Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter	)	
	)	
Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 12 GHz Band, the L Band, and the 1.6/2.4 GHz Band	)	IB Docket No. 01-185
	)	
Amendment of Section 2.106 of The Communications Rules To Allocate Spectrum At 2GHz for Use By the Mobile Satellite Service	)	ET Docket No. 95-18

REPLY COMMENTS
OF
TELEPHONE AND DATA SYSTEMS, INC.

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Summary

TDS continues to oppose to the NPRM's proposal to allow Mobile Satellite Service ("MSS") licensees to provide wireless service.

In our Comments, TDS demonstrated that granting mobile authority to MSS licensees would: (a) undermine the integrity and logic of the auction process; (b) be fundamentally unfair to cellular, PCS, and SMR licensees which can now obtain new spectrum only through an auction process; and (c) reinforce an ill-advised frequency allocation to MSS licensees, many of which are in dire financial straits. TDS also noted that the international character of MSS licensing was crucial to the FCC's decision not to allocate MSS licenses by auction, a rationale which would be undercut by granting domestic mobile authority to MSS licensees.

The comments filed by MSS licensees do not refute these arguments. MSS licensees argue that it is legally permissible for the FCC to grant ancillary terrestrial authority ("ATC") to MSS licensees, but fail to respond to the argument that granting such "flexibility" would undermine future wireless auctions by rendering the value of wireless spectrum uncertain. That uncertainty would certainly reduce future investment in wireless systems. Pursuant to Section 303(y) of the Communications Act, "flexibility" allocations are not to be made if they would reduce investment.

MSS licensees also point out that the "ORBIT" Act forbids MSS spectrum from being auctioned because of its international character but fail to realize that

the protected status of that spectrum is a further reason not to allocate it for domestic purposes.

MSS commenters also fail to refute the argument that an ATC allocation would be unfair to wireless licensees. The post-1993 licensing regime requires auctions and a nationwide wireless allocation, made without auctions, cannot be justified by the "investments" that MSS licensees will make to build their systems. All licensees must make investments and the FCC is still obliged to treat similarly situated licensees equally.

Finally, comments by MSS licensees and users demonstrate that there is a serious threat of interference to existing MSS licensees from the proposed ATC allocation, thus causing that proposed allocation to contravene another part of Section 303(y) of the FCC's Rules, which requires that "flexible" frequency allocations not cause "interference" to other users.

The public interest thus requires that the ATC allocation to MSS licensees be rejected.

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REPLY COMMENTS
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TELEPHONE AND DATA SYSTEMS, INC.

Telephone and Data Systems, Inc., on behalf of itself and its subsidiary, United States Cellular Corporation ("USCC") (collectively "TDS") hereby files its Reply Comments in the above-captioned proceeding.[1]

[1] In the Matter of Flexibility for Delivery of Communications By Mobile Satellite Service providers in the 2 GHz Band the L Band, and 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 Service, IB

Introduction

In our Comments, TDS opposed the NPRM's proposal to allow Mobile Satellite Service ("MSS") licensees to provide terrestrial wireless service for the following reasons:

First, granting such "flexibility" to MSS licensees, whether in the 2 GHz or "L Bands," would undermine the integrity and logic of the auction process. To allow MSS licensees, which have not undergone an auction process, to provide wireless mobile services would diminish the incentives of carriers to participate in future wireless auctions and thus undermine auctions as the required selection method for wireless radio services.

Second, granting terrestrial mobile authority to MSS licensees would be fundamentally unfair to cellular, PCS and SMR licensees, which can obtain new wireless spectrum only through an auction process.

Finally, granting such flexibility would reinforce an ill-advised frequency allocation to MSS licensees, many of which are in dire financial straits, at a time when wireless spectrum is needed by those who can and will actually use it to provide enhanced wireless services.

Moreover, the international character of MSS licensing was crucial to the FCC's decisions not to allocate MSS licenses by auction. That rationale would not be applicable to an FCC decision to allow MSS licensees to become domestic wireless service providers.

Docket 01-185, ET Docket 95-18, Notice of Proposed Rulemaking, FCC 01-225 (adopted August 9, 2001) ("NPRM").

Nothing in the comments filed by any party to this proceeding refutes these arguments. On the contrary, in various ways, the comments provide ample support, both intended and unintended, for denying MSS licensees terrestrial mobile authority.

