

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Introduction of New Advanced Mobile and Fixed Terrestrial Services: Use of Frequencies Below 3 GHz	)	ET Docket Nos. 00-258 and 95-18; IB Docket No. 99-81
	)	
Petition for Rulemaking of the Cellular Telecommunications & Internet Association Concerning Reallocation of 2 GHz Spectrum For Terrestrial Wireless Use	)	RM-....
	)	

**VOICESTREAM WIRELESS CORPORATION  
REPLY COMMENTS**

VoiceStream Wireless Corporation (“VoiceStream”) submits this reply in support of the Petition for Reconsideration that the Cellular Telecommunications & Internet Association (“CTIA”) filed on October 15, 2001 in this proceeding.<sup>1</sup> In that Petition, CTIA asks the Commission to reconsider the denial of its Petition for Rulemaking, where it asked the Commission to reallocate the entire 2 GHz Mobile Satellite Service (“MSS”) band for other, more efficient uses. VoiceStream agrees with CTIA and others that the Commission did not adequately explain its decision, that appellate courts will likely vacate the decision as a result, and that legal challenges will harm the public interest by delaying the productive use of this 70 MHz of spectrum. The opponents’ argument that CTIA’s Reconsideration Petition is moot lacks all merit.

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<sup>1</sup> See *Public Notice*, Report No. 2511 (Oct. 29, 2001); 66 Fed. Reg. 55666 (Nov. 2, 2001). CTIA’s Petition has been supported by AT&T Wireless and Cingular Wireless, but opposed by Boeing and GlobalStar.

**I. RECONSIDERATION IS APPROPRIATE BECAUSE THE COMMISSION HAS NOT ENGAGED IN REASONED DECISIONMAKING**

The Supreme Court has declared that an agency “must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made,” and that to withstand a challenge under the arbitrary and capricious standard, an agency “must cogently explain why it has exercised its discretion in a given manner.”<sup>2</sup> The Court has further ruled that “the Administrative Procedure Act will not permit us to accept such . . . a practice” where there is “no analysis . . . to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion.”<sup>3</sup> These fundamental Administrative Procedure Act (“APA”) requirements apply to Commission decisions declining to commence a new rulemaking.<sup>4</sup>

On May 18, 2001, CTIA filed a Petition for Rulemaking asking the Commission to reallocate to other uses the 70 MHz of 2 GHz spectrum that it had allocated to MSS — before it granted any MSS authorizations.<sup>5</sup> The Commission denied the CTIA Petition three months later, without even requesting public comment, as FCC rules require.<sup>6</sup> The Commission’s reasoning was limited to the following sentence:

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<sup>2</sup> *Motor Vehicle Manufacturers Ass’n v. State Farm*, 463 U.S. 29, 43, 49 (1983)(internal citations and quotations omitted). The Court has further held that it is “well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself” and that “courts may not accept appellate counsel *post hoc* rationalizations for agency actions.” *Id.* at 50.

<sup>3</sup> *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962).

<sup>4</sup> See, e.g., *American Horse Protection Ass’n v. Secretary*, 397 F.2d 1 (D.C. Cir. 1987); *WWHT v. FCC*, 656 F.2d 807 (D.C. Cir. 1981); *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979).

<sup>5</sup> See CTIA, Petition for Rulemaking, RM-.... (May 18, 2001).

<sup>6</sup> The FCC’s failure to follow its own rules is itself reversible error, as CTIA points out. See CTIA Reconsideration Petition at 3-4.

The actions we are taking in this *MO&O* and *FNPRM* better serve the public interest with respect to these issues, and are consistent with the International Bureau's recent action granting 2 GHz MSS authorizations.<sup>7</sup>

VoiceStream agrees with CTIA and others that this explanation is wholly inadequate under the APA.

