

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
New ICO Satellite Services G.P.)	File Nos. SES-LIC-20071203-01646,
)	SES-AMD-20080118-00075, and
Application for blanket authority to operate)	SES-AMD-20080219-00172
Ancillary Terrestrial Component base stations)	
and dual-mode MSS-ATC mobile terminals)	Call Sign E070272
in the 2 GHz MSS bands)	

REPLY OF SPRINT NEXTEL CORPORATION

In its Opposition to Sprint Nextel Corporation's Application for Review, ICO offers nothing to refute Sprint Nextel's showing that the International Bureau (Bureau) exceeded its authority when it granted ICO conditional authority to provide ancillary terrestrial component (ATC) service.¹ Granted in the final hours of the prior administration, the Bureau's decision directly conflicts with the Commission's rules and precedent that unambiguously require operational MSS licensees to actually satisfy the specific Mobile-Satellite Service (MSS) coverage and commercial service gating criteria *before* receiving ATC authority. The Bureau's January 15, 2009 order upends the Commission's well settled rules and policies governing MSS spectrum use. Accordingly, the Commission should reverse the Bureau's unlawful action, confirm the MSS licensees' obligation to pay their fair share of Broadcast Auxiliary Service (BAS) relocation costs, and prohibit ICO from seeking ATC authority until it satisfies that obligation.

¹ Opposition to Application for Review of New ICO Satellite Services G.P., File Nos. SES-LIC-20071203-01646, *et al.* (Mar. 4, 2009) (ICO Opposition); Application for Review of Sprint Nextel Corporation, File Nos. SES-LIC-20071203-01646, *et al.* (Feb. 17, 2009) (Application for Review); *New ICO Satellite Services G.P.*, File Nos. SES-LIC-20071203-01646, *et al.*, Order and Authorization, 24 FCC Rcd. 171 (IB 2009) (DA 09-38) (*Bureau Order*).

I. THE BUREAU ORDER CONTRAVENED COMMISSION LICENSING POLICY AND EXCEEDED THE BUREAU'S DELEGATED AUTHORITY

In its Application for Review, Sprint Nextel demonstrated that the Commission must reverse the *Bureau Order*.² Despite ICO's undisputed failure to satisfy the Commission's ATC gating criteria, the Bureau granted ICO's ATC application conditioned on the outcome of various other proceedings, including one addressing the status of BAS relocation.³ As Sprint Nextel showed, this decision directly contravened Commission rules and precedent that unambiguously require operational MSS licensees to actually satisfy the Commission's MSS geographic coverage and commercial service gating criteria before they receive ATC authority. A Bureau can neither issue a decision that contradicts the licensing rules and policies adopted by the full Commission, nor act on any applications or requests which present novel questions of fact, law, or policy that cannot be decided under outstanding precedents and guidelines.⁴

² In a footnote, ICO alleges that Sprint Nextel's Application for Review is procedurally defective because Sprint Nextel never provided the Bureau with an opportunity to pass on the argument that the Bureau lacked authority to issue a conditional grant to ICO. ICO Opposition at 2 n.7; 47 C.F.R. § 1.115(c). This claim is wholly without merit. First, Sprint Nextel had no way of knowing that the Bureau would contravene Commission rules and precedent by granting MSS ATC to ICO on a "conditional" basis; therefore, Sprint Nextel was neither required nor expected to raise this objection in a petition to deny. Second, Sprint Nextel's April 2008 Petition to Deny and Reply to ICO argued that ICO had failed to satisfy the Commission's geographic coverage and commercial availability gating requirements, and that a grant of its application would contradict the Commission's established ATC licensing framework and encourage speculative efforts to access terrestrial wireless spectrum. These issues are largely indistinguishable from those addressed by Sprint Nextel in its Application for Review; thus the Bureau had ample opportunity to consider them.

³ See *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 4393, ¶¶ 49-56 (2008) (FCC 08-73) (*BAS MO&O and FNPRM*) (seeking comment on amending "top 30 market" rule, a market-by-market approach for MSS entry, and MSS – BAS interference issues).

⁴ Application for Review at 4-8; see also 47 C.F.R. §§ 0.331(a)(2), 1.115(b)(2)(i).

