSS construction milestones, even though the Commission has proposed to strengthen those milestones in a pending rulemaking. Moreover, there are serious questions about whether some licensees actually have entered into non-contingent contracts for system construction, and several have filed modifications applications which further call into question whether they have met the initial milestone.

- Second, two licensees have filed to transfer their unbuilt licenses and spectrum to ICO Global Communications (Holdings) Limited ("ICO"), notwithstanding that the milestone and anti-trafficking rules preclude such efforts.

- Third, Globalstar, L.P. ("Globalstar" or "GLP") applied for and received an experimental license to conduct six months of tests of so-called "ancillary" terrestrial service ("ATC"), without notice to parties in the *MSS Flex*/ATC proceeding.[3] The Office of Engineering and Technology ("OET"), in granting the experimental license, failed to require the filing of a detailed report in the record – even though FCC staff had already directed all interested parties to submit detailed technical information on the record in the *MSS Flex* docket. As problematic, Globalstar conducted a demonstration of the viability of ATC with FCC decisonmaking personnel, but has yet to submit *public* information in the ATC proceeding record describing with any detail what occurred.

Given the many new interrelated issues as to the viability of MSS as a satellite-only service, and the license grants based thereon, the Carriers submit that the Commission must return to the starting point and revisit the license grants, spectrum allocation, and service rules. Certainly, action in the *MSS Flex* docket would be premature until these new threshold issues are resolved. If the Commission does otherwise, it will be acting contrary to its market-oriented policies of not picking winners and losers[4] and of awarding spectrum based on its highest and

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[2] *See* Application for Review of AT&T Wireless Services, Inc., Cellco Partnership d/b/a Verizon Wireless, and Cingular Wireless LLC re: DA 01-1631 through 01-1638 (filed Aug. 16, 2001) (pending); Petition for Reconsideration of the Cellular Telecommunications & Internet Association ("CTIA") in ET Docket Nos. 00-258, 95-18 and IB Docket No. 99-81 (filed Oct. 15, 2001) (pending).

[3] *Flexibility for Delivery of Communications by Mobile Satellite Service Providers*, IB Docket No. 01-185, *Notice of Proposed Rulemaking*, 16 F.C.C.R. 15532 (2001) (pending) ("*MSS Flex*" or "ATC proceeding").

[4] MSS applicants knew at time of licensing that they were expected to "succeed or fail in the market on their own merits" on the basis of a satellite-only authorization. *See, e.g., ICO Services, Ltd.*, 16 F.C.C.R. 13762, 13774 (IB/OET 2001); *id.* at 13774 ("ICO did not . . . seek authority to provide ATC in the context of its LOI, and we do

best use. The public interest will not be served if the Commission perpetuates its effort to prop up a largely bankrupt service that is admittedly non-viable.[5]

- ***Milestone Compliance***

The Commission stated in 2000 that it would "strictly enforce" the 2 GHz MSS milestone requirements to "ensure timely construction of systems and deployment of service."[6] As a result, each 2 GHz MSS license is expressly conditioned upon compliance with the milestones and "shall become NULL and VOID with no further action required on the Commission's part" if any of the milestones are missed.[7] Recently, the FCC proposed strengthening satellite milestone requirements "to identify licensees that are not proceeding with the implementation of their systems in a timely manner . . . so that their licenses can be cancelled and reassigned more expeditiously."[8]

Despite the Commission's promised strict enforcement, there are serious questions about whether three of the eight 2 GHz MSS licensees have met the non-contingent contract milestone; at least three licensees are seeking some form of waiver or extension of milestones; and several

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not grant such authority here. . . . ICO may accept or reject this authorization with this understanding."). The inability of MSS licensees to succeed in the market without terrestrial authorization is of their own making – it is not the Commission's role to intercede. *See generally* Michael E. Kanell, *Powell Promises FCC Won't Govern with a Heavy Hand*, Atlanta Journal and Constitution, June 6, 2001 ("We will let the market pick winners and losers and, hopefully, not government policy.") (remarks of Chairman Powell); *Abernathy Sees 'Limited' FCC Role in Wake of WorldCom Woes*, Comms. Daily, July 10, 2002 ("Our job is not to decide who the winners and the losers are . . . .") (remarks of Commissioner Abernathy); "In Defense of the Public Interest," Remarks of Commissioner Copps before the FCBA (Oct. 15, 2001) ("I share with most of you, I believe, a strong conviction that the role of government is not to pick winners and losers."); *see also Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) (finding that the Commission cannot subordinate the public interest to the interest of "equalizing competition among competitors"); *accord W.U. Telephone Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981).

