

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
New ICO Satellite Services G.P.)	
)	
Application for Blanket Authority to Operate)	File No. SES-LIC-20071203-01646
Ancillary Terrestrial Component Base Stations)	SES-AMD-20080118-00075
and Dual-Mode MSS-ATC Mobile Terminals)	SES-AMD-20080219-00172
in the 2 GHz MSS Bands)	Call Sign: E070272

OPPOSITION TO APPLICATION FOR REVIEW

New ICO Satellite Services G.P. (“ICO”), pursuant to Section 1.115(d) of the Commission’s rules,¹ opposes the application (“Application”) of Sprint Nextel Corporation (“Sprint”)² for review of the International Bureau (“Bureau”) order granting authority to ICO to operate ancillary terrestrial component (“ATC”) facilities in conjunction with its 2 GHz mobile satellite service (“MSS”) system.³ The record and reasoning in the *Order* fully support the Bureau’s decision. The Sprint Application misstates Commission regulations and precedent, fails to provide a legal basis for invalidation of the *Order*, and should be dismissed.

I. THE SPRINT APPLICATION OFFERS NO LEGAL BASIS FOR INVALIDATION OF THE *ORDER* AND SHOULD BE DENIED

A. The *Order* Is Fully Consistent with Commission Rules and Precedent

In considering an application for review, the Commission has discretion to ensure that an order for which review is sought has “examine[d] the relevant data and articulate[d] a satisfactory explanation for their actions, including a ‘rational connection between the facts

¹ 47 C.F.R. § 1.115(d).

² See Sprint Nextel Corp. Application for Review (Feb. 17, 2009).

³ See *New ICO Satellite Services G.P.*, Order and Authorization, 21 FCC Rcd 171 (IB 2009) (“*Order*”).

found and the choice made.”⁴ This is clearly the case here. Contrary to Sprint’s allegation, the *Order* is fully consistent with Commission rules and precedent, and Sprint fails to provide a legal basis for invalidating the *Order*.⁵

Sprint erroneously argues that the Bureau has no authority to issue conditional ATC licenses under any circumstances.⁶ This is simply not true.⁷ In the *Order*, the Bureau properly conditioned ICO’s ATC authority upon full compliance with the commercial availability gating requirement or, alternatively, upon the Commission’s action to eliminate this requirement a pending rulemaking proposal.⁸ Contrary to Sprint’s mischaracterization,⁹ the Bureau did not

⁴ *The Boeing Co.*, Memorandum Opinion and Order, 18 FCC Rcd 1405, ¶ 8 (2003) (“*MSS Licensing Order*”).

⁵ See 47 C.F.R. § 1.115(b)(2)(i) (“The application for review shall specify with particularity ... [that] [t]he action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.”)

⁶ See Sprint Application at 5.

⁷ Sprint has also waived this argument by failing to raise it in its petition to deny or to bring it in a petition for reconsideration before the Bureau. See 47 C.F.R. 1.115(c) (“No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”); *Application for Review of Declaratory Ruling Issued by the Chief, Cable Services Bureau, in re Jay Lubliner and Deborah Galvin, Potomac, Maryland*, 13 FCC Rcd 16107 (1998) (“We will not grant an application for review if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass. . . . [N]ew questions of fact or law may be presented to the designated authority in a petition for reconsideration.”). Sprint argued in its petition to deny that ICO was not entitled to a grant of ATC authority because it had not met the commercial gating criteria. The argument Sprint brings now – that the Bureau lacks authority to issue a *conditional* grant subject to ICO meeting the condition *in the future* – is a different argument. The time has expired to bring this argument on a petition for reconsideration, and Sprint cannot raise this argument in its Application because the Bureau “has been afforded no opportunity to pass” on the issue. See 47 C.F.R. §§ 1.106(f), 1.115(c). ICO addresses the argument above substantively because it so clearly lacks merit.

