
Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Flexibility for Delivery of Communications) IB Docket No. 01-185
by Mobile Satellite Service Providers in the)
2 GHz Band, the L-Band, and the 1.6/2.4)
GHz Band)
)
Amendment of § 2.106 of the FCC's Rules) ET Docket No. 95-18
to Allocate Spectrum at 2 GHz for Use by)
the Mobile Satellite Service)

To: The Commission

JOINT COMMENTS OF CINGULAR WIRELESS AND VERIZON WIRELESS

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SUMMARY

Cingular and Verizon Wireless oppose the proposal to grant “flexibility” to MSS licensees. Awarding terrestrial usage rights to MSS licensees would violate Section 309(j) of the Communications Act. Applications for MSS systems were made on the basis of a satellite-only allocation. If that allocation had included terrestrial use at the time applications and letters of intent were filed, there is no doubt that there would have been a much larger pool of mutually exclusive applicants, thus requiring resolution by competitive bidding. The FCC cannot fundamentally alter the MSS allocation to allow terrestrial use right after the MSS licensing decisions because this would constitute an “end-run” around the auction statute, would contravene the Commission’s responsibilities under Section 309(j) of the Communications Act, and would constitute a windfall for those licensees – depriving the U.S. Treasury and the public of billions of dollars of value in this spectrum. Further, the exemption from competitive bidding contained in the ORBIT Act does not apply to the terrestrial use of spectrum allocated for MSS because that exemption pertains only to satellite uses.

Moreover, the decisionmaking sequence of events surrounding the MSS spectrum is illogical and unreasoned. The International Bureau should not have granted MSS licenses without resolving the substantial and material questions raised by several MSS applicants, New ICO and Motient, that the existing satellite-only allocation was not viable. Instead, the Bureau granted those licenses based on the original satellite-only allocation. Now, only shortly after the Bureau’s decision to let market forces determine whether MSS licensees will succeed or fail “on their own merits,” the Commission has proposed to fundamentally change the nature of MSS licenses to allow terrestrial use, ironically to “assure the commercial viability of MSS.”

The FCC cannot lawfully consider the issues raised in this docket until it fully and finally resolves the pending proceedings involving its licensing of MSS providers and its failure to seriously consider reallocating 70 MHz for terrestrial and/or satellite applicants. Reasoned decisionmaking does not allow a fundamental change in the nature of the MSS band plan without first resolving whether the premises underlying the original allocation still make any sense. Cingular, Verizon Wireless and AT&T Wireless have timely filed a joint Application for Review of the license grants, which remains pending, as does a petition for reconsideration filed by CTIA because its original petition was denied with virtually no consideration. To take up flexible use, before the validity of earlier actions has been resolved, is arbitrary and capricious decisionmaking.

In short, for compelling legal and policy reasons, the FCC should refrain from awarding MSS licensees free terrestrial use of spectrum. The FCC must address the issues before it both in the pending Application for Review of its licensing decisions and in the CTIA proceeding to determine whether the MSS spectrum should be reallocated to terrestrial advanced wireless services.

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Cingular Wireless LLC (“Cingular”) and Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless”) hereby submit these joint comments in opposition to the Commission’s *Flexible Use Notice* in this proceeding.¹ The proposed authorization of terrestrial operations only to MSS providers is both contrary to Section 309(j) of the Communications Act and is fiscally irresponsible. Moreover, affording MSS licensees flexibility now is arbitrary and capricious. Barely three months ago, the International Bureau (the “Bureau”) rejected claims that MSS carriers should not receive licenses because their businesses are not viable, finding that market forces should decide the question of whether a mobile satellite-only service can succeed. Weeks later, the FCC commenced this proceeding considering whether to assure the commercial

¹ *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 Band; Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service*, IB Docket No. 01-185 & ET Docket No. 95-18, *Notice of Proposed Rulemaking*, FCC 01-225 (rel. Aug. 17, 2001), *summarized*, 66 Fed. Reg. 47621 (Sept. 13, 2001) (“*Flexible Use Notice*”).

viability of those licensees by changing its original allocation decision to allow terrestrial use. In the first action, the Commission chose to rely on market forces, and not to intervene. In the second action, the Commission proposed to do just that. These contradictory courses of action demonstrate why it is premature for the FCC to consider the issues in this proceeding before fully and finally ruling on pending challenges to the licensing orders and determining whether the 2 GHz MSS allocation remains justified. A decision to allow only the MSS licensees to engage in terrestrial service would be unlawful on each of these grounds.

BACKGROUND

In 1997, the Commission allocated 70 MHz of spectrum to MSS in the 2 GHz band based upon the belief that MSS would provide service to rural and unserved areas.² Over the next few years, the financial difficulties of several of the applicants became apparent, with several declaring bankruptcy.³ Nevertheless, the Commission affirmed its belief that MSS was in the public interest when it established its band plan and service rules for MSS in August 2000, relying upon the continuing representations of applicants that they would provide service to rural and unserved areas.⁴

² *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18, *First Report and Order and Further Notice of Proposed Rule Making*, 12 F.C.C.R. 7388, 7395 (1997) ("2 GHz MSS Allocation Order"), *recon.*, *Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order*, 13 F.C.C.R. 23949 (1998).

³ *See infra* note 56.

