

**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)	ET Docket No. 95-18
Commission's Rules to Allocate Spectrum at)	
2 GHz for Use by the Mobile Satellite Service)	

REPLY COMMENTS OF VOICESTREAM WIRELESS CORPORATION

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VoiceStream Wireless Corporation (“VoiceStream”) submits this reply to the comments filed in this proceeding to investigate whether mobile satellite services (“MSS”) licensees should receive the authority to provide “ancillary terrestrial services” (“ATS”) using their satellite spectrum.

I. INTRODUCTION AND SUMMARY

MSS licensees have already received one large government subsidy: free radio licenses. Many (but not all) of them now want a second, even larger government handout — the ability to provide terrestrial service so they can use their free spectrum to compete with carriers like VoiceStream that have paid the U.S. treasury billions of dollars for use of its spectrum. As neutral parties observe, if approved, MSS licensees would enjoy “a competitive advantage” over ter-

restrial carriers, an advantage due solely to their access to free spectrum and an advantage that would distort competition in the mobile telecommunications sector.¹

The value of this new sought-after subsidy is enormous. The FCC recently gave away MSS licenses to eight different firms (including to firms that had forfeited other MSS licenses).² Based on the results of Auction No. 35, the collective value of this spectrum for New York City alone (if used for terrestrial rather satellite services) is over \$20 billion. Given that these eight firms were granted nationwide licenses, the collective value of this spectrum nationwide likely exceeds \$80 billion. No one can seriously contend that public interest is served by the government giving away \$80+ billion to private companies and their investors (*e.g.*, Bill Gates, Craig McCaw) rather than auctioning the spectrum so the revenues can be deposited in the U.S. Treasury.³ The value of converting to terrestrial use even half of the 171 MHz that has been reserved for MSS would make puny the NextWave debacle. Given the state of the U.S. economy and the U.S. government's substantial need for revenue, it is truly puzzling that there is any consideration of gifting national assets to private companies and their investors.

The ATS issue is not, as some MSS licensees would like to portray, whether residents of rural areas and travelers through our nation's vast insular areas will have access to advanced services, because some MSS licensees have stated that their survival does not depend on the pro-

¹ Progress & Freedom Foundation Comments at 13-14. *See also* Association for Maximum Service Television/National Association of Broadcasters Joint Comments at 16.

² *See Mobile Communications Holdings*, DA 01-1315, 16 FCC Rcd 11766 (May 31, 2001)(FCC cancels Big LEO license because of failure to meet minimal construction milestones). Two months later, the FCC awarded the same firm a different MSS license. *See Mobile Communications Holdings*, DA-01,1637, 16 FCC Rcd 13794 (July 17, 2001).

³ *See, e.g.*, Cellsat Comments at 2 (ATS "will impose no costs on the U.S. public."); Loral Comments at 13 ("The notion of a windfall for MSS operators is without factual support and is something *the Commission*, ultimately, *should not consider.*")(emphasis added); GlobalStar Bondholder Comments at 28 ("Grant of ATC authority . . . is a 'win-win' proposition which will not in any way adversely affect the public."); Mobile Communications Comments at 11 ("[T]here is no reason not to grant ATC authority. No disadvantage would accompany the substantial public interest benefits.").

vision of terrestrial services. The issue rather is whether *certain* MSS licensees will survive. It is not surprising that some MSS licensees are having difficulty obtaining funding. After all, the Commission has licensed eight different firms to provide satellite service to isolated areas when the potential customer base in the U.S. is at most one or perhaps two million customers. Even in the best of economic times, it would be expected that some MSS licensees would fail. A potential market of one or two million will not support eight different MSS systems given the cost of such systems.

Also not at issue are the claims of enhanced spectrum efficiency. VoiceStream does not doubt that MSS licensees are not fully utilizing their spectrum in urban areas. However, the underutilized MSS spectrum would be used as intensively (and more likely, more intensively) under the “alternate” Commission proposal, whereby certain MSS frequencies would be partitioned and then auctioned for terrestrial use. While the ATS and the “alternate” proposals each would improve spectrum efficiency, the “alternate” proposal would have an additional benefit — the Commission would have confidence that the spectrum is assigned to the firm that most values the spectrum without distorting competition in either the terrestrial or satellite mobile markets. Of course, and certainly not irrelevant, with the “alternative” ATS arrangement, the billions of dollars that would be raised from the auction would be deposited in the U.S. Treasury rather than giving away that value to MSS investors.

II. THE DENIAL OF ATS AUTHORITY WILL NOT IMPACT THE AVAILABILITY OF ADVANCED SERVICES TO RURAL AMERICA

MSS ATS proponents would give the Commission the impression that the continued viability of the MSS industry rests entirely on the ability of MSS licensees to obtain ATS authority:

- “[T]he use of ATCs is critical for MSS,” while the denial of ATS authority would “sound the death knell for MSS” (New ICO at 2 and 5);
- The denial of ATS authority “would ruin the MSS business” (GlobalStar at 15);
- Without ATS, “the continued viability of MSS will be left in question” (GlobalStar Bondholders at 32);
- ATS is “vital to the commercial viability of MSS” (Motient at 11); and
- ATS will “assure the commercial viability of MSS systems” (Constellation at 9).

