

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

FILED/ACCEPTED
DEC - 1 2008
Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
Globalstar Licensee LLC)	File No. SAT-MOD-20080516-00106
)	Call Sign: S2115
Application for Modification of License for)	
Operation of Ancillary Terrestrial)	
Component Facilities)	
)	

PETITION FOR RECONSIDERATION

CTIA – The Wireless Association® (“CTIA”)¹ hereby petitions the Commission to reconsider its order granting in part a request by Globalstar Licensee LLC (“Globalstar”)² to modify its authority to operate an ancillary terrestrial component (the “*Globalstar ATC Order*” or “*Order*”) pursuant to Section 1.106 of the Commission’s Rules.³ In the *Globalstar ATC Order*, the Commission has eviscerated the ancillary terrestrial component (“ATC”) gating criteria, a set of conditions intended to preserve the essential character of the Mobile Satellite Service (“MSS”) spectrum for international

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² Globalstar Licensee LLC, Application for Modification of License for Operation of Ancillary Terrestrial Component Facilities, Order and Authorization, File No. SAT-MOD-20080516-00106, Call Sign: S2115, FCC 08-254 (rel. Oct. 31, 2008) (“*Globalstar ATC Order*” or “*Order*”).

³ 47 C.F.R. § 1.106.

satellite services.⁴ Instead, the interim waiver granted in the *Order* allows Globalstar to game the MSS/ATC regulatory scheme to maximize the use of MSS spectrum for terrestrial service and fundamentally alter the purpose of the allocation. In addition, this authorization to Globalstar violates the competitive bidding requirements of Section 309(j) of the Communications Act of 1934, as amended.⁵ Finally, the *Order* lets Globalstar and subsequent MSS licensees circumvent the disclosure and notification requirements that are imposed on competitive wireless providers for similar spectrum leasing. For these reasons, the FCC must reconsider and reverse the *Globalstar ATC Order*.⁶

I. THE INTERIM WAIVER ENABLES GLOBALSTAR TO GAME THE MSS / ATC REGULATORY SCHEME IN WAYS THAT UNDERMINE THE VERY PURPOSES OF THE RULES.

The Commission's waiver grant effectively converts much of Globalstar's MSS spectrum to terrestrial broadband service and unjustly enriches Globalstar – all in direct

⁴ See *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 Bands*, Report and Order, 18 FCC Rcd 1962, ¶ 2 (2003) (“*ATC Report & Order*”).

⁵ 47 U.S.C. § 309(j).

⁶ CTIA has standing under 47 C.F.R. § 1.106(b)(1). CTIA is a party to the proceeding because it has filed both an informal objection to Globalstar's waiver request as well as an *ex parte* written submission. See CTIA- The Wireless Association, Informal Objection, IBFS File No. SAT-MOD-20080516-00106 (filed Oct. 28, 2008); see also *Ex Parte* Written Submission (filed Jun. 25, 2008). The FCC took formal notice of CTIA's participation in this proceeding. See *Globalstar ATC Order*, n 15. Further, CTIA member, Sprint Nextel Corporation petitioned to deny the application. See Sprint Nextel Corporation, Petition to Deny (filed Jun. 23, 2008). Even if the Commission were to find that CTIA is not a formal party to the proceeding, CTIA can demonstrate that its “interests are adversely affected by the action taken” and show “good reason why it was not able to participate in the earlier stages of the proceeding.” 47 C.F.R. § 1.106(b)(1). As CTIA has noted in its informal objection, the wireless industry is adversely affected by the FCC's grant of Globalstar's waiver request because, as set forth below, the waiver request allows Globalstar to use its MSS spectrum for terrestrial broadband services without requiring Globalstar to bid for this spectrum at auction as CTIA's members have.

contravention of the MSS/ATC gating criteria. As an initial matter, Globalstar does not meet the FCC’s well-established waiver standard. Further, granting the interim waiver of the gating criteria violates Section 309(j), as compliance with the gating criteria was a critical element in the FCC’s finding that the “ancillary” licensing regime did not trigger competitive bidding requirements.⁷ As such, the interim waiver undermines the underlying purpose of the gating criteria and harms the public interest.

As a threshold matter, Globalstar does not meet the FCC’s waiver standard. As the FCC reiterates in the *Globalstar ATC Order*:

Good cause for interim waiver exists ‘where particular facts would make strict compliance inconsistent with the public interest.’ To make this public interest finding, *the waiver cannot undermine the purposes of the rule*, and there must be a stronger public interest benefit in granting the waiver than applying the rule.⁸

Here, the interim waiver directly contradicts the stated purpose of the gating criteria to “ensure that MSS remains first and foremost a satellite service and that the terrestrial component remains ancillary to the primary purpose of the MSS system.”⁹ Under the Commission’s own findings, Globalstar does not meet several of the gating criteria,¹⁰ and thus does not provide the “substantial satellite service” required for a grant of ATC authority.¹¹ Globalstar’s degrading satellite system, which does not offer voice services

⁷ 47 U.S.C. § 309(j); *See ATC Report & Order*, ¶ 224, 226, 229.

