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WILKINSON) BARKER) KNAUER) LLP

2300 N STREET, NW
SUITE 700
WASHINGTON, DC 20037
TEL 202.783.4141
FAX 202.783.5851
www.wbklaw.com

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 7, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band ("MSS Flex")*, IB Docket No. 01-185, ET Docket No. 95-18;

In the Matter of MSS Applications and LOIs, DA 01-1635, File No. 188-SAT-LOI-97, *et al.*, DA 01-1631, File No. 179-SAT-P/LA-97(16), *et al.*, DA 01-1632, File No. 26/27/28-DSS-P-94, *et al.*, DA 01-1633, File No. 181-SAT-P/LA-97(46), *et al.*, DA 01-1634, File No. 183/184/185/186-SAT-P/LA-97, *et al.*, DA 01-1636, File No. 187-SAT-P/LA-97(96), *et al.*, DA 01-1637, File No. 180-SAT-P/LA-97(26), *et al.*, DA 01-1638, File No. 189-SAT-LOI-97, *et al.;*

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 Wireless Services, including Third Generation Wireless Systems, ET Docket Nos. 00-258, 95-18, IB Docket No. 99-81:

Request to Suspend Action in MSS Flex Proceeding Pending Decisions in Related Dockets

Dear Ms. Dortch:

We are writing on behalf of AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (jointly the "Carriers") with regard to the above-referenced *MSS Flex* proceeding. Recent press reports state that New ICO Global Communications (Holdings) Ltd. ("New ICO") is urging the Commission to take expedited action in the *MSS Flex* proceeding. In addition, The Washington Post recently reported that New ICO is lobbying the FCC to allow it to serve urban areas on a terrestrial basis "like a regular cell phone company." Yuki Noguchi, *Iridium Finds Itself in a Contractual Bind*, The Washington Post, May 23, 2002, at E5. The article quoted New ICO as stating that the terrestrial/urban authorization piece is critical because: "We

do not want to launch a satellite with a failed business plan."[1] The Carriers therefore reiterate their position that the Commission should not (and lawfully cannot) act in the *MSS Flex* proceeding without also acting on two other long-pending matters.

The *MSS Flex* rulemaking is of course not just about granting a radio service expanded rights. To see it as only that, one must disregard what is really happening. In simple terms, granting "flexibility" would conflict with previous orders, circumvent the law, and deny significant auction revenues to the Government.

In the face of substantial evidence that satellite-only service was not a productive assignment of spectrum, the International Bureau and Office of Engineering and Technology licensed satellite-only service anyway. In keeping with that action, the Commission refused to open MSS spectrum for terrestrial use, thereby blocking others interested in offering terrestrial service from bidding on that spectrum, in contravention of the basic purpose of the auction statute to award spectrum on the basis of highest and best use. 47 U.S.C. § 309(j). Having insulated incumbent MSS applicants from an auction by restricting service to satellite-only, the Commission reversed course in the *MSS Flex* notice by proposing to allow terrestrial service after all -- to the sole benefit of incumbent MSS applicants.

In direct conflict with the rationales of earlier decisions, the Commission now proposes to protect the MSS licensees from market forces. It is reversible error for the FCC to deny others the right to bid for that same spectrum. This unlawful "gift" to incumbents undermines virtually every spectrum principle for which the Communications Act and the Commission stand.

MSS Flex is only one of three interdependent proceedings each of which involves whether the FCC has unlawfully circumvented sections 309(d), (e) and (j) of the Communications Act, as well as the requirement to engage in reasoned-decisionmaking. Specifically:

(1) On May 18, 2001, the Cellular Telecommunications and Internet Association ("CTIA") filed a Petition for Rulemaking seeking the reallocation of the MSS spectrum because the service is not viable and there is a proven need for the spectrum among terrestrial users. CTIA's petition was summarily denied in large measure[2] and it filed a Petition for Reconsideration on October 15, 2001.

