

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of	)	
	)	
Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands;	)	IB Docket No. 01-185
	)	
Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands	)	IB Docket No. 02-364
	)	

To: The Commission

**OPPOSITION TO PETITION FOR RECONSIDERATION**

Pursuant to Section 1.429(f) of the Commission’s Rules, 47 C.F.R. § 1.429(f), AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (jointly, the “Carriers”) hereby oppose the petition for reconsideration filed by the Boeing Company (“Boeing”) seeking reconsideration and/or clarification of the Commission’s *sua sponte* decision to clarify the initial decision in this proceeding.<sup>1</sup> The *Sua Sponte Order* properly eliminated ambiguity as to the timing for grant of ATC authority. The Commission correctly determined that the public interest and administrative efficiency dictated that ATC authority should not be granted before the gating criteria are satisfied. Thus, the Commission should deny Boeing’s petition for reconsideration.

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<sup>1</sup> 69 Fed. Reg. 7484 (Feb. 17, 2004); *Public Notice*, Rep. No. 2645 (Feb. 9, 2004); see *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band and the 1.6/2.4 GHz Bands*, FCC 03-162 (rel. July 3, 2003) (“*Sua Sponte Order*”), *modifying and clarifying Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band and the 1.6/2.4 GHz Bands*, 18 F.C.C.R. 1962 (2003) (“*MSS ATC Order*”).

## DISCUSSION

As an initial matter, Boeing mischaracterizes the *Sua Sponte Order* as “drastically” altering the application approval process for ATC authority.<sup>2</sup> In fact, the *Sua Sponte Order* merely clarified ambiguities in the *MSS ATC Order* with regard to the timing of grant of any ATC authority.<sup>3</sup> As the Carriers demonstrated in urging such clarification, the *MSS Flexibility Order* was inconsistent in describing when an MSS licensee could obtain and utilize ATC authority.<sup>4</sup> Indeed, Boeing admits that the *Sua Sponte Order* “provides clarity regarding the event that must precede the provision of services” as well as the timing for any such Commission action.<sup>5</sup> Moreover, the Commission properly balanced the competing interests in the application procedures specified in the *Sua Sponte Order*.

Boeing would prefer that the Commission permit early “conditional” licensing – a procedure that the Commission has used in some previous satellite licensing contexts. However, such an approach would not work well in the case of ATC. Those “well-tested” procedures have proven troublesome. As demonstrated by the Commission’s experiences with conditional licensing in the context of DBS and separate international satellite systems, the Commission’s decision to authorize licensees without a concrete

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<sup>2</sup> Boeing Petition at ii; *see also id.* at 4 (“In its Flexibility Order, the Commission adopted straightforward and well-tested procedures to consider applications to provide ATC services.”).

<sup>3</sup> *Sua Sponte Order* at ¶¶ 1-2.

<sup>4</sup> *See* Letter to Marlene H. Dortch, Secretary, FCC from Kathryn A. Zachem, Counsel for AT&T Wireless, Cingular Wireless and Verizon Wireless in IB Docket No. 01-185 (Mar. 6, 2003).

<sup>5</sup> Boeing Petition at p. 6.

demonstration of capabilities has led to extensive delays in service, and did not eliminate or reduce controversy or litigation.

The Commission properly balanced the MSS licensees' desire for an easy and expeditious ATC application process with concerns for the public interest in the ATC application procedures adopted in the *Sua Sponte Order*.<sup>6</sup> As the Commission indicated in the *MSS ATC Order*, shutting down an operating ATC system imposes costs not only on the MSS licensee, but on the ATC customers as well.<sup>7</sup> If the Commission were to allow ATC operations to commence on the basis of "promises" (even if incorporated into the license as conditions), and those promises were later not met, then the Commission would face a difficult choice. It would either have to require the operator to cease ATC service to subscribers with minimal notice or thwart the integrity of its licensing processes by allowing such illegal operations to continue.

Equally important, by keying the grant of ATC authority to actual demonstrations of compliance with the gating criteria, the Commission will be making its licensing decision on the basis of concrete proposals instead of mere promises or certifications. Such a process is more likely to foster administrative efficiency. For example, MSV's initial attempt at an ATC application consisted of little more than a recitation that it

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<sup>6</sup> The Carriers' defense of the Commission's ATC application procedures here is not an endorsement of the substantive gating criteria themselves. Cingular has elsewhere demonstrated that there are problems with the gating criteria adopted by the Commission. See Cingular Wireless LLC Petition for Reconsideration in IB Docket No. 01-185 (filed July 7, 2003). As that petition explains, despite the claims that an MSS licensee can only offer ATC in conjunction with the provision of "substantial satellite service," the Commission failed to place any meaningful limits on the "ancillary" terrestrial operations or require that an MSS licensee launch and operate a *bona fide* satellite system with actual MSS subscribers.

