

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Flexibility for Delivery of Communications by) IB Docket No. 01-185
Mobile-Satellite Service 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) ET Docket No. 95-18
Rules to Allocate Spectrum at 2 GHz for Use by the)
Mobile-Satellite Service)

To: The Commission

**REPLY OF
THE BOEING COMPANY**

The Boeing Company (“Boeing”), by its attorneys and pursuant to Section 1.429 of the Commission’s rules, 47 C.F.R. § 1.429, submits this reply to the opposition filed by AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (hereinafter the “wireless carriers”) to Boeing’s petition for reconsideration (“petition”) of the Commission’s *Order on Reconsideration* in this proceeding.¹

I. INTRODUCTION

The Commission should reinstate its conditional authorization process for Mobile-Satellite Service (“MSS”) licensees seeking authority to include an Ancillary Terrestrial Component (“ATC”) in their MSS networks. A conditional licensing process is necessary to ensure that licensees of operational MSS networks are not forced to withhold integrated

¹ 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*, Order on Reconsideration, FCC 03-162 (July 3, 2003) (“*Order on Reconsideration*”).

MSS/ATC services from consumers while they wait for the Commission to approve ATC applications.

The opposition filed by the wireless carriers provides no basis for their arguments that a conditional licensing process is unnecessary or inappropriate. Instead, the wireless carriers' arguments conflict directly with the Commission's recent experience in processing applications for ATC authority.

As the Commission is aware, on November 18, 2003, Mobile Satellite Ventures Subsidiary LLC ("MSV") filed its most recent application for ATC authority. Nearly four months later, the application has only recently been placed on public notice.

The Commission's processing of MSV's application demonstrates that the Commission will likely take a significant amount of time to review and process ATC applications. The only way to ensure that adequate time is available (without withholding new services from consumers) is to accept such applications well in advance of the launch of new MSS networks and to grant ATC authority on a conditional basis before those MSS networks begin operation.

Even if the Commission declines to reinstate its conditional licensing process, the Commission should rectify the significant inconsistencies that exist in its ATC application processing rules, many of which were detailed in Boeing's petition for reconsideration. These clarifications and corrections should be completed as a part of the Commission's currently pending rulemaking proceeding on MSS ATC services, rather than pursuant to an *ad hoc* declaratory ruling proceeding at an unspecified future date.

II. RECENT EXPERIENCE DEMONSTRATES THAT THE COMMISSION SHOULD CONDITIONALLY GRANT ATC AUTHORITY TO MSS LICENSEES CONCURRENT WITH THE LAUNCH OF THEIR SATELLITE NETWORKS

Boeing expressed concern in its petition for reconsideration that the Commission's *Order on Reconsideration* drastically altered the application approval process for MSS licensees seeking to include ATC services in their MSS network. Specifically, the *Order on Reconsideration* stated that the Commission would not grant authority for MSS licensees to provide ATC services until after a MSS network operator has demonstrated that "it has, in fact, met all of the gating criteria."² In contrast, the Commission had stated in the past that it would authorize MSS licensees to include ATC services in their networks conditioned on first meeting the gating criteria before any ATC services are provided to consumers.³

As Boeing explained in its petition, the new approach will increase significantly the delay and uncertainty involved in introducing integrated MSS ATC services. Once a MSS licensee places its network in operation, the licensee will have to await the completion of the Commission's ATC application review process before providing integrated MSS ATC services, a delay that could extend months or potentially years.

The wireless carriers' opposition dismisses Boeing's concerns as "unsupported speculation" and asserts "[i]f 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."⁴

² *Order on Reconsideration*, ¶ 13; see also 47 C.F.R. § 25.149(e).

³ 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*, Report and Order and Notice of Proposed Rulemaking, FCC 03-15, ¶ 3 (Feb. 10, 2003)

⁴ *Wireless Carrier Opposition* at 5.

In reality, the Commission does not have unfettered control over its decision making process. The Commission must comply with the Administrative Procedure Act (“APA”), including requirements that license applications be placed on public notice for comment and that the substance of those comments be addressed in any order issued by the Commission. The Commissioners must also work with each other and the Bureaus to build consensus on issues and integrate those decisions into formal written orders, all of which takes time. Thus, although the Commission has stated that it will “*endeavor to act on each perfected ATC application no longer than 90 days after*” the gating requirements have been satisfied,⁵ the reality will likely be far different.