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[1] Ironically, the article indicates that New ICO's terrestrial proposal may impair Iridium's plan to deliver a new satellite-only global service to the Department of Defense and other users in remote areas.

[2] *See 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 Wireless Services, including Third Generation Wireless Systems*, 16 FCC Rcd 16043 (rel. August 20, 2001).

(2) On July 17, 2001, the International Bureau and Office of Engineering and Technology granted the applications of New ICO and others despite several applicants' admissions that they could not build the satellite service for which they had applied. On August 16, 2001, the Carriers filed an Application for Review challenging the grant of the MSS licenses without an auction and without resolving substantial and material issues involving the viability of the service and the applicants.

(3) On August 17, 2001, the Commission released a Notice of Proposed Rulemaking instituting the *MSS Flex* proceeding, asking for comment on terrestrial use of the MSS band. The MSS viability and auction issues were again raised and commenters showed that provision of MSS and terrestrial services by separate operators in the MSS band is technically feasible. Thus, any entities seeking the spectrum for terrestrial uses could file mutually exclusive applications that must be resolved by auction.

These proceedings, which are all pending, must be decided together; the linkage is far tighter than a commonality of issues. The key premise of the MSS license grant orders -- refusal to consider the viability of the applied-for service -- would be completely undermined by allowing terrestrial operation in order to improve New ICO's potential viability. Either the licensing orders were right, meaning that terrestrial operations must be denied, or the Commission will decide to prop up MSS by granting flexibility, in which case the decision to grant the licenses was wrong and must be vacated.

A ruling in the *MSS Flex* proceeding alone in favor of New ICO will effectively prejudge the other two pending proceedings. Thus, simultaneous action in all three proceedings is required. The Commission should suspend action in the *MSS Flex* proceeding until it is prepared to resolve all pending matters. Further, if terrestrial service is authorized in the MSS band, would-be terrestrial providers must be allowed to apply consistent with the requirements of the Act.[3]

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[3] *See Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range,* ET Docket No. 98-206, Memorandum Opinion and Order and Second Report and Order, FCC 02-116 (rel. May 23, 2002) (finding that competing applications had to be entertained and the Orbit Act auction exception is inapplicable where spectrum can be separately assigned for satellite and terrestrial use) ("*Northpoint*").

I. Background

In 1997, the Commission allocated 70 MHz of additional spectrum in the 2 GHz band to MSS.[4] The Commission rejected comments reflecting "skepticism over the need for additional MSS spectrum" and arguing that the allocation to satellite service only was unjustified. The Commission found instead that this satellite service "would provide communications to underserved areas, such as rural and remote areas." Nine applications proposing satellite-only service were accepted.[5]

In 2000, the Commission adopted MSS service and licensing rules, including developing a band plan, unlike any proposed by the applicants, which avoided mutual exclusivity among the applicants.[6] The Commission emphasized that satellites are an excellent technology for delivering basic and advanced telecommunications services to unserved, rural, insular or economically isolated areas. The Commission also expressed concern that the deployment of all authorized systems might not occur and that "some authorized systems [may] not [be] able to implement service."

The Commission's concerns proved valid when New ICO, parent of ICO Services Ltd., one of the MSS applicants, made an *ex parte* filing stating that MSS coverage limitations in urban areas and indoors are a "crippling impediment" to MSS systems that place in "dire jeopardy" the ability of MSS to deliver service, including service to rural and underserved areas.[7] According to New ICO, without terrestrial authorization, "MSS service will disappear" because standalone "MSS systems are simply not economically viable."

Following New ICO's filing, CTIA submitted a Petition for Rulemaking urging the Commission to consider whether to reallocate MSS spectrum for terrestrial use.[8] CTIA asked the Commission to withhold further action on the then-pending MSS applications until there was a ruling on its petition – an appropriate request given New ICO's admission that MSS-only service was not viable.

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[4] *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service*, 12 FCC Rcd 7388 (1997).