[5] *See, e.g.*, Application of Mobile Communications Holdings, Inc., File No. SAT-T/C-20020719-00104, Exh. 3 at 4-5 (filed July 18, 2002) (admitting that "it is a foregone conclusion that the capital markets will not finance the multiple deployment of all eight 2 GHz MSS systems"); Letter from Tom Davidson, Esq., Akin Gump, Counsel for Globalstar's Creditors to Marlene Dortch, Secretary, FCC, IB Docket No. 01-185, Att. 1 at 1 (July 26, 2002) (admitting that without ATC authority, the future of the industry is clear: "Motient, Iridium, ICO, and Globalstar all have filed for bankruptcy. Without ATC authority, Globalstar may not be able to continue as a viable business and it will be difficult, if not impossible, for any MSS licensee to raise sufficient funds to launch a new first or second generation global MSS constellation.").

[6] *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, *Report and Order*, 15 F.C.C.R. 16127, 16150-51 (2000) ("*2 GHz MSS Order*"). The Commission further noted that "milestone requirements are especially important because we are declining to adopt financial qualifications." *Id.* at 16177 (emphasis added).

[7] *E.g.*, *ICO Services, Ltd.*, 16 F.C.C.R. at 13755 (emphasis in original); *see* 47 C.F.R. § 25.143(e)(3).

[8] *Amendment of the Commission's Space Station Licensing Rules and Policies*, IB Docket No. 02-34, *Notice of Proposed Rulemaking and First Report and Order*, 17 F.C.C.R. 3847, 3883 (2002) ("*Space Station NPRM*") (pending); *see id.* at 3881-83.

are asking to make substantial modifications to their authorized systems, thus further calling into question whether they have met their initial milestone:

- First, press reports concerning statements made by both ICO and Globalstar suggest that they do not have a "non-contingent" contract that contains *no* condition precedent to construction, as required by the Commission.[9] ICO filed a letter in October 2001 claiming it has satisfied its first three milestones through a 1995 contract with Boeing Satellite Systems International, Inc.,[10] yet it recently indicated that its plans are on hold pending the FCC's resolution of the ATC issue in the *MSS Flex* proceeding.[11] Globalstar, on the other hand, submitted a cursory statement of compliance with the first milestone on July 17, 2002, based on a contract with Space Station/Loral, a subsidiary of its parent, Loral Space and Communications. Trade press, however, has described this as "a contract for the design and *potential* future construction" of a 2 GHz MSS system,[12] and reports that Loral is not doing any manufacturing for Globalstar at present because of Globalstar's bankrupt status.[13] Finally, there is a serious question whether TMI Communications and Company Limited Partnership ("TMI") has entered into a non-contingent contract,[14] as it is relying not upon its own contract with a manufac-

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[9] *See id.* at 3882 n.142 ("By 'non-contingent contract,' we have always meant that there will be neither significant delays between the execution of the contract and the actual commencement of construction, nor conditions precedent to construction."). The Commission has stated that the construction commencement milestone is crucial "to ensure that unused spectrum is reassigned as quickly as possible . . . when there are substantial doubts as to whether the licensee intends to or is able to proceed with its business plan." *NetSat 28 Company, L.L.C.*, 16 F.C.C.R. 11025, 11029 (2001).

[10] *See* Letter from Cheryl A. Tritt, Morrison & Foerster, LLP, Counsel for ICO Services, Ltd. to Magalie R. Salas, Secretary, FCC re: File No. 188-SAT-LOI-97 *et al.* (Oct. 15, 2001). The first three milestones are: (i) execution of a non-contingent satellite manufacturing contract, (ii) completion of critical design review, and (iii) commencement of physical construction of all satellites. *See, e.g., ICO Services, Ltd.*, 16 F.C.C.R. at 13775.

