

**AT&T WIRELESS SERVICES, INC.
CINGULAR WIRELESS LLC
SPRINT CORPORATION**

December 26, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: *Written Ex Parte Communication*
Mobile Satellite Systems – Terrestrial Services
IB Docket No. 01-185; ET Docket No. 95-18

Dear Ms. Dortch:

By this letter, AT&T Wireless Services, Inc., Cingular Wireless LLC, and Sprint Corporation respond to new arguments made by ICO Global Communications (“ICO”) in its December 16, 2002 letter.¹ The ICO letter argues that, if the Commission chooses to allow Mobile Satellite Service (“MSS”) licensees to operate an ancillary terrestrial component (“ATC”), it should not adopt a “gating” condition that requires MSS licensees to provide only dual-mode satellite/terrestrial phones. ICO’s argument relies on rhetoric regarding “technological innovation” and “consumer choice,” but it must be seen for what it is – a brazen attempt to jettison the promise of service to rural areas, on which MSS is based, in favor of a stand-alone terrestrial service provided on spectrum acquired for free.

We once again urge the Commission to recognize that it cannot, consistent with the requirements of Section 309(j) of the Communications Act, grant the right to provide terrestrial service to MSS licensees unless those rights are awarded through competitive bidding. If the Commission decides otherwise, however, sound public policy requires that it adopt sufficient safeguards – including a requirement of dual-mode handsets – to ensure that ATC remains truly ancillary to the satellite service the Commission licensed to foster robust, ubiquitous service to rural areas.

I. A Dual-Mode ATC/MSS Handset Requirement Is Necessary to Protect the Prospects for MSS in Rural Areas

The ICO December 16 Letter opens with an assurance that “ATC is not designed to serve as a stand-alone terrestrial system.”² The remainder of the letter, however, argues that the economics of MSS require that the Commission allow just that – a stand-alone terrestrial service using terrestrial-only terminal devices that cannot communicate directly with ICO’s satellites.

¹ See Letter from Lawrence H. Williams, ICO, to Marlene H. Dortch, FCC Secretary, IB Docket No. 01-185, ET Docket No. 95-18 (Dec. 16, 2002) (“ICO December 16 Letter”).

² *Id.* at 1.

The Commission has long recognized that the principal public interest benefit of MSS was its potential to bring robust, ubiquitous service to rural areas.³ To maintain the promise of rural service even as it considered ATC, the Commission proposed to limit terrestrial operations on MSS spectrum to those services that (1) are integrated with the satellite network, (2) use assigned MSS frequencies, (3) are provided for the purpose of augmenting signals in areas where the principal service signal, the satellite signal, is attenuated, and (4) do not differ materially in nature or character from the satellite services offered by MSS providers.⁴ ICO purports to support these criteria,⁵ but its proposed terrestrial-only service would be wholly inconsistent with the concept of “ancillary” services as defined above. Unless the Commission adopts real gating criteria that include a dual-mode MSS/ATC handset requirement, rural areas will be left behind while MSS licensees expend their resources to pursue urban markets with a stand-alone ATC service that cannot be regarded as “ancillary” to the satellite service.

ICO’s latest line of argument puts the lie to its earlier claims that ATC would enable it to provide better MSS service to rural areas. ICO has consistently told the Commission that residents of rural and insular areas would be the primary beneficiaries of its ATC proposal, and that this benefit provided a sufficient justification for conferring ATC rights on MSS licensees alone. According to ICO, ATC would “improve service to rural and underserved areas” by “improving the quality and prices of the service.”⁶ A major problem with an MSS-only service, ICO claimed, was the so-called “product investment problem”: the potential MSS market is so small that satellite phones are “expensive,” making the service “even less attractive to potential urban and rural users.”⁷ ICO told the Commission that ATC could solve the “product investment problem” by increasing the MSS customer base to include ATC, because with ATC a greater number of satellite phones would be produced, resulting in lower per-unit prices: “Rural users will also benefit from the scale economies that implementation of ATCs will create.”⁸

In its December 16th letter, however, ICO is changing its tune. Faced with the possibility that the Commission will adopt a dual-mode handset requirement, ICO jettisons its product investment argument in favor of claims that a dual-mode mandate would raise the cost of MSS handsets for rural subscribers. ICO asks now for the “flexibility” to offer ATC-only handsets so that it can “attract sufficient demand for ATC services,”⁹ but it leaves unexplained how offering ATC-only handsets will promote the Commission’s goal of encouraging satellite service to underserved areas.

³ See *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, *Report and Order*, 15 FCC Rcd 16127, para. 1 (2000).

⁴ *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*, IB Docket No. 01-185 and ET Docket No. 95-18, *Notice of Proposed Rulemaking*, 16 FCC Rcd 15532, para. 30 (2001).

⁵ See ICO December 16 Letter at 1, n.4.

⁶ ICO Letter, IB Docket No. 01-185 (March 8, 2001) at 2 (emphasis omitted).

⁷ ICO Comments, IB Docket No. 01-185 (Oct. 22, 2001) at 16.

