Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Flexibility for Delivery of Communications by MSS Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands;	)	IB Docket No. 01-185
	)	
Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit MSS Systems in the 1.6/2.4 GHz Bands	)	IB Docket No. 02-364

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

Cingular Wireless LLC ("Cingular") hereby replies to the oppositions to its Petition for Reconsideration in this proceeding submitted by ICO Global Communications (Holdings) Limited ("ICO"), The Boeing Company ("Boeing"), Globalstar, L.P. ("Globalstar"), and Mobile Satellite Ventures Subsidiary LLC ("MSV") (collectively, "Opponents"). As discussed below, the oppositions fail to demonstrate that the gating criteria set forth in the *Report and Order*[1] will ensure that ATC is ancillary to the primary satellite service. Assuming *arguendo* that the Commission had the authority to award terrestrial rights in the first instance, it must adopt meaningful gating criteria as a matter of law and policy.[2] In addition, Opponents' attempt to justify exemption of Personal Data Assistants ("PDAs") from the integrated service requirement is inconsistent with the *Report and Order*'s prohibition against stand-alone terrestrial operations and is similarly unlawful.[3]

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[1] *Flexibility for Delivery of Communications by Mobile Satellite Service Providers*, IB Docket No. 01-185, *Report and Order*, FCC 03-15 (rel. Feb. 10, 2003) ("*Report and Order*"), *summarized*, 68 Fed. Reg. 33640 (June 5, 2003) (providing for Ancillary Terrestrial Component rights, or "ATC," for Mobile Satellite Service ("MSS") licensees), *recon.*, FCC 03-162 (rel. July 3, 2003).

[2] *See* Cingular Pet. at 1-4 & nn.5-7. The question of whether the Commission had the authority to award ATC rights as a threshold matter is now before the U.S. Court of Appeals for the District of Columbia Circuit in *AT&T Wireless Services, Inc. et al. v. FCC*, No. 03-1191 (D.C. Circuit filed July 8, 2003).

[3] *See* Cingular Pet. at 2-4 & nn.5-7, 12.

Cingular's Petition demonstrated that the *Report and Order*:

- Is internally inconsistent, proclaiming a goal of primary satellite service and ancillary terrestrial service but permitting the vast majority of MSS spectrum to be dedicated to ATC;
- Allows substantial terrestrial rights, contrary to the original decision to license 2 GHz MSS providers to succeed or fail on their own merits on a satellite-only basis;
- Provides substantial terrestrial rights under the guise of a satellite license in violation of Section 309(j), which generally requires that terrestrial spectrum be auctioned;[4] and
- Threatens the availability of adequate spectrum to bring MSS to rural areas – the public interest foundation for the MSS allocation.

In sum, meaningful restrictions are required to ensure that terrestrial service will remain truly ancillary to MSS. Because Opponents fail to demonstrate the adequacy of the current rules to ensure terrestrial service is ancillary and not primary, reconsideration is warranted.

DISCUSSION

A. Opponents Fail to Dispel the Need to Adopt Meaningful Criteria to Ensure that ATC Is Truly Ancillary to the Principal MSS Offering.

The oppositions offer little more than conclusory statements that the gating criteria are sufficient to ensure "substantial satellite service," and therefore additional criteria are "unnecessary"[5] to ensure that the added terrestrial component is ancillary to the "principal MSS

[4] Opponents' claim that an auction of terrestrial rights is not required under Section 309(j) because spectrum will not be segmented and MSS licensees will not be unjustly enriched. *See* Boeing Opp. at 9; ICO Opp. at 10-11. Globalstar, however, has indicated that it "would be assigning at least one channel to ATC" in various geographic areas, and in these areas "the ATC channels would not also be available for MSS." *See* Joint Comments of L/Q Licensee, Inc. *et al.*, IB Docket No. 02-364 at 8 (July 11, 2003). In any event, segmentation is only one factor that would require an auction. As Cingular and others have shown throughout this proceeding, the awarding of terrestrial rights so soon after licensing on a satellite-only basis, as the current *Report and Order* permits, is a major license change resulting in an end run around the auction statute. *See, e.g.*, Cingular/Verizon Wireless Comments at 7-11 (Oct. 22, 2001); Cingular/Verizon Wireless Reply Comments 3-9 (Nov. 13, 2001). ICO's reliance on other cases where the Commission has awarded flexibility to demonstrate the absence of unjust enrichment is inapposite, because those cases did not provide for substantial new and material rights so soon after licensing in the absence of an auction. ICO also ignores the *Report and Order*'s failure to explain its departure from a prior Commission finding that MSS and terrestrial services are competitors in the mobile telephony market. *See* Cingular Pet. at 23; *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[5] ICO Opp. at 2; Globalstar Opp. at 2-4; MSV Opp. at 15.