These assertions are not valid. As Inmarsat states, “[n]othing could be further from the truth. Inmarsat is a successful commercial operator of a global MSS network and has no need for an ancillary terrestrial component,”⁴ with Inmarsat noting that it will soon be offering data transmission rates of up to 144 kbps, with speeds increasing to 432 kbps by 2004.⁵ Similarly, Iridium “emphasizes” that it is “not essential to the success of the Iridium System that MSS licensees be permitted to offer ancillary terrestrial services.”⁶ Cellsat, which just acquired its MSS license, states that it designed its business plan “without reliance on terrestrial reuse of satellite spectrum” and that under its plan, it will be able to provide “affordable” and “advanced” services to “all Americans, especially those living in rural areas.”⁷ Even some ATS proponents concede that, without ATS, only “*some* of the licensed MSS networks *may* not come to fruition.”⁸

It is not a surprise – nor a cause for alarm -- that certain MSS licensees are facing difficulty in obtaining the capital needed for constructing their systems. The capital markets understand the simple fact that there are too many potential market participants given the size of the

⁴ Inmarsat Comments at 2.

⁵ *See id.* at 4.

⁶ Iridium Comments at 4.

⁷ Cellsat Comments at 4 and 16-17.

⁸ Loral Comments at 4-5 (emphasis added).

potential MSS market, and the Commission has already recognized, repeatedly, the reality that some MSS licensees will fail.⁹

MSS systems work well in areas not currently reached by terrestrial systems — namely, very rural and insular areas. VoiceStream is not aware of any data indicating the number of Americans that reside in areas not served by terrestrial systems (although that number certainly continues to decrease as terrestrial carriers continue their network buildout).¹⁰ VoiceStream suspects that the number of Americans residing in areas where terrestrial service is not available is one million, or perhaps, two million. A market of this size is simply not large enough to support eight different MSS systems, and may not be large enough to support even four MSS systems.

The issue, then, is not the viability of the MSS industry, but the viability of *certain* MSS licensees. The rule of law is settled: the Commission's job is to protect competition and not individual competitors (or their investors).¹¹ In this regard, the International Bureau emphasized in rejecting the opposition to the award of the 2 GHz MSS licenses that the new licensees “should be given the opportunity to succeed or fail in the market on their own terms.”¹² Accordingly, it would be entirely inappropriate for the Commission to create a new massive government giveaway program based on the claims of firms that cannot even sell on Wall Street their existing business plans.

⁹ See *2 GHz MSS Service Rules Order*, 15 FCC Rcd 16127, 16139 ¶ 18 (2000); *2 GHz MSS Service Rules NPRM*, 14 FCC Rcd 4843, 4858 ¶ 29 (1999).

¹⁰ The FCC has noted that 91% of the population has access to three or more different CMRS operators. See *Sixth Annual CMRS Competition Report*, FCC 01-192, 16 FCC Rcd 13350, 13356 and Appendix C, Table 4 (July 17, 2001).

¹¹ See *Alascom*, 11 FCC Rcd 732, 758 ¶ 56 (1996)(FCC's “statutory responsibility is to protect competition, not competitors.”). See also *LEC Provision of Interexchange Services*, 14 FCC Rcd 10771, 10798 ¶ 38 (1999).

¹² *New ICO Services*, DA 01-1635, 15 FCC Rcd 13762 ¶ 31 (July 17, 2001). Although the Bureau further stated that the MSS applicant may “accept or reject this authorization” without ATS, no rational person would reject grant of valuable spectrum for free.

Take, for instance, GlobalStar, which launched service in January 2000. GlobalStar told investors at the time:

- Its target market, areas not served by terrestrial carriers,¹³ was large, “about 40 million customers,”¹⁴ which “far exceeds the combined capacity of Globalstar, ICO, and Iridium.”¹⁵
- Its system would have the capacity to serve seven million customers.¹⁶
- It would be “cash-flow positive in early 2001,” only a year after launch.¹⁷
- It needed only “240,000 subscribers to cover its operating expenses.”¹⁸
- It needed “less than 1 million subscribers to break even” (operating expenses plus debt).¹⁹
- It would serve 3.3 million customers within three years (year-end 2002),²⁰ an objective that would require it to serve only 8 percent of the potential customer base.

Yet, 18 months after launching service, GlobalStar serves only 51,000 customers,²¹ which, in turn, has forced it to suspend all debt payments.²² Its explanation for its failure: “marketing the service has proved difficult.”²³

GlobalStar’s investors assert that, without ATS, it will be “unlikely” that GlobalStar can obtain the capital needed to launch its “second generation” satellite.²⁴ Given its track record with its current satellite system, and given that its proposed system would support data rates of “up to

¹³ RADIO COMMUNICATIONS REPORT, “Fully Funded Globalstar Lays Out Strategy” (Feb. 7, 2000).

¹⁴ *Id.*

¹⁵ MOBILE SATELLITE NEWS, “A Conversation with Tony Navarra” (March 23, 2000)

¹⁶ RADIO COMMUNICATIONS REPORT, “Fully Funded Globalstar Lays Out Strategy” (Feb. 7, 2000).

¹⁷ MOBILE SATELLITE NEWS, “A Conversation with Tony Navarra” (March 23, 2000)

¹⁸ RADIO COMMUNICATIONS REPORT, “Fully Funded Globalstar Lays Out Strategy” (Feb. 7, 2000).

¹⁹ MOBILE SATELLITE NEWS, “Globalstar USA Prepares for Commercial Launch” (Jan. 13, 2000).

²⁰ WIRELESS TODAY, “McCaw Storming into Mobile-Satellite Orbit” (Dec. 2, 1999).

²¹ GlobalStar Comments at 2.

²² SATELLITE NEWS, “GlobalStar Suspends All Debt Payments in Hopes of Saving Money to Slow Bankruptcy” (Jan. 22, 2001).