⁸ *Order* ¶ 33 (citing *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 4393 (2008) (“*FNPRM*”). In the *FNPRM*, the Commission tentatively concluded to eliminate the “top 30 market rule” as of January 1, 2009, to “allow the 2 GHz MSS operators to begin offering nationwide service, *both satellite and ATC* ... even if BAS relocation is not completed.” *FNPRM* ¶ 52 (emphasis added). The Commission also is considering a market-by-market

waive any ATC gating requirement when it granted ATC authority to ICO. In fact, concerned that a waiver “would prejudice issues the Commission is considering in the [FNPRM],” the Bureau specifically declined to waive the commercial availability requirement.¹⁰

The *Order* is fully consistent with Commission rules and precedent, which allow the Bureau to grant ATC authority conditioned upon ICO’s compliance with the commercial availability requirement.¹¹ Sprint’s selective quotations ignore many of the Commission’s orders on this subject. For example, in both the *ATC Reconsideration Order* and *Second ATC Reconsideration Order*,¹² the Commission expressly contemplated that conditional ATC licenses will be issued under certain circumstances. For operational MSS operators, the Commission stated that it “will grant ATC authority to an operating MSS system in actual compliance with our MSS system geographic and temporal coverage, replacement satellite, and commercial service gating criteria if the MSS ATC applicant makes a satisfactory, *prospective, substantial* showing that its ATC operations *will* meet our integrated service and other gating criteria.”¹³ This language, as the Commission later explained on further reconsideration, “amounts to ...

approach that would allow MSS operators to “begin providing service, *both satellite and ATC*, in a market once all BAS operations ... there have been relocated.” *Id.* ¶ 56 (emphasis added).

⁹ See Sprint Application at 1, 7.

¹⁰ *Order* ¶ 33.

¹¹ Curiously, while Sprint claims that the Bureau lacks authority to grant ATC authority subject to conditions, it specifically states that the spare satellite condition imposed on ICO’s ATC authority is an enforceable one. See Sprint Application at 7, 9 n.28.

¹² See *Flexibility for Delivery of Communications by Mobile Satellite Service Providers*, Order on Reconsideration, 18 FCC Rcd 13590 (2003) (“*ATC Reconsideration Order*”); *Flexibility for Delivery of Communications by Mobile Satellite Service Providers*, Memorandum Opinion and Order and Second Order on Reconsideration, 20 FCC Rcd 4616 (2005) (“*ATC Second Reconsideration Order*”).

¹³ *ATC Reconsideration Order* ¶ 11 (emphasis added).

conditional [ATC] authority.”¹⁴

Similarly, for non-operational MSS operators, the Commission stated that it would grant those parties “the opportunity to demonstrate that they *will* be in compliance with the gating criteria *in the near future*.”¹⁵ The Commission further held that “[u]pon a satisfactory, *prospective and substantial* showing that a non-operational MSS licensee *will* soon meet the gating criteria, [the Commission] will grant the MSS operator ATC authority to begin ATC operations upon actually meeting the gating criteria.”¹⁶ Thus, the Commission expressly contemplated that ATC licenses (1) would be granted to both operational and non-operational MSS operators, based upon a “prospective and substantial” showing that the MSS operator will soon meet the gating criteria; and (2) could be conditioned so as to authorize the MSS operator “to begin ATC operations” only “upon actually meeting the gating criteria.”¹⁷

Consistent with the language of the Commission’s orders in the ATC rulemaking proceeding and with Section 25.149(b) of the Commission’s rules,¹⁸ ICO submitted a “prospective and substantial” showing that it will meet the MSS commercial availability requirement. Based upon this showing, the Bureau properly granted ICO ATC authority conditioned upon full compliance with the commercial availability requirement.

B. ICO’s ATC Authority Is Similar to Prior Grants of ATC Authority

The Bureau’s grant of conditional ATC authority to ICO is consistent with previous grants of similar conditional ATC authority. For example, the Bureau granted conditional ATC

¹⁴ *ATC Second Reconsideration Order* ¶ 87 (emphasis added).