offering."[6] Opponents fail to refute Cingular's argument that the criteria enable a licensee to dedicate 99 percent of its spectrum to ATC.[7] In fact, the Opponents prove the point that the rules provide no meaningful restriction by relying only on arguments that "logic" and the market will ensure that substantial satellite service is provided.[8] Such a cavalier approach amounts to a *de facto* reallocation of MSS spectrum to terrestrial service with a satellite component.

The Opponents' own statements show that their market-based assumptions are unfounded. For example, ICO states that the large upfront investment for NGSO licensees will incent MSS licensees to provide "quality satellite services" to recoup their investments, but separately admits that historic (upfront) costs in satellite are "beside the point" because the motivating force is the desire to seek a profit.[9] Boeing also agrees that investment in a satellite system as an indicator of future behavior "misses the point"; rather, it is the desire to avoid building expensive terrestrial systems that will drive MSS licensees to develop their satellite service.[10] Boeing, however, ignores the recognized ability of MSS licensees to partner with terrestrial providers to avoid the expense of building their own terrestrial network.[11]

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[6] *See Report and Order* at ¶ 1.

[7] Neither ICO nor Globalstar offers any explanation how *the ATC rules themselves* ensure terrestrial service will remain ancillary to the primary satellite service when up to 99 percent of an MSS licensee's spectrum can be used for terrestrial services. *See* ICO Opp. at 2, 5-6; Globalstar Opp. at 2-3. Boeing simply makes the blanket assertion that the rules will prevent such an occurrence, without explaining which rules will do so and how. *See* Boeing Opp. at 4. At another point, Boeing cites to the integrated service/dual mode and "commercial availability" rules, but fails to show how they will ensure that ATC remains ancillary to the principal satellite service. *See* Boeing Opp. at 3. MSV does not address the adequacy of the current rules as a general matter for purposes of ensuring that the provision of ATC by MSS licensees remains ancillary. *See* MSV Opp. at 14-15.

[8] *See* Boeing Opp. at 4, 6 (citing "logic" and "economic incentives"); ICO Opp. at 5-6 (citing "natural economic incentives" and "market incentives"); MSV Opp. at 17 (citing the "marketplace" and what the "market will demand").

[9] *See* ICO Opp. at 5-6. Cingular showed in its petition that upfront costs are not indicative of future behavior. *See* Cingular Pet. at 5-6 & n.14 (citing relevant case law).

[10] *See* Boeing Opp. at 5-6.

[11] As the Commission concluded: "Even if ICO and Nextel currently intended to capitalize on their business strengths and cooperate in offering MSS ATC, nothing would prevent other CMRS and MSS operators

The *real* point is that ATC operations have the capacity to support many more subscribers than MSS and, thus, ATC has a greater revenue/profit potential. As Globalstar acknowledges, "the ATC component can reuse frequency more efficiently than the satellite component because the spectrum can be reused at shorter distances in the terrestrial mode."[12] Thus, MSS licensees have a far greater incentive to invest in terrestrial services, while devoting only those resources to satellite service as are necessary to preserve the underlying license, because investment in ATC provides the best profit opportunity.[13] Recent actions, *e.g.*, reducing the number of satellites in MSS systems and demanding that the PDA exemption be retained, bear this out. Market forces would clearly lead to ATC becoming the primary service to the detriment of satellite service and the provision of MSS to rural areas – the original purpose of the allocation.[14]

In particular, Cingular demonstrated that the ATC rules require that one or more satellites be "in view" of *potential* subscribers, and that coverage be continuing, but do not mandate any particular level of MSS capacity to ensure "substantial satellite service."[15] Likewise, commercial availability is tied to meeting coverage requirements and "offering" service, rather than requiring

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from also doing so. For instance, nothing prohibits MSS providers from affiliating with terrestrial providers . . . in the provision of integrated mobile services and as long as such arrangements comply with our rules and policies governing transfers of control." *Report and Order* at ¶ 44.