⁸ *Globalstar ATC Order*, ¶ 20 (emphasis added) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)).

⁹ *ATC Report & Order*, ¶ 88.

¹⁰ *Globalstar ATC Order*, ¶ 14-19.

¹¹ *ATC Report & Order*, ¶ 66 (“We adopt service-rule requirements for the provision of MSS ATC that, among other things, effectively condition MSS ATC on the provision of substantial satellite service. As explained below, an MSS licensee that wishes to include ATC must meet certain requirements concerning: (1) geographic coverage; (2)

and only offers one-way data/paging service, failed to meet the geographic and temporal coverage requirement, the in-orbit spare requirement, and the integrated service requirement.¹² The interim waiver would allow Globalstar and its terrestrial lessee, Open Range Communications Inc. (“Open Range”), to proceed with deployment of what is essentially a terrestrial broadband service from the first half of 2009 to July 2011 without the deployment of a comparable MSS data service.¹³ Accordingly, nothing about the Globalstar ATC offering can be characterized as “ancillary” services. As such, the interim waiver not only undermines the MSS/ATC rules, but strips the rules of any meaning.

Moreover, granting the interim waiver violates the competitive bidding requirements of Section 309(j). The gating criteria were a critical factor in the FCC’s finding that ATC authorizations should not be treated as initial licenses under Section 309(j)(1).¹⁴ In fact, in justifying why it was necessary to use competitive bidding to assign the rights, the Commission stated that “...MSS operators will not be allowed to use ATC authority for more than ancillary service.”¹⁵ Indeed, under the *Globalstar ATC Order*, the terrestrial service is no longer “ancillary” to Globalstar’s principal MSS

coverage continuity; (3) commercial availability; (4) an integrated offering; and (5) in-band operation.”).

¹² *Globalstar ATC Order*, ¶ 14-19.

¹³ *See id.* ¶ 41.

¹⁴ *ATC Report & Order*, ¶ 224.

¹⁵ *Id.* The Commission also noted that “[w]e agree with those commenters who argue that, because the terrestrial rights associated with a grant of ATC authority to MSS operators will be directly linked to existing MSS authorizations, there will be no separate ‘initial’ authorizations, and therefore no requirement to use competitive bidding to assign such rights....” *Id.* Further, the FCC explained that, “[w]ithout the integrity afforded by these MSS ATC service-rule requirements, an alternative licensing or distribution mechanism should be used.” *Id.* ¶ 66.

authority, and thus, this license modification is “so different in kind” as to warrant treatment as an initial license under Section 309(j).¹⁶ The FCC came to the same conclusion in the 2003 *ATC Report & Order* when it said that “[w]ithout the integrity afforded by these MSS ATC service-rule requirements, an alternative licensing or distribution mechanism should be used.”¹⁷ In addition, the FCC found that the “strict limitations” placed on ATC authority were sufficient to avoid unjust enrichment under Section 309(j)(3).¹⁸ Therefore, by granting Globalstar an interim waiver of the gating criteria, the FCC has unjustly enriched Globalstar in violation of Section 309(j)(3).

The interim waiver effectively eviscerates the gating criteria and enables Globalstar to maximize use of MSS spectrum for terrestrial service without paying the cost of competitive bidding. What is more, the waiver sets harmful precedent¹⁹ that weakens the gating criteria and invites future gaming of both Commission rules and Congressional requirements by subsequent MSS operators. For these reasons, the interim waiver must be reconsidered and denied.

¹⁶ See *Competitive Bidding*, Second Report and Order, 9 FCC Rcd 5532 (1994).

¹⁷ *Id.* ¶ 66.

¹⁸ *ATC Report & Order*. ¶ 226, 229.

¹⁹ Chairman Martin and Commissioner McDowell appropriately recognized the dangerous precedent set by the waiver grant, noting that the Commission’s “rules have outlined the necessary preliminary requirements for operating a terrestrial service ancillary to a satellite system. This application does not meet these criteria and therefore sets an inappropriate precedent. For these reasons, we respectfully dissent.” See *Globalstar ATC Order*, Joint Statement of Chairman Kevin J. Martin and Commissioner Robert M. McDowell. The Commissioners voting in favor of the waiver did not disagree, but rather supported the waiver by noting the availability of a \$267 million loan commitment by the Department of Agriculture’s Rural Development Utilities Program that was contingent upon obtaining the requested waiver – a development that is both curious and troubling.

