Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Applications/LOIs of	)	
	)	
ICO Services Limited	)	DA 01-1635
	)	File No. 188-SAT-LOI-97 *et al.*
	)	
The Boeing Company	)	DA 01-1631
	)	File No. 179-SAT-P/LA-97(16) *et al.*
	)	
Celsat America, Inc.	)	DA 01-1632
	)	File No. 26//27/28-DSS-P-94 *et al.*
	)	
Constellation Communication Holdings, Inc.	)	DA 01-1633
	)	File No. 181-SAT-P/LA-97(46) *et al.*
	)	
Globalstar, L.P.	)	DA 01-1634
	)	File No. 183/184/185/186-SAT-P/LA-97 *et al.*
	)	
Iridium LLC	)	DA 01-1636
	)	File No. 187-SAT-P/LA-97(96) *et al.*
	)	
Mobile Communications Holdings, Inc.	)	DA 01-1637
	)	File No. 180-SAT-P/LA-97(26) *et al.*
	)	
TMI Communications and Company, Limited Partnership	)	DA 01-1638
	)	File No. 189-SAT-LOI-97 *et al.*

To: The Commission

REPLY TO OPPOSITIONS TO APPLICATION FOR REVIEW

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September 13, 2001

Before the
Federal Communications Commission
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In the Matter of Applications/LOIs of	)	
	)	
ICO Services Limited, *et al.*	)	DA 01-1631 through DA 01-1638

To: The Commission

REPLY TO OPPOSITIONS TO APPLICATION FOR REVIEW

AT&T Wireless Services, Inc., Cellco Partnership, d/b/a/ Verizon Wireless, and Cingular Wireless LLC (collectively, the "Wireless Carriers"), hereby reply to the oppositions to their joint application for review of the *2 GHz MSS License Orders*.[1] For the reasons set forth below, the oppositions lack merit.

As a preliminary matter, concerns regarding the Wireless Carriers' standing are misplaced. Contrary to the assertions of several of the Opponents, Section 1.115(a) requires the submission of a statement regarding standing *only if* the applicant for review did not participate below. The Wireless Carriers *did* participate below through several *ex parte* filings submitted at their earliest opportunity with respect to each of the pending applications, which were addressed in all eight license orders.[2] Moreover, the Wireless Carriers are aggrieved because grant of each

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[1] Due to space constraints, the Wireless Carriers hereby incorporate by reference the abbreviations and other short citations utilized in their Application for Review ("AR"). Those parties filing oppositions are collectively referred to as "Opponents" herein.

[2] *See MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) (finding that significant issues that are squarely argued, even in *ex parte* filings, must be addressed and are preserved for review); *accord AT&T Corp. v. FCC*, 86 F.3d 242, 247 (D.C. Cir. 1996). The Wireless Carriers promptly raised these arguments after the ability to achieve the purpose of the 70 MHz allocation was called into serious question.

of the licenses creates a "[l]ilkelihood of economic injury."[3] Given the fact that the Wireless Carriers spent billions of dollars to acquire wireless licenses in Auction No. 35, the results of which have been called into question by the NextWave litigation, the likelihood is extremely high that the carriers would aggressively pursue reallocated 2 GHz MSS spectrum. The Bureau's decision to grant the majority of the available spectrum to MSS applicants has effectively foreclosed that opportunity, resulting in economic injury.[4]

On the merits, the Opponents fail to demonstrate that it was reasonable to license MSS applicants in light of substantial and material questions of fact regarding whether intervening circumstances had undermined the prior public interest finding upon which the applications were granted. Those circumstances include: (i) the admissions on this record by applicants themselves concerning the non-viability of the MSS service, (ii) the growing financial distress of many applicants, (iii) the recognized competing spectrum needs (*e.g.*, 3G) of other service providers, and (iv) the diminished availability of spectrum to satisfy those needs due to the NextWave litigation. Given the FCC's "highest and best use" spectrum policy, and Section 309's obligation to inquire into substantial and material questions of fact and to auction the spectrum, it was unreasonable to move forward with licensing.

The Opponents simply rely on the Bureau's conclusory statements that the Wireless Carriers' presented no new or "credible" evidence to undermine the Commission's August 2000 finding that licensing 2 GHz MSS systems would serve the public interest. *See, e.g.*, Oppositions

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[3] *Philco Corporation v. FCC*, 257 F.2d 656, 658 (D.C. Cir. 1958) (citing *Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940)), *cert. denied*, 358 U.S. 946 (1959).