[12] Globalstar Opp. at 5.

[13] *See, e.g.*, Cingular Pet. at 5-7 and notes 71-72 and accompanying text (discussing spectrum efficiency and economic incentives for MSS licensees to dedicate the majority of their spectrum to ATC); Inmarsat Ventures PLC ("Inmarsat") Pet. at 14 (explaining that "enhancing and expanding the ATC network may be more profitable than maintaining high quality MSS operations").

[14] *See, e.g.*, Inmarsat Pet. at 14 (noting that because of the potential to derive greater profits from ATC operations, "[i]t would then be in the business interests of the operator to prioritize service to profitable urban customers (via ATC) over service to less profitable rural ones (via satellite), which could undermine the Commission's goal of facilitating the provision of vital communication services to rural and underserved areas").

[15] *See* Cingular Pet. at 4.

that MSS licensees actually serve customers or offer satellite service in any meaningful way.[16] ICO claims that MSS licensees do *not* need to satisfy their MSS milestones and complete their licensed systems before gaining ATC authority.[17] In Globalstar's view, an integrated service should allow a mobile subscriber to choose terrestrial service as its default service, conceivably never using the satellite network.[18]

Given the market incentives for MSS licensees to focus on ATC investment and operations, the Commission should reaffirm its commitment to the *Report and Order*'s stated goal: "ensur[ing] that MSS remains first and foremost a satellite service and that the terrestrial component remains ancillary to the primary purpose of the MSS system."[19] It should do so by adopting a capacity limit and a "look first" to the satellite requirement.

Globalstar is flatly wrong in asserting that because it is difficult to identify the "right" mix of satellite and terrestrial services, the Commission should not adopt any limit on the ability of MSS licensees to minimize satellite system capacity.[20] The Commission made a judgment to allow ATC in MSS spectrum – provided that MSS remains the *principal* service. MSS licenses were awarded on a satellite-only basis and without an auction. Thus, to the extent the Commission fails to establish meaningful guideposts on reconsideration to ensure that MSS licensees fulfill this goal, the *Report and Order* will violate the Communications Act (*e.g.*, Section 309(j)) and the reasoned decisionmaking requirement. At a minimum, the Commission

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[16] *See id.*

[17] ICO Opp. at 9. ICO makes no attempt to rebut Cingular's argument that granting ATC rights prior to satisfying all milestones is contrary to the *Report and Order*'s desire to avoid the possibility of terminating ATC subscribers. That is, early grant would enable an MSS licensee to obtain ATC subscribers in advance of completing its authorized MSS system, but could place those subscribers in jeopardy if the licensee subsequently failed to complete that system in its entirety and lost its MSS license. *See* Cingular Pet. at 12-14; *Report and Order* at ¶ 86.

[18] *See* Globalstar Opp. at 7; *see also id.* at 9.

[19] *Report and Order* at ¶ 88.

[20] *See* Globalstar Opp. at 6.

should restrict ATC such that at least one-half of the mobile satellite system's capacity remains available to subscribers at all times.[21]

The Opponents rely heavily on efficiency arguments in an effort to defeat the capacity limit. Globalstar, for example, claims that in order "to maximize spectral efficiency," MSS licensees must be able to allocate MSS spectrum as they see fit.[22] Yet, the decision to allow ATC, while requiring substantial satellite service, was not intended to "maximize spectral efficiency." The Commission stated only that ATC would create "the possibility of achieving greater efficiencies within MSS spectrum than possible today."[23] The capacity limit affords MSS licensees the flexibility to achieve greater efficiencies – while ensuring that ATC does not supplant satellite services. As long as the satellite capacity threshold is satisfied, the limit proposed by Cingular does not dictate the relative number of satellite versus terrestrial customers or minutes of use, and therefore it does not unnecessarily constrain the MSS licensee's ability to increase spectral efficiency.[24]

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[21] *See* Cingular Pet. at 9-10. ICO and MSV argue that DBS and other ancillary case law cited by Cingular is misplaced and has been modified by the Commission. *See* ICO Opp. at 7-8; MSV Opp. at 13-14. These cases demonstrate that the Commission has imposed service restrictions on licensees' introduction of new or different types of offerings when it finds that it is necessary to protect the integrity of the "primary" service. Here, the Commission has similarly adopted a policy of ATC as ancillary to the principal satellite service, but the rules fail to ensure this goal. Thus, similar to the cited cases, restrictions are necessary. While the Commission may later modify or eliminate such restrictions in keeping with its flexible-use policies (like it did in the situation of DBS), in this case it expressly disavowed reliance upon a "flexible-use" model. *See Report and Order* at ¶¶ 1, 31 n.67. Thus, the ancillary cases cited by Cingular remain relevant and instructive here.