[11] *See ICO Acquires Ellispo United and Constellation to Boost MSS Service*, Comms. Daily, July 22, 2002 (noting that plans for ICO's 2 GHz MSS system have been "put on hold" while the FCC considers whether to approve ATC, without which ICO has said it may have to abandon its plans); Yuki Noguchi, *Iridium Finds Itself in Contractual Bind*, Wash. Post, May 23, 2002, at E5 (stating that ATC is critical because "[w]e do not want to launch a satellite with a failed business plan") (quoting a spokesman for ICO).

[12] *Brief Telemetry Air Force Delays Scheduling Four NRO Payloads*, Space & Missile, July 25, 2002 (emphasis added); *see also Skeptics Question Globalstar's Plans*, Satellite News, July 22, 2002 (reporting that serious doubts exist among satellite industry observers about Globalstar's plans and questioning "whether the FCC will find this 'contract' credible") (quoting Ahmad Ghais, President, Mobile Satellite Users Association).

[13] *Loral CEO Promises Not to Divest Assets*, Comms. Daily, Aug. 1, 2002 (citing Loral CEO Bernard Schwartz, who noted that with respect to the Globalstar contract for 60 satellites, "the numbers aren't in our backlog").

[14] *See TMI Communications and Company Limited Partnership*, 16 F.C.C.R. 13808, 13812 (2001) (requiring that "[c]onsistent with the *2 GHz MSS Order*, . . . TMI must . . . [e]nter [a] Non-Contingent Satellite Manufacturing Contract [within] 12 months after authorization").

turer, but rather upon a contract between a *proposed investor*, TerreStar Networks Inc., and Loral.[15]

- Second, Constellation Communications Holdings, Inc. ("Constellation"), Mobile Communications Holdings, Inc. ("MCHI") and Globalstar have all sought some form of waiver or extension of the milestones. Constellation and MCHI recently filed applications to transfer control of their 2 GHz MSS licenses to ICO rather than build, relying on ICO's efforts to satisfy their own milestone requirements.[16] As indicated above, however, ICO has said that its plans are on hold pending the outcome of the MSS Flex proceeding. Moreover, reliance on the progress of others is antithetical to individual milestone requirements. In fact, the FCC has recognized that "our 2 GHz MSS licensing scheme is premised on the construction of eight *separate* systems, and authorizations become null and void if the *particular* system authorized is not constructed."[17] Perhaps for this reason, MCHI and Constellation seek a waiver or extension of all milestones by one year should the FCC disagree with their analysis.[18] Globalstar has also submitted a series of modification applications seeking multi-year extensions of certain of its launch and operational system milestones that would postpone full operations until 2009.[19]

- Third, several licensees have sought to modify their authorized systems. For example, Globalstar seeks Commission approval to reconfigure its authorized NGSO constellation in connection with its milestone extension requests, stating that "[i]n the process of developing a contract [with Loral] . . . , GLP has decided

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[15] *See* Letter from Gregory C. Staple, Vinson & Elkins, Counsel for TMI, to Marlene H. Dortch, Secretary, FCC re: File No. 189-SAT-L03-97, *et al.* (July 26, 2002).

[16] *See Public Notice*, Rep. No. SAT-00116 (Aug. 5, 2002); Application of Constellation, File No. SAT-MOD-20020719-00103 (filed July 17, 2002); Application of MCHI, File No. SAT-MOD-20020719-00105 (filed July 18, 2002); Application of Constellation, File No. SAT-T/C-20020718-00114 (filed July 18, 2002); Application of MCHI, File No. SAT-T/C-20020719-00104 (filed July 18, 2002). The parties did not seek declaratory ruling, even though they knew that failure to meet a milestone results in license cancellation because MCHI has previously lost a license for failure to meet a milestone. *See Mobile Communications Holdings, Inc.*, 16 F.C.C.R. 11766 (IB 2001), *recon denied.*, DA 02-1468 (IB June 24, 2002).

