WILKINSON) BARKER) KNAUER) LLP

2300 N STREET, NW
SUITE 700
WASHINGTON, DC 20037
TEL 202.783.4141
FAX 202.783.5851
www.wbklaw.com

July 22, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Notice of Ex Parte Presentation*
IB Docket No. 01-185; ET Docket No. 95-18

Dear Ms. Dortch:

On July 19, 2002, Charla Rath, Director of Spectrum and Public Policy, Verizon Wireless, Sara F. Leibman, Mintz Levin Cohn Ferris Glovsky & Popeo, PC, representing AT&T Wireless Services, Inc., and the undersigned, representing Verizon Wireless and Cingular Wireless, met with John Rogovin, Deputy General Counsel, and David E. Horowitz and Daniel Harrold, of the Office of General Counsel, regarding the issues raised in the wireless carriers' June 7, 2002 "Request to Suspend Action in MSS Flex Proceeding Pending Decisions in Related Dockets" in the above-referenced dockets. A summary of the points made in the presentation is set forth in the attached document, which was distributed at the meeting.

Pursuant to Sections 1.1206(b)(1) and (b)(2) of the Commission's rules, a copy of this letter and attachment is being filed electronically. Copies are also being served electronically on the Commission personnel listed below.

Respectfully submitted,

Kathryn A. Zachem
L. Andrew Tollin

Attachment

cc: John Rogovin
David E. Horowitz
Daniel Harrold

EX PARTE PRESENTATION OF VERIZON WIRELESS, AT&T WIRELESS AND CINGULAR WIRELESS TO THE OFFICE OF GENERAL COUNSEL

IB DOCKET NO. 01-185, ET DOCKET 95-18

- Certain MSS licensees have recently lobbied for expedited action in the *MSS Flex* proceeding. Although Verizon Wireless, AT&T Wireless ("AWS") and Cingular Wireless have no objection to a prompt decision on this issue, *MSS Flex* cannot be divorced from two other interrelated proceedings pending before the FCC including: (1) CTIA's October 15, 2001 reconsideration petition of the FCC's original decision to allocate the 2 GHz band solely for satellite-only services; and (2) an application for review of the subsequent MSS licensing decisions filed by Verizon, AWS, and Cingular on August 16, 2001 challenging the Bureau's decision to issue satellite-only licenses and to let the marketplace resolve the viability of MSS. (A related rulemaking (ET Docket No. 00-258), issued August 20, 2001, involving the potential reallocation of a small amount of 2 GHz MSS spectrum for terrestrial service, also remains pending.)

- All of these proceedings involve the same facts.

  - In 1997, the Commission allocated spectrum for a satellite-only MSS service and accepted applications on a satellite-only basis; and in August 2000 it established licensing and service rules for the MSS service.

  - On March 8, 2001, one of the pending MSS applicants, ICO, requested authority, upon licensing, to provide terrestrial service in the 2 GHz band on the ground that satellite-only service is not viable.

  - On May 18, 2001, CTIA asked the FCC to reallocate the 2 GHz band for terrestrial service given ICO's and other MSS providers' admissions about the viability of MSS.

  - On June 13, 2001, wireless carriers urged deferral of MSS licensing until the FCC resolved the issues raised in CTIA's petition.

  - IB and OET refused to revisit the satellite-only restrictions, and issued MSS licenses to ICO and other applicants on July 17, 2001 notwithstanding their statements that satellite-only service was not viable; no auction was held.

  - The Bureaus avoided issues about the viability of MSS by granting licenses on a satellite-only basis and leaving it to the marketplace alone to resolve who would be the winners and losers.

  - Yet, shortly thereafter, on August 17, 2001, the Commission commenced the *MSS Flex* proceeding to decide, among other things, whether the "incumbent" (one month) MSS licensees should be allowed to provide non-satellite terrestrial service using licenses they had obtained for free under the ORBIT Act's auction exemption for global satellite services.

- If the *MSS Flex* proposal is granted alone, the bedrock requirement of reasoned decision-making and the Act would be violated in the following ways:

  - ***Original Licensing Decision.*** The basis for the licensing decision was that the satellite-only marketplace would resolve the MSS viability issue, not the FCC. If *MSS Flex* is granted to the MSS licensees before they have even commenced MSS operations, a direct conflict with the rationale underpinning the licensing decision would be created. Review of the licensing decision must take place simultaneously. *See State Farm* citing *Burlington* (facts found and choices made must match). Section 309's requirement to resolve substantial and material facts presented also would be ignored if the licensing decision is not taken up with the flex issue.

  - ***Original Allocation Decision.*** The basis for the satellite-only eligibility restriction would be totally undermined by authorizing *MSS Flex* without explaining why the satellite-only allocation was not revisited. Section 309(j) and case law (*e.g.*, *MaxCell Telecom*) require fair notice of eligibility before applications are invited and then an auction if there is mutual exclusivity. Authorizing *MSS Flex* at this time would constitute an end-run around these statutory requirements.

  - ***Auction Requirement.*** To the extent the Commission now believes that its satellite-only restrictions were incorrect, and wants to authorize terrestrial services on this band, it must distribute the terrestrial licenses via competitive bidding if there is mutual exclusivity. There is no basis in law simply to allow recent MSS licensees to expand their free licenses to include terrestrial services. The Orbit Act's exemption from competitive bidding provided to satellite services is inapplicable here. As the Commission found in *Northpoint*: "Section 647 does not prohibit the auction of spectrum licenses for terrestrial uses where the same spectrum may also be used for global or international satellite communications purposes by other licensees. The spectrum licenses at issue here would be 'assigned' to licensees and auctioned only for domestic terrestrial use." *Northpoint*, ¶¶ 242-245. The case for separate licensing of terrestrial use of MSS spectrum is even more compelling here than in *Northpoint* because the MSS band would be "segmented" between terrestrial and satellite services — not shared. *See, e.g.*, AT&T Wireless *Ex Parte* (filed Apr. 1, 2002) and Cingular/Sprint *Ex Parte* (filed May 13, 2002), IB Docket No. 01-185, ET Docket No. 95-18.

  - ***Prejudgment.*** Deciding *MSS Flex* alone would also raise serious prejudgment issues because the three proceedings are interdependent. Either the satellite-only eligibility and satellite-only licensing decisions were decided correctly (meaning that *MSS Flex* is unwarranted), or those previous decisions must be reversed (and the terrestrial licenses made available through competitive bidding). Broadening substantially the MSS licensees' service authority before deciding the propriety of the satellite-only scope of the original allocation and licensing decisions would prejudge the latter.

- The Commission should revisit the factual premises underlying the original MSS allocation and licensing decisions at the same time it considers whether to permit terrestrial use of MSS spectrum and eligibility issues. Action on the *MSS Flex* proceeding should be suspended until the Commission is prepared to resolve the other interrelated proceedings. *See generally Kessler v. FCC,* 326 F.2d 673, 681 (D.C. Cir. 1963). To do otherwise would violate the Commission's obligation to conduct its proceedings "to avoid piecemeal, duplicative, tactical and unnecessary appeals which are costly to the parties and consume limited judicial resources." *Mt. Wilson FM Broadcasters Inc. v. FCC*, 884 F.2d 1462, 1466 (D.C. Cir. 1989).