In attempting to defend the Bureau's decision, ICO can only point to irrelevant and inapplicable licensing policies and precedent. For example, ICO references the conditional ATC licensing process for *non-operational* MSS licensees,⁵ but that licensing process is irrelevant to the instant proceeding since ICO launched a geostationary satellite in April 2008 and certified it as fully operational.⁶ As indicated above, the Commission requires *operational* MSS licensees like ICO to actually satisfy MSS coverage and commercial service gating criteria *before* they can receive ATC authority.⁷

The second type of prospective grant identified by ICO is also irrelevant to the Commission's consideration of the *Bureau Order*. As ICO points out, the Commission in its *2003 Reconsideration Order* stated that it will grant ATC authority to an operating MSS licensee that makes a prospective, substantial showing that its MSS ATC operations will meet the Commission's integrated service and in-band operation gating requirements, *but only if the licensee actually complies with its geographic and temporal coverage, replacement satellite, and commercial availability gating criteria*.⁸

⁵ ICO Opposition at 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 Bands*, Memorandum Opinion and Order and Second Order on Reconsideration, 20 FCC Rcd. 4616, ¶¶ 88-89 (2005) (*2005 Reconsideration Order*).

⁶ See Public Notice, Policy Branch Information, Report No. SAT-00526, 23 FCC Rcd. 8551 (2008) (DA 08-1265) (determining that ICO had met its launch and operational milestones in the 2 GHz MSS band based on ICO certifications). ICO launched its first non-geostationary satellites in January 2005.

⁷ Even if ICO had not, in fact, certified its satellite system as fully operational in May 2008, ICO could not claim that that it would meet the MSS ATC gating criteria "soon" or "in the near future" because ICO has done *nothing* to fulfill its independent obligation to relocate BAS or reimburse Sprint Nextel or taxpayers for the cost of doing so. ICO Opposition at 4 (quoting *2005 Reconsideration Order* ¶ 89).

⁸ *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*, Order on Reconsideration, 18 FCC Rcd. 13590, ¶ 11 (2003) (*2003 Reconsideration Order*); 47 C.F.R. § 25.149(f).

Indeed, both the *2003 Reconsideration Order* and section 25.149(f) of the Commission's rules state that operational MSS licensees such as ICO must meet their fundamental geographic coverage and commercial availability requirements *before* they can gain ATC authority.⁹

ICO next cites the Bureau's 2006 grant of ATC authority to Globalstar LLC (Globalstar), which prohibited Globalstar from initiating ATC operations until it deployed in-orbit spare satellites and satisfied the Commission's replacement satellite gating requirement for non-geostationary (NGSO) MSS systems.¹⁰ While ICO appears to read the Bureau's *Globalstar Order* as conditional, it is readily distinguishable from the instant matter. The need for spare NGSO satellites is not as essential to the integrity of the MSS ATC framework as the Commission's fundamental geographic coverage and commercial availability gating requirements. While an MSS licensee's non-compliance with the spare satellite requirement by itself has no immediate impact on its service offerings, a licensee's failure to comply with the Commission's geographic coverage and commercial availability criteria creates the potential for stand-alone ATC service in areas where satellite service is unavailable – essentially an “end run” around the Commission's carefully crafted gating criteria to prevent MSS licensees from *de facto* reallocation of unauctioned satellite spectrum for terrestrial use. Globalstar satisfied the fundamental prerequisite to obtaining ATC authority by satisfying the Commission's satellite coverage and commercial availability criteria. ICO, by contrast, has fallen far short of

⁹ *2003 Reconsideration Order* ¶ 11; 47 C.F.R. § 25.149(f).

¹⁰ *Globalstar LLC*, Order and Authorization, 21 FCC Rcd. 398, ¶ 36 (IB 2006) (*Globalstar Order*).

demonstrating compliance with these fundamental requirements, and its application therefore cannot be granted even on a conditional basis under the Commission's rules.

