

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

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

COMMENTS OF AT&T WIRELESS SERVICES, INC.

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COMMENTS OF AT&T WIRELESS SERVICES, INC.

Pursuant to the Commission's August 17, 2001, Notice of Proposed Rulemaking ("NPRM"),^{1/} AT&T Wireless Services, Inc. ("AWS") hereby submits its comments in the above-captioned proceeding. In light of the critical need for new terrestrial spectrum to meet ever-growing consumer demand for wireless services (including next generation services), AWS strongly supports the reallocation of at least a portion of the mobile satellite service ("MSS") band for terrestrial use and the licensing of such spectrum through an auction open to all interested bidders.

INTRODUCTION AND SUMMARY

In the NPRM, the Commission acknowledges the significant underutilization of spectrum allocated for MSS and appropriately asks what can be done to increase efficiency in these bands. The answer is not, as some MSS operators propose, to offer the satellite industry a gift of

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

nationwide spectrum licenses to compete unfairly in the terrestrial market. As the Commission has already acknowledged, permitting terrestrial use of satellite spectrum amounts to a new allocation of such frequencies. The free grant of these frequencies to MSS operators would manifestly disserve the public interest, both by squandering a valuable and scarce public resource and by vastly distorting the competitive market for terrestrial wireless services. The terrestrial allocation of MSS spectrum should instead be opened to all interested parties, with competing applications resolved through an auction.

Preferential treatment of MSS licensees would give them a substantial and unjustified market advantage over providers of commercial mobile radio service (“CMRS”) that have paid billions of dollars for their spectrum. It would reward and even perpetuate inefficient use of MSS frequencies, rather than ensuring that this scarce resource is put to its highest and best use by making it available to CMRS providers who face significant spectrum constraints. And it would do little to prop up the faltering MSS business or promote service to rural and underserved consumers. Indeed, attempts to subsidize MSS through regulatory fiat could actually hasten its demise.

Terrestrial use of the MSS band cannot be characterized as merely “ancillary.” The proposals put forward by New ICO Global Communications (Holdings) Ltd. (“New ICO”) and Motient Services Inc. (“Motient”) demonstrate clearly that the terrestrial offering would be wholly separate from the satellite services for which that spectrum is currently allocated. New ICO and Motient admit that terrestrial and satellite channels would be assigned non-overlapping spectrum and that the vast majority of their terrestrial subscribers would complete calls without ever using a satellite. The economic characteristics of their proposals -- with terrestrial

Serv., IB Docket No. 01-185, ET Docket No. 95-18, *Notice of Proposed Rulemaking*, 16 FCC

operations providing the bulk of the supposedly “integrated” network’s profits, while the MSS segment generates most of the costs -- create a further incentive to segregate the terrestrial and satellite systems and would likely lead them to downgrade or even abandon the latter. Given the separate technical and economic characteristics of MSS and CMRS, a requirement that the MSS licensees commence or maintain satellite operations as a condition of offering terrestrial service would be difficult to enforce and unlikely to prevent such atrophy. Even if the Commission were to impose such conditions, it has not explained how it could handle rationally the lapses in satellite coverage that will almost certainly occur down the road.

Rather than allocating additional free spectrum to entities that have failed to use the spectrum already assigned to them, the Commission should allow the market to determine the most efficient use of the bands. As the Commission has recognized, auctions not only promote efficient use of spectrum better than any other method of awarding licenses by putting spectrum in the hands of those that value it most, they encourage innovation, foster the rapid deployment of new technologies and services, and compensate the public for use of a valuable resource. That is why Congress requires the Commission to distribute wireless licenses pursuant to competitive bidding in almost every circumstance. Both the law and the public interest militate strongly in favor of allowing all interested parties to compete fairly for these valuable spectrum licenses rather than simply giving them away in an attempt to bolster a floundering industry.

The Commission’s obligation to distribute licenses to any newly reallocated spectrum is not restricted by the Open-Market Reorganization for the Betterment of International Telecommunications Act (“ORBIT”). ORBIT merely prohibits the auction of spectrum to be used for international or global satellite service. This prohibition was grounded largely in a

Rcd 15532 (2001) (“NPRM”).

concern that domestic auctions for satellite authorizations would trigger similar auction requirements in other nations that would in turn severely hinder satellite development and deployment. ORBIT is irrelevant here because any spectrum reallocated for terrestrial use would, by definition, not be used for satellite service. To the contrary, the Communications Act and sound Commission precedent require that terrestrial rights to MSS spectrum be made available to any party that wants to compete for it at auction.