I. The MSS Comments Do Not Refute TDS's Argument That The ATC Allocation Would Undermine Auctions as the Required Wireless Licensee Selection Method

In our Comments (pp. 3-10), TDS demonstrated that federal law provides that auctions are now the preferred (and indeed, in most instances, required) method for selecting FCC licensees. To grant to existing MSS licensees what they refer to as an "Ancillary Terrestrial Component" ("ATC") to their authorizations would be contrary to that statutory requirement, in that it would undermine auctions as the mandatory wireless selection method, by diminishing the value of the wireless spectrum to be auctioned in the future.

The MSS commenters do not come to grips with this basic point. They focus instead on whether it is legally permissible for the FCC to authorize ATC for MSS licensees and conclude that it is. Or MSS commenters argue that spectrum already used for MSS cannot now be auctioned without violating the statutory mandate against such auctions contained in the 2000 Open Market Reorganization Act for the Betterment of International Telecommunications Act ("ORBIT Act").[2]

[2] 106 P.L. 180, 114 Stat. 48, codified at 47 U.S.C. § 765(f). See, e.g. Comments of New ICO Global Communications ("New ICO"), p.39; Constellation Communications Holdings, Inc. ("Constellation"), pp. 21-22.

However, TDS did not argue that the statute, or existing FCC rules or international treaty obligations necessarily forbade a grant of ATC for MSS licensees and we did not propose to auction spectrum currently allocated to MSS.

Rather, we argued that an ATC authorization for MSS would be contrary to and thus would undermine the auction mandate in Section 309(j) of the Act for newly allocated wireless spectrum and was thus a bad idea, whether or not a court would find it to be an illegal action.[3] Further, we maintained that if MSS licensees failed to comply with their required construction milestones and consequently lost their licenses, their spectrum should cease to be MSS spectrum and thus could be auctioned pursuant to Section 309(j).

Moreover, we would also note that the existence of the ORBIT Act only reinforces another point made by TDS in our Comments (pp 9-10), namely that it is precisely the protected international character of MSS spectrum which ought to be a barrier to any domestic terrestrial authorization for such spectrum. MSS spectrum is carved out from the normal FCC universe of auctionable spectrum for international MSS usage. That is all the more reason not to grant MSS licensees domestic terrestrial mobile authority, which substantially changes the character of the spectrum and removes its "international" aspect.

It is the considered judgment of Congress that MSS spectrum cannot be auctioned, with the logical corollary that such spectrum is to be used only for MSS purposes. An ATC allocation would overturn that judgment and create a different

[3] A court may well so find, but whether or not it would do so should not be the determining factor in the FCC's decision now.

type of radio service. But such a different service should not be entitled to the same privileges and protections to which MSS is entitled, precisely because of its international character. The MSS licensees want to retain all the benefits of MSS status while escaping the burdens of that status. They should not be allowed to do so.

II. The Requirements of Fairness and Section 303(y) of the Communications Act Are Opposed to an ATC Allocation

TDS and other wireless commenters have noted the obvious unfairness of allowing MSS licensees to obtain 2 GHz spectrum for terrestrial mobile services without an auction process while CMRS licensees must participate in auctions to obtain new spectrum.[4] Responses to this argument by MSS commenters generally make the following points.

MSS licensees refer to the investments they have previously made in their MSS systems as evidence that they have indeed already "paid for" their licenses.[5]

They also argue that cellular licensees did not have to participate in auctions prior to 1993 and that the logical implication of the cellular/PCS argument is that cellular licenses should have been taken back and re-auctioned at the time PCS licenses were auctioned.[6]

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[4] See TDS Comments, p. 8.

[5] See New ICO Comments, p.3; Comments of The Unofficial Bondholders Committee of Globalstar, L.P. ("Bondholders"), p.5.

[6] See Comments of Loral Space and Communications, Ltd. ("Loral"), p. 13.

Finally, they maintain that in the recent ITFS/MMDS "flexibility" order,[7] which granted terrestrial mobile authority to ITFS and MMDS licensees, the FCC rejected similar arguments by wireless carriers and adopted a conception of the public interest broader than the interests of "one group of providers" and that similar principles should be applied here.[8]

The first two of those arguments may be responded to briefly. The last requires a longer answer.

