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January 28, 2005

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

**Re: Written Ex Parte Presentation  
IB Docket No. 01-185**

Dear Ms. Dortch:

On July 7, 2003, Cingular Wireless LLC (“Cingular”), along with the Cellular Telecommunications and Internet Association (“CTIA”), submitted petitions for reconsideration of the *MSS ATC Order* in this proceeding.<sup>1</sup> In their petitions, Cingular and CTIA challenged the order’s failure to adopt meaningful criteria to ensure MSS licensees would provide “substantial satellite service” and that terrestrial use of the MSS bands (“ancillary terrestrial component” or “ATC”) will be truly “ancillary.” For example, Section 25.149(a)(6) of the FCC’s rules states only that “ATC base station operations shall use *less than all* available MSS frequencies.”<sup>2</sup> This hardly preserves the distinction between substantial and ancillary, as an MSS licensee can dedicate 99% of its spectrum to ATC.<sup>3</sup>

The need for meaningful gating and operational criteria to ensure that terrestrial use of the MSS bands remains ancillary to the “substantial satellite service” is critical for several reasons: (i) the FCC’s original and continuing objective of the 2 GHz MSS allocation is to provide satellite service to “rural, unserved and underserved areas of the country;”<sup>4</sup> (ii) MSS

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<sup>1</sup> *Flexibility for the Delivery of Communications by Mobile Satellite Service Providers*, 18 F.C.C.R. 1962 (2003) (“*MSS ATC Order*”), recon., 18 F.C.C.R. 13590 (2003) (*sua sponte*), further recon. pending, appeal pending sub nom. *Cellco Partnership d/b/a Verizon Wireless v. FCC*, No. 03-1191 (D.C. Cir. filed July 8, 2003); see Cingular Petition for Reconsideration (filed July 7, 2003) (“Cingular Pet.”); CTIA Petition for Reconsideration (filed July 7, 2003) (“CTIA Pet.”); Cingular Reply to Oppositions to Petition for Reconsideration (filed Sept. 4, 2003) (“Cingular Reply”); CTIA Reply to Oppositions to Petition for Reconsideration (filed Sept. 4, 2003) (“CTIA Reply”).

<sup>2</sup> 47 C.F.R. § 25.149(a)(6) (emphasis added); see also *infra* note 16 and accompanying text.

<sup>3</sup> See Cingular Pet. at 5; see also CTIA Pet. at 5.

<sup>4</sup> *Flexibility for the Delivery of Communications by Mobile Satellite Service Providers, Notice of Proposed Rulemaking*, 18 F.C.C.R. 15532, 15543 (2001); *Policies and Rules for MSS in the 2 GHz Band*, 15 F.C.C.R. 16127, 16128-29 (2000) (“*2 GHz MSS Order*”) (“2 GHz MSS systems will . . . promote development of regional and global communications to unserved communities in the United States, its territories and possessions, including rural and Native American areas, as well as worldwide.”).

applicants were not subjected to the auction process; (iii) MSS applicants were licensed on the basis of succeeding or failing on their own merits in the satellite-only market; and (iv) the disconnect between the *MSS ATC Order*'s goal that satellite service predominate over terrestrial use, and the ATC rules, which allow the opposite result, is arbitrary and capricious.<sup>5</sup> Accordingly, Cingular and CTIA urged the Commission to close any loopholes that could enable MSS licensees to "game" the ATC approval process or threaten the availability of adequate spectrum to achieve the FCC's goal of bringing satellite service to rural areas.

One of the concerns specifically raised by Cingular in its petition was the trend toward substituting single GSO satellites for multi-satellite NGSO constellations and the potential for abuse of the gating criteria this presented.<sup>6</sup> Recent developments have shown this concern to be well-founded, as ICO, like Boeing and Iridium before it, has now requested authority to abandon its authorized multi-satellite, global NGSO system in favor of a (presumably cheaper) single-satellite GSO system serving the United States.<sup>7</sup> Thus, all of the surviving 2 GHz NGSO licensees have now scaled back their proposed systems to a single satellite. As discussed below, this trend reinforces the need to reconsider and modify the *MSS ATC Order* for the following reasons:

- First, it confirms a move away from robust satellite operations, calling into question the adequacy of service to rural areas absent a meaningful requirement to do so.
- Second, it undermines the *MSS ATC Order*'s conclusion that high upfront satellite costs obviate the need for strengthened gating criteria to ensure the preservation of substantial satellite service.
- Third, it is inconsistent with the order's finding that there would be no unjust enrichment because high upfront satellite costs would offset the value of ATC rights.
- Fourth, ICO's application highlights the need for clarification of the order's exemption for Personal Data Assistants ("PDAs").

