THE *NORTHPOINT* DECISION SUPPORTS AUCTIONING TERRESTRIAL USE OF MSS SPECTRUM

The same technical, legal, and policy factors that led the FCC to license terrestrial use of the 12 GHz band separately through competitive bidding in *Northpoint* support the separate licensing of terrestrial use of the 2 GHz MSS band and the award of terrestrial licenses by auction. Terrestrial use of the MSS band will proceed most efficiently if it is open to all eligible applicants, rather than reserved to existing satellite licensees that received their authorizations with no expectation of terrestrial rights. Such an outcome best serves the public interest in this instance and does not preclude the FCC from giving licensees flexibility of use *where warranted*.

- In *Northpoint*, the FCC found that it is technically feasible for both satellite and terrestrial services to share the 12 GHz band. The Commission rejected all of Northpoint's arguments for an exclusive license to provide terrestrial service without competitive bidding. *Northpoint*, FCC 02-116 (rel. May 23, 2002).

- Like the 12 GHz spectrum at issue in *Northpoint*, the 2 GHz band can support both satellite and terrestrial uses. The case for separate licensing of terrestrial use of MSS spectrum is even more compelling than in *Northpoint* because the MSS band would be "segmented" between terrestrial and satellite services -- not shared, as in the 12 GHz band -- and the Commission would not have to establish the detailed technical rules that were necessary to permit frequency sharing in *Northpoint*. *See, e.g.,* AT&T Wireless Ex Parte (filed Apr. 1, 2002) and Cingular/Sprint Ex Parte (filed May 13, 2002), IB Docket No. 01-185, ET Docket No. 95-18 (demonstrating that terrestrial service in the 2 GHz band can be provided by third parties, and that spectrum segmentation is necessary irrespective of whether MSS and terrestrial service are offered by the same or different carriers).

- The fact that ICO and other proponents of ancillary terrestrial service ("ATC") have recently received licenses to operate in the 2 GHz band is irrelevant to the question of whether the FCC can separately license terrestrial licenses. In *Northpoint*, the FCC did not limit terrestrial licensing solely to DBS incumbents. In addition, the MSS licensing order issued by the International Bureau ("IB") and Office of Engineering ("OET") on July 17, 2001 authorized ICO to provide *only* satellite service and explicitly disclaimed any promise to grant ICO terrestrial authority in the future. IB and OET noted that "[t]he Commission will decide separately whether and how to proceed with consideration of ICO's ATC concept. ICO may accept or reject this authorization with this understanding." *ICO Services Limited*, Order, DA 01-1635 (rel. July 17, 2001). ICO obviously accepted its satellite-only license.

- The FCC disagreed with Northpoint's argument that ORBIT precludes an auction simply because Northpoint's terrestrial services will operate on the same frequencies as satellite services: "Section 647 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. The spectrum licenses at issue here would be 'assigned' to licensees and auctioned only for domestic terrestrial use." *Northpoint*, ¶ 245; *see also id.*, ¶¶ 242-245. The same logic applies to the terrestrial use of the 2 GHz MSS band.

- Spectrum efficiency and flexibility issues must be considered in the context in which they are raised. While in some cases it might promote the public interest to grant incumbents additional spectrum rights, in other situations the highest and best use of the spectrum will be realized through flexible reallocation and open licensing. Certainly, in the case of MSS, the creation of terrestrial use rights is a new allocation of the band that warrants the assignment of licenses through competitive bidding. *Cf. Northpoint*, ¶¶ 35, 85; 47 U.S.C. § 309(j).

- ICO has not demonstrated that giving one or two MSS incumbents -- which have not taken even preliminary steps to deploy the satellite service they were licensed to provide -- the exclusive right to offer terrestrial service in the 2 GHz band would in any way further the FCC's flexibility goals. ICO and other incumbents acknowledge that they do not have a viable satellite-only business plan, and the record does not support ICO's contention that adding a terrestrial component would help ensure the survival of MSS. Nor is there any support for ICO's claims that ATC would remain ancillary, or that it would enhance service to rural areas. Under these circumstances, giving ICO the "flexibility" it requests would result in nothing more than a multi-billion dollar spectrum windfall for ICO. A giveaway of this magnitude would undermine the public interest in ensuring the highest and best terrestrial use of the MSS band.