²³ GlobalStar Comments at 3.

²⁴ GlobalStar Bondholder Comments at 6.

200 kbps,”²⁵ *or less than half that being proposed by other MSS licensees*,²⁶ it is not surprising at all that GlobalStar is having difficulty finding investors. Put another way, it is entirely understandable that not only GlobalStar, but also two of its largest investors, are now asking for a second government give-away in order to, in their words, “boost [its] business plans.”²⁷ Obtaining what is effectively a nationwide PCS license for free would do much to anyone’s net worth.

If the MSS ATS concept truly makes sense, the Commission should at minimum wait until the market decides which of the eight MSS licensees will survive, and grant ATS authority only after market forces have had an opportunity to work. Propping up certain individual companies that have not developed sound business plans is not a productive use of national wireless assets. As the Progress & Freedom Foundation notes, “government agencies are not well-suited to assess risky and entrepreneurial ventures and ‘pick winners.’”²⁸

The Commission should also view skeptically the MSS licensee claims that they need ATS for their individual survival. For example, New ICO would have the Commission believe that it is doomed to failure without ATS, even though two of our nation’s most successful entrepreneurs, Bill Gates and Craig McCaw, have invested \$100 million and \$500 million, respectively, of their personal money in the venture.²⁹ Similarly, while New ICO is telling the Commission that its proposed system is “not economically viable” without terrestrial service,³⁰ it is

²⁵ *Id.* at 22.

²⁶ *See, e.g.*, Inmarsat Comments at 4 (data rates of up to 432 kbps); New ICO Comments at 8 (data rates of up to 384 kbps); Motient Comments at 9 (data rates of up to 384 kbps).

²⁷ GlobalStar Comments at 5. In seeking this new government subsidy, GlobalStar’s investors remarkably assert that they are only asking the FCC to rely on “market forces [rather] than regulatory intervention.” GlobalStar Bondholder Comments at 29.

²⁸ Progress & Freedom Foundation Comments at 8.

²⁹ *See, e.g.*, Satellite News, “Microsoft Founder Gates Gives Boost to ICO-Teledesic with \$100 Million Infusion” (July 17, 2000).

³⁰ *See* ICO ATC Letter, Docket No. 99-81, at 16 (March 8, 2001),

simultaneously telling investors that it intends to serve at least five different product markets that “are underserved by terrestrial communication services, some of which present “a significant opportunity.”³¹ With respect to one of these markets, “individuals and small and medium-sized businesses,” New ICO states:

New ICO believes that there is an attractive market among individuals and small- and medium-sized businesses that are underserved by fixed and mobile networks or that lack access to data services or telephony.³²

New ICO’s chief executive officer has stated that there exist “enough of those contiguous niches . . . that we can construct a *very lucrative business* for our shareholders.”³³ Based on its representations to the investor community, ATS is not essential for New ICO’s economic viability.

In summary, perhaps some MSS licensees will fail. These failures, however, will only strengthen the remaining MSS licensees that have developed sound business cases. There is, in short, absolutely no evidence that the very survival of the MSS industry depends upon the U.S. Government gifting away ATS authority.

III. THE ATS PROPOSAL IS NOT IN THE PUBLIC INTEREST

Increased flexibility in spectrum use can result in more efficient spectrum markets. The Commission has also recognized, however, that increased flexibility is “not . . . appropriate in all instances.”³⁴ In fact, Congress amended the Communications Act in 1997 to *limit* Commission discretion to adopt flexible use policies because Congress determined that “unlimited flexibility”

³¹ See www.ico.com/about/markets/index.htm.

³² See www.ico.com/about/frame/main.htm.

³³ CT Wireless, “When Voice Is Not the Answer” (Aug. 11, 2000)(emphasis added); Mobile Satellite News, “A Conversation with ICO-Teledesic’s New CEO Greg Clarke” (Aug. 10, 2000)(emphasis added).

³⁴ *Secondary Markets NPRM*, Docket No. 00-230, FCC 00-402, 15 FCC Rcd 24203, at ¶ 94 (Nov. 27, 2000). See also *Spectrum Policy Statement*, 14 FCC Rcd 19868, 19871 ¶ 11 (1999).

can cause “problems.”³⁵ Section 303(y) therefore commands that, at minimum, the Commission must make “affirmative findings” that the proposed flexible use be “in the public interest.”³⁶

There is no doubt that grant of the relief New ICO and other ATS proponents seek would promote the private financial interests of certain MSS licensees (actually, their investors). However, as VoiceStream demonstrates below, grant of ATS authority would not be in the *public’s* interest.

A. MSS LICENSEES HAVE NOT DEMONSTRATED THEIR QUALIFICATIONS TO PROVIDE TERRESTRIAL SERVICE TO THE EXCLUSION OF EVERYONE ELSE

New ICO and other ATS proponents make no attempt to demonstrate their qualifications to provide terrestrial services, much less show that they are better qualified than all other potential users of the spectrum to provide such services. The Commission must therefore deny their ATS request and auction the underutilized spectrum. If New ICO’s business plan is as good as it has proclaimed to the investor community, it will prevail at auction.

The Commission has recognized that spectrum “must be allocated and assigned in a manner that will provide the greatest possible benefit to the American public.”³⁷ Congress has also determined the procedure the Commission is to use in ensuring that spectrum is put to its

³⁵ H.R. CONF. REP. NO. 105-217, 105th Cong., 1st Sess. 581 (1997). *See also* 700 MHz NPRM, 14 FCC Rcd 11006, 11009 n.10 (1999)(“Section 303(y) . . . limits the Commission’s authority to allocate spectrum so as to provide flexibility of use.”); *First 700 MHz Order*, 15 FCC Rcd 476, 481 ¶ 10 (2000) (“Section 303(y) reflects Congressional concern that proposals for the flexible use of spectrum have the potential, if not thoroughly considered, to create interference between services and discourage investment and technical innovation.”)