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<sup>5</sup> See Cingular Pet. at 2-4; Cingular Reply at 2; see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)) (agencies must articulate a "rational connection between the facts found and the choice made").

<sup>6</sup> See Cingular Pet. at 5-7, 22-23 & n.72; Cingular Reply at 4.

<sup>7</sup> ICO Satellite Services G.P., File No. SAT-MOD-20050110-0004 (filed Jan. 10, 2005) ("ICO Mod. App."); see also *infra* notes 9-10 and accompanying text. Cingular is not taking herein a position on the merits of the ICO application.

As a preliminary matter, the trend away from NGSO constellations signals a downsizing of satellite operations at a time when the value of terrestrial use of the MSS spectrum in question would clearly be worth billions of dollars.<sup>8</sup> In addition to ICO, Boeing has already received approval to convert from a 16-satellite NGSO constellation to a single GSO satellite,<sup>9</sup> and Iridium has filed a modification request to convert from a 96-satellite NGSO constellation to a single GSO satellite.<sup>10</sup> To any reasonable observer, this trend calls into question whether the robustness of the satellite services to be provided – particularly to rural and underserved areas – will be “substantial” in the absence of strengthened gating and operational criteria to ensure such a result. Given the increasing value of terrestrial use rights and greater profitability of ATC operations over MSS operations,<sup>11</sup> there is a clear incentive to utilize MSS spectrum for terrestrial service which the Commission must address. This is particularly the case in light of

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<sup>8</sup> The Commission recently placed a value of \$4.86 billion on 10 MHz of nationwide terrestrial spectrum in bands adjacent to the 2 GHz MSS bands. See *Improving Public Safety in the 800 MHz Band*, WT Docket No. 02-55, FCC 04-168, at ¶ 297 (rel. Aug. 6, 2004). The five surviving MSS licensees in the 2 GHz band (Boeing, Celsat, ICO, Iridium and TMI) are expected to divide the 40 MHz MSS allocation in the 2 GHz band on a *pro rata* basis (*i.e.*, 8 MHz apiece), see *AWS Third Report and Order*, 18 F.C.C.R. 2223, 2239-40 (2003), although this is unclear given the number of milestone certifications yet to be ruled on by the Commission.

<sup>9</sup> See *The Boeing Company*, 18 F.C.C.R. 12317 (IB/OET 2003). ICO challenged the Boeing modification, claiming that it was (i) a new application that must be considered in a new processing round; (ii) unprecedented; (iii) contrary to the 2 GHz MSS band plan, which assumed at least several NGSOs would be licensed to provide global services; and (iv) contrary to the public interest, given that Boeing would not deliver on its promise of global MSS. See *ICO Global Communications (Holdings) Limited, Application for Review re: DA 03-2073 at 3-7* (filed July 24, 2003) (“ICO App. Rev.”); see also *id.* at 2 (stating that “a modification of a satellite license to substitute a single GSO satellite for an NGSO system conflicts with the Commission’s 2 GHz MSS allocation policies and will not serve the public interest”). ICO abruptly filed for permission to withdraw its challenge on January 7, 2005 – three days before it submitted its modification application to substitute a single GSO satellite.

<sup>10</sup> See *Iridium 2 GHz LLC*, File No. SAT-MOD-20030828-00286 (filed Aug. 28, 2003). Although the Commission has stated that it “will require prospective operators to identify any system modifications needing prior FCC approval well in advance of the CDR milestone,” *2 GHz MSS Order*, 15 F.C.C.R. at 16179, Iridium refiled its NGSO-to-GSO modification application after the CDR milestone following the dismissal of an earlier modification application on procedural grounds. The Commission has yet to rule on Iridium’s modification application or its compliance with the CDR and subsequent milestones.

<sup>11</sup> See *Petition for Reconsideration and Clarification of Inmarsat Ventures PLC at 14* (filed July 7, 2003) (noting that because of the potential to derive greater profits from ATC operations, “[i]t would then be in the business interests of the operator to prioritize service to profitable urban customers (via ATC) over service to less profitable rural ones (via satellite), which could undermine the Commission’s goal of facilitating the provision of vital communication services to rural and underserved areas”).

statements by MSS licensees that MSS without ATC will not survive.<sup>12</sup> Accordingly, MSS licensees have every reason to “game” the system and maximize the use of MSS capacity to provide terrestrial services using “less than all” available frequencies.

