

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter of )  
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)  
Motient/TMI Assignment and Transfer of )  
Control Applications, and Motient's Request )  
for Second Generation Satellite/Terrestrial )  
Base Station System )  
)

File Nos. SAT-ASG-20010302-00017, et al.

Received  
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To: Chief, International Bureau

Satellite Policy Branch  
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**RESPONSE OF CINGULAR WIRELESS LLC**

Cingular Wireless LLC ("Cingular") hereby responds to the "Consolidated Opposition to Petitions to Deny and Reply to Comments" ("Opposition") submitted jointly by Motient Services, Inc., Mobile Satellite Ventures Subsidiary LLC, and TMI Communications and Company Limited Partnership (collectively "Motient" or "Applicants") on May 7, 2001. In particular, Cingular notes the following:

- Contrary to Motient's claims that the waiver process is the appropriate vehicle for spectrum reallocations (Opposition at 19), precedent from both the United States Court of Appeals for the District of Columbia Circuit and the FCC clearly establish that spectrum allocation issues should be addressed in the context of a rulemaking;
- Contrary to Motient's claims that it has "justified a waiver grant," it has failed to make an adequate waiver showing<sup>1</sup> and has even failed to cite the rule(s) it seeks waived; and
- Contrary to Motient's claims, the Commission may reallocate the L-Band MSS spectrum for Third Generation ("3G") wireless systems without violating any treaty obligations.

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<sup>1</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

## I. SPECTRUM REALLOCATIONS SHOULD TAKE PLACE IN THE CONTEXT OF A RULEMAKING PROCEEDING, RATHER THAN VIA THE WAIVER PROCESS

In its comments on Motient's request to waive the table of allocations to permit terrestrial base stations to operate on L-Band MSS frequencies, Cingular established that the waiver process was the inappropriate vehicle for reallocating spectrum.<sup>2</sup> The Commission has previously noted that waiver requests that "amount to a request for reallocation of spectrum" should be denied and that spectrum reallocation "should take place within the context of a rulemaking, rather than a series of waivers."<sup>3</sup> The Commission expressed considerable concern that to do otherwise would risk "the possible evisceration of our allocation plan by waivers."<sup>4</sup>

Ironically, Motient itself acknowledges that:

[w]hen a proposal raises issues of general applicability that could affect a large number of parties, the Commission is wise to proceed by rulemaking or it risks providing inadequate notice to those interested parties and being subject to a flood of identical waiver requests. The cases cited by Cingular and Sprint present exactly this situation.<sup>5</sup>

Motient attempts to get out of this box by citing to a variety of decisions where the FCC allegedly granted waivers similar to the one Motient seeks. These decisions, however, are not controlling.

None of the cited cases granted waivers of the type sought by Motient. In the majority of cases, the decisions granted either interim waivers or waivers to address unique public safety concerns.<sup>6</sup>

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<sup>2</sup> Cingular Comments at 6-9.

<sup>3</sup> *Amendment of Section 22.501(a) of the Rules to Allow the 35 MHz Frequency Band to be Used for One-Way Signaling on an Exclusive Basis in the Domestic Public Land Mobile Radio Service*, CC Docket No. 80-189, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 78 F.C.C.2d 438, 439 (1980) ("35 MHz Order"). See Cingular Comments at 6-9.

<sup>4</sup> *35 MHz Order*, 78 F.C.C.2d at 439.

<sup>5</sup> Opposition at 18.

<sup>6</sup> See *Geostar Positioning Corporation, Order on Authorization*, 4 F.C.C.R. 4538 (1989) ("Geostar Order") (granting temporary waiver); *Waiver of Parts 2 and 90 of the Commission's Rules*

The waiver requested by Motient is *neither* interim in nature *nor* would it improve public safety.<sup>7</sup>

Moreover, virtually all of the decisions cited were issued by FCC bureaus pursuant to delegated authority. Of the 15 decisions referenced by Motient, only 5 were issued by the Commission.<sup>8</sup> Importantly, none of these decisions involved a waiver of the table of allocations to permit terrestrial use of frequencies allocated for satellite use. Two of the decisions granted waivers based on vital public safety needs;<sup>9</sup> two of the decisions granted only temporary waivers;<sup>10</sup> and the remaining Commission decision granted a waiver because the proposed use was indistinguishable from those permitted by the table of allocations.<sup>11</sup> Thus, each of the Commission decisions referenced by Motient are readily differentiated from this case.