⁴ *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, *Report and Order*, 15 F.C.C.R. 16127, ¶ 33 (2000) ("2 GHz MSS R&O")

In March 2001, however, two MSS applicants, New ICO Global Communications (Holdings) Ltd. (“New ICO”) and Motient Services Inc. (“Motient”), admitted to the Commission *for the first time* that MSS is not a viable service.⁵ According to New ICO and Motient, MSS operators cannot economically provide service to rural and unserved areas because the limitations of satellite service preclude serving urban and in-building locations.⁶ New ICO stated that MSS is in “dire jeopardy” and service “will be available to none,” absent a fundamental change in the rules to allow terrestrial operations.⁷ In the meantime, other sectors of the communications industry, notably CMRS, have been experiencing double-digit growth that has given rise to a dire need for additional terrestrial spectrum, as carriers worked to respond to record increases in subscribership while beginning to rollout advanced wireless services.

In response to these new developments, CTIA filed a petition for rulemaking indicating that the premise behind the original 70 MHz allocation – a pure satellite service that would cover rural areas – is no longer realistic. CTIA argued that the spectrum should be reallocated to its highest and best use as determined at auction rather than go forward with licensing a nonviable service.⁸ In order to preserve the rights of all parties, MSS applicants and CMRS providers

⁵ *Ex Parte* Letter from Lawrence H. Williams and Suzanne Hutchings, New ICO Global Communications (Holdings) Ltd., to Chairman Michael K. Powell, Federal Communications Commission, IB Docket No. 99-81, at 6 (March 8, 2001) (“New ICO *Ex Parte*”); Application filed by Motient Services Inc. and Mobile Satellite Ventures Subsidiary LLC for Assignment of Licenses and for Authority to Launch and Operate a Next-Generation Mobile Satellite Service System, at 12 (filed March 1, 2001) (“Motient Application”).

⁶ *See* New ICO *Ex Parte* at 2, 5-6; Motient Application at iii, 12-13.

⁷ New ICO *Ex Parte* at 1, 6..

⁸ Petition for Rulemaking of the Cellular Telecommunications & Internet Association (filed May 18, 2001) (“CTIA Petition for Rulemaking”).

alike, CTIA urged the Commission to defer licensing MSS systems until their viability issue was resolved. Cingular, Verizon Wireless and several other wireless carriers supported CTIA's petition.⁹

Instead, on July 17, 2001, the Bureau granted the MSS applications based upon the FCC's prior and outdated public interest findings concerning MSS.¹⁰ Dismissing evidence of nonviability, it held that MSS applicants "should be given the opportunity to succeed or fail in the market on their own merits."¹¹ At the same time, the Bureau did not grant MSS applicants' terrestrial service request, but indicated a separate proceeding would be commenced.

Cingular, Verizon Wireless and AT&T Wireless (the "Wireless Carriers") timely filed a joint Application for Review of the license grants on August 16, 2001.¹² The Application for Review argued that the Bureau engaged in unreasoned decisionmaking by granting the licenses *before* resolving substantial and material questions of fact concerning viability and whether the original allocation was still warranted given that its factual predicate was no longer valid. The Application for Review also argued that the licensing decisions failed to comply with the FCC's highest and best use spectrum policy, and warned that Section 309(j) would be violated if the FCC allowed MSS applicants to offer terrestrial services without an auction. Accordingly, the

⁹ Joint *Ex Parte* Letter of AT&T Wireless Services, Inc., Cingular Wireless LLC, Sprint PCS, and Verizon Wireless (filed Jun. 13, 2001).

¹⁰ *E.g.*, *ICO Services*, DA 01-1635 at ¶¶ 30-31.

¹¹ *E.g.*, *ICO Services*, DA 01-1635 at ¶ 31.

¹² Application for Review of AT&T Wireless Services, Inc., Cellco Partnership d/b/a Verizon Wireless, and Cingular Wireless LLC (filed Aug. 16, 2001) ("Application for Review").

Application for Review requested that the license grants be vacated pending final resolution of the issues raised in the CTIA petition.

One day later, on August 17, 2001, the FCC released the instant *Flexible Use Notice* seeking comment on whether to permit MSS providers to offer terrestrial services over their spectrum to “assure the commercial viability of MSS systems.”¹³ On August 20, 2001, the Commission released its *Advanced Services Further Notice* denying CTIA’s petition for rulemaking insofar as it requested reallocation of the entire band.¹⁴

CTIA timely filed a petition for reconsideration on October 15, 2001,¹⁵ citing the Commission’s failure to place the petition on public notice as required by its rules and to provide a clearly articulated basis for the denial. CTIA contended that the Commission’s cross-reference in the denial to the recent MSS licensing decisions was misplaced, because those licensing decisions could properly occur only *after* full consideration of CTIA’s petition. Moreover, by granting the licenses first and then summarily denying CTIA’s petition without basis, the Commission impermissibly prejudged the CTIA petition without consideration on its merits. The pleading concluded that had CTIA’s rulemaking petition been properly considered on the merits, it would have been clear that the original predicate for moving ahead with licensing – service to rural and unserved areas – no longer existed.

¹³ See *Flexible Use Notice* at ¶ 25.

¹⁴ *Introduction of New Advanced Mobile and Fixed Terrestrial Wireless Services; Use of Frequencies Below 3G*, ET Docket Nos. 00-258 and 95-18 and IB Docket No. 99-81, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 01-224, at ¶ 23 (rel. Aug. 20, 2001), *summarized*, 66 Fed. Reg. 47618 (Sept. 13, 2001) (“*Advanced Services Further Notice*”), *pet. recon. pending*.