The trend also undermines the FCC’s conclusion that further regulatory intervention to ensure “substantial satellite service” is not necessary because the significant upfront satellite costs expended by MSS providers would preclude those providers from discontinuing or degrading satellite service.<sup>13</sup> Current figures show that GSO satellites suitable for MSS use can be constructed and launched for less than \$200 million<sup>14</sup> – far below the \$2.8-4.4 billion the Commission has indicated that MSS licensees spend to construct and launch multi-satellite NGSO systems.<sup>15</sup> The result is that for a several hundred million dollar investment, MSS licensees can construct and launch a single GSO satellite covering the United States<sup>16</sup> and, in so

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<sup>12</sup> See, e.g., Letter to Michael K. Powell, Chairman, FCC, from Lawrence H. Williams, New ICO, in IB Docket No. 99-81, at 6, 14, 16 (Mar. 8, 2001) (declaring that satellite-only systems “are simply not economically viable” and that without the ability to offer terrestrial service, “there may be *no 2 GHz service to rural areas at all*” and “MSS service will disappear”).

<sup>13</sup> *MSS ATC Order*, 18 F.C.C.R. at 1982. The order also suggested that MSS providers would be “unwise” to abandon satellite services merely for the opportunity to compete with terrestrial CMRS given the intensely competitive CMRS market. See *id.* The fact that MSS providers are obligated to provide “some” satellite services, and may continue to do so to distinguish themselves in the mobile telephony market, in no way ensures that satellite service will not become ancillary to the provision of terrestrial service.

<sup>14</sup> For example, Orbital Sciences Corporation (“Orbital”) manufactures a mid-size geostationary satellite – the STAR GEO platform – which is capable of carrying “payloads for FSS, MSS and DTH missions.” Orbital Brochure for STAR Geostationary Satellites, *available at* <[http://www.orbital.com/NewsInfo/Publications/GEO\\_Brochure.pdf](http://www.orbital.com/NewsInfo/Publications/GEO_Brochure.pdf)>, at 2, visited Jan. 25, 2005 (emphasis added). According to Venik’s Aviation (<<http://www.aeronautics.ru/archive/reference/Satellites/ORBITAL%20SCIENCES%20CORP.htm>>, visited Jan. 18, 2005), the price of an Orbital Star-2 GEO satellite ranges from \$40 million (DAWN-DISCOVERY) to \$100 million (GALAXY 5R-PanAmSat). Taking a conservative estimate from the upper end of that range (\$100 million) and assuming a launch cost of \$50 million (Futron Corporation, “Space Transportation Costs: Trends in Price Per Pound to Orbit 1990-2000,” Sept. 6, 2002, at 2, *available at* <<http://www.futron.com/pdf/FutronLaunchCostWP.pdf>>, visited Jan. 25, 2005 (cost of a Long March 2E launch of \$50 million)), it appears that a licensee could construct and launch a satellite for well under \$200 million.

<sup>15</sup> See *MSS ATC Order*, 18 F.C.C.R. at 1987 n.103.

<sup>16</sup> See 47 C.F.R. § 25.149(b)(1). 2 GHz MSS GSO licensees must also maintain a ground spare satellite, see *id.* at § 25.149(b)(2). While MSS and ATC operations must be “integrated,” see *id.* at § 25.149(b)(4), the *MSS ATC Order* fails to provide sufficient insight into what “integrated ATC” entails. See CTIA Pet. at 5; CTIA Reply at 6. Moreover, although the FCC requires that MSS be “commercially  
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doing, acquire access to valuable spectrum for terrestrial services. Moreover, there is nothing in the Commission's gating criteria or rules that would restrict the ability of the MSS licensee from devoting the vast majority of its "MSS" spectrum to more valuable nationwide terrestrial use. ICO's prior statement that "heavy-handed regulatory oversight is unnecessary" because "[t]he ATC gating criteria . . . effectively require NGSO MSS licensees to invest billions of dollars," and therefore the licensees "have natural economic incentives to provide quality satellite services," is thus directly called into question by the NGSO-to-GSO trend.<sup>17</sup>

Completely lost in the rush from NGSOs to GSOs is the rural service objective. The complete abandonment of NGSO constellations by 2 GHz MSS proponents undermines the FCC's conclusion that further regulatory intervention is not needed to ensure the maintenance of "substantial" satellite service,<sup>18</sup> and raises serious questions about the adequacy of satellite service to rural areas.