I. THE GRANT OF EXCLUSIVE TERRESTRIAL RIGHTS TO MSS LICENSEES WOULD BE UNLAWFUL AND UNWISE

Under applicable law and precedent, the Commission may not simply declare that spectrum allocated for MSS use is available to MSS licensees to offer terrestrial services by deeming such an expanded function to be a permissible use of an existing allocation. Rather, section 303(y) of the Communications Act permits the Commission to provide for such “flexibility of use” only if it makes an affirmative finding after public notice and comment that flexibility will further the public interest and will not deter investment in communications services and systems.^{2/} In light of the enormous and unmerited windfall that the free grant of terrestrial rights would bestow on MSS operators in a time of spectrum scarcity, and the harm it would cause to terrestrial licensees that had to compete at auction for their spectrum, section 303(y) does not authorize the Commission to confer such flexibility on MSS licensees unilaterally.

A. The Public Interest Would Not Be Served by a Grant of Free Spectrum to an Industry Whose Prospects are Uncertain At Best

New ICO and Motient argue that grant of their terrestrial proposals would further the public interest because it would assure the commercial viability of MSS and promote the

^{2/} 47 U.S.C. § 303(y).

Commission's goal of bringing advanced services to rural and underserved areas. Neither of these premises can withstand scrutiny.

As a threshold matter, a review of the proposals put forward by New ICO and Motient demonstrate clearly that the terrestrial offering would be wholly separate from the satellite services for which that spectrum is currently allocated. As New ICO admits, the terrestrial and satellite channels would be assigned non-overlapping spectrum, and urban consumers would be able to complete calls without ever leaving the terrestrial portion of the network.^{3/} The economic relationship between the offerings would only reinforce this segregation. The terrestrial services provided in the segmented part of the band would independently produce the vast majority of MSS providers' profits, while the satellite operations would draw little or no revenue and generate most of the system's costs.^{4/} Such an imbalance would provide strong economic incentives -- possibly imperatives -- for MSS providers to supplant MSS with terrestrial service as their primary or even sole service.

This proposed lack of system integration removes any doubt that terrestrial use rights for MSS spectrum are a separate allocation for which any interested party should be able to compete through an auction.^{5/} In the context of section 303(y), the separateness of the terrestrial offering undermines New ICO's and Motient's arguments that a gift of free spectrum for terrestrial use

^{3/} See NPRM, ¶ 11 (Noting that under New ICO's proposal "it appears that the MSS operator would assign separate channels to the terrestrial and satellite portions of the network to meet traffic demands and that a call could originate and terminate on one part of the network (e.g., terrestrial) without being carried on the other part of the network (e.g., satellite)"); Letter from Lawrence H. Williams, New ICO Global Communications (Holdings) Ltd. to FCC Chairman Michael Powell, Mar. 8, 2001, at Appendix B 3-4, 6-7 ("New ICO Letter").

^{4/} See New ICO Letter at 1-6; *In the Matter of Motient Servs. Inc. and Mobile Satellite Ventures Subsidiary, LLC for Assignment of Licenses and Authority to Launch and Operate a Next-Generation Mobile Satellite Serv. Sys.*, File No. SAT-ASG-20010302-0017, at ii-iii, 12-13 (filed Jan. 16, 2001) ("Motient Application").

^{5/} See Section II, *infra*.

would permit them to serve rural America more effectively. If competing in the urban terrestrial market generates the bulk of revenues for MSS providers, the correct economic choice will be to reinvest profits in that business. There is no reason to believe that MSS operators would devote the resources necessary to sustain a separate satellite system used only to serve rural customers, or that rural customers would be willing or able to pay the premium necessary to support enhanced satellite service. Nor have New ICO or Motient demonstrated that grant of their requests would generate sufficient demand for MSS to drive down handset costs.

Notwithstanding these economic realities, the Commission suggests that ensuring the survival of MSS service as the primary service in an “integrated” system might be possible if it imposes certain satellite coverage and capability threshold requirements.^{6/} This is easier said than done. Even if the Commission could rationally determine the appropriate level of MSS coverage that should be required prior to the commencement of terrestrial service, it is not clear what consequences should attach to partial or permanent lapses in satellite coverage caused by technical failure or obsolescence of a satellite (or any other reason). Rescinding authority to provide terrestrial service is one solution proposed in the NPRM, but the Commission does not explain how it would deal with existing “MSS” customers that use only terrestrial facilities or with on-going enterprises that have come to rely on terrestrial service as their primary source of revenue. Attempts to promote flexibility based on the artificial constructs of system integration and ancillary service ultimately would prove difficult to police and impossible to undo.