[5] "Satellite Applications and Letters of Intent Accepted for Filing in the 2 GHz Band," Report No. SPB-119 (rel. March 19, 1998).

[6] *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, 15 FCC Rcd 16127, at ¶ 32 n.107 (2000).

[7] Letter from Lawrence H. Williams, New ICO Global Communications (Holdings) Ltd., to Michael K. Powell, FCC Chairman, dated March 8, 2001.

[8] Petition for Rulemaking of the CTIA (May 18, 2001).

Nevertheless, on July 17, 2001, the International Bureau and Office of Engineering and Technology, rejecting requests to defer action by CTIA and others, and in the face of New ICO's admissions regarding the viability of satellite-only service, granted the applications, finding that the applicants "should be given the opportunity to succeed or fail in the market on their own merits."[9] The Bureau did not grant New ICO's proposal to permit MSS licensees to provide terrestrial service; to do so would have undermined the rationale for its license grants.[10]

On August 16, 2001, the Carriers filed an Application for Review of the MSS license grants. The Carriers challenged, among other things, the decisions as contrary to the Commission's fundamental obligation to utilize auctions and resolve substantial and material questions of fact regarding whether the licensees could provide the service for which they had received free (unauctioned) spectrum. Ten months later, the Commission has still not decided.

Rather than resolve the fundamental issues raised by the license and allocation challenges, on August 17, 2001, the Commission instituted the *MSS Flex* proceeding, asking for comment on terrestrial use of the MSS band. A substantial record was compiled demonstrating that terrestrial use of MSS spectrum did not have to be limited to the satellite-only licensees.[11]

Three days after the *MSS Flex* NPRM, the Commission released a Further Notice of Proposed Rulemaking proposing reallocation of part of the MSS band for advanced wireless services. Therein, the FCC denied CTIA's petition for rulemaking to the extent it proposed reallocating the 2 GHz MSS spectrum to advanced wireless services without even asking for comment as required by the Commission's rules. On October 15, 2001, CTIA filed a petition asking the Commission to reconsider that action, but again, the Commission has not yet acted.

II. The Various MSS Proceedings are Interdependent and Need to be Resolved Together Consistent With the Communications Act and Reasoned Decisionmaking

The proceedings described above involve the same operative facts. Specifically, the Commission: (1) avoided an auction by designing, on its own initiative, the MSS band plan to eliminate competing satellite applicants; (2) adopted service rules that permitted <u>only</u> satellite service; (3) avoided substantial and material factual issues (raised by the applicants as well as petitioners) as to the viability of the service and the applicants, instead basing license grants upon a ruling that the marketplace would resolve the viability question; and (4) then inexplicably reversed course and began the *MSS Flex* proceeding to decide whether to bail-out the MSS indus-

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[9] *See, e.g., ICO Services Ltd.*, 16 FCC Rcd 13762 (IB & OET July 17, 2001).

[10] *Id.* at n.17.

[11] *See* Cingular Wireless, LLC and Sprint Corporation written Ex Parte Communication of May 13, 2002 attaching study by Telecordia Technologies, "Analysis of Spectrum Sharing Between MSS and Terrestrial Wireless Services"; *see also* Further Technical Comments of CTIA filed March 22, 2002.

try by intervening in that marketplace so that the licensees could provide terrestrial service. This ordering of events does not constitute reasoned decisionnmaking, circumvents the Communications Act, and undermines the satellite-only basis for the license grants.

The illogic of the Commission's actions will be compounded if the *MSS Flex* proceeding is decided before the Commission has even reviewed the propriety of both the initial license grants for satellite-only service and the original satellite-only allocation. It is improper for the Commission to review whether the MSS licensees should be granted even broader authority before the Commission decides whether the original allocation, eligibility rules, and license proceeding were valid.