[17] *New Advanced Wireless Services*, ET Docket No. 00-258, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 16 F.C.C.R. 16043, 16058 (2001) ("*3G FNPRM*") (pending) (emphasis added).

[18] The Commission has stated that milestone extensions are only granted in "extraordinary circumstances beyond the control of the licensee," and that business decisions, including mergers or contract negotiations, do not qualify. *Columbia Communications Corporation*, 15 F.C.C.R. 16496, 16497-98 (2000).

[19] *See, e.g.*, Application of Globalstar, File No. SAT-MOD-20020717-00116 (filed July 17, 2002) (describing requests for an extension of the launch milestone for its first two non-geostationary satellites from January 2005 to April 2007, and an extension of its operational system milestones from July 2007 to 2009); *see also Public Notice*, Rep. No. SAT-00115 (Aug. 1, 2002) (listing applications).

> to modify a number of the technical parameters of the authorized system."[20] Yet, Globalstar's first milestone certification suggests that the contract is limited to the reconfigured constellation,[21] in which case it is contingent upon Commission approval of the proposed modifications. MCHI and Constellation are also both seeking authority to change their authorizations to conform with the technical specifications of ICO's system because they no longer plan to build their own systems.[22]

These developments make even more apparent the flaws underlying the Bureau's grant of the MSS licenses. Addressing milestone waivers and license modifications, without first resolving the up-front issues of whether the allocation and licensing of a satellite-only service was lawful, would not be valid decisonmaking. In its *Space Station NPRM*, the FCC appears to recognize the problem, although it is attempting to strengthen the milestones far too late in the 2 GHz MSS process.[23] The fact that so many licensees are seeking extensions, filing uncertain milestone certifications with waivers, and/or filing modifications to change their proposed systems, demonstrates the flaw in tying up spectrum for a non-viable industry and why substantial and material questions of fact at the licensing stage cannot lawfully be dodged.

To verify compliance with the initial milestone, copies of the contracts and other supporting documentation for all 2 GHz MSS licensees should be made public for comment.[24] Although the FCC appears to have requested that all licensees except ICO provide copies of their contracts and supporting documentation by July 29, only some of this information has appeared in the public files to date.[25]

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[20] *See, e.g.*, Application of Globalstar, File No. SAT-MOD-20020722-00107 (filed July 18, 2002).

[21] *See* Letter from William D. Wallace, Crowell & Moring, Counsel for Globalstar, to Marlene H. Dortch, Secretary, FCC re: File No. 182-SAT-P/LA-97(64) *et al.*, Decl. at 1 (July 17, 2002) (cross-referencing the pending Globalstar modification applications, and certifying that "GLP has entered into a non-contingent contract with Space Systems/Loral, Inc. to design, produce, launch and deliver on-orbit the non-geostationary and geostationary components of the 2 GHz MSS system, *as modified*.") (emphasis added).

[22] *See supra* note 16.

[23] CTIA advised the Commission before licensing of the need to strengthen and rigorously enforce milestones, and to make all milestone filings available for public comment. *See* Letter from Thomas E. Wheeler, President, CTIA to Michael K. Powell, Chairman, FCC in IB Docket No. 99-81 and ET Docket No. 00-258 (July 12, 2001).

[24] *See 2 GHz MSS Order*, 15 F.C.C.R. at 16178 (agreeing "to make milestone reports public to all interested parties" and counseling licensees to "limit the scope of confidentiality requests"); Comments of CTIA in ET Docket No. 00-258 at 6 (filed Oct. 22, 2001) (arguing that milestone filings should be placed on public notice for comment).