[22] Globalstar Opp. at 5.

[23] *Report and Order* at ¶ 20.

[24] Boeing criticizes the Telcordia study by claiming that it plans to use dynamic spectrum management techniques rather than segmentation. Boeing Opp. at 9. The point of the Telcordia study, however, is that dynamic shifting is not efficient and therefore segmentation must be contemplated. *See* Cingular Pet. at 17-21; *cf.* Joint Comments of L/Q Licensee, Inc. *et al.*, IB Docket No. 02-364 at 8 (July 11, 2003) (explaining Globalstar's plans to dedicate certain channels only to ATC use in various geographic areas). Otherwise, the *Report and Order*'s references to the efficiencies to be gained by ATC are in doubt and should be revisited. Globalstar's claim that Cingular is restating arguments with respect to the Telcordia study that were addressed and answered is simply wrong. *See* Globalstar Opp. at 4 n.3. The petition demonstrated that the *Report and Order* failed to address key elements of the study and related follow-up submissions in the record which compel a different result. *See* Cingular Pet. at 18; *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29,

Contrary to Boeing's claims that a capacity limit could force MSS operators to employ "expensive monitoring and record keeping programs,"[25] such a limitation is readily measured. Indeed, Globalstar acknowledges that "monitoring satellite and terrestrial usage . . . is possible."[26] Moreover, compliance could be certified on an annual basis without burdensome reporting requirements. The Commission should adopt the capacity limit as a measured yet meaningful way to ensure substantial satellite operations.

Despite Opponents' claims,[27] the *Report and Order* did not address the look first to the satellite proposal, although it had been proposed in the record.[28] Boeing asserts that it opposes the look first condition, yet appears to fully support the concept: "In the vast majority of geographic locations, handsets will be within range of a satellite signal and will utilize the satellite for transmission links. In those few locations where a satellite signal is not available, the handset will be instructed by the network prior to initiation of any call to look for access to a terrestrial communications path."[29] In contrast, Globalstar misconstrues the condition when it claims that look first would prevent subscribers from accessing ATC base stations if the satellite component were overloaded.[30] This scenario is precisely the type of circumstance in which look

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43 (1983). Moreover, ICO contends that the Telcordia study was refuted by ICO, but fails to note that ICO's submission was in turn rebutted by Cingular/Sprint. *See* Cingular Pet. at 21 n.67.

[25] Boeing Opp. at 7 n.24.

[26] Globalstar Opp. at 6. No MSS licensee disputes Cingular's engineering statement, which demonstrates that an MSS capacity obligation is easily accomplished. *See* Cingular Pet., Att. A at 1-3.

[27] *See* Globalstar Opp. at 6-7; Boeing Opp. at 8.

[28] *See, e.g.,* Letter to Michael K. Powell, Chairman, FCC, from Thomas E. Wheeler, Cellular Telecommunications & Internet Association ("CTIA") at 4 (Dec. 17, 2002). The *Report and Order* discussed a separate proposal that would "route communications from ATC base stations to MSS earth stations to the MSS satellite and back again"– which Cingular is not advocating here. *Report and Order* at ¶ 100.

[29] Boeing Opp. at 8.