<sup>7</sup> *MSS Flexibility Order* at ¶ 86.

would comply with each of the gating criteria. After that application was dismissed as procedurally defective, MSV filed a second, somewhat more detailed ATC application. Even following that second application, however, Commission staff was compelled to issue several requests for supplemental information in order to find the application sufficient to go out for public comment.<sup>8</sup> Boeing, however, downplays the burdens placed on the Commission by such premature ATC applications.<sup>9</sup>

Boeing has also overstated the potential drawbacks to the procedures clarified by the *Sua Sponte Order*. Boeing argues that inevitably there will be delays in grant of ATC authority, and that the possibility of such delays will “dramatically escalate the business risks for MSS licensees”<sup>10</sup> and “risks killing the very service offerings the Commission has decided to permit.”<sup>11</sup> Yet, as Boeing acknowledges, the Commission has committed to expeditious processing of ATC applications.<sup>12</sup> Moreover, predictions that such potential delays in ATC authorization will preclude MSS altogether flies in the face of the Commission’s justification for licensing 2 GHz MSS in the first instance. That is,

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<sup>8</sup> In an email dated December 16, 2003, the Deputy Chief of the International Bureau’s Policy Division asked MSV to submit additional information pertaining to the waiver requests. In addition, in an inquiry letter dated January 21, 2004, the Chief of the International Bureau’s Satellite Division advised MSV that certain further information was needed to facilitate assessment of its waiver requests.

<sup>9</sup> Boeing Petition at p. 8; *cf. Sua Sponte Order* at ¶ 7 (expectation that applications will be filed at or shortly before criteria are met).

<sup>10</sup> Boeing Petition at p. 6.

<sup>11</sup> Boeing Petition at p. 7.

<sup>12</sup> *See, e.g., Sua Sponte Order* at n.27 (“In order to ensure that there is not unnecessary regulatory delay associated with the ATC application process, for all parties not filing pursuant to 25.149(f), the Commission will endeavor to act on each perfected ATC application no longer than 90 days after the relevant ATC applicant actually meets all ATC gating criteria contained in our rules.”).

notwithstanding substantial questions as to MSS system viability raised by another applicant (ICO), the Commission found that 2 GHz MSS applicants like Boeing should succeed or fail in the market on their own merits on the basis of a satellite-only authorization.<sup>13</sup> Indeed, Boeing itself has recently claimed before the D.C. Circuit that ATC is not necessary to the success of its system.<sup>14</sup>

Boeing further asserts that there is likely to be significant delays because the Commission will be unable to resolve the inevitable disputes in a timely manner.<sup>15</sup> If Boeing files a complete application demonstrating compliance with the Commission's requirements, it can expect the Commission to grant that application in a timely manner. Boeing's assumption that there will be delays in Commission action is based on nothing more than unsupported speculation. Only if there is something materially wrong with the application and/or the showing thereunder should Boeing or other applicants justifiably expect delays in processing.

In addition, to the extent Boeing is concerned about the Commission delaying action on its ATC application because of novel or complex issues, the Commission made clear that an MSS licensee could seek an early declaration that its proposed operation or design complies with the gating criteria or other rules.<sup>16</sup> Thus, Boeing has procedural

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<sup>13</sup> See *ICO Services Limited*, 16 F.C.C.R. 13762, ¶ 30 (IB 2001), *aff'd*, *Memorandum Opinion and Order*, 18 F.C.C.R. 1405 (2003), *appeal pending*.

<sup>14</sup> See Brief of Intervenors in *AT&T Wireless Services, et al. v. FCC*, No. 03-1042, at 19 (D.C. Cir. filed Feb 6, 2004) (stating that Boeing and other 2 GHz MSS applicants "believe that a terrestrial component is not necessary for the success of the MSS systems").

<sup>15</sup> Boeing Petition at 6, 9.