Not only would this level of regulatory oversight be an ineffective and costly means of propping up the MSS industry, it is entirely unnecessary because MSS providers can obtain supplementary terrestrial service through partnerships with existing CMRS providers or with

^{6/} NPRM, ¶¶ 32, 41-49.

entities that obtain terrestrial spectrum through future auctions. Indeed, MSS providers have already successfully partnered with CMRS providers to address the signal problems in urban areas that MSS operators cite as the primary reason for the failure of MSS. Motient, for instance, notes that it has successfully implemented a satellite paging service by using the existing terrestrial network that it acquired through its merger with ARDIS,^{7/} and New ICO's controlling shareholder also controls a national terrestrial CMRS provider -- Nextel Communications, Inc. ("Nextel").^{8/} Similarly, Celsat has proposed to rely on commercial arrangements to overcome signal problems and extend coverage to urban areas.^{9/} If MSS providers want to offer their own terrestrial services, they would not be precluded from participating in an auction for terrestrial authorizations on the MSS band.

It is also significant that there is far from unanimous agreement within the MSS industry itself regarding the effectiveness or advisability of the proposed "integrated" service -- even if implemented on the MSS providers' proposed terms -- as a means of ensuring the survival of MSS. Indeed, Globalstar's Chairman, Olof Lundberg, recently stated that MSS "will never be perceived by the average customer as a general product," and is more appropriately characterized as a niche provider of various specialized services.^{10/} Mr. Lundberg further noted that proponents of MSS/terrestrial use have "tended to oversell the opportunity -- that this is a

^{7/} Motient Application at 12.

^{8/} See *McCaw's Decision To Abandon Iridium Darkens Survival Prospects for Bankrupt Company*, *Satellite Today*, Col. 3, No. 42, Mar. 6, 2000 (noting Craig McCaw's interests in various companies including New ICO and Nextel); *Nextel Communications Inc.*, Company Intelligence Database, Business Rankings Annual, Gale Group; Thomson Financial, 2001.

^{9/} See NPRM, ¶ 27 (citing Letter to Magalie Roman Salas, Secretary, Federal Communications Commission from Brian Weimer, Skadden, Arps, Slate, Meagher & Flom LLP (December 9, 1999)).

^{10/} See Lynnette Luna, *Live Via Satellite*, *Telephony*, Sept. 17, 2001, at 28.

blessing for mankind that can solve poverty and the digital divide.”^{11/} Iridium has similarly recognized the narrow appeal of MSS by acknowledging a need to focus on certain specialized markets.^{12/} Accordingly, there is substantial doubt about whether an MSS/terrestrial service, even under the ideal (but unlikely) circumstances in which it remains the primary service, would sufficiently broaden the subscriber base to ensure MSS survival.

B. Inefficient Spectrum Use Harms Consumers

New ICO’s and Motient’s concessions that MSS has not proven to be an economically viable enterprise are clearly accurate.^{13/} Despite a massive investment of financial resources and ample deployment time, MSS providers have been unable to establish the stable and efficient business models necessary to make full and effective use of their spectrum.^{14/} New ICO (collectively with Teledisic) has lost \$985 million dollars and was forced to file for bankruptcy in 1999.^{15/} Iridium similarly declared bankruptcy despite investing more than \$5 billion in its satellite system.^{16/} Although temporarily revived through new ownership, analysts believe that

^{11/} See *id.*

^{12/} See *id.*

^{13/} See New ICO Letter at 1-2 (“[D]ue to the failures of early MSS projects and the instability of the telecom and satellite financial markets,” the viability of the MSS industry “is in dire jeopardy”) (emphasis omitted); *id.* at 3-4 (describing the financial woes of various MSS providers); Motient Application at 12-13.

^{14/} See Lynnette Luna, *Live Via Satellite*, Telephony, Sept. 17, 2001 at 28 (asserting that “the entire MSS industry is still dangerously close to permanent collapse” because, as “all MSS providers” now recognize, “satellite phones are not mass-market products”); Malcolm Spicer, *Mobile-Satellite Providers Get Toll-Free Access*, Wireless Insider, Jul. 23, 2001; *MSS Hopefuls Get Ok to Deploy Sys. in 2 GHz Band Despite Wireless Opposition*, Satellite News, Jul. 23, 2001; Andrew Backover and Paul Anderson, *8 Companies Get Free Spectrum Licenses*, USA Today, Jul. 17, 2001 (“Satellite service has produced some big failures”).