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*to Permit New York Metropolitan Area Public Safety Agencies to Use Frequencies at 482-488 MHz on a Conditional Basis, Order*, 10 F.C.C.R. 4466 (1995) (“*Public Safety Order*”) (granting waiver for public safety reasons); *Offshore Telephone Company, Memorandum Opinion and Order*, 80 FCC 2d 383 (1980) (“*Offshore Order*”) (granting waiver to protect vital public need — preservation of life and property); *COMSAT and AMSC, Memorandum Opinion and Order*, 5 F.C.C.R. 4117 (1990) (“*AMSC Order*”) (granting temporary waiver); *Motorola Satellite Communications, Inc., Order and Authorization*, 11 F.C.C.R. 13952 (IB 1996) (did *not* grant a waiver of table of allocations); *Newcomb Communications, Inc., Order and Authorization*, 11 F.C.C.R. 3084 (IB 1996) (granting temporary waiver to “provide vital safety related needs”); *Mobile Datacom Corporation, Order and Authorization*, 10 F.C.C.R. 4552 (IB 1995) (granting temporary waiver); *Rockwell Collins, Inc., Order*, 14 F.C.C.R. 3340 (PSPWD, WTB 1999) (granting waiver to enhance air safety).

<sup>7</sup> Although Motient’s Opposition pays lip service to public safety issues, grant of the waiver would not improve public safety. See *Aeronautical Radio, Inc. (“ARINC”) Petition to Deny in Part at 5-7 (April 18, 2001)*.

<sup>8</sup> See *Qualcomm, Inc., Memorandum Opinion, Order and Authorization*, 4 F.C.C.R. 1543 (1989) (“*Qualcomm Order*”); *Geostar Order*, 4 F.C.C.R. 4538 (1989); *Public Safety Order*, 10 F.C.C.R. 4466 (1995); *Offshore Order*, 80 F.C.C.2d 383 (1980); *AMSC Order*, 5 F.C.C.R. 4117 (1990).

<sup>9</sup> *Public Safety Order*, 10 F.C.C.R. at 4466; *Offshore Order*, 80 F.C.C.2d at 384.

<sup>10</sup> *Geostar Order*, 4 F.C.C.R. at 4540 (granting temporary waiver until its dedicated satellites become operational); *AMSC Order*, 5 F.C.C.R. at 4118.

<sup>11</sup> *Qualcomm Order*, 4 F.C.C.R. at 4538.

Motient opposes addressing the terrestrial base station issue in a rulemaking because it will preclude timely action on its amendment. Cingular disagrees. Motient's amendment containing the terrestrial base station request has not been accepted for filing and was exempted from the petition to deny cycle established by the public notice.<sup>12</sup> Thus, if a rulemaking is not commenced, the Commission must still accept Motient's amendment for filing and place it on public notice.

At a minimum, as Motient concedes, interested parties must be given "adequate notice and opportunity for comment" before the FCC could grant its waiver.<sup>13</sup> Motient alleges that this standard has been satisfied because "[t]he Public Notice initiating this proceeding could not have been more explicit as to [Motient's] proposed terrestrial operations."<sup>14</sup> Cingular disagrees. First, Motient's request for terrestrial use was buried in a transfer and assignment public notice. Second, the public notice appeared to exclude Motient's terrestrial proposal from public comment. According to the public notice:

The amendment includes a request to deploy terrestrial base stations. . . . Motient seeks a waiver of any Commission rules that prevent use of these bands for this purpose. *We are not accepting the amendment for filing insofar as it seeks authority for terrestrial base stations, but are instead seeking comment on Motient's request.* Thus, with respect to the terrestrial base station [issue], petitioners to deny need not file by the deadlines established by this public notice.<sup>15</sup>

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<sup>12</sup> "International Bureau Sets Deadlines Concerning Motient/TMI Assignment and Transfer of Control Applications, and Motient's Request for Second Generation Satellite/Terrestrial Base Station System; Deadline Extended for TMI's Applications to Assign Earth Stations," FCC Public Notice, Report No. SAT-00066 (rel. Mar. 19, 2001) ("Public Notice, Report No. SAT-00066").

<sup>13</sup> Opposition at 16 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947)).

<sup>14</sup> Opposition at 16.

<sup>15</sup> Public Notice, Report No. SAT-00066.