³⁶ 47 U.S.C. § 303(y)(2), and *Part 101 Reconsideration Order*, 15 FCC Rcd 31219, 3171 ¶ 84 (2000). *See also* *First 700 MHz Order*, 15 FCC Rcd 476, 481 ¶ 10 (2000)(“positive determination” required). There is, therefore, no “presumption under Section 303(y) . . . that terrestrial reuse will serve the public interest. *Cellsat* Comments at 12.

Section 303(y) imposes other requirements, such as interference protection and international treaty obligations. Other parties adequately address these additional issues, and VoiceStream will not repeat these points here. *See, e.g.,* *Aerospace & Flight Test Radio Coordinating Council* Comments; *Aviation Industry Parties* Comments; *KIT-Comm Satellite* Comments; *Inmarsat* Comments at 12-26.

³⁷ Policy Statement, *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, 14 FCC Rcd 19868, 19870 ¶ 7 (1999)(“*Spectrum Policy Statement*”).

best use: “Auctions . . . ensure that licenses are assigned to the entity that most values the frequencies.”³⁸

New ICO and others understandably oppose the Commission’s “alternate” auction proposal. They would rather enjoy the opportunity to obtain the terrestrial spectrum to the exclusion of all others *and* to obtain the valuable spectrum for free. ATS proponents, however, have made no showing (much less a convincing showing) that they would put the scarce resource to its best use — that is, that they would use the spectrum more intensively than everyone else. The only qualifications in the record supporting assignment of the terrestrial spectrum to New ICO and other ATS proponents are:

1. They have filed the necessary paperwork to obtain 2 GHz MSS licenses for free (paperwork that did not include any financial qualifications), where they represented they would build and operate a viable satellite-only business; and
2. They have developed a business plan for mobile service that Wall Street has found is not attractive.

It is not apparent to VoiceStream how these “qualifications” should now entitle MSS licenses to provide terrestrial services to the exclusion of all other interested parties.

The Commission cannot decide that spectrum allocated (for free) to satellite service may be used in the provision of terrestrial services, but then give only MSS licensees the opportunity to provide such services. Congress has made clear that the best way to ensure that spectrum is put to its most productive use is to subject the spectrum to competitive bidding.

³⁸ H.R. Rep. No. 105-149, 105th Cong., 1st Sess. 558 (June 24, 1997). *See also 2 GHz MSS Allocation NPRM*, 10 FCC Rcd 3230, 3233 ¶ 17 (1995) (“[C]ompetitive bidding best serves the public interest by ensuring that the licenses are awarded to the entities that value them the most highly.”).

B. THE PROVISION OF TERRESTRIAL SERVICES WILL NOT SOLVE THE PROBLEMS THAT ATS PROPONENTS CLAIM THEY ARE FACING

Without conceding that it is inappropriate and unlawful for the Commission to establish a bail-out program to overcome the defects in certain MSS licensees' business plans, the ATS proponents' arguments for the provision of terrestrial service simply said make no sense. According to the ATS proponents, the fundamental problem that MSS licensees face is a "market size problem" — too many MSS licensees are competing in the limited market that MSS was designed to serve: rural areas not covered by terrestrial systems.³⁹ The problem is aggravated, they say, because potential MSS customers (rural customers who have no access to any other service) will not purchase MSS service unless they also can use their MSS handset and data devices in the areas where CMRS and SMR services are available when traveling in urban areas.⁴⁰ But, they contend, reliable MSS service is not available in urban areas because of the "urban signal problem."⁴¹

The assumption underlying this argument is fatally flawed. It is simply not credible to believe that a resident of a remote area without any terrestrial service will forgo purchasing MSS because the service may not be completely reliable while traveling in urban areas.⁴² Moreover, as one ATS proponent concedes, dual-band satellite/terrestrial handsets are "effective" in meeting the needs of rural MSS customers when they roam in urban areas.⁴³

³⁹ New ICO Comments at 16.

⁴⁰ *Id.* at 16 and 19.

⁴¹ New ICO Comments at 15-16.

⁴² The related argument that MSS service is too pricy for residents of remote areas (*see, e.g.*, GlobalStar Bondholder Comments at 20-21; New ICO Comments at 16) can be addressed through the universal service program. *See* 47 U.S.C. § 254.

⁴³ GlobalStar Comments at 14. *See also* Inmarsat Comments at 27-28; Stratos Mobile Comments at 10-11. In fact, New ICO boasts that it has already executed roaming agreements with "more than 70 network operators." *See* www.ico.com/about/profile/icostatus.htm.

ATS proponents next assert that the “urban canyon problem” prevents them from providing satellite services in urban areas.⁴⁴ MSS was not designed to provide service in urban areas where consumers already have a choice of five or more terrestrial providers and, even ATS proponents concede, terrestrial carriers “efficiently serve” the public in urban and suburban areas.”⁴⁵ Indeed, the chart Motient prepared confirms that, even ignoring MSS service quality issues, MSS systems cannot possibly compete with terrestrial systems:

COMPARISON OF MSS AND CELLULAR/PCS SERVICES⁴⁶

	<u>Handset Price</u>	<u>Per Minute Price</u>
MSS	\$895 to \$2,999	\$1.10 to \$2.00
Cellular/PCS	0 to \$150	\$0.12 to \$0.15

There is, therefore, no merit to the assertion that incomplete coverage in certain urban areas is the reason MSS licensees have been unable to obtain customers residing in cities.