⁸ ICO Letter, IB Docket No. 01-185 (March 8, 2001) at 14.

⁹ ICO December 16 Letter at 4.

ICO complains that a dual-mode requirement “would force some customers to pay for additional satellite or ATC features that they otherwise would not purchase.”¹⁰ Clearly, this statement reveals that ICO’s principal motivation is not to use ATC to “augment” its satellite offering, as the Commission intended. Indeed, ICO does not intend its ATC offering to be “ancillary” at all; ICO wants to sell terrestrial services separate and apart from any MSS offering. The December 16th letter makes it clear that ICO’s primary focus is on the terrestrial customer. In sum, residents of rural areas would realize no benefits from ICO’s provision of ATC service.

Here ICO has the temerity to ask the Commission, if it grants exclusive ATC authority, to refrain from adopting rules that would ensure that ATC is true to its name. If the Commission allows ATC-only handsets to be marketed, ICO and others are sure to divert more of their resources away from the intended purpose of MSS – provision of satellite service to rural and insular areas. We respectfully suggest that if MSS cannot be made to succeed with a truly ancillary ATC, the Commission should take back the spectrum and auction it for a higher and better use.

II. The Commission Is Legally Required to Auction Any ATC Rights It Creates

Having said this, we wish to reemphasize that, if the Commission decides to permit ATC, as a matter of law it must award ATC rights through competitive bidding.

Section 309(j) of the Communications Act requires the Commission to grant licenses through the use of competitive bidding when mutually exclusive applications for initial licenses are filed.¹¹ As an initial matter, the record shows that independent ATC operations separate from MSS licensees’ operations are “quite feasible”:

In sum, there seems to be no technical reason why spectrum-sharing MSS and ATC systems cannot be provided by separate operators.¹²

Because it is technically feasible for entities other than MSS licensees to operate terrestrial mobile services in the MSS band, the Commission is obligated by law to conduct auctions if it decides to authorize ATC in the MSS band. Just last year, the Commission concluded that when satellite and terrestrial service uses can be assigned separately, the terrestrial license rights should be assigned by

¹⁰ *Id.*

¹¹ 47 U.S.C. § 309(j)(1). There are certain statutory exceptions to this auction requirement, but they are not relevant in this context.

¹² Cingular/Sprint Ex Parte, IB Docket No. 01-185 (May 13, 2002), *attaching* Dr. Jay Padgett, Senior Research Scientist, Telcordia Technologies, “Analysis of Spectrum Sharing Between MSS and Terrestrial Wireless Services,” at 2 and 79 (May 10, 2002). In response to ICO’s claim that Telcordia had used “bad science” (ICO Further Comments, IB Docket No. 01-185 (June 13, 2002) at 10), Cingular and Sprint demonstrated that ICO’s criticisms were based on erroneous calculations or a careless reading of the Telcordia Analysis and that ICO did not even challenge the major points that Telcordia had made. *See* Cingular/Sprint Ex Parte, IB Docket No. 01-185 (July 31, 2002). ICO has not responded to this demonstration, and the ICO December 16 Letter omits any mention of this issue.

auction because it ensures that the spectrum will be put to its best use.¹³ The requirements of Section 309(j) would present a significant legal problem for the Commission if it were to award ATC rights only to MSS licensees. If the Commission rejects the dual-mode handset requirement and grants MSS licensees the right to offer stand-alone terrestrial service, its Section 309(j) analysis fails because other potential MSS applicants never had notice that MSS licenses could be used to provide terrestrial commercial mobile radio service on a stand-alone basis.

Conclusion

The ICO December 16 Letter should be understood for what it is – merely the latest volley in its attempt to perform an end-run around the auction statute. ICO seeks the right to provide a terrestrial commercial mobile service that is completely separate from its proposed satellite services – using a separate terrestrial-based network, selling terrestrial-only handsets, and offering different services than its satellite operations. In short, ICO wishes to take satellite spectrum that it was granted free of charge and use it to provide a competitive terrestrial commercial mobile service against carriers who have paid billions for their spectrum. These requests find little or no support in any legal or policy rationale, but if the Commission decides to authorize ATC, it must give meaning to the term “ancillary” by adopting real gating requirements, including a dual-mode handset requirement.

¹³ See *Amendment of the Commission’s Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates*, ET Docket No. 98-206, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, paras. 238-45 (May 23, 2002). Indeed, Senator John McCain recently observed that the terrestrial use rights in satellite spectrum “must be auctioned” given the Commission’s previous interpretation of section 309(j) in cases “where multiple parties seek to use satellite spectrum to provide terrestrial services.” Letter from The Honorable John McCain, Ranking Republican, U.S. Senate Committee on Commerce, Science, and Transportation to The Honorable Michael K. Powell, Chairman, FCC (December 20, 2002).

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Pursuant to Section 1.1206(b)(1) of the Commission's rules, one copy of this letter is being filed electronically with the Secretary's office for filing in IB Docket No. 01-185 and ET Docket No. 95-18.

Respectfully submitted,

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