**A. The Commission's Invocation of the Public Interest Is Unexplained and Contrary to All Evidence**

One of the two reasons that the Commission recited for denying CTIA's Rulemaking Petition was its view that the public interest was "better served" by awarding MSS authorizations, and examining later whether some of this spectrum should instead be reallocated for other uses. But as CTIA points out, the "mere recitation that its action best serves the public interest is insufficient because it fails to provide any indication of *why* denial is in the public interest."<sup>8</sup> As appellate courts have held in vacating other Commission decisions:

A simple invocation of "the public interest," without more, is an insufficient explanation . . . . The agency is obliged to provide a more reasoned, less inscrutable basis for its actions.<sup>9</sup>

As it now stands, the Commission's decision almost certainly constitutes reversible error. The public interest is not served if productive use of this valuable spectrum is delayed because of the time consumed by court appeals. The public interest would be served if the Commission took steps on reconsideration to correct its own errors, thereby rendering court challenges unnecessary.

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<sup>7</sup> *Advanced Wireless Services Reconsideration Order*, Docket Nos. 95-18, 99-81 and 00-258, FCC 01-224, at ¶ 23 (Aug. 20, 2001).

<sup>8</sup> CTIA Reconsideration Petition at 5 (emphasis in original).

<sup>9</sup> *Alegria v. FCC*, 905 F.2d 471, 474 (D.C. Cir. 1990).

VoiceStream submits, however, that the Commission cannot find that the public interest today warrants allocation of the 2 GHz spectrum to the MSS industry. VoiceStream presumes that in reciting the public interest, the Commission intended to incorporate its 1997 determination that the allocation of 70 MHz of spectrum to MSS was in the public interest. There are two problems with such reliance: (1) the original 1997 decision is itself of questionable validity, and (2) the Commission ignored the central thrust of CTIA's Rulemaking Petition – namely, the significant changes that have occurred since the Commission made its original decision to allocate an additional 70 MHz of spectrum to the MSS industry.

1. The Commission's Original MSS Allocation Order Is Suspect. The Commission determined in 1997 that the public interest would be served by allocating an additional 70 MHz to MSS.<sup>10</sup> The Commission based its decision on the fact that there were “ten commenters who indicated they plan to provide mobile satellite service in the 2 GHz band,” and on its view that “70 MHz will also provide sufficient bandwidth for the operation of multiple service providers.”<sup>11</sup> But in making this allocation, the Commission never analyzed the market demands for MSS, nor did it consider other, better uses of this valuable spectrum.

With its *2 GHz MSS Allocation Order*, the Commission has allocated a total of 171 MHz of spectrum to MSS. Satellites, the Commission has correctly noted, are an “excellent technology for delivering basic and advanced telecommunications services to unserved, rural, insular or economically isolated areas.”<sup>12</sup> But as MSS licensees have acknowledged (and even ignoring MSS service quality issues), MSS systems cannot compete with terrestrial systems:

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<sup>10</sup> See *2 GHz MSS Allocation Order*, 12 FCC Rcd 7388 (1997).

<sup>11</sup> *Id.* at 7394-95 ¶¶ 13-14.

<sup>12</sup> *2 GHz MSS Service Rules Order*, 15 FCC Rcd 16127, 16145 ¶ 32 (2000).

### Comparison of MSS and Cellular/PCS Services<sup>13</sup>

	<u>Handset Price</u>	<u>Per Minute Price</u>
MSS	\$895 to \$2,999	\$1.10 to \$2.00
Cellular/PCS	0 to \$150	\$0.12 to \$0.15

For all practical purposes, the satellite market is limited to areas where terrestrial services are not available.

The potential customer base for U.S. MSS systems is small (one or perhaps two million), and 171 MHz of spectrum clearly is not needed to provide even the most advanced satellite services to a market this size. VoiceStream submits that the Commission would not have allocated 70 MHz of additional spectrum to MSS had it conducted a basic analysis of the satellite market (*e.g.*, potential customer base and amount of spectrum needed to adequately serve these customers).<sup>14</sup>

2. The Commission Is Required to Consider Subsequent Factual Changes. Appellate courts have held that “changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so. In the rulemaking context, for example, it is settled law that an agency may be forced to reexamine its approach if a significant factual predicate of a prior decision . . . has been removed.”<sup>15</sup> CTIA’s Rulemaking Petition was based largely on material changes that have occurred since the Commission adopted its *2 GHz MSS Allocation Order*, including recent statements by MSS operators that their indus-

<sup>13</sup> The data in this chart is taken from Motient Comments, Docket Nos. 95-18 and 01-185, at 13 (Oct. 22, 2001).