The Carriers and others have already raised multiple challenges to the validity of the Commission's course of action that must be addressed before, or as part of the *MSS* Flex decision. These include:

(1) A decision in the *MSS Flex* proceeding to allow MSS spectrum to be used for terrestrial purposes without permitting additional applicants and without an auction to resolve any mutual exclusivity circumvents the requirements of Section 309(j) of the Act and the related requirement of fair notice to potential applicants. Originally, the Commission entertained applications and granted MSS licenses based upon the proposed global satellite service to rural and underserved areas. A decision to reclassify the spectrum to permit the provision of terrestrial/urban services without allowing new applicants to apply would expose the agency's end-run around Section 309(j).

(2) Such a decision is also unsupported by the ORBIT Act, which exempts from auction only spectrum "used for the provision of international or global satellite communications services." 47 U.S.C. §765(f). In fact, the Commission has recently held that the ORBIT Act does not "prohibit the auction of spectrum licenses for terrestrial uses where the same spectrum may also be used for global or international satellite communications purposes by other licensees."[12]

(3) Such action will also violate the Commission's obligation to provide clear notice of the eligibility requirements with regard to the MSS spectrum. *See* 47 U.S.C. § 309(j) (mandate to specify "eligibility and other characteristics of such licenses"); *see also Maxcell Telecom Plus, Inc. v. FCC*, 815

[12] *Northpoint* at ¶ 244. *See also id.* at ¶ 243 (rejecting the argument that the ORBIT Act bars the assignment of licenses by competitive bidding where the terrestrial licensee will be operating on the same frequencies as a satellite service); *id.* at ¶ 245 (where satellite and terrestrial communications can be separately assigned and share spectrum, the ORBIT Act is not a bar to assigning terrestrial licenses through competitive bidding.)

> F.2d 1551, 1558, 1559 (D.C. Cir. 1987); *McElroy Electronics Corporation v. FCC,* 990 F.2d 1351, 1358 (D.C. Cir. 1993). Here, the Commission provided no notice of the potential to use MSS spectrum for terrestrial purposes until *after* it shut the door on applications that could have sought such authority. This, of course, skewed any mutual exclusivity auction determination. The Commission has recently held that, where mutual exclusivity "is possible," competitive bidding must be utilized.[13] The Commission should avoid compounding its original mistake by refusing to entertain terrestrial applications if terrestrial use is permitted.

Ironically, a decision in the *MSS Flex* proceeding to allow terrestrial use of the spectrum by MSS licensees would prejudge the Carriers' pending application for review, while essentially agreeing with it. The Carriers showed that there were serious MSS viability issues raised by even the applicants before licensing which were not resolved in the license grants. Allowing the MSS licensees terrestrial use effectively concedes that viability was a serious issue that could not be evaded by reliance on the satellite-only marketplace. Specifically, New ICO itself raised and continues today to emphasize the need for terrestrial/urban service to bail out MSS – the antithesis of the global rural service originally envisioned and licensed by the Agency. The Bureau chose to let the satellite market determine the viability issues raised in the licensing phase.[14] The Commission's almost immediate institution of the *MSS Flex* proceeding, proposing to substantially change the market conditions pursuant to which MSS licensees operate, cannot be reconciled with the Bureau's opposite approach and rationale. The Commission cannot ignore a central factual issue running through each MSS proceeding.[15]

Authorizing the existing MSS licensees to provide terrestrial service will also prejudge the CTIA petition for reconsideration which asks the Commission to revisit the original MSS allocation given the MSS viability problems. Once again, the FCC would be agreeing with CTIA's viability and highest use assessment (the need for terrestrial spectrum), while refusing to revisit the allocation and entertain interested terrestrial applicants. Again, this contradiction reveals unreasoned decisionmaking.

In sum, the Commission should recognize that the *MSS Flex* proceeding does *not* involve simply providing flexibility for MSS licensees. Since long before the licensing decision on delegated authority, it has been clear that a satellite-only allocation would not result in a viable ser-

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[13] *Northpoint* at ¶ 237.

[14] *See, e.g., ICO Services Ltd.,* 16 FCC Rcd 13762, at ¶ 31.