¹⁵ *Id.* ¶ 89 (emphasis added).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 47 C.F.R. § 25.149(b) (requiring a demonstration that the ATC applicant “does or will comply” with the gating criteria through certification).

authority to Globalstar, a non-geostationary satellite orbit (“NGSO”) MSS operator,¹⁹ even though Globalstar had not yet complied with the replacement satellite gating requirement that “[o]perational NGSO MSS ATC systems shall maintain an in-orbit spare satellite.”²⁰ Globalstar admitted that it had no in-orbit spare at the time, but expected to launch up to eight ground spare satellites in the near future.²¹ The Bureau found that Section 25.149(b) of the Commission’s rules requires an ATC applicant to “demonstrate . . . through certification” that it “does or will comply” with the applicable replacement satellite requirement.²² The Bureau further concluded that Globalstar satisfied Section 25.149(b)’s requirement by certifying that it intends to comply with the replacement satellite requirement prior to commencing ATC operation. Consequently, the Bureau effectively conditioned the grant of ATC authority by requiring Globalstar to postpone commencement of ATC operation if Globalstar fails to comply with the replacement satellite requirement prior to the planned inauguration of ATC service.²³

Like Globalstar, ICO certified that it “does or will comply” with all applicable ATC gating requirements. Based upon that certification, the Bureau properly granted ATC authority conditioned upon ICO’s compliance with the commercial availability requirement. The Bureau also properly exercised its authority to resolve the issues of ATC licensing, without deferring action on ICO’s ATC application, pending Commission action on the top 30 market rulemaking proceeding and other proceedings. Thus, the Bureau’s decision to grant conditional authority is

¹⁹ See *Globalstar LLC*, 21 FCC Rcd 398, ¶¶ 35-36 (IB 2006) (“*Globalstar*”).

²⁰ 47 C.F.R. § 25.149(b)(2)(i).

²¹ See *Globalstar* ¶ 35. Like ICO, Globalstar also conditionally requested that the Bureau grant a waiver “in the event we [the Bureau] construe the NGSO-in-orbit-spare rule to require that an in-orbit spare be available at the time when an ATC authorization is granted.” *Id.* ¶ 35 n.72.

²² *Id.* ¶ 36 (quoting 47 C.F.R. § 25.149(b)).

²³ *Id.*

expressly supported by Commission orders and precedent.

C. The *Order* Is Fully Consistent with Commission Policy

The *Order* also is fully consistent with Commission policy. The Commission adopted the commercial availability gating requirement because it found that “the financial incentives to operate an MSS system are neither as strong, nor as pressing, if an MSS licensee can operate [ATC] prior to constructing, launching and operating MSS space stations and offering commercial MSS services.”²⁴ Accordingly, the Commission adopted the commercial availability gating requirement to preclude the possibility that an MSS licensee “may choose not to launch space stations, or may delay implementation through petitions for waiver of the implementation milestones” if it were allowed to operate ATC prior to commencing satellite service.²⁵ Here, this policy concern is not applicable because the conditional grant expressly precludes ICO from offering ATC service until it complies with the commercial availability requirement (either as it currently exists or as modified by the Commission). Moreover, ICO’s successful launch and operation of its satellite demonstrate its commitment to providing satellite service as quickly as possible.

The Commission also specifically rejected Sprint’s suggestion that all Bureau action must cease in the face of pending rulemakings. For example, in its *MSS Licensing Order*, the Commission found that cessation of the Bureau’s application processing subject to pending rulemaking proceedings would “greatly disrupt the agency’s ability to function ... and undermine the regulatory certainty necessary for industry to rely upon agency decisions in

²⁴ *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 and Notice of Proposed Rulemaking, 18 FCC Rcd 1962 ¶ 86 (2003) (“*ATC Order*”).