¹⁵ Petition for Reconsideration of the Cellular Telecommunications & Internet Association (filed Oct. 15, 2001) (“CTIA Petition for Reconsideration”).

DISCUSSION

At the outset, the Commission should recognize that consideration of the issues raised in the *Flexible Use Notice* is premature at this time. The Commission must first fully and finally resolve the threshold question of whether the full 70 MHz of spectrum originally allocated to 2 GHz MSS remains warranted where the factual predicate for the allocation has been undermined by applicants' admissions that MSS is not viable.¹⁶ The alternative demands for terrestrial mobile spectrum have been amply demonstrated and represent the highest and best use of the spectrum.

The need to defer action until these threshold issues have been resolved is emphasized by the illogic of this proceeding, which is examining whether to fundamentally change the nature of MSS licenses to “assure the commercial viability of MSS”¹⁷ when only weeks before that the International Bureau (“the Bureau”) dismissed concerns regarding viability and ruled that MSS applicants should be licensed so they can succeed or fail “on their own merits.”¹⁸ These contradictory positions demonstrate that the license grants were unreasoned and premature.

Any MSS spectrum used for terrestrial purposes must be made available to any interested party and awarded by auction. The Commission should not compound the Bureau's initial licensing error by fundamentally altering the MSS allocation shortly thereafter to allow only

¹⁶ Agencies do not have unbridled discretion to order their proceedings where the factual assumptions for a rule or decision are no longer valid or the public interest is subverted by prejudging issues which are subsumed by taking issues out of order (*e.g.*, licensing decisions made prior to resolving spectrum allocation). *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995) (citing *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992)).

¹⁷ *Flexible Use Notice* at ¶25.

¹⁸ *E.g.*, *ICO Services Limited*, DA 01-1635 (rel. July 17, 2001) (“*ICO Services*”), *app. for review pending*.

those licensees terrestrial use of MSS spectrum. To do so would contravene the Commission's responsibilities under Section 309(j) of the Communications Act, constitute a windfall for those licensees – depriving the U.S. Treasury and the public of billions of dollars of value in this spectrum – and conflict with the Commission's obligation to engage in reasoned decisionmaking.

I. SECTION 309(j) REQUIRES THAT IF MSS SPECTRUM IS MADE AVAILABLE FOR TERRESTRIAL USE, IT MUST BE LICENSED BY AUCTION

The Commission asks whether the obligations in Section 309(j) of the Communications Act to auction spectrum are invoked if the Commission determines to make 2 GHz MSS spectrum available for alternate, *e.g.*, terrestrial, uses. The answer is clearly yes. Any spectrum in the 2 GHz MSS band that is either reallocated to terrestrial uses or made available for terrestrial use by a flexible use policy must be auctioned to the highest bidder in an auction open to all interested parties, including MSS licensees.¹⁹

As shown below, Section 309(j) of the Communications Act requires that spectrum made available for terrestrial CMRS use be assigned through competitive bidding. The ORBIT Act does not mandate a different result in the instant case, because that statute exempts from auctions only spectrum used for satellite services. Further, the policies underlying Section 309(j) cannot be squared with allowing MSS licensees access to terrestrial spectrum for free. Accordingly, if the Commission makes available any MSS spectrum for terrestrial uses, whether by reallocation or through a flexible use policy, it must assign licenses for those terrestrial uses by auction.

¹⁹ The Commission must resolve the substantial and material questions of fact raised by Motient in its application as to whether its service is viable in the first instance before addressing the broader questions concerning terrestrial use over the L-Band. *See* 47 U.S.C. §309(a)-(e). Until those issues are resolved, action regarding the L-Band is premature.

A. The FCC Will Violate Section 309(j) If It Authorizes Terrestrial Operations Only to MSS Providers

In 1997, Congress amended Section 309(j)(1) Communications Act to provide that if “mutually exclusive applications are accepted for any initial license or construction permit, . . . the Commission *shall* grant the license or permit to a qualified applicant through a system of competitive bidding.”²⁰ The Commission suggests that this obligation to use competitive bidding “would not appear to be implicated” were the FCC to permit only existing MSS operators to provide terrestrial service over the MSS spectrum, because such service would be linked to pre-existing MSS authorizations and thus there would be no mutual exclusivity.²¹ This rationale is plainly erroneous, given that the basis for adopting the 2 GHz MSS band plan that avoided mutual exclusivity – to expedite the development of a satellite-*only* service to unserved communities²² – no longer exists.

As noted above, after the 2 GHz MSS band plan was adopted in August 2000 but before the 2 GHz MSS applications were granted in July 2001, filings by New ICO and Motient made clear that they seek authorization to provide terrestrial service to urban areas, without which they assert they cannot commercially provide satellite service to rural and unserved areas. By

²⁰ See Balanced Budget Act of 1997 § 3002(a)(1)(A), 47 U.S.C. § 309(j)(1) (emphasis added). Section 309(j)(2) contains certain exceptions not applicable here, *e.g.*, licenses and construction permits for public safety radio services, digital television service licenses and permits given to existing terrestrial broadcast licensees to replace their analog television service licenses, and licenses and construction permits for noncommercial educational broadcast stations and public broadcast stations. 47 U.S.C. §309(j)(2)

²¹ *Flexible Use Notice* at ¶ 39.