^{15/} See Sharon Pian Chan, *Satellite Firms Link Up: McCaw’s New ICO, Ellipso Partners in Telecom Network*, Seattle Times, Mar. 15, 2001, at C1.

^{16/} See David Barbozza, *Iridium, Bankrupt, Is Planning a Fiery Ending for Its 88 Satellites*, N.Y. Times, Apr. 11, 2000, at C1.

lack of demand for satellite phone services is likely to doom Iridium's new effort.^{17/} Globalstar also has been threatened by bankruptcy, and MSS provider Mobile Communications Holdings, Inc. (the Ellipso System) recently lost its license as a result of its failure to meet a construction milestone.^{18/} In these circumstances, the MSS providers' proposals for a regulatory bailout present the question of whether the Commission should throw good spectrum after bad by continuing to subsidize an industry that is admittedly unable to utilize effectively the spectrum already allocated to it.

The answer to that question is plainly no, especially in light of the existence of already successful commercial services that are in dire need of spectrum to continue their rapid growth. In sharp contrast to MSS, there is strong consumer demand for CMRS, and CMRS providers possess the ability to make use of this spectrum efficiently and with little lead time. The spectrum currently allocated for CMRS, however, is utterly inadequate to meet future consumer demands.^{19/} The scope of this increasingly urgent need for new spectrum is illustrated by the

^{17/} See Carmen Nobel, *New Satellite Serv. Rises from Ashes*, eWEEK, Apr. 2, 2001.

^{18/} *Globalstar Reveals Mounting Woes That May Spur Involuntary Bankr. Within Months*, Satellite News, Apr. 9, 2001; *Globalstar Telecomms. Ltd.: Layoff Plans are Announced as Cash Reserve Dwindles*, Wall Street Journal, Aug. 14, 2001, at B4 (asserting that Globalstar's cash reserves will only support operation through the end of the year); *Ellipso Loses Its LEO License*, Interspace, Iss. 270 (June 6, 2001).

^{19/} See *In the Matter of Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Servs. to Support the Introduction of New Advanced Wireless Servs., Including Third Generation Wireless Sys., Notice of Proposed Rulemaking and Order*, FCC 00-455 (rel. Jan. 5, 2001) ("Allocation of Spectrum Below 3 GHz NPRM"); *Principles for Reallocation of Spectrum to Encourage the Dev. of Telecomms. Technologies for the New Millennium, Policy Statement*, 14 FCC Rcd 19868, 19870 (1999) ("Spectrum Policy Statement") (noting the existence of "very little unencumbered spectrum . . . for new services" and indicating that one of the Commission's primary spectrum policy priority is promoting greater efficiency in spectrum markets); Office of Engineering and Technology, Mass Media Bureau, Wireless Telecommunications Bureau and International Bureau, Federal Communications Commission, *Spectrum Study of the 2500-2690 MHz Band, The Potential for Accommodating Third Generation Mobile Sys.*, Final Staff Report, Public Notice, DA 01-786, <http://www.fcc.gov/3g/> (rel. Mar. 30, 2001) ("FCC Spectrum Report"); see also NTIA, U.S.

explosive growth in personal cell phone use in the domestic market over a period of less than a decade. In 1994, 16 million Americans subscribed to cellular phone services.^{20/} That number has now risen to approximately 122 million and penetration of the domestic market is expected to increase further to 70 percent.^{21/} Moreover, as the Commission hoped, many CMRS providers, including AWS, are developing a variety of 3G services, which will be rolled out within the next few years.

Although these new advanced services, coupled with the ever-increasing demand for voice services, make the availability of spectrum crucial to CMRS providers, bandwidth is becoming harder, rather than easier, to obtain today. It is not clear whether additional spectrum currently allocated for government use (*i.e.*, DoD spectrum) will be freed for commercial use,^{22/} and the Commission just ended consideration of the MMDS/ITFS bands for such use.^{23/} In light of this severe spectrum drought, the Commission has identified efficiency as one of its highest priorities in making allocation decisions.^{24/} Rather than expand the subsidization of a technology

Dept. of Comm., *The Potential for Accommodating Third Generation Mobile Sys. in the 1710-1850 MHz Band: Federal Operations, Relocation Costs, and Operational Benefits*, Final Report (rel. Mar. 30, 2001) (“NTIA Spectrum Report”).