<sup>14</sup> Indeed, the Commission has asked in a related proceeding whether “too much spectrum has been allocated for MSS.” *MSS Terrestrial Use NPRM*, Docket Nos. 95-18 and 01-185, FCC 01-225, at ¶ 28 (Aug. 17, 2001).

<sup>15</sup> *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992)(internal citations omitted). There is, therefore, no basis to GlobalStar’s arguments that it is “too late” for the FCC to change the allocation of the 2 GHz spectrum or that CTIA’s Petition for Rulemaking is an untimely petition for reconsideration of the *2 GHz MSS Allocation Order*. See GlobalStar Opposition at 4 and 5.

try is not viable (supported by mounting evidence that that the MSS industry is financially troubled), and the demonstrated need for spectrum by terrestrial CMRS carriers to support their services.

The facts are undisputed that MSS licensees are not using their spectrum efficiently, and that terrestrial CMRS carriers need additional spectrum both to meet growing demand for existing services and to support the introduction of innovative 3G services.

#### Efficiency of Spectrum Use

	<u>Satellite Carriers</u>	<u>Terrestrial Carriers</u>
Total Spectrum Allocated	171 MHz <sup>16</sup>	190 MHz <sup>17</sup>
Total Customers	750,000 (globally) <sup>18</sup>	123,000,000 (U.S. only) <sup>19</sup>
Customers per MHz	4,386	648,000

In addition, terrestrial carriers have continued network buildout at a rapid pace. Since CTIA filed its Rulemaking Petition, the Commission has observed that 91 percent of all Americans have a choice of three or more different terrestrial operators.<sup>20</sup> What this means as a practical matter is that the market for satellite services has become even smaller than it was in 1997, when the Commission allocated an additional 70 MHz to the MSS industry. This development alone suggests that the Commission should immediately reallocate all 70 MHz to terrestrial

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<sup>16</sup> The FCC has allocated 68 MHz for L-Band systems (1525-59 MHz and 1626.5-1660.5 MHz); 35 MHz for Big LEO systems, (1610-1626.5 MHz and 2483.5-2500 MHz); and 70 MHz for 2 GHz systems (1990-2025 MHz and 2165-2200 MHz).

<sup>17</sup> This includes 50 MHz of cellular, 120 MHz for licensed broadband PCS, and an estimated 20 MHz for the SMR spectrum that Nextel uses in its services.

<sup>18</sup> Mobile Satellite Users Association Comments, Docket No. 01-185, at 3 (Oct. 22, 2001)(By the end of 2,000, there were close to 750,000 mobile satellite terminals commissioned for operation around the globe.”).

<sup>19</sup> See [www.wow-com.com](http://www.wow-com.com).

<sup>20</sup> See *Sixth Annual CMRS Competition Report*, 16 FCC Rcd 13350, 13356 (July 17, 2001).

CMRS carriers or to other licensees or entities that must be reallocated as a result of a 3G allocation.

**B. The Bureau Grant of MSS Authorizations Provides No Support for the Denial of the CTIA Rulemaking Petition**

The second reason the Commission recited for denying CTIA's Rulemaking Petition was that such action was "consistent with the International Bureau's recent action granting 2 GHz MSS authorizations."<sup>21</sup> On July 17, 2001, two months after CTIA had filed its Petition specifically asking that the Commission "withhold the grant of 2 GHz licenses to the existing applicants while it considers CTIA's petition,"<sup>22</sup> the International Bureau granted MSS authorizations to eight different firms.<sup>23</sup> Among the firms to which the Bureau granted authorizations were firms that had forfeited other MSS licenses;<sup>24</sup> firms that have announced they will be filing for bankruptcy because they have failed to provide a viable MSS service;<sup>25</sup> and firms that have told the Commission that they will not have a viable business, unless the FCC authorizes them to provide entirely different terrestrial services.<sup>26</sup>

The Commission's reliance on these Bureau authorization orders is, as AT&T Wireless points out, circuitous reasoning:

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<sup>21</sup> *Advanced Services Reconsideration Order* at ¶ 23.