²² See *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, *Report and Order*, 15 F.C.C.R. 16127, ¶¶ 1, 30 & n.107 (2000) (“*2 GHz MSS R&O*”).

authorizing the provision of terrestrial service under the guise of flexible use, the FCC would be authorizing an entirely new service – even broader than the “ancillary” terrestrial component proposed by New ICO and Motient. Such a fundamental change in the nature of the service would alter who would apply for that service. Had the Commission accepted applications to provide a service that could be satellite and/or terrestrial, the applicant pool would have been vastly larger and involved mutually exclusive applications.²³ To rely on a prior finding of no mutual exclusivity, based upon facts no longer in existence, to avoid compliance with Section 309(j) is “no more than an end-run around the statutory scheme” and should not be countenanced.²⁴

While the Act does permit the FCC to avoid mutual exclusivity, that permission is limited in several ways. First, Section 309(j)(6)(E) indicates that it must be “in the public interest” to avoid mutual exclusivity. Second, the FCC has indicated in interpreting Section 309(j)(6)(E) that attempts to avoid mutual exclusivity have gone too far if “avoid[ing] mutual exclusivity . . . would defeat the overall goals of [the] auction statute itself.”²⁵ Accordingly, the Commission has previously rejected arguments that the statute forbids the Commission from conducting an

²³ For example, nearly 90 bidders qualified to participate in the recently completed Auction No. 35, which involved terrestrial mobile PCS spectrum, and generated net bids in excess of \$16 billion. See Auction 35 Fact Sheet, available at <www.fcc.gov/wtb/auctions/35/factsheet.html>, visited Oct. 16, 2001.

²⁴ *Burlington N. R.R. v. Surface Transp. Bd.*, 75 F.3d 685, 694 (D.C. Cir. 1995).

²⁵ See *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, IB Docket No. 95-168, *Report and Order*, 11 F.C.C.R. 9712, ¶ 147 (1995).

auction until it has used every means to attempt to eliminate mutual exclusivity.²⁶ Such is clearly the case where, as here, the purpose of the auction statute and the public interest outweigh any purported desire to avoid mutual exclusivity.

The purposes of Section 309(j) are to ensure the “rapid deployment of . . . services for the benefit of the public;” to recover “the value of the public spectrum” made available for commercial use to avoid “unjust enrichment;” to “efficient[ly] and intensive[ly]” use spectrum; and to “disseminat[e] licenses among a wide variety of applicants.”²⁷ Section 309(j) also includes a presumption that licenses should be assigned by auction to those who place the highest value on the use of the spectrum, as such entities are presumed to be those best able to put the licenses to their most efficient use.²⁸ Collectively, these purposes of Section 309(j) are undermined by an all too convenient, and invalid, claim of no mutual exclusivity to avoid an auction.

Allowing only the licensed MSS operators to use the MSS band to provide terrestrial service fails to meet the objectives of Section 309(j) in other ways. First, the Commission would unjustly enrich MSS entities by allowing them to acquire spectrum for terrestrial use for free

²⁶ See *Amendment of the Commission’s Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, CC Docket No. 92-166, *Report and Order*, 9 F.C.C.R. 5936, 5966 (1994).

²⁷ 47 U.S.C. § 309(j)(3); see *Amendment of the Commission’s Rules Regarding Multiple Address Systems*, WT Docket No. 97-81, *Notice of Proposed Rule Making*, 12 F.C.C.R. 7973, 7997 (1997); *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, *Ninth Report and Order*, 11 F.C.C.R. 14769, 14773 (1996).

²⁸ See *TPS Utilicom, Inc., Request for Waiver*, DA 01-1833, *Order*, ¶ 9 (rel. July 31, 2001) (citing 47 U.S.C. § 309(j)(3); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 F.C.C.R. 2348, 2358, 2361 (1994)).

while terrestrial CMRS providers have had to invest billions of dollars to bid for terrestrial licenses. Second, the Commission would violate its mandate to recover a portion of the value of that spectrum for the public.²⁹ Third, the Commission would be artificially limiting the number of applicants to provide terrestrial services, rather than allowing a wide variety of applicants, including MSS operators, to compete for the spectrum at auction. And fourth, the Commission would be disregarding evidence that the highest and most efficient use of the spectrum is *not* that provided by MSS operators. In sum, each of these policies is designed to cure some of the very problems highlighted by New ICO and Motient concerning MSS. It is therefore contrary to the public interest and the purposes of the auction statute to subvert these purposes in the name of avoiding mutual exclusivity.³⁰

Finally, allowing MSS licensees to offer a terrestrial mobile service violates principles of regulatory parity³¹ and would afford MSS licensees an unfair competitive advantage.³² The

²⁹ See 47 U.S.C. § 309(j)(3)(C).

³⁰ The Commission must not engage in “picking winners and losers on an unsupportable basis,” but rather should instead let “the marketplace determin[e] winners based upon an auction.” *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, *Second Report and Order*, 12 F.C.C.R. 16436, 16447 (1997) (noting that such a result “would be contrary to our long-held goal to put licenses into the hands of those who value them the most”), *aff’d sub nom. U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000).

³¹ See, e.g., *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010*, WT Docket No. 96-86, *Second Report and Order*, 15 F.C.C.R. 16720, ¶ 19 (2000) (noting that “federal policy generally favors regulatory symmetry among competing or potentially competing CMRS providers”) (citing *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Third Report and Order*, 9 F.C.C.R. 7988, 8009-12 (1994)).