[15] *AT&T Wireless Services, Inc. v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001) (remand based on "[c]onclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review.").

vice.[16] It has also long been clear that, without terrestrial service, MSS is not the highest and best use of the instant spectrum. Further, to the extent terrestrial service is authorized, would-be providers must be allowed to apply and any mutual exclusivity must be resolved by competitive bidding. As the Commission has recognized, "[a]ssigning . . . licenses through competitive bidding . . . promotes efficient and intensive use of the spectrum . . . by awarding licenses to the entities that value them most highly . . . [and] are more likely to rapidly introduce new and valuable services and deploy those services quickly."[17] The Commission, however, has refused to face these issues either in the allocation or licensing context.

The Commission should, therefore, revisit the factual premises underlying the original MSS allocation and licensing decisions at the same time it considers whether to permit terrestrial use of MSS spectrum and eligibility issues. Action on the *MSS Flex* proceeding should be suspended until the Commission is prepared to resolve the other interrelated proceedings. *See generally Kessler v. FCC*, 326 F.2d 673, 681 (D.C. Cir. 1963). To do otherwise would violate the Commission's obligation to conduct its proceedings so as "to avoid piecemeal, duplicative, tactical and unnecessary appeals which are costly to the parties and consume limited judicial resources." *Mt. Wilson FM Broadcasters Inc. v. FCC*, 326 F.2d 673, 681 (D.C. Cir. 1963).

Respectfully submitted,

Kathryn A. Zachem
L. Andrew Tollin

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[16] The FCC is free to reverse or modify the Bureau's grant under delegated authority and therefore such action is not final. *See* 47 C.F.R. §1.115(g), (k). A licensee proceeds at its own risk if a Bureau grant is challenged. *See, e.g., Saco River Cellular, Inc.* v. *FCC*, 133 F.3d. 25 (D.C. Cir. 1998), *cert denied sub. nom., Northeast Cellular Tel. Co.* v. *FCC*, 119 S.Ct. 47 (1998) (the Commission changed licensees three times despite construction and operation by licensees with non-final grants.). In any event, The Washington Post reported that New ICO's position is as follows: "Without the Commission's approval for the terrestrial spectrum, the current model for satellite communications does not make sense." *Washington Post, supra* at E5. Moreover, the earliest MSS applicants are required to launch is 2005. *See, e.g., ICO Services Limited*, 16 FCC Rcd 13762, at ¶ 34.

[17] *Northpoint* at ¶ 241; *see also* Joint Statement of Chairman Michael K. Powell and Commissioner Kathleen Q. Abernathy at 7 ("While we understand the equitable basis for Northpoint's claims, we cannot support that equitable concern trumping the auction regime Congress created in the statute, or the value of allowing other competitors to vie for a chance to offer service to the public.").

CERTIFICATE OF SERVICE

I, Anne Marie Pierce, hereby certify that a copy of the foregoing has been served this 7th day of June, 2002, by hand delivery and first class United States mail, postage prepaid, on the following:

*Chairman Michael K. Powell
Federal Communications Commission
445 Twelfth Street, SW, Room 8-B201
Washington, DC 20554

*Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 Twelfth Street, SW, Room 8-B115
Washington, DC 20554

*Commissioner Kevin J. Martin
Federal Communications Commission
445 Twelfth Street, SW, Room 8-A204
Washington, DC 20554

*Commissioner Michael J. Copps
Federal Communications Commission
445 Twelfth Street, SW, Room 8-A302
Washington, DC 20554

*Jane E. Mago
General Counsel
Federal Communications Commission
445 Twelfth Street, SW, Room 8-C755
Washington, DC 20554

*Peter A. Tenhula
Senior Legal Advisor
Office of Chairman Michael K. Powell
Federal Communications Commission
445 Twelfth Street, SW, Room 8-B201
Washington, DC 20554