[25] *See* Letters from Casandra C. Thomas, Deputy Chief, Satellite Division, to Counsel for Boeing Company; Celsat America, Inc.; Constellation Communications Holdings, Inc.; Globalstar, L.P.; Iridium, LLC; Mobile Communications Holdings, Inc.; and TMI Communications and Company, Limited Partnership (July 18, 2002). It does not appear that ICO has updated its filing, *see* 47 C.F.R. § 25.143(e)(3) ("All operators of 2 GHz Mobile-Satellite Service systems shall, *within 10 days after a required implementation milestone as specified in the system authorization*, certify to the Commission by affidavit that the milestone has been met or notify the Commission by letter that it has not been met.") (emphasis added), nor has it submitted a copy of its non-contingent contract. This highlights a fur-

To the extent the FCC rules that the original license grants were issued in error, or that the licenses are no longer valid for failure to meet the initial milestone, flexibility for MSS licensees is a moot issue. It is therefore premature to decide whether to afford MSS licensees "flexibility" to use their spectrum before deciding whether they may retain their licenses. To the extent any spectrum is returned due to the invalidation or cancellation of the underlying license(s), the *3G FNPRM* has asked whether it should be considered for reallocation to other uses.[26]

- ***Mergers/Spectrum Consolidation***

In applications to transfer control of their licenses to ICO, Constellation and MCHI gloss over the fact that there is a pending proceeding specifically examining whether to allow such transfers at all. In the *3G FNPRM*, the Commission asks "whether we should permit MSS operators to consolidate operations, such that system operators that reach an agreement would be able to use, for a single system, all or some portion of the spectrum assigned to their individual systems."[27] The Commission clearly states, however, that "various Commission rules and policies may prevent or place limitations on such [consolidation] arrangements," including its milestones and anti-trafficking rule.[28]

Equally important, the 7 MHz of spectrum licensed to each MSS licensee is more than the 5 MHz the FCC determined is needed to commence operations.[29] The FCC also declared that to the extent additional spectrum is necessary "for expansion of systems that are *operational* and require additional spectrum," it would "evaluate whether to redistribute [abandoned] spectrum for system expansion . . . *after achievement of each of our milestones.*"[30] To allow a single

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ther problem – while the FCC places great significance on milestone compliance, the certifications and follow-up correspondence do not appear in IB's electronic filing system and there is no requirement that they be placed on public notice. Once filed, they appear inconsistently in the public files – hardly a transparent process designed to ensure compliance.

[26] *See 3G FNPRM*, 16 F.C.C.R. at 16056.

[27] *3G FNPRM*, 16 F.C.C.R. at 16058. In its comments on this issue, CTIA states that the Commission should not permit MSS operators to consolidate or acquire each other's spectrum: "Permitting a stronger licensee to buy a weaker one would artificially support the allocation of spectrum to MSS even after a licensee has concluded that its business plan lacks marketplace viability. If an MSS licensee cannot survive in the marketplace, the Commission should reallocate its frequencies to meet the demand for advanced wireless services . . . ." Comments of CTIA in ET Docket No. 00-258 at 7 (filed Oct. 11, 2001).

[28] *3G FNPRM*, 16 F.C.C.R. at 16058-59 (footnotes omitted); *see also supra* text accompanying note 17.

[29] *2 GHz MSS Order*, 15 F.C.C.R. at 16138-39 ("our experience has demonstrated that five megahertz of spectrum assigned to one system . . . is sufficient for commencement of service").

[30] *Id.* at 16139 (emphasis added). Although the *2 GHz MSS Order* permitted MSS licensees to share each other's spectrum on a secondary basis, and to attain additional spectrum on a primary basis either (i) prior to licensing if not all system proponents proceeded to authorization or (ii) after licensing by meeting certain unserved area criteria, the licensing orders "[declined to] implement that portion of the Commission's *2 GHz MSS Order* that would give each

licensee to acquire three times the amount of spectrum before commencing operations would violate this decision and prejudge the pending rulemaking, thus precluding a grant. Moreover, subsequent to the Commission's *2 GHz MSS Order*, the Commission's *3G FNRPM* sought comment on the more fundamental question of whether to reallocate abandoned or returned 2 GHz MSS spectrum for advanced wireless terrestrial uses.[31] Any action with respect to the merger applications would also unlawfully prejudge the outcome of that proceeding.