Flexible Use Notice actually proposes to “model[] technical rules on the rules currently in place for broadband PCS” if use of MSS spectrum for terrestrial services is permitted,³³ but it fails to consider other significant regulatory obligations imposed upon PCS and other terrestrial mobile CMRS providers, *e.g.*, E911 requirements.³⁴ MSS was actually exempted from these requirements based upon the belief that it was *not* competing with terrestrial CMRS.³⁵ The competitive advantage MSS licensees would gain if they are allowed to use spectrum acquired for free to provide satellite service to offer terrestrial services would be exacerbated unless they were also subject to all of the rules and mandates imposed on CMRS providers.

B. Neither the ORBIT Act Nor *National Public Radio* Apply to Spectrum Used for Terrestrial Services

The Commission also asks how Section 647 of the ORBIT Act³⁶ and the recent decision of the U.S. Court of Appeals for the D.C. Circuit in *National Public Radio, Inc. v. FCC*³⁷ impact

³² See *Flexible Use Notice* at ¶ 27 (asking “[w]hat are the competitive implications of permitting MSS operators to provide terrestrial services directly, especially in areas where terrestrial wireless services are available?”).

³³ See *Flexible Use Notice* at ¶ 34.

³⁴ See *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Memorandum Opinion and Order*, 12 F.C.C.R. 22665, 22706-07 (1997) (“*E911 MO&O*”); see also, *e.g.*, *Telephone Number Portability*, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8352, 8433-34 (1996) (“*First Number Portability Order*”).

³⁵ See, *e.g.*, *E911 MO&O*, 12 F.C.C.R. at 22707 (“[W]e might revisit our decision [not to impose E911 requirements upon MSS] if these various services develop into a mobile public telephone service like cellular or broadband PCS.”).

³⁶ Open-Market Reorganization for the Betterment of International Telecommunications Act (“ORBIT Act”), Pub. L. No. 106-180, § 647, 114 Stat. 48, 57 (2000) (*codified at* 47 U.S.C. § 765(f)).

³⁷ 254 F.3d 226 (D.C. Cir. 2001).

its proposals concerning the provision of terrestrial services over spectrum currently allocated for 2 GHz MSS.³⁸ Neither is relevant here because neither applies to spectrum used to provide terrestrial services.

Section 647 of the ORBIT Act was adopted in March 2000 and provides that:

Notwithstanding any other provision of law, the Commission shall not have the authority to assign by competitive bidding orbital location or spectrum *used for the provision of international or global satellite communications services*.³⁹

This language is clearly limited on its face to the *use* of spectrum to provide international satellite services, and is in no way tied to the classification of the user or any specific spectrum allocation. The use of MSS spectrum for non-satellite, *i.e.*, terrestrial, purposes therefore does not fall within the scope of the ORBIT Act.

Because Section 647 of the ORBIT Act is clear from its plain language, there is no need to look at the legislative history.⁴⁰ Nevertheless, nothing in the legislative history would lead to a different interpretation of the plain language of the statute. To the contrary, the legislative history explains why Section 647 is limited to spectrum “used for” international satellite services. Congress was concerned that if the FCC auctioned international spectrum and orbit slots, it would “open[] the door and allow[] countries around the globe to conduct such auctions” resulting in “a dramatic, negative impact upon the development of global competition in the

³⁸ See *Flexible Use Notice* at ¶ 39.

³⁹ ORBIT Act, § 647, 114 Stat. at 57 (*codified at* 47 U.S.C. § 765(f) (emphasis added)).

⁴⁰ See, e.g., *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (“[W]e do not resort to legislative history to cloud a statutory text that is clear.”); *Burlington N. R.R. Co. v. Oklahoma Tax Comm’n*, 481 U.S. 454, 461 (1987) (stating that when language of statute is unambiguous, review of legislative history is unnecessary).

industry.”⁴¹ The FCC agreed that auctioning spectrum for satellite services “opens the possibility of a hold up by some later country that is the vital final piece, [which] sets auction terms that are unfair and capricious and thus lead[] to distortions in the marketplace.”⁴² Moreover, this exclusion applies only to international use. Spectrum used for domestic satellite communications services *is* auctioned.⁴³ Both Congress and the FCC were concerned with the impact of auctioning spectrum used for international satellite services because of the global implications, none of which are implicated by *domestic* satellite use, and certainly not by *terrestrial* mobile uses of the spectrum.

Likewise, *National Public Radio v. FCC* is inapplicable to 2 GHz spectrum used for terrestrial purposes. In *National Public Radio v. FCC*, the court was considering one of the specific exemptions to the FCC’s auction authority and held that Section 309(j)(2) of the Communications Act denies the Commission the authority to use auctions for any licenses “issued . . . for . . . [noncommercial educational broadcasters].” Section 309(j)(2) does not discuss satellite licenses or applicants for satellite spectrum. In fact, *National Public Radio*

⁴¹ See Hearings on Satellites and the Telecommunications Act Before the Senate Commerce, Science and Transportation Subcomm. on Communications, 105th Cong. (Jul. 30, 1997) (Statement of Chairman Conrad Burns), *referenced in* S. 376 Report, S. Rep. No. 106-100 (Jun. 30, 1999).

⁴² *Id.* (Statement of Peter Cowhey, Chief, FCC International Bureau).

