

I. MOTIENT HAS NOT MET ITS BURDEN OF DEMONSTRATING ITS ENTITLEMENT TO A WAIVER

Courts have held that waiver applicants “face[] a high hurdle even at the starting gate” and “must plead with particularity the facts and circumstances which warrant such action.”² In certain cases, a waiver *may* be appropriate *if* “[1] special circumstances warrant a deviation from the general rule and [2] such deviation will serve the public interest.”³ In addition, the applicant “must clearly demonstrate that the general rule is not in the public interest when applied to its particular case and that granting the waiver will not undermine the public policy served by the rule.”⁴ Of course, “[t]he very essence of waiver is the assumed validity of the general rule.”⁵ Finally, a decision to grant a waiver “must be based on articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application.”⁶

² *WAIT Radio v. FCC*, 418 F.3d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

³ *Texas Waiver Order*, 13 FCC Rcd 21798, 21801 ¶ 6 (1998)(emphasis added), *citing Northeast Cellular v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), and *WAIT Radio*, 418 F.2d at 1157.

⁴ *U S WEST*, 12 FCC Rcd 8343, 8346 ¶ 10 (1997); *Bell Atlantic*, 12 FCC Rcd 10196, 10198 ¶ 5 (1996).

⁵ *WAIT Radio*, 418 F.2d at 1158. *See also Southwestern Bell*, 12 FCC Rcd 10231, 10239 ¶ 13 (1997); *U S WEST Communications*, 7 FCC Rcd 4043, 4044 ¶ 6 (1992). Courts have recognized that the Commission “has broad discretion to deny waivers.” *A/B Financial v. FCC*, 1995 U.S. App. LEXIS 37378, at 5 (D.C. Cir. 1995). Courts will reverse a waiver denial only if the Commission’s reasons are “so insubstantial as to render that denial an abuse of discretion.” *Melcher v. FCC*, 134 F.3d 1143, 1163 (D.C. Cir. 1998).

⁶ *Texas Waiver Order*, 13 FCC Rcd at 21801 ¶ 6, *citing Northeast Cellular*, 897 F.2d at 1166.

Motient has not begun to satisfy its heavy burden here. First, it has not “plead with particularly” the facts justifying the relief it seeks. Motient’s waiver request is limited to the following single sentence:

[Motient] urge[s] the Commission to waive those rules in light of the public interest benefits that will be provided by the addition of base stations and the absence of any interference to other users from their operations.⁷

Such a cursory statement is inadequate.

Second, Motient has not demonstrated how grant of the requested waiver would serve the public interest. Although Motient asserts that grant of a waiver would “revitalize” *its* MSS system,⁸ grant of special treatment to a single competitor so it can be “revitalized” is hardly consistent with the *public* interest. As the Commission has recognized, “the Commission’s statutory responsibility is to protect competition, not competitors.”⁹

Third, Motient also fails to identify the circumstances unique to it. Thus, it is questionable whether the Commission could even grant Motient a waiver without providing the identical relief to all other MSS providers – thus undermining the basis for the original waiver.¹⁰ Indeed, another MSS provider has already sought authority to engage in the same activity.¹¹ For all practical purposes, grant of the Motient waiver would re-

⁷ Motient Application at 15.

⁸ Motient Application, Summary at i.

⁹ *Alascom*, 11 FCC Rcd 732, 758 ¶ 56 (1995). See also *Hawaiian Telephone v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974)(FCC did not conform to public interest mandate when it considered the factor of “competition not in terms primarily as to benefit the public but specifically with the objective of equaling competition among competitors.”); *LEC Interexchange Services*, 14 FCC Rcd 10771, 10798 ¶ 38 (FCC goal “is to ‘protect competition in the relevant market, not particular competitors.’”).

¹⁰ See *Northeast Cellular*, 897 F.2d at 1166 (“The agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.”).

¹¹ See Letter to Hon. Chairman Michael K. Powell from Lawrence H. Williams, New ICO Global Communications (March 8, 2001)(“New ICO Letter.”).

sult in a *de facto* reassignment of the MSS bands to terrestrial CMRS bands without the conduct of a rulemaking. In the past, the Commission has properly rejected waiver requests that would result in the *de facto* reallocation of spectrum:

Guidance from the courts indicates that issues of general applicability are more suited to rulemaking than to adjudication. Here, we conclude that the practical effect of granting the waiver applicants' requests . . . would have established a policy of general applicability to all operators in the 28 GHz band. * * * [R]ulemaking rather than individual adjudication is the better method to set national policy in a matter of frequency designation.¹²

The appellate court, in affirming the dismissal of the waiver applications in that case, held the "FCC's reasoning in this regard was not only rational, but highly sound":

The [waiver] petitions raised systemic issues most appropriately considered in a rulemaking proceeding that offered all interested parties the opportunity to comment and gave the agency the opportunity to proceed in a more thorough and fair manner.¹³

Thus, assuming *arguendo* that Motient's next generation/fill-in terrestrial base station proposal has merit, it should be considered in a rulemaking proceeding, not in the context of a waiver application.