*Bryan Tramont
Senior Legal Advisor
Office of Commissioner Kathleen Abernathy
Federal Communications Commission
445 Twelfth Street, SW, Room 8-B115
Washington, DC 20554

*Sam Feder
Senior Legal Advisor
Office of Commissioner Kevin Martin
Federal Communications Commission
445 Twelfth Street, SW, Room 8-A204
Washington, DC 20554

*Jordan Goldstein
Senior Legal Advisor
Office of Commissioner Michael Copps
Federal Communications Commission
445 Twelfth Street, SW, Room 8-A302
Washington, DC 20554

*Thomas J. Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, SW, Room 3-C252
Washington, DC 20554

*Donald Abelson, Chief
International Bureau
Federal Communications Commission
445 Twelfth Street, SW, Room 6-C750
Washington, DC 20554

*Dr. Robert M. Pepper, Chief
Office of Plans and Policy
Federal Communications Commission
445 Twelfth Street, SW, Room 7-C347
Washington, DC 20554

Raymond G. Bender, Jr.
Carlos M. Nakla
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, NW, Suite 800
Washington, DC 20036
Counsel for Astrolink International

Stephen J. Duvall
David A. Nall
Bruce A. Olcott
Squire, Sanders & Dempsey, LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20044
Counsel for The Boeing Company

John M. Griffin
Kelley, Drye & Warren, LLP
1200 Nineteenth Street, NW, Suite 500
Washington, D.C. 20006
Counsel for BT North America, Inc.

*Edmond J. Thomas, Chief
Office of Engineering and Technology
Federal Communications Commission
445 Twelfth Street, SW, Room 7-C155
Washington, DC 20554

John L. Bartlet
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006
Counsel for Aeronautical Radio, Inc.

Philip Malet
Steptoe & Johnson, LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Counsel for The Boeing Company

R. Craig Holman
Office of the General Counsel
The Boeing Company
P.O. Box 3999, M/C 80-RF
Seattle, WA 98124-2499
Counsel for The Boeing Company

Cheryl Lynn Schneider
Chief Regulatory Counsel, Americas
BT North America, Inc.
601 Pennsylvania Avenue, NW
Washington, DC 20006
Counsel for BT North America Inc.

John C. Quayle
Brian D. Weimer
Skadden Arps Slate Meagher & Flom, L.L.P.
1440 New York Avenue, NW
Washington, DC 20005
Counsel for Celsat America, Inc.

Karen E. Watson
Director, Government Relations
Echostar Communications Corporation
1233 Twentieth Street, NW, Suite 701
Washington, DC 20036
Counsel for Echostar

Mitchell Lazarus
Fletcher, Heald & Hildreth, PLC
1300 North Seventeenth Street,11th Floor
Arlington, VA 22209
Counsel for Fixed Wireless Communications Coalition

William D. Wallace
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Counsel for Globalstar L.P.

Robert A. Mazer
Vinson & Elkins, L.L.P.
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1008
Counsel for Constellation Communications

Nils Rydbeck
Vice President Research & Development
Chief Technical Officer
Ericsson Mobile Phones & Terminals
7001 Development Drive
Research Triangle Park, NC 27709
Counsel for Ericsson, Inc.

Peter A.Rohrbach
Karis A. Hastings
Hogan & Hartson, LLP
555 Thirteenth Street, NW
Washington, DC 20004
Counsel for GE American Communications, Inc.

William F. Adler
Vice President, Legal and Regulatory Affairs
Globalstar, L.P.
3200 Zanker Road
San Jose, CA 95134
Counsel for Globalstar, L.P.

Gary M. Epstein
John P. Janka
James H. Barker
Latham & Watkins
1001 Pennsylvania Avenue, NW, Suite 1300
Washington, DC 20004
Counsel for Hughes Communications Galaxy, Inc.

Scott B. Tollesfson
Senior Vice President, General
Counsel & Secretary
Hughes Communications, Inc.
200 N. Sepulveda Boulevard
El Segundo, CA 90245
Counsel for Hughes Communications Galaxy, Inc.