[30] *See* Globalstar Opp. at 7. Moreover, Globalstar is incorrect when it asserts that look first would "add a few seconds to every call set-up time." Globalstar Opp. at 8. As Boeing readily acknowledges, in modern

first would direct the ATC network to carry the call. The look first requirement would be fully consistent with the flexibility requested by ATC proponents – to "rely on ancillary terrestrial base stations in those locations where satellite signals cannot penetrate, or where traffic demands overwhelm the satellite beam," as Boeing states.[31]

ICO fails in its attempt to equate the "substantial satellite service" obligation with the "substantial service" requirement applicable to some wireless communications services.[32] ICO ignores that the Commission, in light of its ATC decision, sought to ensure that MSS licensees remain true to their original purpose – the ongoing provision of a ubiquitous, robust "substantial satellite service." The obligation is intended to limit the potential for ATC operations to dominate MSS operations. In contrast, the terrestrial wireless "substantial service" requirement ensures that spectrum is put to use without regard to the type of service that is provided.

Ultimately, given Opponents' claim that the market will incent them to develop a primary satellite service and will limit ATC to ancillary, they should have no objection to rules which ensure such a result. The record demonstrates that Cingular's gating criteria proposals are technically feasible, administratively manageable, and retain ample flexibility for MSS licensees to achieve efficiencies in spectrum usage.

B. The PDA Exemption Is Inconsistent with the Prohibition Against Stand-Alone Terrestrial Operations and Is Otherwise Unlawful.

Despite ICO's claim that the *Report and Order* created "a narrow exemption" when it carved out PDAs, laptops and other computers from the integrated services requirement, the exception enables MSS licensees to offer stand-alone terrestrial services once they initiate a

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communications networks user terminals are in continuous contact with base stations so that "when a call is initiated, the user terminal already 'knows' the transmission path." Boeing Opp. at 8.

[31] Boeing Opp. at 7.

[32] *See* ICO Opp. at 7 & n.23 (citing, *e.g.*, 47 C.F.R. § 22.940(a)(1)(i); 47 C.F.R. § 27.14(a)).

bare-bones MSS service. The *Report and Order* provided no public policy rationale for the exemption, nor does one exist.[33]

ICO and Globalstar defend the exemption vigorously but completely ignore the Commission's unequivocal statement: "We do not intend, nor will we permit, the terrestrial component to become a stand-alone service."[34] Moreover, their justifications to deviate from the integrated services requirement are feeble. With no rationale to rely on, ICO chooses to make up reasons why the Commission exempted PDAs. It asserts that the exemption "reflects an understanding" that PDAs provide "more innovative spectrum use" and are "distinct" from traditional mobile handsets.[35] It conveniently overlooks Cingular's points that "PDA" has no clear definition and that there are numerous handsets on the market that combine voice and "PDA" functionalities.[36] The exemption is unworkable.

ICO also claims without explanation that the exemption will advance a policy objective in favor of satellite and ATC services.[37] Yet, the exemption creates incentives for MSS licensees to pursue markets wholly unrelated to any MSS offering. Globalstar, for example, believes that the PDA exemption allows it to offer an "ATC-only service" to a customer with a desktop computer "since it is unlikely that the computer would ever need to use satellite service."[38]

Ultimately, the Opponents are unable to reconcile the PDA exemption with the Commission's view that "[w]ithout the integrity afforded by these MSS ATC service-rule

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[33] *See Report and Order* at ¶ 87 n.229.

[34] *Id.* at ¶ 1. The *Report and Order* also stated, "MSS licensees must make an affirmative showing to the Commission that demonstrates that their ATC service offering is truly integrated with their MSS offering." *Id.* at ¶ 87.

[35] ICO Opp. at 3.

[36] Cingular Pet. at 12 & n.38 (citing examples).

[37] ICO Opp. at 3.

[38] Globalstar Opp. at 9.

requirements [including the integrated service showing], an alternative licensing or distribution mechanism should be used."[39] The Commission must eliminate the PDA exemption or risk further undermining the *Report and Order* and running afoul of Section 309(j) and the satellite-only licensing decisions.[40]

CONCLUSION

For the foregoing reasons and the reasons set forth in Cingular's underlying Petition for Reconsideration, the Commission should reconsider its *Report and Order*.

Respectfully submitted,

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[39] *Report and Order* at ¶ 66.

[40] For the same reasons, the Commission should prohibit ATC-only subscriptions, consistent with the Petition for Reconsideration filed by CTIA. *See* CTIA Pet. at 6.

CERTIFICATE OF SERVICE

I, Karen Freeman, hereby certify that copies of the foregoing Reply to Oppositions to Petition for Reconsideration have been served this 4th day of September, 2003, by first class United States mail, postage prepaid, on the following:

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