In the end, ATS proponents want to build stand-alone terrestrial networks to compete head-on with CMRS and SMR carriers. They plan to generate revenues from their urban terrestrial systems to subsidize their rural satellite services.⁴⁷ This urban-terrestrial/ rural-satellite subsidy will be possible, they continue, because CMRS and SMR carriers enjoy “eye-popping prof-

⁴⁴ See, e.g., GlobalStar Comments at 4.

⁴⁵ Mobile Communications Comments at 6. See also GlobalStar Comments at 12 (“[P]ersons who use mobile phones on a daily basis in the urban corridors are likely to demand the functions and prices available on cellular and PCS services.”); Stratos Comments at 3-4 (“Few users of MSS have a need for MSS in cities or inside buildings in areas covered by terrestrial services because they typically have terrestrial wireless services that fulfill this need.”).

⁴⁶ See Motient Comments at 13.

⁴⁷ See, e.g., Constellation Comments at 9-11; GlobalStar Comments at 4-5; GlobalStar Bondholder Comments at 19-20.

its” and MSS licensees in providing terrestrial service will also enjoy these “eye-popping profits.”⁴⁸

VoiceStream has been and is creating value, but it can state with confidence that there have been no “eye-popping profits” in the terrestrial mobile sector. Terrestrial networks are extremely expensive to build and the market is intensely competitive, with retail prices continuing to fall. In this environment, it is not apparent how New ICO or any other MSS licensee can expect to enjoy “eye popping” profits when it enters a particular market as the seventh (or 8th or 9th) terrestrial provider, even with the benefit of getting terrestrial spectrum for “free.”

Even assuming MSS licensees can do what experienced terrestrial carriers have been unable to do (enjoy “eye-popping profits”), MSS licensees would have no legal obligation to use those profits to subsidize their rural satellite services. In fact, they would not be incented to engage in such subsidies. Common sense suggests that MSS licensees would reinvest in the profitable enterprise to generate yet additional profits.

In summary, the arguments that ATS proponents make do not make practical economic or technical sense, and the idea that MSS licensees will subsidize their rural satellite business just is not credible.

**C. PERMITTING MSS LICENSEES TO PROVIDE TERRESTRIAL-BASED CMRS
WOULD DISTORT COMPETITION IN THE TERRESTRIAL MARKET**

Certain MSS licensees want to use spectrum that they acquired for free to provide terrestrial services in competition with CMRS licensees that paid hefty sums for their radio licenses. They claim that ATS would promote the public interest because “urban areas will have available

⁴⁸ New ICO Comments at 3.

more service from additional providers.”⁴⁹ However, grant of the MSS ATS proposal would place CMRS licensees at a significant competitive disadvantage and distort the market as a result. As Alaska Native Wireless Corporation has already advised the Commission:

ANW, as a designated entity that plans to offer service in rural and underserved areas, would be placed at a significant disadvantage vis-à-vis New ICO and other MSS providers if MSS providers were allowed to provide essentially the same services without paying for their spectrum at auction.⁵⁰

VoiceStream and its joint ventures have paid (or are committed to paying) the U.S. Treasury over \$3 billion for the right to provide CMRS services throughout the country. MSS licensees obviously would have an enormous cost advantage if they could over-build VoiceStream’s network and, then, be excused by the Commission from paying any license fees.

The Progress & Freedom Foundation recognizes that the MSS ATS proposal could give MSS licensees an artificial competitive advantage, “raising efficiency concerns” in the terrestrial market, and therefore proposes that the Commission assess fees on MSS ATS providers to offset this advantage.⁵¹ But the Commission has already concluded that it “likely do[es] not have the authority to assess . . . fees” on MSS licensee provision of ATS.⁵²

Congress has “directed” the Commission to “achieve regulatory parity among services that are substantially similar.”⁵³ Congress determined that “disparities in the current regulatory

⁴⁹ Motient Comments at 13. *See also* Constellation Comments at 8 (“Since demand for service is growing in urban areas, ancillary terrestrial operations by MSS operators will increase the competitive supply of service without requiring the allocation of any additional spectrum.”).

⁵⁰ Alaska Native Wireless Corporation Ex Parte, Docket No. 99-81, at 2 (July 2, 2001).

⁵¹ Progress & Freedom Foundation Comments at 13-15.

⁵² *MSS Terrestrial NPRM* at ¶ 40.

⁵³ H.R. REP. NO. 103-111, 103d Cong., 1st Sess. 259 (1993). Congress specifically established the CMRS regulatory classification to undo the disparate regulatory regime that the FCC had allowed to develop, whereby some carriers (cellular) were regulated under one set of rules, and another set of carriers competing in the same market (enhanced SMR) were subject to an entirely different set of rules.

scheme could impede the continued growth and development of commercial mobile services.”⁵⁴

The MSS proposal to provide terrestrial services using free spectrum in competition with firms paying millions (or billions) for their licenses would create the very disparate regime that Congress directed the Commission to “undo.”

In summary, the Commission may not invoke reliance on market forces, when the result of this invocation would be to distort the free operation of competition and market forces.