^{20/} *GAO Says More Research Needed: None*, Network World, July 2, 2001.

^{21/} *Id.*; Jennifer Davies, *Cell-Phone Industry Not Hurt By Sell-Off This Week*, San Diego Union-Tribune, Sept. 20, 2001 (placing current subscribership at about 120 million); Margaret McHugh, *Stocks Get Boost with First Hints of Growing Trend*, Newark Star-Ledger, Sept. 19, 2001 (citing CTIA for subscribership number of approximately 122 million).

^{22/} *See generally* FCC Spectrum Report; NTIA Spectrum Report.

^{23/} *See generally* Allocation of Spectrum Below 3 GHz NPRM; *Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690 MHz Frequency Bands for the Mobile Satellite Serv.*, ET Docket No. 00-258, RM 9911, First Report and Order and Memorandum Opinion and Order, FCC 01-256, (Sept. 24, 2001).

^{24/} *See* Allocation of Spectrum Below 3 GHz NPRM; Spectrum Policy Statement at 19870 (noting the existence of “very little unencumbered spectrum . . . for new services” and indicating that one of the Commission’s primary spectrum policy priority is promoting greater efficiency in spectrum markets); FCC Spectrum Report at 1-5; NTIA Spectrum Report at 13-15.

for which there is little demonstrated demand or successful economic infrastructure, the Commission should reallocate MSS spectrum for terrestrial wireless use and allow the market to determine its most efficient use through competitive bidding. If MSS providers wish to deploy such services actually develop a viable economic model, they will be able to obtain the financing necessary to succeed at auction or will be able to partner with terrestrial wireless providers to provide the type of integrated services they propose. If not, then it is in the public interest for other, more efficient, users to obtain and make use of this spectrum.

C. Providing One Segment of the Communications Industry with a Significant Competitive Advantage Would Hinder the Recovery of Past Investments and Distort Future Investment Decisions

As discussed above, economic incentives militate in favor of terrestrial service either supplanting unprofitable MSS or replacing such service entirely. Even if a licensee begins operations with both an MSS and a terrestrial component, there is a good chance that the satellite service would not have significant staying power. Satellites have a relatively short life span and are very expensive to launch. Thus, if there is little demand and little revenue coming from the MSS operations, there would be a corresponding lack of incentive on the part of the licensee to pursue continued launches. Even if the satellite portion of the MSS network were to survive, demand would quickly relegate it to “ancillary” status, at best. This would mean that “MSS/terrestrial” providers ultimately would become terrestrial wireless providers while retaining all of the benefits provided by their initial status as MSS providers.

Among those benefits would be access to nationwide blocks of spectrum without compensation to the public. Because existing competitors in the terrestrial wireless market had to pay for spectrum used to provide the same services, such a policy would severely distort the CMRS marketplace. The lower cost of providing terrestrial wireless enjoyed by MSS providers

would hinder CMRS providers' ability to recover investments in their networks and discourage otherwise economically rational investment in the future. In addition, such a system would reward inefficient investment and business decisions made by MSS providers that have been unable in the past to develop a workable model for MSS despite the provision of free spectrum, the investment of billions of dollars, and an extensive deployment period.

It would also be very difficult to remedy the economic distortions introduced by such a gift of spectrum. Should MSS providers again fail to make their proposed integrated systems financially viable, prior experience teaches that it may not be easy for the Commission to reclaim such spectrum and redistribute it for more efficient purposes.^{25/} Indeed, the Commission's experience with digital television illustrates the problems that the Commission could encounter in trying to retrieve spectrum if MSS continues to falter. The Commission, for instance, has approved a plan that would permit broadcasters to vacate spectrum allocated for digital use in return for payment by new users, despite the fact that those broadcasters received their digital spectrum for free.^{26/} Recognizing that the public (rather than private companies) should be compensated for the use of a private benefit, Senator John McCain characterized the digital

^{25/} See, e.g., Christopher Stern, *NextWave, FCC Discuss Settlement: Telecom Firm May Get \$5 Billion for Airwaves*, Wash. Post, at E01, Sept. 21, 2001 (noting that NextWave stands to "reap a multibillion dollar payout, although the company has yet to serve a single customer" and paid only \$500 million dollars of the \$4.8 billion dollars that it bid to gain access to the spectrum).