Cheryl A. Tritt
David Munson
Morrison & Foerster LLP
2000 Pennsylvania Avenue, NW, Suite 500
Washington, DC 20006
Counsel for ICO Services Limited

Lawrence H. Williams
Suzanne Hutchings
ICO Teledisic Global, Ltd.
1730 Rhode Island Avenue, NW, Suite 1000
Washington, DC 20036
Counsel for ICO Services Limited

Jeffrey O. Olson
Paul, Weiss, Rifkind, Wharton & Garrison
1615 L Street, NW
Washington, DC 20036
Counsel for Iridium, LLC

Gerald Musarra
Senior Director
Commercial Policy & Regulatory Affairs
Space and Strategic Missiles Sector
Lockheed Martin Corporation
1725 Jefferson Davis Highway, Suite 403
Arlington, VA 22202
Counsel for Lockheed Martin Corporation

Tracie Becker
Gerald B. Helman
Mobile Communications Holdings, Inc.
Two Lafayette Center
1133 Twenty-First Street, NW
Washington, DC 20036
Counsel for Mobile Communications Holdings, Inc.

Tom Davidson
Phil Marchesiello
Akin, Gump, Strauss, Hauer & Fields LLP
1333 New Hampshire Avenue, NW
Suite 400
Washington, DC 20036
Counsel for Mobile Communications Holdings, Inc.

Bruce D. Jacobs
David S. Konczal
Paul A. Cicelski
Shaw Pittman
2300 N. Street, NW
Washington, DC 20037
Counsel for Motient Services, Inc.

Lon C. Levin
Vice President and Regulatory Counsel
Motient Services, Inc.
10802 Park Ridge Boulevard
Reston, VA 20191
Counsel for Motient Services, Inc.

Mark A. Grannis
Harris, Wiltshire & Grannis
1200 Eighteenth Street, NW
Washington, DC 20036
Counsel for North American GSM Alliance LLC

Henry Goldberg
Joseph A. Godles
Mary J. Dent
Goldberg, Godles, Werner & Wright
1229 Nineteenth Street, NW
Washington, DC 20036
Counsel for PanAmSat Corp.

Benjamin J. Griffin
Reed Smith Shaw & McClay
1301 K Street, NW, East Tower
Washington, DC 20005
Counsel for Primestar

Philip L. Spector
Jeffrey H. Olson
Diane C. Gaylor
Paul, Weiss, Rifkind, Wharton & Garrison
1615 L Street, Suite 1300
Washington, DC 20036
Counsel for SkyBridge L.L.C.

Mark A. Grannis
Harris, Wiltshire & Grannis
1200 Eighteenth Street, NW
Washington, DC 20036
Counsel for Teledesic

Denis Couillard
Eric Schimmel
Telecommunications Industry Association
2500 Wilson Boulevard., Suite 300
Arlington, VA 22201
Counsel for Telecommunications Industry Association

Gregory C. Staple
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, NW Suite 600
Washington, DC 20004
Counsel for TMI Communications and Company, Limited Partnership

Norman P. Leventhal
Walter P. Jacob
Leventhal, Senter & Lerman, PLC
2000 K Street, NW, Suite 600
Washington, DC 20006
Counsel for TRW, Inc.

Marvin Rosenberg
Holland & Knight
2100 Pennsylvania Avenue, NW
Washington, DC 20037
Counsel for U.S. Satellite Broadcasters

Paul J. Sinderbrand
Wilkinson Barker & Knauer
2300 N Street, NW
Washington, DC 20037
Counsel for Wireless Communications Association International, Inc.

Andrew Krieg
President
1140 Connecticut Avenue, NW, Suite 810
Washington, DC 20036
Counsel for Wireless Communications Association International, Inc.

Anne Marie Pierce

Anne Marie Pierce

June 7, 2002

*Via Hand Delivery