Third, the trend undermines the Commission's separate but unsupported conclusion that MSS ATC licensees would not be unjustly enriched.<sup>19</sup> Clearly, where the added value of terrestrial rights vastly outstrips the cost of constructing and launching a single GSO satellite, there will be unjust enrichment.<sup>20</sup> While the *MSS ATC Order* also states that it would not be unjust to award ATC rights because MSS with ATC will not compete directly with terrestrial CMRS, the FCC has already found that MSS and terrestrial CMRS compete in the mobile telephony segment.<sup>21</sup> The *MSS ATC Order*'s departure from this precedent without explanation is both unlawful, as Cingular has explained,<sup>22</sup> and erroneous. Whereas the *MSS ATC Order* states that operating, financial and cost characteristics between MSS with ATC and terrestrial

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available," there is no requirement that satellite service be provided to *actual* subscribers. See 47 C.F.R. § 25.149(b)(3); Cingular Pet. at 3-4. The FCC effectively conceded this point before the D.C. Circuit. See Brief of Appellee, *AT&T Wireless Services, Inc. et al. v. FCC*, No. 03-1042, at 28 n.8 (D.C. Cir. filed Jan. 22, 2004).

<sup>17</sup> Consolidated Opposition of ICO Global Communications (Holdings) Limited at 5 (filed Aug. 20, 2003) ("ICO Opp.").

<sup>18</sup> See *MSS ATC Order*, 18 F.C.C.R. at 1982.

<sup>19</sup> See *MSS ATC Order*, 18 F.C.C.R. at 2071-72.

<sup>20</sup> Cf. 47 U.S.C. § 309(j)(3)(C).

<sup>21</sup> See Cingular Pet. at 23 & n.74 (citing precedent); cf. *2 GHz MSS Order*, 15 F.C.C.R. at 16128 ("The 2 GHz MSS systems also will enhance competition in mobile satellite and terrestrial communications services.").

<sup>22</sup> See Cingular Pet. at 23 and Cingular Reply at 2 n.4.

CMRS are too different to be close substitutes,<sup>23</sup> current MSS-only voice offerings belie that conclusion. For example, a Globalstar phone offering voice telephony service is available today new for \$645 and refurbished for \$399, and per minute rates run as low as fifteen cents depending upon the plan chosen.<sup>24</sup>

Fourth, ICO's application to convert to a single GSO satellite highlights the need for reconsideration of one other important aspect of the Commission's *MSS ATC Order*. In their petitions, Cingular and CTIA sought clarification that the Commission did not intend Footnote 229 of the *MSS ATC Order* to exempt PDAs from the integrated service requirement.<sup>25</sup> The petitions explained that if PDAs, laptops or other computers are not subject to the integration requirement, then potentially significant terrestrial services could be provided on a stand-alone basis, particularly in light of the ambiguity over what constitutes a PDA for devices that provide data and voice capabilities. ICO opposed the request in order to preserve its ability to avoid having to integrate satellite communications capability directly into ATC-capable PDA devices used for voice and data.<sup>26</sup> In its recent application, ICO states that its proposed GSO satellite is designed to work with a variety of user terminals, including a "personal accessory device" connected to a PDA.<sup>27</sup> ICO's application highlights the need for the Commission to resolve the PDA issue to make clear that PDAs (including those that can be used for voice service) must satisfy the integrated service requirement.

Finally, the trend toward single GSO satellites focusing coverage on the U.S. market makes even more direct the standing of terrestrial CMRS carriers to contest the Commission's rules providing for MSS ATC offerings. MSS and terrestrial CMRS providers are currently competitors in the mobile telephony market.<sup>28</sup> Moreover, terrestrial CMRS carriers provide extensive service to many of the same market segments that will be targeted by MSS ATC licensees, including the public safety<sup>29</sup> and the consumer markets.<sup>30</sup> These MSS ATC services

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<sup>23</sup> See *MSS ATC Order*, 18 F.C.C.R. at 2072.