⁴³ Licenses for satellite broadcasting services, including the Digital Audio Radio Service (“DARS”) and the Direct Broadcast Satellite (“DBS”) service, have been assigned using competitive bidding. See *Establishment of Rules and Policies for DARS in the 2310-2360 MHz Frequency Band*, IB Docket No. 95-91, *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 F.C.C.R. 5754, ¶ 149 (1997) (noting that “[u]sing competitive bidding for satellite DARS, a new national satellite service, does not present the same complexities and difficulties inherent in any consideration of using auctions for transnational systems”); *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, IB Docket No. 95-168, *Report and Order*, 11 F.C.C.R. 9712 (1995).

demonstrates why the ORBIT Act is inapplicable here. *National Public Radio* involved a statute that precluded the auctioning of spectrum based on the *classification of the licensee* irrespective of how that spectrum was used (“[C]ompetitive bidding authority . . . shall not apply to . . . licenses or construction permits *issued . . . for . . .* [noncommercial educational broadcasters].”).⁴⁴ By contrast, the ORBIT Act precludes the auctioning of spectrum *based strictly upon its use* to provide satellite service (“[T]he Commission shall not have the authority to assign by competitive bidding . . . spectrum *used for* the provision of . . . satellite communications services.”).⁴⁵ Accordingly, non-satellite, *i.e.*, terrestrial, uses of the spectrum do not fall within the ambit of either the ORBIT Act or the court’s holding in *National Public Radio*.

Nor can “flexible” terrestrial uses by MSS providers be deemed purely ancillary to satellite service and therefore arguably within the scope of the ORBIT Act,⁴⁶ because ancillary service is by definition subordinate or auxiliary to the primary service.⁴⁷ There is no question here, however, that by authorizing the provision of terrestrial service to assure the viability of MSS, terrestrial service would not be ancillary.⁴⁸

⁴⁴ See 47 U.S.C. § 309(j)(2)(C) (emphasis added) (cross-referencing *id.* § 397(6)).

⁴⁵ See 47 U.S.C. § 765(f) (emphasis added).

⁴⁶ The *Flexible Use Notice* suggests that 309(j) may not be implicated because terrestrial rights would be “ancillary” and linked to pre-existing MSS authorizations and operations. *Flexible Use Notice* at ¶ 39.

⁴⁷ See Merriam-Webster Dictionary 19 (1998); *cf.* *Flexible Use Notice* at ¶ 30 (seeking comment on defining the term “ancillary” to refer to services that do not “differ materially in nature or character from the principal services offered by MSS providers.”).

⁴⁸ Indeed, it is questionable whether the underlying economic rationale for New ICO’s and Motient’s terrestrial proposals – that attracting more profitable urban customers will enable
(continued on next page)

Furthermore, New ICO has demonstrated that in order to offer such so-called “ancillary” terrestrial services, it would have to segment its terrestrial and satellite operations.⁴⁹ In effect, this would be a private reallocation of the band, with the MSS licensees reaping the economic benefit of the reallocation rather than the U.S. government. This was clearly not the intent of 309(j) or the ORBIT Act. Accordingly, the Commission cannot grant MSS licensees flexibility.

II. REASONED DECISIONMAKING REQUIRES THAT THE FCC MUST FIRST DECIDE WHETHER TO REALLOCATE MSS SPECTRUM

Consideration of whether to accord MSS operators the flexibility to provide terrestrial services in the 2 GHz MSS band before the FCC resolves challenges both to its decision not to seek comment on reallocation of the entire band and to the Bureau’s licensing orders violates well-established principles of reasoned decisionmaking.⁵⁰ As discussed below, the record in this and related proceedings to date demonstrates that the 2 GHz MSS allocation should be reallocated to terrestrial mobile uses in light of (i) admissions by MSS applicants that MSS as authorized is not commercially viable and that MSS spectrum will lie fallow; (ii) increasing evidence that MSS licensees will not be able to provide the service for which they were

them to subsidize service to rural areas – makes any economic sense at all. Cross-subsidies are difficult to achieve in competitive markets like CMRS. By definition, to be able to cross-subsidize rural service, one must charge prices significantly above costs in urban areas. Doing so in the competitive CMRS market, however, will make it difficult for MSS licensees to obtain the critical mass of urban customers that would be needed for any rural cross-subsidization, unless the services offered were of significantly higher value to customers. This seems unlikely and is not even mentioned in the New ICO or Motient proposals.

⁴⁹ New ICO *Ex Parte*, Appendix B at 3, 4, 6 and 7.

⁵⁰ See 5 U.S.C. §706(2)(A); see, e.g., *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998); *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995).

authorized; (iii) the fact that nonviable operators will not be able to provide service to rural/unserved areas, thereby undermining the purpose for the allocation; (iv) the demonstrated competing needs of CMRS carriers for additional spectrum to satisfy demand and roll-out advanced services; and (v) the FCC's responsibility to ensure that spectrum is put to its highest and best use.

A. Affording MSS Licensees Terrestrial Relief Is Inconsistent with Allowing Market Forces to Determine the Viability of MSS.

It is not reasoned decisionmaking to (i) allocate a large band of spectrum for pure satellite service, (ii) license applicants without resolving whether the purpose of the allocation is still viable (given applicants' own admissions) by purportedly and inexplicably relying on market forces, but then (iii) intervene in the market by bailing out the recently licensed MSS applicants by changing the allocation to permit terrestrial use.