II. THE COMMISSION SHOULD CONSIDER MSS SPECTRUM IN ITS 3G PROCEEDING

Motient states that mobile satellite services are "ideal for rural areas" but incapable of providing "high-quality service in urban areas."¹⁴ New ICO, another MSS provider, recently made the same point.¹⁵ They further assert that the need for additional mobile services in metropolitan areas is "well documented":

¹² *Second 28 GHz Order*, 12 FCC Rcd 1254512705 ¶¶ 388-89 (1997).

¹³ *Melcher v. FCC*, 134 F.2d 1143, 1164 (D.C. Cir. 1998).

¹⁴ Motient Application at ii and 12-13.

¹⁵ See New ICO Letter at 5 and 13-15.

[T]he proliferation of mobile and data communications has only whet the appetite of U.S. consumers for faster and more pervasive wireless communication capabilities. The Commission is struggling to find enough spectrum to meet this demand.¹⁶

The solution now proposed by some within the MSS industry is to let it use MSS spectrum to provide terrestrial-based CMRS in metropolitan areas.¹⁷ For example, Motient states that it would introduce its proposed services five years from now, in 2006.¹⁸ At that time, it would offer data services at transmission rates of “up to 165.5 Kbps.”¹⁹

This proposal is not impressive. Sprint PCS will be providing *later this year* data rates of up to 144 kbps.²⁰ Sprint PCS plans on deploying 1xEV-DO in 2003 — *three years before* Motient proposes to launch 165.5 kbps service. Indeed, Sprint PCS envisions achieving rates of 3 to 5 Mbps in 2004 — two years before Motient plans to launch its 165.5 kbps service.²¹ Given these facts, it would also be difficult to justify the reallocation of spectrum for a service that provides data rates that are significantly slower than what other carriers will be supporting.

¹⁶ Motient Application at 13-14.

¹⁷ Motient’s and New ICO’s position apparently is not unanimous within the MSS industry. *See, e.g., Mobile Communications Report*, “McCaw Creates Stir by Asking FCC for Terrestrial Spectrum” (April 16, 2001)(“Executive of satellite rival called proposal ‘a devious plan to secure free spectrum.’ . . . Iridium and Arianespace official Leo Mondale . . . said Commission ‘should auction spectrum’ rather than give it away: ‘The spectrum would be worth billions and billions of dollars worldwide and McCaw now wants it free of charge.’”).

¹⁸ *See* Motient Application at ii.

¹⁹ *Id.* at 34.

²⁰ *See Press Release*, “Sprint PCS Prepared to Transition Its Nationwide Network to 3G Later This Year” (March 20, 2001).

²¹ *See id.*

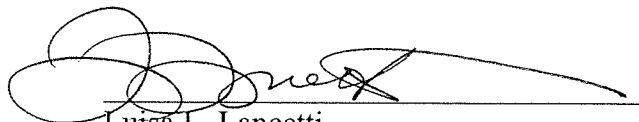
In sum, the Commission has commenced a rulemaking to locate additional spectrum for 3G technologies and services.²² If MSS spectrum cannot be efficiently used in metropolitan areas, as Motient and New ICO appear to concede, the Commission should consider this spectrum in its 3G rulemaking proceeding.

III. CONCLUSION

For the foregoing reasons, Sprint respectfully requests that the Commission deny the Motient waiver request and that it consider use of mobile satellite spectrum for terrestrial CMRS services in a rulemaking proceeding. The pending 3G rulemaking may be the appropriate proceeding in which to consider this important issue.

Respectfully submitted,

SPRINT CORPORATION



Luisa L. Lancetti
Vice President, PCS Regulatory Affairs
Jay C. Keithley
Vice President, Federal Regulatory Affairs
Roger C. Sherman
Senior Attorney, PCS Regulatory Affairs
401 9th Street, N.W., Suite 400
Washington, D.C. 20004
(202) 585-1924

Its Attorneys

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²² See Amendment of Part 2 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.

CERTIFICATE OF SERVICE

I, Jo-Ann G. Monroe, hereby certify that on this 18th day of April 2001, copies of the foregoing "Opposition of Sprint Corporation" were served by first class U.S. mail, postage prepaid, to the following:

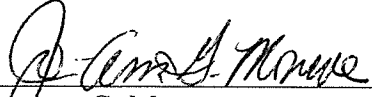
Bruce D. Jacobs
David S. Konczal
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037

Lon C. Levin
Vice President and Regulatory Counsel
Motient Services Inc. and Mobile Satellite
Ventures Subsidiary LLC
10802 Parkridge Boulevard
Reston, VA 20191

Cheryl A. Tritt
Charles Kennedy
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006

Lawrence H. Williams
Suzanne Hutchings
New ICO Global communications
(Holdings) Ltd.
1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, D.C. 20036

International Transcription Services
The Portals
445 12th Street, S.W., Room CY-B402
Washington, D.C. 20554



Jo-Ann G. Monroe