^{26/} See Cablefax, Vol. 12, Issue 181, Sept. 18, 2001 (stating that the FCC's recent decision to allow broadcasters to clear certain digital spectrum would allow Paxson "to make billions of dollars selling the spectrum the government gave to [Paxson]" and asserting that the company "basically . . . held a gun to the FCC's head, saying [it] would leave the spectrum early, freeing it for the wireless industry, *for a price.*") (emphasis added).

spectrum give-away as “one of the great rip-offs in American history,”^{27/} The Commission should avoid repeating this experience in the MSS context.

For the foregoing reasons, the Commission cannot reallocate MSS spectrum for supposedly integrated terrestrial use by MSS providers consistent with the dictates of section 303(y). Conferring free spectrum upon a single, favored industry sector that has a dismal track record so that the providers of MSS may compete directly in the terrestrial wireless market with competitors that had to pay billions of dollars to obtain their spectrum would not be in the public interest and would deter investment in, and deployment of, new communications technology and services.

II. MSS SPECTRUM REALLOCATED FOR TERRESTRIAL USE MUST BE LICENSED BY COMPETITIVE BIDDING

If the Commission reallocates MSS spectrum for terrestrial use (as it should), it is required to license these bands by auction. Both Congress and the Commission have emphasized that, whenever possible, the market is far better than regulators at allocating resources efficiently, encouraging productive technological innovation, and governing market development.^{28/}

^{27/} See Erick Glick, *Former Presidential Candidate, A Potential Telecom Ally?*, *Wireless Week*, Apr. 2, 2001, at 19.

^{28/} See *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24014 (1988) (asserting that the Commission’s role “is not to pick winners or losers, or select the ‘best’ technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers.”); *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, Docket No. 98-146, Report, 14 FCC Rcd 2398 ¶ 5 (1999) (noting that the Commission’s role is not to select technological winners and losers and that it “intends to rely as much as possible on free markets and private enterprise”); *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Dev. of Secondary Mkts.*, Policy Statement, 15 FCC Rcd 24178 ¶ 8 (2000) (“[T]he best way to realize the maximum benefits from the spectrum is to permit and promote the operation of market forces in determining how spectrum is used”). Cf. H.R. 2264, 103d Cong., 139 Cong. Rec. H3088

Accordingly, Section 309(j)(1) of the Communications Act requires that licenses for terrestrial wireless service be distributed through competitive bidding when mutually exclusive applications are accepted. Auctions may only be avoided if the Commission determines that mutual exclusivity would not be in the public interest.^{29/} In the instant situation, such a case cannot be made. The benefits of competitive bidding -- including efficient allocation of spectrum, compensation for the use of a valuable public asset, and minimal regulatory involvement in the selection of business plans -- far outweigh any speculative benefits stemming from the conferral of free spectrum upon certain favored competitors.^{30/} Moreover, because the licenses being distributed would be for terrestrial rather than satellite use, ORBIT would not preclude an auction.

A. It Is Not in the Public Interest To Avoid Mutual Exclusivity

In light of the overwhelming demand for spectrum, there is no doubt that multiple applications would be filed for any spectrum reallocated for terrestrial use. The Commission, therefore, is required by Section 309(j)(1) to distribute licenses for such spectrum by a system of competitive bidding unless it determines that mutual exclusivity would not further the public interest.^{31/} As the Commission has repeatedly recognized by its reliance on auctions, grant of

(1993) (enacted) (finding that “a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment and produce revenues and produce revenues to compensate the public for use of the public airwaves’); H.R. Conf. Rep. No. 103-213, at 481 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1173, (incorporating such findings by reference).

^{29/} 47 U.S.C. 309(j).

^{30/} See H.R. 2264, 103d Cong., 139 Cong. Rec. H3088 (1993) (enacted) (listing benefits of competitive auction); H.R. Conf. Rep. No. 103-213, at 481 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1173, (incorporating such findings by reference).