The purpose of the Commission's anti-trafficking rule for 2 GHz MSS is to ensure that licensees could not sell "bare," *i.e.*, non-operational, MSS licenses for profit.[32] The Commission specifically rejected arguments by ICO that milestones were enough to prevent speculative applications.[33] In fact, the Commission specifically adopted such anti-trafficking measures as one means to ensure against speculative behavior where licenses were not assigned by competitive bidding, as was the case here.[34] Neither MCHI nor Constellation has provided evidence that they have taken any actions to build their systems. This is the essence of transferring a non-operational license and is expressly precluded under the Commission's rules.[35]

MCHI and Constellation cavalierly argue that the anti-trafficking rule should be waived if necessary, particularly "where the Commission has proposed to eliminate the rule in its entirety."[36] The Commission has previously held that "[where] validity of the rule is essentially at issue, the proper resolution necessarily entails use of the rulemaking process, rather than the waiver process."[37] More importantly, MCHI and Constellation ignore the fact that the proposal

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system proponent access to more than 3.5 megahertz of spectrum in each direction on a primary basis." *E.g.*, *ICO Services, Ltd.*, 16 F.C.C.R. at 13765; *see 2 GHz MSS Order*, 15 F.C.C.R. at 16139-48. The licensing orders did so because "the Commission has received new proposals for use of the 2 GHz MSS bands," and therefore decided to delay designating any additional spectrum to MSS licensees to "give the Commission the opportunity to consider these proposals." *E.g.*, *ICO Services, Ltd.*, 16 F.C.C.R. at 13765 (citing ICO ATC proposal and CTIA petition to reallocate MSS spectrum).

[31] *See supra* note 26.

[32] *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, *Notice of Proposed Rulemaking*, 14 F.C.C.R. 4843, 4887 (1999) ("*2 GHz MSS NPRM*") (noting that an anti-trafficking rule prohibits "selling bare licenses for profit," but does "permit firms to combine operations or sell *operating* facilities, including their licenses, subject to Commission approval") (emphasis added).

[33] *2 GHz MSS Order*, 15 F.C.C.R. at 16187.

[34] *See id.*; *see also 2 GHz MSS NPRM*, 14 F.C.C.R. at 4887 (proposing not to apply an anti-trafficking rule if competitive bidding is adopted).

[35] 47 C.F.R. § 25.143(g).

[36] MCHI and Constellation cite the Commission's *Space Station NPRM*, which has asked whether to eliminate the anti-trafficking rule in conjunction with a proposal to apply the 2 GHz MSS milestones to all satellite licensees and to strengthen those milestones. *See* 17 F.C.C.R. at 3881-84.

[37] *Telecom Services, Inc.*, 16 F.C.C.R. 18623, 18625-26 (PS&PWD/WTB 2001) (citing *CBS Inc. Petition for Special Relief*, 87 F.C.C.2d 587, 593 (1981)); *see also UTV of San Francisco, Inc.*, 16 F.C.C.R. 14975, 14988 (2001) (mak-

to eliminate the rule is predicated upon *strengthening* the milestones (which they have also failed to meet).

Thus, these applications cannot be granted because (i) the Commission has decided that licensees would not be awarded more than 7 MHz of spectrum; (ii) the Commission now prohibits the transfer of bare licenses, and, at a minimum, has yet to decide whether such a restriction will be eliminated in favor of stricter milestones; (iii) the applicable milestone requirements have not been met (or at best have not even been decided); and (iv) the question of whether to reallocate returned spectrum for advanced wireless services is still pending. Given all the threshold issues involving direct impediments to the transfers or unresolved policy issues, the transfer applications should not have been accepted for filing; should not have been placed on public notice for comment; and are certainly not grantable.

Finally, it is a well-established legal principle that where there are outstanding basic qualification issues regarding a transferor or assignor, no public interest finding concerning the transfer application can be made.[38] The Commission has yet to resolve the basic qualifying issues raised against the MSS licensees concerning their viability.[39] In addition, there is a serious question whether MCHI and Constellation have met the first milestone and have anything to transfer. Thus, processing of the mergers cannot go forward.