²⁵ *Id.*

making investments in new services.”²⁶ In that case, petitioners sought to delay Commission action on pending MSS license applications pending the outcome of spectrum allocation proceedings involving MSS. In affirming Bureau grant of MSS license applications, the Commission specifically noted that the petitioners had an opportunity to put their views before the Commission in pending rulemaking proceedings. The Commission further noted that the petitioners had failed to demonstrate that they would be harmed as a result of grant of the applications at issue.²⁷

Sprint has had the opportunity to present its views to the Commission on the proceeding to consider elimination of this requirement to permit nationwide commercial availability of MSS, and in other proceedings. ICO filed its ATC application in 2007, and Sprint has had ample opportunity to (and has) presented its views to the Bureau, the Commissioners, and staff, in addition to filing formal comments. During the year in which the Bureau was considering ICO’s ATC application, the Commission granted, under the Bureau’s authority, ICO’s applications for gateway and other earth stations to complete its satellite ground segment.²⁸ With the expenditure of hundreds of millions of dollars, ICO successfully launched its MSS satellite on April 14, 2008, and notified the Commission that it had chosen the 2010-2020 MHz and 2180-2190 MHz bands as its Selected Assignments, pursuant to the Commission’s policy that the first 2 GHz MSS system to launch its satellite into its authorized orbital location may choose its service-link

²⁶ *MSS Licensing Order* ¶ 12 (“the filing of a petition for rulemaking or similar document does not require the Commission to freeze all administrative activity involving the subject of the pleading”).

²⁷ *Id.*

²⁸ *See Order* ¶ 2 (citing FCC Public Notice, *Satellite Communications Services Information, Actions Taken*, Report No. SES-01023 (Apr. 9, 2008)). *See also* FCC Public Notice, *Policy Branch Information, Actions Taken*, Report No. SAT-00518 (Apr. 25, 2008) (modification of spectrum reservation to revise certain technical specifications and waive cross-polarization isolation requirement).

spectrum blocks.²⁹ Accordingly, the Bureau acted well within its discretion and authority in issuing the *Order*.

D. The *Order* Is Well Within Bureau Discretion and Authority and Serves the Public Interest

In the *Order*, the Bureau correctly found that a grant of ICO’s ATC application will serve the public interest.³⁰ The Bureau properly implemented the Commission’s determination that “ATC operation would serve the public interest by facilitating increased network capacity, more efficient use of spectrum, extension of coverage for handset operation to places where MSS operators have previously been unable to offer reliable service, improved emergency communications, enhanced competition, and economies of scale in handset manufacture that would be passed on to consumers.³¹ The Bureau further determined that ATC authority would enable ICO to “plac[e] advanced satellite communications capabilities in a mass-market service,” thereby “greatly expand[ing] the reach of devices that can enhance public safety and enable users to communicate in disaster situations when traditional cellular networks are inaccessible.”³² The Bureau had ample basis in the record to find that grant of ATC authority to ICO is in the public interest.

In sum, Sprint offers no legitimate basis for invalidating the *Order*.

II. THE COMMISSION SHOULD GRANT A LIMITED WAIVER IF NECESSARY

Even if Sprint were somehow correct (which, as discussed in Section I above, is clearly not the case), the Commission can and should grant a limited waiver to permit ICO to obtain ATC authority conditioned upon future compliance with the commercial availability gating

²⁹ See *Order* ¶ 2.

³⁰ *Id.* ¶ 67.

³¹ *Id.* ¶ 3 (citing *ATC Order* ¶¶ 2, 20-45, and 210-11)

³² *Id.* ¶ 8.

requirement or upon the outcome of the *FNPRM*.³³ A limited waiver would be fully consistent with the underlying policy objectives of the commercial availability requirement.

In adopting the commercial availability gating requirement, the Commission intended to remove the financial incentives for an MSS licensee to commence ATC operation while delaying the launch of its satellite system.³⁴ Because ICO will not commence ATC operations prior to meeting the commercial satellite service requirement (absent Commission action on the *FNPRM*), grant of conditional ATC authority offers no financial incentives for ICO to delay commencement of commercial satellite service. Moreover, ICO has launched its satellite and met all of its milestone requirements. Thus, grant of a limited waiver, if one were required (and it is not), is warranted in this case.