Evidence of both the failure of MSS as originally envisioned and the accelerating demand for terrestrial advanced wireless services was before the Bureau at the time of the license grants, but the Bureau dismissed that evidence in favor of granting MSS applicants "the opportunity to succeed or fail in the market on their own merits." The Commission should not now, almost in the same breath, be considering a bail-out that would fundamentally change the nature of MSS licenses "to assure the commercial viability of MSS systems." If MSS is not viable without aid from the Commission to allow terrestrial operations, it is clear that MSS operators cannot succeed on their own. This lack of viability goes to the heart of why it was unreasoned to grant the applications prior to addressing on the merits the issues that CTIA raises in its petition for rulemaking, and why it is necessary for the Commission to address both CTIA petitions and the

Application for Review *before* the instant proceedings are allowed to go forward.⁵¹ This is especially the case given the needs of CMRS providers who are ready, willing and able to put the spectrum to use immediately.

B. MSS Applicants Admit that the Purpose of the MSS Allocation Is Not Commercially Viable.

After the 70 MHz allocation and service and band rules were finalized, two MSS operators, New ICO and Motient, told to the Commission for the first time that without the ability to attract urban subscribers through a change in their licenses to permit terrestrial operations, MSS cannot become a viable enterprise and will not be able to “preserve the promise of MSS” to deliver important public interest benefits to rural and underserved areas.⁵² New ICO specifically asserted that without the ability to offer terrestrial services in urban areas, the future not just of its service, *but of MSS as a whole*, is in “dire jeopardy.”⁵³ It maintained that “MSS service must be extended to all, or it will be available to none.”⁵⁴ Likewise, according to

⁵¹ Where the factual predicate for the allocation and license grants has been called into question, the Commission must reexamine the issue in a rulemaking. *See, e.g., Geller v. FCC*, 610 F.2d 973, 977-80 (D.C. Cir. 1979) (per curiam) (ordering the FCC to reexamine whether regulations continued to serve the public interest long after the predicate for the regulations had ceased to exist); *American Horse Protection Ass’n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (stating that refusal to conduct a rulemaking “sets off a special alert when a petition has sought modification of a rule on the basis of a radical change in its factual premises”); *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) (“[A]n agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject . . . has been removed.”); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d at 767 (“[W]here the factual assumptions which support an agency rule are no longer valid, agencies must ordinarily reexamine their approach.”).

⁵² *Flexible Use Notice* at ¶ 24 (quoting New ICO *Ex Parte* at 1, 5-6; Motient Application at 12-13).

⁵³ *Flexible Use Notice* at ¶ 24 (quoting New ICO *Ex Parte* at 1).

⁵⁴ *Flexible Use Notice* at ¶ 24 (quoting New ICO *Ex Parte* at 1, 6).

Motient, “the inability of a satellite-only system to offer in-building coverage in urban areas has prevented *the MSS industry* from achieving its potential success as a provider of competitive services to all areas, including rural and underserved areas.”⁵⁵

In conjunction with extensive evidence already before the Commission that the MSS industry is financially troubled,⁵⁶ these statements by MSS applicants themselves make clear that MSS systems as authorized cannot achieve the purpose of the original 2 GHz MSS allocation: bringing access to advanced communications services to rural and underserved areas of the country.⁵⁷ The Commission contemplates this regrettable outcome when it asks “should we view the ICO and Motient proposals as indicating that too much spectrum has been allocated for

⁵⁵ *Flexible Use Notice* at ¶ 17 (citing Motient Application at 12-13) (emphasis added).

⁵⁶ The Commission’s recently released *Sixth Competition Report* reports the bankruptcies of two MSS providers, Iridium LLC and ICO Global Communications (a New ICO subsidiary), and reports that a third company, Globalstar Telecommunications LTD (“Globalstar”), may “soon declare bankruptcy, following the paths of Iridium and ICO.” *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Sixth Report*, FCC 01-192, at 35-38 & n.262 (rel. July 17, 2001) (“*Sixth Competition Report*”). The financial ability of two other MSS applicants, Constellation Communications Holdings, Inc. (“Constellation”) and Mobile Communications Holdings, Inc. (“MCHI”), to get their services off the ground has also been questioned by industry analysts and other applicants, and the Bureau has already declared MCHI’s LEO authorization null and void for failure to meet a construction milestone. *See* Application for Review at 10 & n.30, 13 & n.39. Constellation and MCHI have also announced plans to join New ICO, which as discussed above has stated that its service as authorized is not commercially viable. *See id.* Another MSS applicant, TMI Communications and Company, Limited Partnership (“TMI”), is affiliated with Motient which, like New ICO, admits it does not have a viable service under current rules. *Id.* at 4 n.6. Motient also just announced that it would not be able to make interest payments on its senior notes. *See* Margo McCall, *Motient Shares Spiral Downward*, *Wireless Week*, Oct. 10, 2001, at 10.

⁵⁷ *Flexible Use Notice* at ¶ 25.

MSS?”⁵⁸ New ICO provides the answer. It admits that as presently authorized, MSS operators will not be able to utilize frequencies in urban areas, which will “lie fallow.”⁵⁹

C. Competing CMRS Needs Warrant Reallocation to Put 2 GHz MSS Spectrum to Its Highest and Best Use.

As the FCC has recognized, “[t]he introduction of wireless Internet, advanced data, and 3G services, as well as global competition within these services, has created a shortage of suitable available spectrum,”⁶⁰ and “demand for spectrum has increased dramatically as a result of explosive growth in wireless communications.”⁶¹ There is thus unquestionably a need for more spectrum for terrestrially-provided advanced wireless services. For 3G purposes alone, an estimated 200 MHz of additional spectrum is needed by U.S. carriers,⁶² who have only 40-50 % the amount of spectrum as their international competitors.⁶³

⁵⁸ *Flexible Use Notice* at ¶ 28.