^{31/} See 47 U.S.C. 301(j)(1); 309(j)(6)(e); *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 9 FCC Rcd 2941 ¶¶ 4-6 (1994).

licenses through a system of competitive bidding provides numerous public benefits,^{32/} including “speed[ing] the development and deployment of new services . . . and encourag[ing] efficient use of the spectrum” by placing licenses in the hands of “those parties who value them most highly” and are therefore most likely to “introduce service rapidly to the public.”^{33/}

The Commission also has noted that auctions promote innovation by leaving delicate and ever-changing determinations regarding the likelihood of success of new products or technologies to the market rather than to a well-intentioned but inflexible and distant regulatory mechanism.^{34/} In contrast, reallocating spectrum without auctioning it would effectively substitute the Commission’s will for the market’s more efficient mechanisms. Finally, relying on the market for licensing decisions frees regulatory and industry resources that would otherwise be devoted to such determinations, and directly compensates the public for use of a very scarce and valuable asset.^{35/}

The proposed alternative to this preferred licensing mechanism -- playing regulatory favorites by conferring free spectrum for the exclusive use of carriers that have failed to utilize spectrum already allocated to them -- provides no benefits that would justify rejection of the

^{32/} Services that have been auctioned include: (1) narrowband and broadband Personal Communications Services; (2) Public Mobile Services; (3) 218-219 MHz Service; (4) Specialized Mobile Radio Services; (5) Private Carrier Paging Service; (6) General Wireless Communications Service; (7) Local Multipoint Distribution Service; (8) Wireless Communications Service; (9) Digital Audio Radio Service; (10) Direct Broadcast Service; (11) 220-222MHz radio service; (12) Location and Monitoring Service; and (13) VHF Public Coast Stations. *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended*, 14 FCC Rcd 5206 ¶ 8 (1999). The Commission has also completed its auction of the 700 MHz Guard Band and has announced upcoming auctions of (1) 700 MHz Band, (2) Limited Low Power Television, and (3) 24 GHz Band (“DEMS”).

^{33/} *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 9 FCC Rcd 2941 ¶ 6.

^{34/} *See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended*, 14 FCC Rcd 5206 ¶ 7 (1999).

auction mechanism. As indicated above, there is no reason to believe that the primary purpose of subsidizing MSS providers would have the desired result of increasing service to rural and other underserved areas because there is no reason to believe that such a subsidy would actually sustain MSS operations in the long run. This is especially the case as existing CMRS providers are already moving to meet the needs of rural consumers and, in light of their existing and well-established networks, are likely to be able to provide more rapid deployment and stable service than MSS providers. Certainly, the questionable at best benefits touted now by New ICO and Motient do not outweigh the costs of forgoing competitive bidding in this case.

B. ORBIT Does Not Bar Competitive Bidding for Terrestrial Licenses

Any concern that the auction of spectrum newly allocated for terrestrial use would be precluded by ORBIT is unfounded. ORBIT's bar on competitive bidding applies only to spectrum used to provide satellite service and therefore has no impact on spectrum allocated for terrestrial use. ORBIT provides that "the Commission shall not have the authority to assign by competitive bidding *orbital locations or spectrum used for the provision of international or global satellite communications services.*"^{36/} This restriction on the Commission's ability to require competitive bidding is thus expressly limited by the terms of the statute to spectrum *to be used for* international satellite service.

The purpose of ORBIT's limitation on auctions is to address a specific problem unique to satellite services -- the need to obtain licenses in multiple countries because of the global nature of such services. Specifically, Congress wished to avoid triggering a situation in which MSS providers would be required to bid for spectrum in numerous jurisdictions, creating the potential for long delays in obtaining licenses and exponentially increasing the costs of providing

^{35/} *See id.*

service.^{37/} There is no such concern in the instant context because to the extent the spectrum in question is reallocated for terrestrial use, the allocation would apply (and auctioning would occur) solely within the United States.

The Commission itself has recognized that ORBIT presents no bar to the auction of terrestrial licenses for frequencies also being used by satellite operators. In a recent proceeding concerning the use of satellite spectrum for terrestrial service, the Commission expressly rejected Northpoint Technology Ltd.'s contention that ORBIT's prohibition extended to non-satellite services using spectrum allocated for global satellite service.^{38/} The Commission asserted that "the statute does not prohibit the Commission from auctioning licenses for non-satellite services,"^{39/} and that when it "establishes a terrestrial service . . . the ORBIT Act is not a bar to

^{36/} 47 U.S.C. § 765(f) (emphasis added).

^{37/} Although there is no explanatory statement in any of the hearings, committee reports or floor debates relating to ORBIT's prohibition of competitive bidding for satellite spectrum, legislative history relating to an identical provision in a precursor bill to the Act is illuminating. The Commerce Committee Report states: "The Committee believes that auctions of spectrum or orbital locations could threaten the viability and availability of global and international satellite services because concurrent or successive spectrum auctions in the numerous countries in which U.S.-owned global satellite service providers seek downlink or service provision licenses could place significant financial burdens on providers of such services. This problem would be compounded by the fact that the multi-year period required for design, construction and launch of global and international satellite systems usually requires service providers to invest substantial resources well before they obtain all needed worldwide licenses and spectrum assignments. The uncertainty created by spectrum auctions could disrupt availability of capital for such projects and significantly reduce the available benefits offered by global and international satellite systems." H.R. REP. NO. 105-494, at 64-65 (1998).