The Commission’s recent handling of MSV’s ATC application provides an example of the delays that can occur.⁶ MSV’s ACT application was filed on November 18, 2003, but was not placed on public notice until February 9, 2004, nearly 90 days after the application was filed.⁷ The formal comment cycle for the application is currently scheduled to conclude on April 26, 2004, more than five months after the application was filed with the Commission.⁸

The wireless carriers disparagingly describe MSV’s ATC application as “premature.”⁹ In reality, MSV controls two operating MSS satellites, has preexisting satellite-only customers and

⁵ *Id.*, ¶ 7 n.27 (*emphasis added*).

⁶ MSV actually filed a prior application for ATC authority, but the International Bureau dismissed the application because it was filed with the Commission prior to the effective date of the Commission’s rules for ATC. *See Letter from Thomas S. Tycz, Chief, Satellite Division, International Bureau, to Bruce D. Jacobs, et al., Shaw Pittman LLP* (June 24, 2003).

⁷ *See Public Notice, Policy Branch Information, Mobile Satellite Ventures Subsidiary LLC Ancillary Terrestrial Component Applications Accepted for Filing*, Report No. SPB-200 (Feb. 9, 2004).

⁸ *See id.*

⁹ *Wireless Carrier Opposition* at 4.

has already met each of the Commission's gating requirements.¹⁰ MSV is requesting only modest waivers of the Commission's rules for integrated MSS ATC systems.¹¹ Therefore, MSV's ATC application *should have been* a perfect candidate for the Commission's 90 day application approval target.

Instead, the processing of MSV's application was delayed while MSV responded to a series of technical questions raised by the International Bureau.¹² The addition of ATC services to MSS satellite networks raises new technical considerations that the International Bureau has not addressed in previous license applications. As a result, the International Bureau is likely to have unique questions about each ATC application that is filed.

Boeing, of course, does not oppose the International Bureau's efforts to carefully examine each ATC application and pose questions to applicants about technical issues. It is critically important, however, that the Commission provide its staff with adequate time to study these issues without the pressure of a 90 day application approval target and without requiring MSS network operators to withhold integrated MSS ATC services from the public while their ATC applications are pending.

¹⁰ See *Mobile Satellite Ventures Subsidiary LLC, Application for Minor Modification of Space Station License*, FCC File Nos. SAT-MOD-20031118-00333, SAT-AMD-20031118-00332 & SES-MOD-20031118-01879, at 2 & 8-11 (Nov. 18, 2003).

¹¹ The most significant waiver requested by MSV is a proposal to use a spare satellite that is already in-orbit to satisfy the Commission's requirement that MSS licensees providing ATC services must maintain a spare satellite on the ground. See *MSV Application* at 8-9. The Commission adopted the ground spare requirement to ensure that, in the event of a satellite outage, a replacement satellite could be brought into service without excessive delay. See *ATC Order*, ¶¶ 83-84. In light of the fact that an in-orbit spare can be brought into service much faster than a ground spare, MSV's proposal satisfies the intent of the Commission's rule.

¹² See Public Notice, *Policy Branch Information, Mobile Satellite Ventures Subsidiary LLC Ancillary Terrestrial Component Applications Accepted for Filing*, Report No. SPB-200 (Feb. 9, 2004) (detailing the technical exchanges between MSV and the International Bureau during the months that followed the filing of MSV's application).

Instead, the Commission should accept applications for ATC authority well in advance of the launch date for new MSS networks and grant ATC authority concurrent with the launch of those networks, conditioned on the full satisfaction of each of the operator's gating obligations. Accepting filings well in advance of network operations will provide Commission staff with adequate time to carefully examine each ATC application concurrent with the construction of MSS satellites. Such an approach will ensure that the provision of new integrated MSS ATC services to consumers is not unnecessarily delayed.

The wireless carriers' argument that the Commission's past use of conditional licenses has "proven troublesome" is simply erroneous.¹³ There is no basis for the wireless carriers' unsupported assertion that "such an approach would not work well in the case of ATC."¹⁴ Just last year, the Commission reaffirmed its reliance on conditional authorizations to issue satellite licenses.¹⁵ The Commission eliminated its financial qualification rules and its anti-trafficking rules, and decided instead to continue to condition authorizations on compliance with strict milestones for the construction and launch of satellite networks.¹⁶ Pursuant to the Commission's rules, a satellite license is "automatically terminated" without further notice to the licensee if the licensee fails to meet its milestones.¹⁷ The Commission has repeatedly exercised this authority by canceling the authorizations of satellite licensees that fail to meet milestone requirements.