<sup>24</sup> See <<http://www.outfittersatellite.com/globalstar.htm>>, visited Jan. 25, 2005.

<sup>25</sup> See Cingular Pet. at 12; CTIA Pet. at 7-8.

<sup>26</sup> ICO Opp. at 3-4.

<sup>27</sup> ICO Mod. App., Att. A at 12.

<sup>28</sup> See *supra* notes 21-24 and accompanying text.

<sup>29</sup> See *MSS ATC Order*, 18 F.C.C.R. at 1975 ("MSS ATC may enhance competition in some of the important niche markets that MSS serves, including the . . . commercial-transportation and public-safety markets that rely on MSS."). Public safety and law enforcement organizations are a key target market for MSS, but their usage today is largely limited to remote areas. *MSS ATC Order*, 18 F.C.C.R. at (continued on next page)

will be in direct competition with the services that terrestrial CMRS licensees provide to public safety<sup>31</sup> and consumers.<sup>32</sup> MSS operators have indicated that the provision of terrestrial service is critical to their survival,<sup>33</sup> and if they are successful in competing for even a *de minimis* amount of terrestrial CMRS customers as a result of the ATC rules,<sup>34</sup> terrestrial CMRS operators will suffer competitive harm.<sup>35</sup> Under these circumstances, there can be no question that CMRS carriers would be adversely affected by the failure to grant reconsideration.<sup>36</sup>

In sum, although the FCC conceived of ATC as a terrestrial exception to the “substantial satellite service” requirement, the loopholes in the *MSS ATC Order* allow the exception to swallow the rule. Such overbreadth is error, especially in view of the fact that petitioners have put forward a more tailored approach.<sup>37</sup> Recent developments also call into question the

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1978; *see id.* at n.62. ATC will allow these organizations to use service provided by an MSS licensee even in densely populated urban areas. *See id.* at 1978.

<sup>30</sup> *Id.* at 1975.

<sup>31</sup> The Commission, for example, has recently observed that “federal, state and local government public safety organizations are increasingly using CMRS systems.” *VoiceStream Wireless Corp.*, 17 F.C.C.R. 6134, 6135 (2002) (citations omitted).

<sup>32</sup> The Commission’s unsupported conclusion that financial and costs characteristics between MSS with ATC and terrestrial CMRS are too different for the two to be direct competitors, *MSS ATC Order*, 18 F.C.C.R. at 2072, is erroneous. *See supra* notes 23-24 and accompanying text. Even assuming, *arguendo*, the FCC is correct that MSS with ATC and terrestrial are imperfect substitutes, it has acknowledged that the two will compete directly for consumers requiring enhanced services. *MSS ATC Order*, 18 F.C.C.R. at 1986.

<sup>33</sup> *See supra* note 12.

<sup>34</sup> *See MSS ATC Order*, 18 F.C.C.R. at 2072 (conceding there will be “some competition” between MSS with ATC and terrestrial CMRS); *id.* at 1986 (acknowledging the ability of MSS with ATC to take at least some subscribers from terrestrial wireless providers).

<sup>35</sup> *See United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (the extent of the injury suffered is generally immaterial to the question of injury in fact; an “identifiable trifle” will suffice).

<sup>36</sup> *See FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476-77 (1940) (recognizing the doctrine of competitor standing).

<sup>37</sup> *See United States Telecom Association v. FCC*, 359 F.3d 554, 571 (2004) (“[A] rule is irrational . . . if a party has presented to the agency a narrower alternative that has all the same advantages (continued on next page)

commitment of MSS licensees to provide “substantial” satellite service. Unless the FCC corrects the order, only token satellite service will be required. Thus, MSS’s promise of service to rural and underserved areas of America will not be realized. For the foregoing reasons, the Commission must (i) substantially limit the amount of bandwidth that can be utilized by MSS licensees for ATC, (ii) require that customer equipment “look first” to the satellite to complete a connection, and (iii) prohibit ATC-only subscriptions.<sup>38</sup>

Pursuant to Section 1.1206(b)(1) of the Commission’s rules, this letter is being filed electronically. If you have any questions concerning this submission, please contact the undersigned.

Respectfully submitted,

/s/ Brian F. Fontes

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and fewer disadvantages, and the agency has not articulated any reasonable explanation for rejecting the proposed alternative.”).

<sup>38</sup> See Cingular Pet. at 8-11; CTIA Pet. at 3-6; CTIA Reply at 3-4, 7.