- ***ATC Experimental License***

Actions by Globalstar and FCC staff further demonstrate that this proceeding is careening out of control. In March 2002, the Commission issued a public notice expressly requesting that parties submit "detailed, technical discussion" of the feasibility of terrestrial operations in MSS bands.[40] Cingular Wireless, Sprint Corporation, and AT&T Wireless filed detailed studies demonstrating that it is technically feasible for separate satellite and terrestrial providers to operate in the MSS bands and that there would be no loss of spectral efficiency if two different firms operate the satellite and terrestrial systems.[41] Globalstar has since responded,[42] but does not dispute

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ing clear that a waiver is not warranted merely because reexamination of the rule is ongoing or "on the horizon") (citing *Stockholders of Renaissance Communications Corp.*, 13 F.C.C.R. 4717, 4718-19 (MMB 1998)).

[38] *See Jefferson Radio Co., Inc. v FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) (affirming the FCC policy of not considering transfers or assignments until the Commission decides whether the assignor/transferor has forfeited its authorization); *see also, e.g., Global Crossing Ltd. and Frontier Corporation*, 14 F.C.C.R. 15911, ¶ 10 (1999) (citing to *Jefferson Radio* in a common carrier context and noting that it "applies to issues regarding a licensee's basic qualifications that, if proved, could result in the loss of operating authority or denial of a pending application").

[39] *See supra* note 2.

[40] *See Public Notice*, "Commission Staff Invites Technical Comment on the Certain Proposals to Permit Flexibility in the Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band," IB Docket No. 01-185, ET Docket No. 95-18, DA 02-554, at 2 (rel. March 6, 2002).

[41] *See* Letter from Brian Fontes, Cingular Wireless LLC, and Luisa L. Lancetti, Sprint Corporation to Donald Abelson, Chief, International Bureau, FCC *et al.* in IB Docket No. 01-185 (May 13, 2002); Letter from Douglas I. Bran-

the carriers' underlying showings.[43] Even as the parties were responding to the Commission's request for technical discussion, in May and June of 2002 Globalstar quietly submitted an experimental application and accompanying STA to test ATC for six months and to demonstrate ATC before FCC staff.[44] Although Globalstar acknowledged that the test results and methodology were necessarily related to the issues in the *MSS Flex*/ATC proceeding,[45] neither application was filed in the rulemaking docket, nor were parties thereto notified. OET granted Globalstar experimental authority to test some form of ATC outside the very public process set up in the ATC proceeding to decide the issue. Inexplicably, no condition was placed on the authorization requiring that the test methodology and results be placed in the record for public comment.[46]

Moreover, on July 18 Globalstar apparently hosted a demonstration for select Commission staff involved in the *MSS Flex* proceeding "to demonstrate that ATC can be successfully provided within the Globalstar™ network."[47] To date, Globalstar has not submitted any substantive report of the FCC demonstration into the *MSS Flex* docket. Globalstar's *ex parte* contained a one-line reference noting only that its representatives "demonstrated telephone calls over the Globalstar satellite telephone system and over an experimental ATC network."[48] The demonstration compounds the many appearance problems in these proceedings. Some of the same FCC staff that had requested all parties in March 2002 to submit on the record all relevant technical information attended the private demonstration, yet no technical information has been filed regarding that demonstration.

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don, AT&T Wireless Services, Inc., to William F. Caton, Acting Secretary, FCC in IB Docket No. 01-185 (April 1, 2002).

[42] *See* Letter from William D. Wallace, Counsel for Globalstar L.P., to Marlene H. Dortch, Secretary, FCC in IB Docket No. 01-185 (July 27, 2002).

[43] *See* Letter from Brian Fontes, Cingular Wireless LLC, and Luisa L. Lancetti, Sprint Corporation to Donald Abelson, Chief, International Bureau, FCC *et al.* in IB Docket No. 01-185 (Aug. 5, 2002); Letter from Douglas I. Brandon, AT&T Wireless Services, Inc., to Donald Abelson, Chief, International Bureau, FCC *et al.* in IB Docket No. 01-185 (July 26, 2002).

[44] *See* Application of Globalstar, File No. 0238-EX-ST-2002 (filed June 27, 2002) ("Globalstar STA Application"); Application of Globalstar, L.P., File No. 0104-EX-PL-2002 (filed May 17, 2002) ("Globalstar Experimental Application"). Following grant of the experimental application, the STA was dismissed as moot.