[4] In any event, the Commission has a statutory duty to resolve substantial and material questions of fact before arriving at a public interest decision. *See* 47 U.S.C. § 309(a), (e); *USTA v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000); *City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153, 1167-69 (D.C. Cir. 1987).

of Boeing at 3; Celsat at i-iii, 3-6; Globalstar at ii, 9, 12; ICO at 8; TMI at 3-4. For example, Celsat contends that the Wireless Carriers present no new evidence because the financial difficulties of "some" of the applicants were known in August 2000 when the *2 GHz MSS Order* was released. Not only was the extremity of the financial difficulties not known in August of 2000,[5] applicants themselves have subsequently called into question the economic viability of the industry as a whole and the need to provide terrestrial service. Such admissions by applicants are extraordinary and are due substantial weight, particularly where they call into question the ability to make a public interest finding consistent with the original rationale for the MSS allocation. In fact, the admission is crucial because the basis upon which the Bureau granted the applications *was* the Commission's prior public interest finding concerning MSS.[6] Thus, contrary to the claims of Celsat, Globalstar, and TMI, the public interest finding made by the Commission last year has been called into serious question by applicants' subsequent admissions. Where the factual predicate for the allocation is called into question by applicants, it is incumbent upon the Bureau to determine whether the MSS service is the best and highest use of the entire 70 MHz before proceeding with licensing. *See* AR at 12 n.36 (citing cases).

Globalstar's repetition of the Bureau's statement that prompt licensing is necessary to avoid delay in service to the public puts the cart before the horse. If the industry is not viable, licensing applicants will actually delay service to the public. The process of industry failures, bankruptcy, and eventual reallocation of spectrum will take years. Given the clear evidence that

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[5] The August 2000 order referenced only the bankruptcy of Iridium and the failure of Inmarsat to prosecute its application, *2 GHz MSS Order* at n.80, and ICO had contemporaneously filed for bankruptcy protection. Since that time, Globastar has been reported to be near bankruptcy and the financial viability of both Constellation and MCHI has been called into serious question. *See* AR at 10 & n.30.

[6] *E.g., ICO Order* at ¶¶ 30-31.

terrestrial providers stand ready to use the spectrum immediately, the agency should auction the MSS spectrum to those prepared to put the spectrum to use.

Opponents also assert that there are no substantial and material questions of fact concerning the viability of the industry or their individual applications. *See, e.g.*, Oppositions of Boeing at 1-3; Celsat at ii, 13 n.37; Constellation at 6-7; Globalstar at 14-16; ICO at 8; Iridium at 5-6; TMI at 6. These claims, however, again ignore the fact that the Commission relied upon its earlier public interest finding in the MSS spectrum allocation proceeding, which was made prior to the admissions by applicants and the other aforementioned developments. Even though the Commission declined to adopt a specific financial qualification requirement, financial viability of the service is relevant to the public interest determinations which have been made with regard to each application – whether the goal of rural service will be fostered – or is there a better use to which the spectrum could be put.

Moreover, the fact that some carriers may offer pure MSS does not mean revisitation of the entire band is inappropriate. Where each licensee selects its own spectrum assignment and the bandplan adopted by the Bureau reserves only *de minimis* spectrum for non-MSS use, a fragmented bandplan will result.[7] Consideration of the overall bandplan for the 2 GHz spectrum at issue was therefore required prior to licensing. Accordingly, the Bureau engaged in unreasoned decisionmaking by granting the licenses before the Commission determined whether the 70 MHz MSS allocation should be revisited in light of intervening events.

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[7] The suggestion by Globalstar that the band plan can only be challenged in a rulemaking and not a licensing proceeding is a red herring because the two are integrally related. Where circumstances change and the factual predicate is called into question after the rulemaking, the viability of the allocation must be revisited because such decisions depend on policy decisions reached in the prior rulemaking. Rulemaking decisions can be challenged during the proceeding or when they are applied. *See Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 813 (1959).

Because MSS spectrum was given away rather than auctioned, the failure to resolve the relevant issues before licensing compounds the error. Not surprisingly, no Opponent seriously challenged the positions that the Commission may not avoid the auction statute by authorizing terrestrial use after licensing carriers for MSS service only. Such a process not only violates the auction statute, but also compromises the Commission's highest and best use spectrum policy.[8]

Respectfully submitted,

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[8] Several opponents also incorrectly argue that consideration of the application for review is moot given the denial of CTIA's petition, while others contend that the Wireless Carriers can present their arguments regarding whether the need for 2 GHz MSS justified the amount of spectrum currently allocated in pending rulemakings. These differing views reflect confusion about what is being decided in which proceeding because the rationale for denying the CTIA petition actually cross-references the *2 GHz MSS License Orders* at issue here. *MO&O & FNPRM*, FCC 01-224 at ¶ 23. Thus, the *MO&O* and the *2 GHz MSS License Orders* are inextricably intertwined. It is unknowable what the FCC will decide in the new proceedings. Moreover, the *MO&O* denying the CTIA petition is also not yet final and is still subject to challenge on reconsideration. Finally, the denial did not address other issues raised in the application for review, *e.g.*, the provision of terrestrial service over the band and the true amount of the remaining spectrum and its utility given the need for contiguous spectrum.

CERTIFICATE OF SERVICE

I, Joy M. Taylor, hereby certify that copies of the foregoing Reply to Oppositions to Application for Review has been served this 13th day of September, 2001, by first class United States mail, postage prepaid, on the following:

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