FCC commercial licensees and those who invest in such licensees acquire licenses and later make investments because they believe that the licensee's business, conducted under the rules in effect at the time the license is obtained, will be profitable. Such beliefs may or may not be correct. But since all licensees, whether they receive licenses through auctions or not, must make investments, it is not a refutation of the argument that the FCC should treat similarly situated licensees similarly, for MSS licensees to argue that they have already paid for their licenses through investments.

PCS licensees, for example, must participate in auctions, or buy the licenses of entities which have participated in auctions, as well as investing in the building or expanding of their systems.

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[7] See In the Matter of Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHZ for Mobile and Fixed Services to Support the Introduction of New Advanced Services, including Third Generation Wireless Systems; Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2690 MHZ Frequency Bands For Mobile-Satellite Service, First Report and Order and Memorandum Opinion and Order, FCC 01-256, released September 24, 2001 ("ITFS/MMDS Order")

[8] See Loral Comments, pp 12-13.

Also, it is not a serious argument to maintain that since cellular licensees, like all pre-1993 licensees, did not have to pay for their licenses that an ATC grant to MSS licensees would now be fair. It is impossible and not the FCC's responsibility to determine the balance of "fairness" and "unfairness" in comparing past and present regulatory regimes. What the FCC is obliged by law to do is be fair in light of present requirements, under which terrestrial wireless licenses must be auctioned.

With respect to the last argument, it is true that the FCC granted to ITFS/MMDS licensees a right to provide mobile wireless service, on the theory that that grant of "flexibility" met the statutory criteria of Section 303(y) of the Communications Act.[9]

TDS believes that the Commission was in error in the ITFS/MMDS Order. However, whatever the policy or legal merits of that order, its adoption does not necessarily mean that the flexibility grant proposed here is the right decision or that an ATC grant would automatically comply with Section 303(y).

TDS has argued that an ATC grant here, coupled with past and (presumably) future wireless flexibility orders, would undermine future wireless auctions by rendering uncertain the value of the spectrum being auctioned. Such uncertainty is

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[9] 47 U.S.C. Section 303(y). That section gives the FCC authority to permit flexible use of spectrum provided:

1. such use is consistent with international agreements to which the United States is a party; and

2. the Commission finds, after notice and comment, that:

   (a) such an allocation would be in the public interest;

   (b) such use would not deter investment in communications services and systems, or technology developments, and

cumulative, and an ATC grant here would only deepen and intensify the negative effects of the ITFS/MMDS flexibility grant by increasing the number of potential wireless licensees operating on non-auctioned spectrum. How could that not have the effect of diminishing the value of auctioned spectrum? The FCC is obliged to consider these cumulative effects in making its "public interest" determination under Section 303(y).

Among other things, the FCC must consider under that section whether the ATC proposal would deter future wireless investments. If it diminishes auction participation, it would certainly "diminish," if not eliminate, the "investments" of those who would have otherwise participated in the auction, thus violating Section 303(y).

Also, as will be discussed in Section III. below, this proceeding is replete with evidence of interference dangers from ATC, both in the L Bands and in the 2 GHz band.

Thus, as with the ORBIT Act, Section 303(y) considerations in fact constitute reasons not to grant ATC authority to MSS licensees.

III. The Comments Disclose A Substantial Threat of Interference From The ATC Proposal

As noted above, Section 303(y) of the Communications Act requires the FCC to weigh interference considerations in determining whether to make spectrum flexibility grants. And, even if Section 303(y) did not exist, interference issues

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(c) such use would not result in harmful interference among users.

would obviously rank high for the FCC in making a public interest determination in such cases.

The comments disclose that granting ATC authority for MSS licensees would give rise to serious and destructive interference within the MSS and adjacent frequencies.

Inmarsat, the world's largest satellite provider of mobile communications and data services, strongly opposes the ATC proposal, believing it would "create unacceptable interference into Inmarsat's [L Band] MSS system."[10]

The Mobile Satellite Users Association ("MSUA"), while not expressing outright opposition to the ATC, is nonetheless strongly skeptical of it on the grounds of possible interference to existing MSS services. MSUA notes that "service to rural areas, emerging services and the like-services the MSS was designed to provide-must not be placed in jeopardy simply to reduce [sic] opportunities for terrestrial dial tone."[11]

KITComm Satellite Communications Ltd ("KITComm"), an L Band applicant, expresses concern that ATC-equipped MSS operators could "drown out" competition from non-ATC equipped operators and would "eradicate welcome differentiation of services among ATC operators."[12]

The Telecommunications Industry Association, through its Wireless Communications Division ("WCD") believes that undesirable "band segmentation"

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[10] Comments of Inmarsat, p. 10.