**D. PERMITTING MSS LICENSEES TO PROVIDE TERRESTRIAL-BASED CMRS
WOULD DISTORT COMPETITION IN THE SATELLITE MARKET**

Assume MSS ATS proponents are correct: their provision of terrestrial services would generate profits that would then be used to subsidize their provision of satellite services. Even a highly efficient, standalone satellite system cannot compete against an inefficient but subsidized satellite system. Thus (and again taking the ATS proponent claims at face value), all MSS licensees would have no choice but to offer terrestrial services to remain competitive in their primary satellite business. But as Iridium points out, New ICO would have an enormous (and completely artificial) advantage in the new market that the Commission would be establishing (terrestrial-satellite vs. satellite-only).⁵⁵ This is because New ICO’s affiliate, Nextel, already owns and operates a nationwide terrestrial network, and to provide its terrestrial services, New ICO/Nextel would only need to add radios (tuned to MSS spectrum) to existing cell sites. In contrast, all other MSS licensees would be required to build terrestrial networks from scratch. As Iridium

⁵⁴ H.R. REP. NO. 103-111, 103d Cong., 1st Sess. 260 (1993). The regulatory parity mandate is not absolute. Specifically, the FCC may adopt disparate regulations applicable to different CMRS carriers if disparate rules “would promote competition and protect consumers.” H.R. CONF. REP. NO. 103-213, 10d Cong., 1st Sess. 491 (1993). Permitting MSS licensees to use free spectrum to provide terrestrial services in competition with licensees that have paid for the spectrum would not promote competition or protect consumers.

⁵⁵ See Iridium Comments at 2-8.

correctly observes, it is “unclear why any rational investor would seek to compete against Nextel’s entrenched position in this market.”⁵⁶

Thus, in authorizing MSS ATS, the Commission would effectively allow New ICO/Nextel to monopolize the satellite market. This success would be based not on New ICO’s efficiency in the satellite business, but instead on the fact that the New ICO/Nextel relationship gives New ICO an advantage possessed by no other MSS licensee.

In addition, given current Commission rules permitting operational satellite systems to use MSS spectrum outside their “selective assignment,” the Commission would set the stage for Nextel to acquire “perhaps 50 MHz (or more) of highly valuable nationwide spectrum for its existing terrestrial network – spectrum that will enable it to achieve a nationwide terrestrial ‘footprint’ – without having to compete for that spectrum at auction.”⁵⁷ As Iridium correctly observes:

It is clearly in ICO/Nextel’s long-term economic interests to spend a few billion dollars constructing, launching and operating a minimalist MSS constellation in order to gain free access to \$30-40 billion worth of nationwide spectrum for the expansion of Nextel’s existing terrestrial network. As a practical matter, the ICO satellite system will be ancillary to the Nextel terrestrial network, regulatory constraints to the contrary notwithstanding.⁵⁸

In the end, permitting MSS licensees to provide terrestrial services would “harm MSS users, not help them”:

Indeed, given the large terrestrial mobile services market that exists, opening up the MSS bands to terrestrial use will create the wrong incentives for MSS providers, and will likely lead to the MSS bands being overwhelmed by terrestrial mobile use.⁵⁹

⁵⁶ *Id.* at 3.

⁵⁷ Iridium Comments at 3.

⁵⁸ Iridium Comments at 8.

⁵⁹ Stratos Mobile Comments at 2-3. *See also* Inmarsat Comments at 27.

In summary, grant of the MSS ATS proposal would distort competition in the satellite market, would likely lead to the monopolization of that market, and would, as a practical matter, lead to the *de facto* reallocation of MSS spectrum to terrestrial use.

E. THE “ALTERNATE” ATS PROPOSAL BETTER SERVES THE PUBLIC INTEREST THAN THE MSS ATS PROPOSAL

The Commission has sought comment on two different proposals: (1) the MSS ATS proposal that would permit only MSS licensees to provide terrestrial services using spectrum initially allocated for mobile satellite services; or (2) the “alternate” ATS proposal that would partition some of the MSS spectrum, reallocate it to terrestrial use, and auction that spectrum. Between these alternatives, it is clear that the latter proposal better promotes the public interest:

Comparison of Public Interest Benefits

	<u>MSS ATS Proposal</u>	<u>“Alternate” ATS Proposal</u>
More efficient use of the spectrum	Yes	Yes
Confidence that spectrum would be assigned to entities most valuing it	No	Yes
Beneficiary of procedure	MSS Investors	Taxpayers
Permits New ICO/Nextel to monopolize satellite market and obtain dominant spectrum position in the terrestrial market	Yes	No

MSS ATS proponents nonetheless oppose the Commission’s “alternate” proposal, but their arguments lack merit.

The principal argument that certain MSS licensees advance in opposition to the “alternate” ATS proposal is that the “split band approach” is “probably . . . not feasible” and would be

“difficult” to implement.⁶⁰ Although the MSS licensees would like to give the impression that their ATS proposal would promote “integrated” operations,⁶¹ the fact is that the terrestrial networks they want to build would be physically separate from their satellite networks. As the Telecommunications Industry Association notes, “*any* terrestrial use of 2 GHz MSS spectrum will require the segmentation of the band to separate it from satellite use.”⁶² In addition, ATS proponents specifically seek authority:

- To be relieved of any obligation to route their terrestrial traffic through their satellite network⁶³ and
- To have the flexibility to lease their terrestrial channels to terrestrial carriers.

These positions only confirm that independent terrestrial operations are feasible.⁶⁴ Consequently, if the MSS bands in urban areas must be separated for the MSS ATS proposal, it logically follows that the Commission’s “alternate” ATS proposal is technically feasible as well.

