Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Applications/LOIs of	)	
	)	
ICO Services Limited	)	DA 01-1635
	)	File No. 188-SAT-LOI-97 *et al.*
	)	
The Boeing Company	)	DA 01-1631
	)	File No. 179-SAT-P/LA-97(16) *et al.*
	)	
Celsat America, Inc.	)	DA 01-1632
	)	File No. 26//27/28-DSS-P-94 *et al.*
	)	
Constellation Communication Holdings, Inc.	)	DA 01-1633
	)	File No. 181-SAT-P/LA-97(46) *et al.*
	)	
Globalstar, L.P.	)	DA 01-1634
	)	File No. 183/184/185/186-SAT-P/LA-97 *et al.*
	)	
Iridium LLC	)	DA 01-1636
	)	File No. 187-SAT-P/LA-97(96) *et al.*
	)	
Mobile Communications Holdings, Inc.	)	DA 01-1637
	)	File No. 180-SAT-P/LA-97(26) *et al.*
	)	
TMI Communications and Company, Limited Partnership	)	DA 01-1638
	)	File No. 189-SAT-LOI-97 *et al.*

To: The Commission

APPLICATION FOR REVIEW

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SUMMARY

In licensing the 2 GHz MSS spectrum, the Bureau failed to give appropriate consideration to the public interest in reallocating the spectrum to a higher and better use given intervening circumstances since the spectrum was originally allocated. Review by the full Commission of the *2 GHz MSS License Orders* is therefore warranted because (i) the Bureau's failure to defer licensing of the 2 GHz MSS applications constitutes unreasoned decisionmaking; (ii) its failure to resolve substantial and material questions of fact is contrary to Section 309 and established principles of administrative law; (iii) its specific grant of ICO's application is arbitrary and contrary to FCC regulations, and (iv) its band plan is unreasoned.

First, the Bureau's failure to defer licensing constitutes unreasoned decisionmaking. While the original MSS allocation was based upon the promised ability of MSS applicants to provide service to rural and underserved areas, ICO states that such service is not economically viable under the Commission's existing rules. Moreover, the financial viability of several of the applicants to construct has been challenged. At the same time, the immediate spectrum needs of other sectors of the telecommunications industry are well documented. Given the serious questions that were raised concerning the fundamental public interest rationale for the MSS allocation and the possible alternative disposition of this spectrum proposed by CTIA, it was not reasoned decisionmaking for the Bureau to proceed with licensing prior to resolution of those issues.

Second, the Bureau failed to resolve major factual issues on which the Commission's original public interest finding and licensing decisions depended. There were a variety of factual issues concerning the viability of MSS and questions of fact about specific applicants' ability to construct. The existence of these unresolved questions of fact necessarily upsets the principal premise on which the very allocation of spectrum to the service is based: that MSS is "an excellent method for quickly extending basic and advanced telecommunications services to rural and unserved areas." If MSS simply is not viable, then in ICO's words rural service "will be available to none." Accordingly, the grant of 2 GHz MSS authorizations does not comport with the statutory obligation to grant authorizations only in the public interest, after resolving any substantial and material questions of fact.

Third, the Bureau's grant of ICO's application is itself arbitrary. The Bureau has granted an application that the applicant itself has asserted is not viable without a terrestrial component — an issue the Bureau declined to rule on. The Bureau also erred in ignoring evidence that ICO's milestones for construction would be missed. Moreover, it was not rational for the Bureau to grant the authorization because ICO's submissions reflected a fundamental amendment to its original application and LOI that required prior notice and comment. The Commission should also not countenance any additional "bait and switch" efforts by ICO (or any other applicant) to avoid compliance with the Commission's auction statute in Section 309(j) by allowing it to (i) obtain spectrum excluded from the auction process for free based on proposed satellite uses and then (ii) turn around after grant and reclassify the spectrum to permit terrestrial use which would otherwise require an auction.

Finally, the Bureau erred in adopting a bandplan requiring MSS licensees to space their assignments in 3.88 MHz increments. In doing so, it essentially ruled out the effective use of any unassigned spectrum for non-satellite uses. In the interest of efficient spectrum allocation and utilization practices, the Commission should reject the Bureau band plan and adopt a band plan that, in the first instance, ensures that there is actually 14 MHz of reserve spectrum that could be considered for other uses. Further, such band plan should ensure that any "recovered" or reallocated MSS spectrum is able to be used in efficient combination with the 14 MHz of reserve spectrum. Any other potential result would obviously frustrate the Commission's efforts to ascertain the most appropriate use of this valued spectrum.

Accordingly, the *2 GHz MSS License Orders* should be vacated and remanded with instructions to freeze further processing of the applications/LOIs pending action by the Commission on CTIA's petition to reallocate the spectrum and a related rulemaking examining the provisioning of terrestrial service over the band.

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To: The Commission

APPLICATION FOR REVIEW

AT&T Wireless Services, Inc. ("AT&T"), Cellco Partnership, d/b/a/ Verizon Wireless ("Verizon Wireless"), and Cingular Wireless LLC ("Cingular") (collectively, the "Wireless Carriers"), pursuant to Section 1.115 of the Commission's rules, hereby submit this application for review in response to the recent orders issued by the Chief of the International Bureau (the "Bureau") and, in certain cases, the Acting Chief of the Office of Engineering and Technology

("OET"), granting the above-captioned 2 GHz Mobile-Satellite Service ("MSS") applications or letters of intent ("LOIs").[1] For the reasons set forth herein, the orders should be vacated and remanded with instructions to freeze further processing of the applications/LOIs pending action by the Commission on a petition by the Cellular Telecommunications and Internet Association ("CTIA") to reallocate the 2 GHz MSS spectrum to other uses and a related rulemaking examining the provisioning of terrestrial service over the band. In licensing the 2 GHz MSS spectrum, the Bureau failed to give appropriate consideration to the public interest in reallocating the spectrum to a higher and better use. Intervening circumstances have undermined the original basis for the allocation and leave no public interest rationale for the grants.