⁵⁹ *Flexible Use Notice* at ¶ 46.

⁶⁰ *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, *Order on Reconsideration*, 16 F.C.C.R. 1343, ¶ 13 (2001) (citing, *inter alia*, Jill Carroll and Leslie Cauley, *Demand for Airwaves May Create Shortage*, *The Wall Street Journal*, Aug. 2, 2000, at A2 (“The explosion in wireless communications and the emergence of 3G technology have resulted in a shortage of spectrum to satisfy the huge demand.”)).

⁶¹ *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258, *Notice of Proposed Rule Making and Order*, 16 F.C.C.R. 596, ¶ 2 (2001) (citing *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, 14 F.C.C.R. 19868, ¶ 2 (1999)).

⁶² *See, e.g.*, Reply Comments of Verizon Wireless in ET Docket No. 00-258 at 10-12 (Mar. 9, 2001); Report ITU-R M.2023.

⁶³ *See* Telephia, *Wireless Network Performance in U.S. Metro Areas* (July 2001) (available at <www.wow-com.com/articles.cfm?ID=553>).

Terrestrial mobile carriers' need for more spectrum is also borne out by the recent Auction No. 35 results, where carriers bid a record \$16.9 billion for additional spectrum and by the continuing dramatic increases in CMRS subscriber growth. U.S. mobile telephone subscribership is now more than 123 million,⁶⁴ and during the last year it experienced "the largest twelve-month increase in total number of subscribers in the history of the sector."⁶⁵ Other key measurements demonstrate "the increased demand for and reliance placed on mobile services," including a 75% increase in minutes of use last year.⁶⁶ The growth in customer numbers and the average time spent using the mobile phones means that capacity has to increase 75% a year just to keep pace.⁶⁷

Despite these dramatic increases in customers and usage, however, efforts to provide U.S. carriers with access to additional spectrum to meet future requirements and ensure continuing high standards of quality have been largely unsuccessful to date. In the 3G proceeding, for example, the majority of spectrum under consideration for reallocation has been taken off the table – the Commission recently formally removed the MMDS/ITFS bands from consideration for 3G purposes,⁶⁸ and the National Telecommunications and Information Administration

⁶⁴ See <www.wow-com.com>, visited Oct. 13, 2001.

⁶⁵ *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Sixth Report*, FCC 01-192, at 82 (rel. July 17, 2001) ("*Sixth Competition Report*").

⁶⁶ See *Sixth Competition Report* at 82.

⁶⁷ See Scott Woolley, *A Call for Help*, *Forbes, Inc.*, p. 114, Sept. 17, 2001.

⁶⁸ See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz to Support Advanced Wireless Services*, ET Docket No. 00-258, *First Report and Order and Memorandum Opinion and Order*, FCC 01-256 (Sept. 24, 2001).

(“NTIA”) recently announced that little, if any, federal government spectrum would be reallocated for private sector use.⁶⁹ As a result, the current 3G auction deadline of September 2002 will likely be pushed back until at least September 2004.⁷⁰ Despite rescheduling the 700 MHz auction for the fifth time,⁷¹ it is unclear when the spectrum will be usable for wireless operations given incumbent broadcast operations. Access to the Auction 35 spectrum is also uncertain, given the recent D.C. Circuit decision in the *NextWave* case⁷² and the uncertain final outcome of settlement discussions.

In light of the foregoing, it is clear that the approximately 10-14 MHz of 2 GHz MSS spectrum “left-over” following the Bureau’s licensing of 2 GHz MSS systems and under consideration for possible reallocation to 3G purposes in the *Advanced Services Further Notice* does not even begin to satisfy the recognized immediate spectrum needs of CMRS providers. At the same time, many of the 2 GHz MSS applicants whose licenses were granted by the Bureau are either financially unstable, have admitted to being commercially nonviable as licensed, and/or have affiliated themselves with applicants admitting to being commercially nonviable as licensed.⁷³ Given the FCC’s policy of fostering the highest and best use of spectrum,⁷⁴ the

⁶⁹ See NTIA Statement Regarding New Plan To Identify Spectrum for Advanced Wireless Mobile Services (Oct. 5, 2001).

⁷⁰ See *id.*

⁷¹ See *Public Notice*, “Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Scheduled for June 19, 2002,” Report No. AUC-01-31-D, DA 01-2394 (WTB rel. Oct. 15, 2001).

⁷² See *NextWave Personal Communications, Inc. v. FCC*, Case No. 00-1402 (D.C. Cir. decided June 22, 2001).

⁷³ See *supra* note 56 and discussion *supra* Section II.B. Those applicants include New ICO, Constellation, Globalstar, Iridium, MCHI and TMI.

Commission must promptly initiate a rulemaking and seek comment on reallocating the 70 MHz 2 GHz MSS spectrum allocation to CMRS use, consistent with CTIA's petitions and the Application for Review.

⁷⁴ See Application for Review at notes 23-26 and accompanying text.

CONCLUSION

The proposed authorization of terrestrial operations only to MSS providers is contrary to Section 309(j) of the Communications Act, and nothing in the ORBIT Act undermines this conclusion. It is also not reasoned decisionmaking to consider the issues raised in the *Flexible Use Notice* at this time. The Commission must first fully and finally resolve the threshold question of whether the original 70 MHz of spectrum allocated to 2 GHz MSS remains justified where the factual predicate for the allocation has been undermined by applicants' admissions that MSS is not viable, particularly given the competing immediate spectrum needs of terrestrial mobile carriers.

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