II. THE ORDER IMPROPERLY ALLOWS GLOBALSTAR AND SUBSEQUENT MSS OPERATORS TO CIRCUMVENT THE SPECTRUM LEASING RULES.

The findings in the *Globalstar ATC Order* explicitly recognize that an MSS lease of ATC spectrum to a terrestrial provider is not authorized under the FCC's terrestrial wireless secondary markets rules and must comply with the gating criteria to be permitted under the existing MSS policies. Yet, without even a waiver, the *Order* somehow concludes that the Globalstar/Open Range lease is nonetheless permissible after-the-fact.²⁰

The FCC's established satellite-capacity leasing policy does not expressly contemplate a lease of MSS spectrum for a non-MSS purpose, and the existing secondary markets rules explicitly rejected application of the terrestrial wireless leasing rules to MSS operations.²¹ In fact, the *Globalstar ATC Order* observes that "the Commission declined to make the specific spectrum leasing rules adopted for wireless terrestrial services . . . applicable to satellite services."²² The *Order* also notes "the Commission . . . left the established satellite-capacity leasing policy intact."²³ And, while the Commission has briefly noted the possibility of a lease of MSS spectrum to a terrestrial licensee for ATC services, the FCC explicitly asserted that "such spectrum could only be used if its usage met the requirements to ensure it remained ancillary to MSS and were used in

²⁰ Globalstar and Open Range entered into a lease agreement in October 2007 and filed a notice with the FCC on November 14, 2007.

²¹ In the *Globalstar ATC Order*, the FCC cites only precedent that relates to leasing of satellite transponder capacity. See *Globalstar ATC Order*, ¶ 25, n.66.

²² *Globalstar ATC Order*, ¶ 25.

²³ *Id.*

conjunction with MSS operations, *i.e.*, that it met all of our gating requirements.”²⁴ Yet despite the Commission’s previous conclusions, the *Globalstar ATC Order* erroneously applies the Commission’s terrestrial wireless secondary market leasing rules to the Globalstar/Open Range lease and approves the Globalstar/Open Range lease.

Compounding the inappropriate application of the secondary market leasing rules to the Globalstar/Open Range lease, the *Globalstar ATC Order* then found that it was appropriate to analyze the relationship between Globalstar and Open Range under the *Secondary Markets Order*²⁵ “effective working control” standard.²⁶ Notwithstanding that the secondary markets standard for *de facto* control was limited by the *Secondary Markets Order* to those terrestrial wireless services for which spectrum leasing is permitted, and the determination that those policies do not apply to MSS/ATC leasing, the *Order*—without a waiver—applies a more lenient control standard to the Open Range arrangement. The application of a *de facto* control standard explicitly developed in a narrow, limited context to an arrangement that falls outside those parameters—without any explanation or justification—is arbitrary, capricious, and an unlawful reversal of prior rulemaking decisions.

Even if the application of the secondary markets policies to the Globalstar/Open Range lease were legally permissible, the *Globalstar ATC Order* is also deficient in that, having determined to apply those policies, the *Globalstar ATC Order* selectively enforces

²⁴ *ATC Report & Order*, ¶ 3 n.5.

²⁵ *Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking, Report and Order, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604 (2004) (“*Secondary Markets Order*”)

²⁶ *Globalstar ATC Order*, ¶ 26 (“we find it appropriate to apply this interpretation of Section 310(d) with respect to spectrum leasing arrangements involving ATC services.”).

those policies.²⁷ At a minimum, to the extent that the FCC permits MSS operators to lease spectrum to third-party terrestrial providers, the FCC must require that MSS operators comply with the same leasing rules that competitive wireless providers are required to follow under the *Secondary Markets Order*.²⁸ These rules generally set forth filing procedures for disclosure, and in some circumstances, prior approval of spectrum leasing arrangements. While the FCC found that Globalstar had provided “satisfactory disclosure” of its lease, the FCC did not require MSS operators to follow any established process.²⁹ Specifically, because Globalstar was found to have retained *de jure* and *de facto* control in its leasing arrangement under the “effective working control” standard,³⁰ Globalstar should be required to follow the FCC’s disclosure standards for spectrum manager leases.³¹ Given that the FCC found that it was appropriate to apply the “effective working control” standard from the *Secondary Markets Order* to MSS leasing, the FCC should also find it appropriate to apply the disclosure rules in the *Secondary Markets Order*.

²⁷ See *id.* ¶ 25.

²⁸ See generally, *Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking, Report and Order, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604 (2004) (“*Secondary Markets Order*”); See 47 C.F.R. 1.9001, *et seq.*

²⁹ See *Globalstar ATC Order*, ¶ 25.

³⁰ See *id.*, ¶ 26.

³¹ Spectrum manager leases must be disclosed according to the procedure listed in 47 C.F.R. § 1.9020. The procedure listed in this section requires a notification to be filed with the Commission via the Universal Licensing System and FCC Form 608 at least 21 days before operations commence. Notifications are placed on an informational public notice on a weekly basis and are subject to reconsideration.

III. CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission grant its Petition for Reconsideration and reverse the *Globalstar ATC Order*.

Respectfully submitted,

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Dated: December 1, 2008

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