¹³ *Wireless Carrier Opposition* at 2.

¹⁴ *Id.*

¹⁵ *See Amendment of the Commission's Space Station Licensing Rules and Policies; Mitigation of Orbital Debris*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 03-102 (May 19, 2003).

¹⁶ *See id.*

¹⁷ 47 C.F.R. § 25.161.

This same authority can and should be used to enforce that Commission's ATC gating requirements.

The Commission should therefore reinstate the process of reviewing ATC applications concurrent with the construction of MSS networks and conditionally approving ATC authorizations before the MSS networks in question are ready to provide service to consumers. Such an approach would expedite the provision of new services to the public, reduce regulatory risks for MSS licensees and place no additional administrative or enforcement burden on the FCC.

III. THE WIRELESS CARRIERS DISREGARD SIGNIFICANT CONFLICTS IN THE COMMISSION'S RULES, WHICH MUST BE RESOLVED AS A PART OF THIS RULEMAKING PROCEEDING

Even if the Commission does not reinstate its conditional licensing process for MSS licensees seeking to provide ATC services, the Commission should rectify the significant inconsistencies that exist in the ATC application processing rules. The wireless carriers have stated that they have no objection to the Commission resolving these inconsistencies,¹⁸ many of which were detailed in Boeing's petition for reconsideration.

For example, Subsection 25.149(b)(2)(ii), Subsection 25.149(b)(2) and Subsection 25.149(e) of the Commission's rules each include conflicting provisions regarding the Commission's gating requirement for MSS replacement satellites. Subsection 25.149(b)(2)(ii) appropriately permits GSO MSS networks to maintain a spare satellite on the ground "within one year of commercial operations."¹⁹ In contrast, Subsection 25.149(e) states that the Commission will not grant ATC authority "until the applicant has demonstrated *actual compliance*" with its

¹⁸ See *Wireless Carrier Opposition* at 7.

¹⁹ 47 C.F.R. § 25.149(b)(2)(ii).

gating criteria, apparently including the requirement to maintain a spare satellite on the ground.²⁰ Subsection 25.149(b)(2) of the Commission's rules provides conflicting guidance, indicating that the Commission will not grant ATC authority until MSS licensees "demonstrate that the applicant does *or will comply*" with the requirement to maintain a replacement satellite.²¹

The inconsistencies in these rules further heighten the regulatory risk for MSS licensees that want to provide integrated MSS/ATC services. The Commission should therefore revise its rules to clarify that MSS licensees will be permitted to offer integrated MSS/ATC services soon after placing their satellite networks into operation, even if they do not complete construction of a replacement satellite until one year after the start of network operations.

The wireless carriers suggest that any conflicts in the Commission's ATC rules should be resolved by the Commission through declaratory rulings and not as a part of this rulemaking process.²² The Commission has discretion "on a case-by-case basis, to determine whether it is best to resolve a controversy by the adoption of a general rule or by an individual *ad hoc* proceeding, such as a declaratory ruling."²³ In exercising this discretion, the Commission has repeatedly observed that "the presence or absence of factual disputes is a significant factor" in deciding whether to use a declaratory ruling or a rulemaking process.²⁴

²⁰ 47 C.F.R. § 25.149(e); *see also Order*, ¶ 7 (stating that a MSS licensee must demonstrate that it has "actually satisfied" each of its gating requirements).

²¹ 47 C.F.R. § 25.149(b)(2) (*emphasis added*).

²² *See Wireless Carrier Opposition* at 7.

²³ *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 187 (Aug. 27, 1999).

²⁴ *Id.*

In this case, the only issue in controversy is the language and interpretation of the Commission's ATC gating rules. No factual issues or disputes exist. Therefore, the Commission's currently pending rulemaking proceeding on MSS ATC services is by far the most appropriate vehicle to resolve each of the inconsistencies raised by Boeing in its petition for reconsideration.

IV. CONCLUSION

For the reasons set forth above, the Commission should reconsider its decision to alter the application approval process for MSS ATC services and reinstate its process of conditionally granting ATC authority to MSS licensees. The Commission should also resolve the significant conflicts that have been introduced into its rules. Absent such changes, MSS licensees will face needless difficulties in making the demonstrations necessary to secure Commission approval to provide integrated MSS ATC services to the public.

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CERTIFICATE OF SERVICE

I, Brenda E. Crutchfield, hereby certify that a copy of the foregoing Reply of The Boeing Company was mailed, postage prepaid, first-class mail this 16th day of March, 2004 to the following:

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