Stated simply, conditional grant of MSS ATC authority to ICO upends Commission MSS ATC policy. While ICO claims this not to be the case,¹¹ the Commission required MSS licensees to satisfy the geographic coverage and commercial availability gating criteria prior to receiving ATC authority for the express purpose of precluding "speculative, prematurely filed ATC applications."¹² In this case, however, the Bureau granted ICO MSS ATC conditioned on the outcome of a rulemaking that appears to be months from resolution. This type of open-ended, conditional authority represents precisely the type of speculative application that the Commission sought to prohibit.¹³

Finally, the Commission should reject ICO's claim that BAS cost-sharing issues are "unrelated" to its ATC authorization, and that Sprint Nextel improperly raised these issues in its Application for Review. ICO appears to forget that the Bureau conditioned its ATC grant on ICO's compliance with the Commission's eventual decision on BAS cost sharing. Given that the Bureau expressly conditioned ICO's ATC grant on ICO's compliance with the Commission's BAS cost-sharing decision, Sprint Nextel is free to

¹¹ ICO Opposition at 6-8.

¹² *2003 Reconsideration Order*, 18 FCC Rcd. 13590, ¶ 10.

¹³ Sprint Nextel does not contend, as ICO claims, that "all Bureau [licensing] action must cease in the face of pending rulemakings." ICO Opposition at 6. A Bureau may engage in licensing activity while the Commission conducts a related rulemaking on service rules or other issues under certain circumstances. Here, however, the Bureau's grant of conditional ATC authority to ICO directly contravenes the established Commission MSS ATC licensing process and undermines key Commission policies. See ICO Opposition at 7 n.26 (citing *The Boeing Co.*, Memorandum Opinion and Order, 18 FCC Rcd. 1405, ¶ 12 (2003)).

contest that issue here. ICO should be ineligible for ATC authority until the Commission has completed its pending BAS rulemaking and ICO has satisfied all of its BAS relocation and reimbursement obligations.¹⁴ ICO should also be required to reimburse Sprint Nextel for its full, *pro rata* share of the costs of BAS relocation, which Sprint Nextel has estimated to be approximately \$100 million.

II. THE COMMISSION SHOULD NOT WAIVE ITS GEOGRAPHIC COVERAGE AND COMMERCIAL AVAILABILITY GATING REQUIREMENTS

ICO asks that if the Commission finds (as it should) that the *Bureau Order* exceeded the Bureau's delegated authority, the Commission should grant a limited waiver to permit ICO to obtain ATC authority conditioned upon its future compliance with the commercial availability requirement or upon the outcome of the BAS relocation rulemaking proceeding.¹⁵ The Commission should reject this request. As described above, the issuance of this conditional grant would undermine a key policy objective of the Commission's MSS ATC licensing framework.¹⁶ If the Commission approves ICO's MSS ATC application conditioned on the outcome of its pending rulemaking proceeding on BAS relocation, this action will represent the grant of precisely the type of "speculative, premature application" that the full Commission sought to prohibit.

As described in the Application for Review, ICO is nowhere close to demonstrating that it can satisfy the commercial availability and satellite coverage gating criteria. ICO has done *nothing* to fulfill its BAS relocation and reimbursement

¹⁴ Application for Review at 8-9.

¹⁵ ICO Opposition at 8-9.

¹⁶ Application for Review at 7; *see also Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

obligations on its own and ICO has rebuffed all invitations to participate in the Sprint Nextel-led transition process. And ICO has never paid a penny to Sprint Nextel or the American taxpayers for the hundreds of millions of dollars spent clearing the spectrum ICO's service will occupy. While ICO has proposed that MSS licensees be allowed to commence commercial MSS before all BAS licensees are relocated, the Commission is still considering this proposal in a pending proceeding.¹⁷ Until that proceeding is completed, and until ICO satisfies all of its BAS relocation and reimbursement obligations, it is ineligible for its requested waiver and a grant of ATC authority.

III. CONCLUSION


ICO has done nothing to refute Sprint Nextel's compelling demonstration in its Application for Review that the *Bureau Order* contravened the Commission's MSS ATC licensing framework and exceeded the Bureau's delegated authority. Sprint Nextel urges the Commission to reverse the Bureau's *Order* and dismiss ICO's application, or, in the alternative, hold the application in abeyance until such time as ICO demonstrates full compliance with the Commission's ATC gating criteria as well as its obligation to

¹⁷ See note 3 *supra*.

reimburse Sprint Nextel for ICO's *pro rata* share of BAS relocation costs that Sprint Nextel has incurred on ICO's behalf.

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Certificate of Service

I, Ruth E. Holder, hereby certify that on this 16th day of March, 2009, I caused true and correct copies of the foregoing Reply of Sprint Nextel Corporation to be mailed by first class U.S. mail, postage prepaid, to:

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