Although Cingular and a few others filed comments out of an abundance of caution, the public notice certainly should not be deemed to provide adequate notice and opportunity for comment.<sup>16</sup>

## II. MOTIENT HAS FAILED TO JUSTIFY ITS WAIVER REQUEST

As Cingular stated in its comments, courts have made clear that “[a]n applicant for waiver faces a high hurdle even at the starting gate.”<sup>17</sup> Moreover, the Commission has stated that a waiver will be denied if:

the grounds advanced in support of [the] waiver are such that to grant the relief requested would involve a fundamental change in the rule itself rather than the creation of *a limited exception due to particular unique circumstances* or other considerations which make application of the general policy of the rule inappropriate.<sup>18</sup>

Cingular’s comments demonstrated that Motient failed to satisfy this waiver standard for two reasons: (i) it failed to demonstrate the unique nature of its proposal; and (ii) it failed to identify the rules it sought waived.<sup>19</sup>

Motient responds by making conclusory statements that it has fully justified a waiver grant and that it has demonstrated its unique need for a waiver because all “L-band licensees, both in the U.S. and Canada, face an urgent need to begin constructing and preparing for the launch of a second generation system.”<sup>20</sup> These statements do not demonstrate that Motient is facing “individual

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<sup>16</sup> Cingular contacted Commission staff to determine whether comments were sought on the terrestrial base station issue and received conflicting responses. Moreover, Commission staff indicated that other interested parties were also confused by the Public Notice.

<sup>17</sup> *WAIT Radio*, 418 F.2d at 1157.

<sup>18</sup> *CBS Inc.*, 87 F.C.C.2d 587, 593 (1981).

<sup>19</sup> Cingular Comments at 3-4, 6-9.

<sup>20</sup> Opposition at 18.

hardship justifying a waiver;”<sup>21</sup> rather, they demonstrate the existence of an industry-wide problem. Moreover, the perceived need for terrestrial base stations is not limited to the L-Band MSS industry. New ICO is seeking similar relief for 2 GHz MSS licensees. Accordingly, the appropriate vehicle for obtaining relief is a rulemaking where the Commission can “take advantage of the broad public participation and resource-saving advantages” of addressing the issue once rather than in a series of waivers by different industry participants.<sup>22</sup>

Finally, it would defy logic to find that Motient made the requisite waiver showing when it failed to identify the rule sections it seeks waived in both its waiver and its Opposition.<sup>23</sup> The failure to specify “all the rules it believes require a waiver” renders Motient’s request defective on its face.<sup>24</sup> Accordingly, the waiver request should be summarily dismissed.

### **III. THE INTERNATIONAL TABLE OF FREQUENCY ALLOCATIONS DOES NOT PRECLUDE THE REALLOCATION OF THE L-BAND FOR 3G SERVICES**

Perhaps the most dubious claim set forth in Motient’s Opposition is that the International Table of Frequency Allocations (“International Table”) precludes the reallocation of the L-Band for 3G services as suggested by Cingular and others.<sup>25</sup> *The initial allocation of the L-Band for MSS use was itself inconsistent with the International Table!* In fact, ARINC attempted to block the allocation of the L-Band for MSS use under the same theory now espoused by Motient. The United States Court of Appeals for the District of Columbia Circuit upheld the allocation, however, because

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<sup>21</sup> 35 MHz Order, 78 F.C.C.2d at 439.

<sup>22</sup> *Id.*

<sup>23</sup> See Cingular Comments at 3-4, 6.

<sup>24</sup> *TRW Inc., Memorandum Opinion and Order*, DA 01-371, ¶8 (March 12, 2001) (finding defective a request for waiver of all rules that may hinder frequency use).

<sup>25</sup> Opposition at 12-13.

nonconforming uses of spectrum within the United States are permitted so long as harmful interference is not caused to conforming international uses.<sup>26</sup> Thus, although a 3G allocation would be a nonconforming use, it is permitted provided the deployment of these systems do not cause interference to conforming international allocations.

### CONCLUSION

For the reasons set forth above and in Cingular's Comments, the waiver requested by Motient should be denied.

Respectfully submitted,

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May 21, 2001

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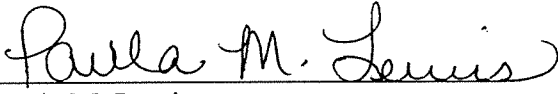
<sup>26</sup> *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 444-45 (D.C. Cir. 1991).

**CERTIFICATE OF SERVICE**

I, Paula M. Lewis, hereby certify that copies of the foregoing **Response of Cingular Wireless LLC** have been served on the following by first-class U.S. mail, postage prepaid, this 21st day of May, 2001:

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