<sup>16</sup> *Sua Sponte Order* at ¶ 7.

options available to minimize the risk that grant of ATC authority will be delayed. In this way, Boeing retains the ability to control “the timing of the start-up of their business.”<sup>17</sup>

Boeing’s suggestion that granting “conditional” licenses is necessary to remove any “clouds” over an MSS licensee’s authority to provide ATC services is untenable. Any Commission decision based on such applications would of necessity be tentative and/or conditional, so that potential investors would still have no assurance that such authority will not terminate for failure to meet the condition. In addition, to the extent there are questions with regard to compliance with the gating criteria, Boeing’s proposed procedure merely delays litigation over compliance to the stage at which the MSS licensee certifies compliance with the condition(s). As demonstrated by the Commission’s experiences verifying 2 GHz MSS milestone compliance, whereby the Commission must engage in a time consuming back-and-forth effort to obtain supporting documentation after-the-fact, given the absence of a requirement to demonstrate actual compliance at the time of the milestone, the Commission would have to expend significant resources determining whether the conditions are actually fulfilled under Boeing’s proposed procedure.<sup>18</sup>

For the reasons set forth above, the Commission should reject Boeing’s request to overturn the procedures adopted in the *Sua Sponte Order*. The Commission should also reject Boeing’s request to apply the “streamlined” procedures applicable to operational

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<sup>17</sup> Boeing Petition at 7.

<sup>18</sup> Alternatively, if ATC operations must await an affirmative Commission determination that the MSS licensee has fulfilled the conditions, then Boeing’s proposed procedure will be no faster than the process adopted by the Commission in the *Sua Sponte Order*, and will be less efficient because it will be necessary to obtain two Commission approvals – one at the “conditional” stage and then a second one to remove the conditions.

MSS systems to non-operational systems.<sup>19</sup> The Commission rationally determined that it could apply different procedures to operational systems, because their actual operations demonstrate the necessary commitment and actual (not promised) compliance with critical gating criteria.<sup>20</sup> Boeing's alternative request to apply the streamlined procedures to its non-operational system is nothing more than a backdoor attempt to have the Commission grant "conditional" authority based on mere promises under a slightly different guise. As the Carriers explained above, the Commission properly clarified its ATC application procedures to key the timing for grant with the actual deployment of the MSS system.<sup>21</sup>

Finally, Boeing requested that, at a minimum, the Commission should clarify what demonstrations will suffice to show compliance with particular gating criteria.<sup>22</sup> The Carriers have no objection to such further clarifications. Such clarifications, however, may better be made in the context of requests for declaratory ruling – with specific proposals – rather than in a vacuum, based on vague discussions in a petition for reconsideration.<sup>23</sup>

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<sup>19</sup> Boeing Petition at 10-14.

<sup>20</sup> The Carriers have concerns with the substance of the gating criteria adopted by the Commission, *see supra* note 6, but at least in the case of operational MSS systems there is a specific, concrete satellite system to evaluate, thus justifying the streamlined treatment for timing purposes.

<sup>21</sup> To the extent that Boeing is concerned with particular demonstrations needlessly delaying grant of ATC authority, Boeing Petition at 11-14, the Commission made clear that MSS licensees could make early requests for declaratory ruling with regard to potentially controversial issues. *Sua Sponte Order* at ¶ 12.

<sup>22</sup> Boeing Petition at 14-19.

<sup>23</sup> For example, Boeing seeks clarification that its demonstration of actual compliance with the geographic and temporal coverage requirements should be satisfied

## CONCLUSION

For all of the reasons set forth above, the Carriers urge the Commission to deny Boeing's request for reconsideration or application of streamlined procedures for non-operational MSS systems. The ATC application procedures specified in the *MSS ATC Order*, as clarified by the *Sua Sponte Order*, best balance the MSS licensees' desire for expediency with the public interest benefits of precluding premature ATC grants and fostering greater administrative efficiency.

Respectfully submitted,

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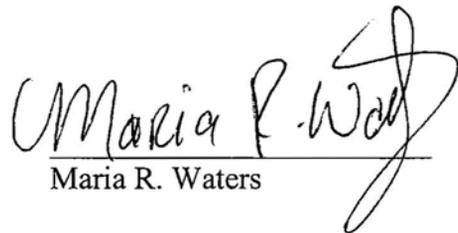
based upon use of predicted contours and reporting to the Commission of any anomalies. Boeing Petition at 15-16. Notwithstanding the fact that use of a predicted contour to demonstrate actual coverage is inherently inconsistent, it is unclear why, if Boeing can report technical anomalies to the Commission, it cannot subsequent to launch evaluate the predicted contour and tell the Commission that it is accurate based on the absence of such anomalies.

**CERTIFICATE OF SERVICE**

I, Maria R. Waters, hereby certify that on this 3rd day of March, 2004, copies of the "Opposition to Petition for Reconsideration" have been served by first class United States mail, postage prepaid, on the following:

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