New ICO further argues that an independent terrestrial network using MSS spectrum would be “so constrained that no one would bother to build it.”⁶⁵ This contention, however, addresses the *value* of the spectrum rather than the feasibility or desirability of having the terrestrial services being provided by firms other than MSS licensees. New ICO may be correct: a terrestrial ATS band may be of more value to the MSS licensee than anyone else. However, this proposition can be proved only by subjecting the terrestrial ATS bands to competitive bidding.

⁶⁰ GlobalStar Comments at 13 and GlobalStar Bondholder Comments at 33.

⁶¹ *See, e.g.*, GlobalStar Bondholder Comments at 27; Mobile Communications Comments at 3-4 and 7-8.

⁶² Telecommunications Industry Association-Wireless Communications Division Comments at 1 (emphasis added).

⁶³ *See, e.g.*, New ICO at 25 n.41 and 45.

⁶⁴ *See, e.g.*, Constellation Comments at 19 n.38; GlobalStart5 Comments at 10 n.11.

⁶⁵ New ICO Comments at 36.

Finally, several ATS proponents assert that the split-band approach “necessarily takes valuable spectrum away from MSS operators.”⁶⁶ This argument is baseless. The only reason the Commission is considering either of the ATS proposals is because certain MSS licensees state that they would not be using their spectrum in urban areas. If this claim is correct, the establishment of a separate ATS band in urban areas will have no impact on the ability of MSS licensees to provide their satellite services in rural areas. If this claim is not correct, then the Commission should not be considering any ATS proposal.

Also baseless is the assertion that the amount of spectrum that the Commission has allocated to MSS is “relatively small compared to the amount of spectrum allocated for terrestrial mobile services.”⁶⁷ The Commission has allocated approximately 190 MHz of spectrum for terrestrial CMRS, which is used to support mobile services to over 123 million Americans.⁶⁸ In contrast, the Commission has allocated 171 MHz for MSS to serve those people who do not currently have access to any terrestrial telecommunications network.⁶⁹ Any problems the MSS industry may be encountering certainly are not due to the lack of adequate spectrum to provide satellite services.

⁶⁶ GlobalStar Comments at 16. *See also* Motient Comments at 33 (Independent ATS operations would “severely reduce [MSS] satellite capacity.”).

⁶⁷ Constellation Comments at 17. *See also* GlobalStar Comments at 16 (“There is a minimal amount of spectrum available for MSS.”).

⁶⁸ The FCC has allocated 50 MHz for cellular, 120 MHz for PCS, and approximately 20 MHz for SMR.

⁶⁹ *See* Constellation Comments at 1 n.1 and 17. According to one estimate, this MSS spectrum is used to support 750,000 terminals around the world. *See* Mobile Satellite Users Association Comments at 3.

IV. CONDITIONS ARE IMPERATIVE IF THE COMMISSION APPROVES THE MSS ATS PROPOSAL

VoiceStream believes that the record evidence demonstrates conclusively that the ATS proposal advocated by certain MSS licensees is not in the public interest. If, however, the Commission disagrees, it should impose the conditions identified below.

A. TERRESTRIAL SERVICE MAY NOT BE COMMENCED UNTIL THE SATELLITE SYSTEM IS OPERATIONAL

MSS licensees state that their terrestrial service will be “ancillary” to their satellite service and will be used to support their provision of satellite services to rural areas. The ATS proponents all agree that their terrestrial authorization should be triggered only when their satellite system are operational.⁷⁰ Similarly, as some ATS proponents acknowledge, an MSS licensee’s authority to provide terrestrial service “should be revoked if the operator ceases to use its MSS frequencies for satellite service.”⁷¹ VoiceStream agrees. A service cannot be “ancillary” if there is no primary service.

B. MSS LICENSEES SHOULD BE REQUIRED TO SELL ONLY DUAL-MODE HANDSETS

While the view among MSS licensees is not unanimous, some MSS licensees claim that one of the major benefits of ATS is that they will be able to purchase handsets in larger volumes, thereby enabling them to obtain better pricing from their vendors and to sell handsets at a lower price.⁷² This purported benefit will be realized only if MSS licensees sell only dual-mode hands to all of their customers, whether a given customer is served primarily by the satellite system or

⁷⁰ See, e.g., Constellation Comments at 26; Motient Comments at 23-24; TMI Comments at 3.

⁷¹ See, e.g., Constellation Comments at 27; Motient Comments at 24; TMI Comments at 3.

⁷² See, e.g., GlobalStar Bondholder Comments at 20. However, Cellsat states that even without ATS, it will offer a handset “as small as the smallest PCS-sized handheld phone on the market today [at] extremely affordable rates.” Cellsat Comments at 5. See also Motient Comments at 10 (Even without ATS, it will offer “low-cost handsets.”).

the terrestrial network, and MSS interests concede that a dual mode handset requirement would be reasonable.⁷³ So that rural-satellite customers truly reap some of the benefits of an urban-terrestrial service, the Commission should require that all handset models that an MSS licensee makes available to an urban-terrestrial customer are also made available to rural-satellite customers at the same price.

C. MSS LICENSEES MUST PROVIDE THE SAME CAPABILITIES ON BOTH THE SATELLITE AND TERRESTRIAL PLATFORMS

MSS licensees assert that the provision of terrestrial services will enable them to provide “more robust satellite services.”⁷⁴ Thus, some MSS interests recognize that it would be entirely reasonable for the Commission to impose the requirement that MSS licensees “not provide any services via the ATC platform that they are not also capable of providing via satellite.”⁷⁵ Thus, for example, an MSS licensee could not offer voicemail or Internet services to its urban-terrestrial customers unless the identical voicemail and Internet services are made available to its rural-satellite customers. Similarly, if the MSS licensee offers 394 kbps transmission rates to its urban-terrestrial customers, the same transmission rates must be made available to its rural-satellite customers.