<sup>22</sup> CTIA Rulemaking Petition at 4.

<sup>23</sup> *See FCC News*, "FCC International Bureau Authorizes New Mobile Satellite Service Systems in the 2 GHz Band" (July 17, 2001).

<sup>24</sup> *See Mobile Communications Holdings*, DA 01-1315, 16 FCC Rcd 11766 (May 31, 2001) (Bureau cancels Big LEO license because of failure to meet minimal construction milestones). Two months later, the Bureau awarded the same firm a different MSS license. *See Mobile Communications Holdings*, DA 01-1637, 16 FCC Rcd 13794 (July 17, 2001).

<sup>25</sup> *See COMMUNICATIONS DAILY*, *Globalstar Announced Plans to Enter Chapter 11 Bankruptcy* (Nov. 15, 2001); *WIRELESS WEEK*, *Globalstar to File Chapter 11* (Nov. 14, 2001).

<sup>26</sup> *See Cingular Comments* at 6 n.25.

The [CTIA] Rulemaking Petition . . . was submitted approximately two months *before* the International Bureau's action was taken, and . . . CTIA specifically asked the Commission to defer licensing 2 GHz MSS systems until it had conducted the requested rulemaking. To now use the Bureau's *subsequent* grant of the MSS licenses as justification for denial of the Rulemaking Petition cannot be considered reasoned decision making.<sup>27</sup>

The Bureau authorization orders do not support the Commission's rejection of the CTIA Petition given that CTIA specifically asked that the Commission not grant such authorizations.

## II. CTIA'S PETITION IS NOT MOOT

GlobalStar, which has failed to provide a viable MSS service and has announced its intention to file for bankruptcy, contends that CTIA's Petition for Reconsideration is "moot and should be dismissed" because the Commission has "asked for comment on whether to reallocate that [2 GHz MSS] spectrum in the Further 3G NPRM."<sup>28</sup> Similarly, Boeing argues that CTIA's Petition should be denied because CTIA has "implicitly been granted the rulemaking it requested."<sup>29</sup>

GlobalStar and Boeing are mistaken. First, CTIA's Petition asked that the Commission reallocate the entire 70 MHz of spectrum to other uses, while the Commission's *Further 3G NPRM* proposes to reallocate only 10-14 MHz of this spectrum to other uses. Second, CTIA specifically asked that the Commission reallocate the 2 GHz band "before this band is licensed to service providers who may never launch, or who may serve an extremely small customer base":

The Commission should stop to consider the lessons that could be learned from the low earth orbit ("LEO") experience before authorizing a whole new category of MSS providers to serve a market where there is precious little evidence of consumer demand for their offerings. The appropriate reallocation of these frequencies should be determined through a full rulemaking proceeding with ample op-

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<sup>27</sup> AT&T Wireless Comments at 2-3 (emphasis in original).

<sup>28</sup> GlobalStar Opposition at 2-3.

<sup>29</sup> Boeing Opposition at 3.

portunity for public comment regarding the wide variety of possible uses for this valuable public asset and full, deliberate consideration by the Commission of all relevant issues.<sup>30</sup>

The *possible* reallocation of 10-14 MHz is not the same as the reallocation of all 70 MHz and, therefore, CTIA's Rulemaking Petition is not moot.

### III. CONCLUSION

For all the foregoing reasons, VoiceStream respectfully requests that the Commission reconsider its decision denying CTIA's Petition for Rulemaking and that it promptly commence a proceeding proposing that the entire 70 MHz of 2 GHz MSS band be reallocated to other, more productive uses.

Respectfully submitted

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<sup>30</sup> CTIA Rulemaking Petition at 4 (emphasis in original).