III. THE COMMISSION SHOULD REJECT SPRINT'S IMPROPER ATTEMPTS TO INTRODUCE UNRELATED MATTERS

In its Application, Sprint again attempts to use an improper forum to alter the broadcast auxiliary service (“BAS”) cost sharing rule.³⁵ Sprint seeks to condition ICO’s ATC authorization upon compliance with the Commission’s BAS cost-sharing rules, but does not establish either

³³ The Commission may waive its rules upon a showing of “good cause.” 47 C.F.R. § 1.3. Specifically, the Commission may waive a rule if the waiver “would not undermine the underlying policy objectives of the rule in question” and would serve the public interest. *See Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, Order and Authorization, 15 FCC Rcd 3385, ¶ 14 (IB 1999); *see also Northeast Cellular Telephone Co., LP v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“*WAIT Radio*”). In granting a waiver, the Commission may consider special circumstances, including “considerations of hardship, equity, or more effective implementation of overall policy.” *WAIT Radio*, 418 F.2d at 1159.

³⁴ *See ATC Order* ¶ 86.

³⁵ Sprint injects its efforts to alter the BAS cost sharing rules into every available proceeding, regardless of relevance or appropriateness. *See, e.g.,* Sprint Petition to Deny, File Nos. SES-LIC-20071203-01646 *et al.* (Apr. 4, 2008); Ex Parte letter from Lawrence R. Krevor, Vice President-Spectrum, Sprint Nextel to Marlene H. Dortch, Secretary, FCC, WT Dkt. 02-55 at 8 (June 25, 2008); *Sprint Nextel Corp. v. New ICO Satellite Services G.P.*, Case No. 1:08cv651 (EDVa June 25, 2008).

the applicability of those rules to ICO or the connection between those rules and the ATC requirements.³⁶ Sprint's proposed condition constitutes a modification of the established BAS cost-sharing rules outside of a rulemaking proceeding and has no foundation in statute, regulation, case precedent, or established Commission policy. Accordingly, the Commission should reject Sprint's proposed condition as a self-serving attempt to circumvent the rulemaking process to impose additional regulatory requirements.³⁷

IV. CONCLUSION

In sum, ICO respectfully requests that the Commission deny Sprint's Application. The Bureau's *Order* is consistent with Commission rules and precedent and Sprint provides no basis for invalidating the *Order*. If the Commission finds that the Bureau may not grant conditional ATC authority (which is not the case for the reasons stated), the Commission can and should grant a limited waiver to permit ICO to obtain ATC authority conditioned upon future compliance with the commercial availability gating requirement or upon the outcome of the *FNPRM*.

Respectfully submitted,
NEW ICO SATELLITE SERVICES G.P.

Cheryl A. Tritt
Phuong N. Pham
Morrison & Foerster LLP
2000 Pennsylvania Ave., NW, Suite 6000
Washington, D.C. 20006

Its Counsel

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By: /s/ Suzanne Hutchings Malloy
Suzanne Hutchings Malloy
Senior Vice President, Regulatory Affairs
Peter A. Corea
Senior Regulatory Counsel
815 Connecticut Avenue, N.W., Suite 610
Washington, D.C. 20006
(202) 330-4005

³⁶ See Sprint Application at 8-10.

³⁷ The Bureau concluded that reimbursement issues will be decided in a rulemaking proceeding. Thus, the Bureau properly declined to address those issues in granting ICO ATC authority "[t]o avoid prejudicing the outcome of this dispute ... the resolution of which will occur in another proceeding." *Order* ¶ 34.

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2009 a copy of the foregoing Opposition to Application for Review was served by hand upon the following:

Lawrence R. Krevor, Vice President - Spectrum
Trey Hanbury, Director, Government Affairs
Sprint Nextel Corporation
Government Affairs Division
2001 Edmund Halley Drive
Reston, VA 20191

/s/ Patricia Lamm
Patricia Lamm