VoiceStream agrees with this proposed requirement. MSS licensees may have no incentive to upgrade their satellite systems, their “primary” service, without such a condition.

D. MSS LICENSEES SHOULD BE REQUIRED TO OFFER THE SAME PRICING TO ALL OF THEIR CUSTOMERS

⁷³ See, e.g., GlobalStar Bondholder Comments at 31.

⁷⁴ Motient Comments at 1. See also Constellation Comments at 8-9; New ICO Comments at 30.

⁷⁵ GlobalStar Bondholder Comments at 31.

MSS licensees claim that their provision of ATS will enable them to lower their prices to their rural-satellite customers because the cost of the satellite system can be spread over a greater number of customers.⁷⁶ MSS licensees further assert that they will not apply for universal service subsidies if they receive ATS authority.⁷⁷

To help ensure that rural-satellite customers reap some of the purported benefits of ATS, the Commission should require that all pricing plans made available to an MSS licensee's urban-terrestrial customers be made available to its rural-satellite customers.

E. ALL REGULATORY OBLIGATIONS APPLICABLE TO TERRESTRIAL CARRIERS
SHOULD APPLY TO ALL MSS SERVICES

Terrestrial carriers are subject to numerous regulatory obligations, including CALEA, E911 (Phase I and II), local number portability, N11 services, number pooling, and TTY. Of course, these same obligations would apply automatically to any terrestrial services that MSS licensees may provide. Consistent with the "one service" principle discussed above, the Commission should extend these same obligations to MSS satellite services.

F. THE COMMISSION MUST ADOPT CONDITIONS TO ENSURE THAT ATS
REMAINS TRULY ANCILLARY TO SATELLITE SERVICES

MSS systems play a critical role in our society, both in providing services to areas not currently covered by terrestrial networks and in providing "back-up" communications in times of emergency.⁷⁸ ATS proponents therefore assert that their provision of terrestrial services will be only "ancillary" to their provision of satellite services, and they recognize that it would be appropriate for the Commission to "promulgate rules to ensure that MSS licensees' use of their an-

⁷⁶ See, e.g., GlobalStar Bondholder Comments at 20.

⁷⁷ See, e.g., New ICO Comments at iii and 13.

⁷⁸ See Stratos Comments at 4-5.

cillary ATC authority in no way undermines the provision of their primary satellite service.”⁷⁹

Nevertheless, ATS proponents further assert that the Commission should not impose a “maximum percentage or minutes or frequency channels that must be designated for . . . ATC services” because they believe that terrestrial services would constitute “a significant portion of the total traffic carried by” MSS licensees.⁸⁰

The problem with this position is that it would result in the *de facto* reallocation of the MSS band to terrestrial services. As Stratos explains, “[g]iven the large market for terrestrial mobile services, opening up the MSS bands for terrestrial mobile use will only encourage MSS providers to move away from the provision of MSS and focus their business plans towards the terrestrial mobile services market”:

The end result will be that terrestrial use will overwhelm the MSS bands. As a result, financial investment by MSS providers, and manufacturers of MSS equipment, will move away from MSS and towards terrestrial mobile services. With decreased investment, MSS networks will be compromised and lack the necessary technological innovations to keep up with demand.⁸¹

Thus, if the Commission is interested in pursuing the ATS concept, it must adopt some mechanism to ensure that terrestrial service remains “ancillary” only and that the availability of satellite services is not eviscerated as a result. One simple condition that the Commission could impose would be to require that the number of an MSS licensee's terrestrial customers never exceeds the number of its satellite customers. Such a condition would give an MSS licensee powerful incentives to market its satellite services and ensure that all residents in remote areas have access to advanced telecommunications services.

⁷⁹ GlobalStar Bondholder Comments at 29; Motient Comments at 23.

⁸⁰ GlobalStar Bondholder Comments at 30.

⁸¹ Stratos Comments at 10.

**G. THE COMMISSION SHOULD NOT PERMIT THE PROVISION OF ATS OUTSIDE
“SELECTED ASSIGNMENTS”**

It is one thing for the Commission to give away for free seven MHz nationwide terrestrial licenses. It is another thing entirely to allow an MSS licensee to aggregate 40 or 50 MHz of free spectrum for the provision of terrestrial services — whether because of MSS consolidations or because operational MSS licensees use spectrum outside of their selected assignment. The Commission should therefore hold that no MSS licensee may use more than seven MHz of MSS spectrum in the provision of terrestrial services.

V. CONCLUSION

MSS licensees and the federal government have cut a deal: in return for free spectrum, they will build and operate satellite systems to serve rural America. ATS proponents have decided they no longer like this deal. The most logical course for the Commission to take would be to reacquire the licenses and either give them to firms that believe they can operate a profitable satellite business, or reallocate the spectrum to another use such as advanced terrestrial services. ATS proponents have a different proposal for the government: rather than auction the spectrum for terrestrial services, where the government would generate billions of dollars of revenues to the benefit of all taxpayers, the government should instead permit MSS licensees to provide terrestrial service where the benefit instead goes to MSS licensee investors. No one can credibly contend that this newest MSS proposal is in the public interest.

For the foregoing reasons, VoiceStream respectfully requests that the Commission reject the proposal to permit MSS licensees to use spectrum they acquired for free in the provision of terrestrial-based services, in competition with terrestrial-based licensees that have paid for their spectrum.

Respectfully submitted,

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