[45] *See* Globalstar STA Application, Exh. A at 2.

[46] *See* Application of Globalstar, File No. 0104-EX-PL-2002 (OET, July 9, 2002). The application was not subject to public notice and comment, nor has the subsequent license been announced in a public notice.

[47] Globalstar Experimental Application, Exh. 2 at 2; *see also* Bruce Branch, *Globalstar Attempts Rebound by Adding ATC Component*, Comms. Daily, July 22, 2002, at 4 ("[C]ompany showcased for FCC and selected members of media . . . first-known public demonstration of ATC system. As FCC ponders use of ATC networks with Mobile Satellite Services (MSS), Globalstar believes experimental license puts it out front of competitors that include ICO and Iridium.").

[48] Letter from William D. Wallace, Counsel for Globalstar L.P., to Marlene H. Dortch, Secretary, FCC in IB Docket No. 01-185 (July 19, 2002) ("July 19 Globalstar Letter").

The Commission should condition the experimental license to require detailed reporting of the test operations and must ensure that interested persons have the opportunity to comment on these submissions and attend any further demonstrations *before* the Commission acts in the *MSS Flex* proceeding. As the D.C. Circuit observed, an agency engaged in informal rulemaking benefits from exchanges with interested persons but must avoid "the danger of one administrative record for the public and [the] court and another for the Commission."[49]

While Globalstar urges the Commission to grant terrestrial authority "expeditiously,"[50] its experimental application explains that "[t]he program of tests will be conducted over the next six months . . . to ensure that the system can be successfully deployed and tested."[51] As the Commission is well aware, its decisions must give "reasoned consideration to all material facts and issues."[52] Here, the Commission has requested technical information regarding terrestrial operations, and decisionmaking staff has participated in Globalstar's demonstration. Thus, the Commission must wait until the tests are completed, and Globalstar must submit a detailed report that then must be subject to public comment, to avoid running afoul of the Administrative Procedure Act. As the D.C. Circuit has noted, "the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives."[53]

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[49] *Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981) (quotation omitted); *see also Hanover Potato Products, Inc. v. Shalaha*, 989 F.2d 123, 130 (3rd Cir. 1993) ("We believe a regulated party *automatically suffers prejudice* when members of the public who may submit comments are denied access to the complete public record.") (emphasis added).

[50] July 19 Globalstar Letter, Att. at 16.

[51] Globalstar Experimental Application, Exh. 2 at 1.

[52] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[53] *Sierra Club*, 657 F.2d at 400-01 (quotation omitted); *see Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."); *see also U.S. Lines v. Federal Maritime Commission*, 584 F.2d 519, 533-35 & n.42 (D.C. Cir. 1978) (remanding agency decision relying on extra-record evidence as contrary to the APA and a barrier to effective judicial review because it precludes the opportunity for adversarial comment); *Air Products & Chemicals, Inc. v. FERC*, 650 F.2d 687, 698-99 (5th Cir. 1981) (finding agency reliance on extra-record evidence contrary to the APA and "our sense of fair play").

- ***Conclusion***

In sum, the Carriers submit that the Commission cannot move forward in the *MSS Flex* proceeding, nor take action with respect to the pending merger applications, until it first resolves, among other things:

- Whether it lawfully restricted eligibility for 2 GHz MSS spectrum to satellite-only companies given that it began a terrestrial use proceeding barely one month after licensing applicants on a satellite-only basis.
- Whether to revisit the allocation, change the eligibility rules to accept terrestrial providers, and hold an auction.
- Whether the satellite-only applicants who were licensed to provide satellite-only service were basically qualified to provide such service.
- Whether certain MSS licensees have failed to comply with the initial milestone and thus have automatically forfeited their licenses.
- Whether, in light of the basic qualification issues, milestone and anti-trafficking rules, and policy questions concerning spectrum aggregation, action on the transfer filings must await the conclusion of various proceedings considering all of these issues.
- What the highest and best use is of the MSS spectrum in light of competing terrestrial needs.

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