[11] MSUA Comments, p. 5.

[12] KITComm Comments, p.4

will be required to implement ATC and that the ATC proponents have not submitted adequate data to support the ATC allocation they seek.

Stratos Mobile Networks LLC ("Stratos") and MarineSat Communications Networks, ("MarineSat"), large scale customers of Inmarsat and providers of safety and emergency communications on worldwide basis, believe that "opening up the MSS bands to terrestrial use will create the wrong incentives for MSS providers and will likely lead to MSS bands being overwhelmed by terrestrial mobile use."[13] Finally, the Wireless Communications Association International, Inc. ("WCA") argues that if the FCC permits:

> "…terrestrial use of the MSS bands, the Commission will have to use guardbands, power limits, spectral masks, and frequency stability requirements to craft an environment in which MDS and ITFS licenses will be free from interference caused by terrestrial operations on MSS spectrum."[14]

Thus, interference related concerns are real and substantial. They are also largely ignored in the filings of ATC proponents. At the least, these filings suggest that the FCC should look more closely at interference concerns in this context than it has done previously. However, TDS believes that such concerns mean that this proposal probably cannot satisfy the "interference" test imposed by Section 303(y).

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[13] Stratos/MarineSat Comments, p.3.

[14] WCA Comments, p. 4.

IV. The Overall Public Interest Does Not Support a Grant of ATC Authority To MSS Licensees

The heart of the MSS case for obtaining ATC rests on the following set of propositions.

1. It is desirable that MSS licensees survive and provide the safety and emergency services that only MSS can provide;

2. MSS licensees cannot survive without ATC, as ATC will allow those licensees to provide service in urban areas and thus obtain a customer base large enough to generate the revenues necessary for survival; and

3. ATC can be provided by existing MSS licensees without causing interference to co-channel MSS frequencies or adjacent channel frequencies.[15]

It is certainly desirable that MSS survive and prosper, so Point 1 is undisputed. But with respect to Point 2, it has not been proven that a grant of ATC will ensure the success of MSS licensees either in the 2 GHz or L Bands. Indeed, knowledgeable commenters such as Stratos/MarineSat (Comments, pp.3-6) and Inmarsat (Comments, pp. 12-21) argue that ATC would undermine and threaten existing MSS services, which, they say, are thriving under the present MSS rules. Moreover, Iridium, an existing MSS licensee, has argued that the ATC proposal is an attempt by New ICO to obtain an MSS monopoly for its investor Nextel, thus destroying other MSS licensees.[16] Point 3, regarding interference, as discussed in Section III above, is in substantial doubt as well.

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[15] See e.g. Comments of Motient Services, Inc., TMI Communications and Company Limited Partnership and Mobile Satellite Ventures Subsidiary LLC ("Motient/TMI"), pp. 5-16; New ICO Comments, pp. 5-23.

[16] See Comments of Iridium Satellite LLC ("Iridium"), pp. 2-3.

TDS would stress that the comments dealing with interference, made by participants in the MSS service, should be given special weight, as they are made by parties with an obvious interest in a vibrant future for MSS.

TDS would also note in connection with Point 2 that no MSS commenter has demonstrated or even begun to demonstrate how ATC will generate the number of new customers necessary to rescue badly off MSS licensees from their precarious financial condition.

TDS's position is that the public interest requires that additional frequencies be allocated to mobile services. If MSS licensees can build the systems they originally proposed to build, well and good. But if they can't, there is an urgent need that their spectrum be "repossessed" for the public and allocated to carriers with a track record of providing mobile service.

The MSS licensees' attempt to obtain an ATC grant is a last minute attempt to avoid what is probably the inevitable fate of most MSS proposals, namely failure to construct and loss of license. As noted in our Comments, we oppose this attempt to "prop up" failed MSS authorizations and believe that the weight of comment evidence supports that position.

Conclusion

For the foregoing reasons and those given previously, the FCC should not adopt an Ancillary Terrestrial Component authorization for MSS licensees.

Respectfully submitted,

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I, Aileen M. Caffey, hereby certify that copies of the foregoing Reply Comments were sent to the following, by First Class Mail, postage prepaid, in this 13th day of November, 2001.

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