^{38/} *In the Matter of Amendment of Parts 2 and 2 of the Commission's Rules to Permit Operation of NGSO FSS Sys. Co-Frequency with GSO and Terrestrial Sys. in the Ku-Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7GHz Band by Direct Broadcast Satellite Licensees and their Affiliates and; Applications of Broadwave USC, PDC Broadband Corp. and Satellite Receivers, Ltd. to Provide a Fixed Serv. in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, RM-9147, RM-9245, *First Report and Order and Further Notice of Proposed Rule Making*, 16 FCC Rcd 4096 ¶ 326 (2000).

^{39/} *Id.*

auctioning licenses merely because the terrestrial service operates on the same frequencies as a satellite service.”^{40/}

In fact, the Commission has repeatedly auctioned or commenced auction proceedings for dual-use spectrum. For instance, it recently adopted rules for awarding licenses for terrestrial fixed service in the 24 GHz band, which is allocated for terrestrial fixed services and satellite service.^{41/} Similarly, spectrum was auctioned for terrestrial fixed service in the 39 GHz band, which was also allocated for shared terrestrial/satellite use.^{42/} The Commission further intends to auction licenses for fixed and mobile terrestrial services in a band (3650-3700 MHz) in which fixed satellite service operates,^{43/} and has expressly determined that “the assignment of licenses for terrestrial services by competitive bidding is not prohibited by the [ORBIT Act].”^{44/}

Nor does the purported use of the satellite spectrum for “ancillary” terrestrial services bring that spectrum within the scope of ORBIT’s exemption. As discussed above, the concept of an “integrated” satellite and terrestrial service is not realistic because the vast majority of customers would rely either primarily or entirely upon the terrestrial rather than satellite portion of the system and the majority of revenues would come from the terrestrial network. Even with the adoption of conditions designed to ensure continued and primary satellite coverage, attempts

^{40/} *Id.*

^{41/} *Id.* (citing *Amendment to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Servs. at 24* WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934 (2000)).

^{42/} *Id.* (citing *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order and Second Notice Proposed Rule Making, 12 FCC Rcd 18600 (1997) and *39 GHz Band Auction Closes*, DA 00-1035, Report No. AUC-30-E, Public Notice, 15 FCC Rcd 13648 (2000)).

^{43/} *Id.* (citing *39 GHz Report and Order*, 12 FCC Rcd 18600 (1997)).

^{44/} *Amendment of the Commission’s Rule with Regard to the 3650-3700 MHz Gov’t Transfer Band*, ET Docket No. 98-237; *The 4.9 GHz Band, Transferred from Federal Gov’t Use*, WT Docket No. 00-32, *First Report and Order and Second Notice of Proposed Rulemaking*, 15 FCC Rcd 20488 ¶ 20 n.64 (2000).

to relegate terrestrial operations to ancillary status would fly in the face of economic reality. The Commission should not expand ORBIT's exemption beyond Congress' clear intent based on an artificial construct that will crumble as soon as it meets the marketplace.^{45/}

CONCLUSION

For the foregoing reasons, AWS requests that the Commission reallocate MSS spectrum for terrestrial use and that this spectrum be licensed via competitive bidding open to all interested parties.

Respectfully submitted,

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^{45/} There is also no basis to find that the decision of the U.S. Court of Appeals for the D.C. Circuit in *National Public Radio v. FCC*, 254 F.3d 26 (D.C. Cir. 2001), is in any way applicable to the issues raised in this proceeding. NPRM, ¶ 39. In *National Public Radio*, the court held that Section 309(j)(2) denies the Commission the authority to use auctions for *any* licenses “issued . . . for . . . [noncommercial educational broadcasters].” *National Public Radio*, 254 F.3d at 227. Section 309(j)(2) does not discuss satellite licenses or applicants for satellite spectrum. Significantly, as explained above, ORBIT, which *is* applicable to satellite services, only prohibits the Commission from auctioning spectrum *used* for global satellite services. Thus, if the intended use of the spectrum is terrestrial CMRS (as New ICO and Motient propose), neither ORBIT nor *National Public Radio* (by implication) would preclude competitive bidding.

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