BACKGROUND/INTRODUCTION

In 1997, the Commission allocated 70 MHz of spectrum to MSS at 1990-2025 MHz and 2165-2200 MHz. Rejecting comments expressing "skepticism over the need for additional MSS spectrum" and arguing that the "allocation proposals are not justified," the Commission found that this satellite service "would provide communications to underserved areas, such as rural and remote areas."[2] The Commission affirmed this conclusion in 2000 when it adopted MSS service

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[1] *Boeing Co.*, DA 01-1631 (IB July 17, 2001); *Celsat America, Inc.*, DA 01-1632 (IB July 17, 2001); *Constellation Communications Holdings, Inc.*, DA 01-1633 (IB & OET July 17, 2001) ("*Constellation Order*"); *Globalstar, L.P.*, DA 01-1634 (IB & OET July 17, 2001); *ICO Services Limited,* DA 01-1635 (IB & OET July 17, 2001) ("*ICO Order*"); *Iridium LLC,* DA 01-1636 (IB July 17, 2001); *Mobile Communications Holdings, Inc.*, DA 01-1637 (IB & OET July 17, 2001) ("*MCHI Order*"); *TMI Communications and Co., Limited Partnership,* DA 01-1638 (IB July 17, 2001) (collectively, the "*2 GHz MSS License Orders*"). Although several of the orders were jointly released by the Bureau and OET, for convenience, references herein to action by the Bureau shall also refer to the joint action with OET, as applicable. Likewise, references to "applicants" shall refer to filers of either 2 GHz MSS applications or LOIs.

[2] *See 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, ¶¶ 12-13 (1997) ("*2 GHz MSS*
(continued on next page)

and licensing rules.[3] There, the FCC developed a band plan that avoided mutual exclusivity among the applicants.[4] The Commission also declined to adopt financial qualifications based upon a belief that implementation milestones would ensure buildout, although it expressed concern that the deployment of all authorized systems "might not occur" and that "some authorized systems [may] not [be] able to implement service."[5]

Subsequent to the issuance of the *2 GHz MSS Order*, these concerns were fully realized through a series of *ex parte* filings detailing a significant change in circumstances affecting both the viability of MSS and the underlying 70 MHz MSS spectrum allocation. In particular, New ICO Global Communications (Holdings) Ltd. ("New ICO"), the parent of one of the MSS applicants, ICO Services Limited (collectively "ICO"), directly asserted that MSS was not viable under the Commission's existing rules, thus challenging the ability of virtually all MSS licensees to provide the service for which spectrum had been allocated. ICO pointed out the "string of failures" in MSS — Iridium's bankruptcy, near-destruction of its satellite constellation, and ability to muster only 55,000 subscribers; Globalstar's financial collapse; Motient's conclusion that MSS-only systems cannot provide affordable and competitive service in urban areas, which

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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 Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band,* IB Docket 99-81, *Report and Order,* 15 F.C.C.R. 16127, ¶ 34 (2000) ("*2 GHz MSS Order*").

[4] *See 2 GHz MSS Order* at ¶ 30.

[5] *2 GHz MSS Order* at ¶ 18 (emphasis added); *see id.* at ¶ 48.

caused Motient to propose the use of terrestrial base stations;[6] and ICO's own bankruptcy. ICO submitted that MSS coverage limitations in urban areas and indoors are a "crippling impediment" to MSS systems that place in "dire jeopardy" the ability of MSS to deliver service, including service to rural and underserved areas. It argued that terrestrial augmentation of MSS is essential, and without it "MSS service will disappear," because stand-alone "MSS systems are simply not economically viable."[7]

Following ICO's filing, CTIA submitted a petition for rulemaking to consider whether to reallocate MSS spectrum for terrestrial use.[8] CTIA gave as one example of the efficacy of the reallocation the "ever increasing spectrum needs" of CMRS providers to meet growing demand for existing wireless services and to roll out advanced services, citing recent FCC and NTIA reports detailing the "intense demand" for CMRS spectrum.[9] To ensure not only that all interested parties — MSS applicants and other prospective licensees — were treated fairly, but also that the MSS spectrum be put to its highest and best use, CTIA asked the Commission to withhold further action on the then-pending applications until action on its petition.[10] CTIA also proposed that any reallocated spectrum, such as any that might be earmarked to terrestrial uses,

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[6] Motient is affiliated with another MSS applicant, TMI. *See* "Motient, TMI to Combine U.S., Canadian Mobile Satellite Assets into New Partnership," Satellite Today, Jan. 17, 2001.

[7] *See generally* New ICO Global Communications (Holdings) Ltd. *ex parte* letter dated March 8, 2001 ("*March 8 ICO Ex Parte*"). ICO describes its proposed terrestrial augmentation as an "ancillary terrestrial component" ("ATC") of MSS service. ICO's claims about the viability of all stand-alone MSS carriers were contested by Celsat and Globalstar.

[8] Petition for Rulemaking of the Cellular Telecommunications and Internet Association (filed May 18, 2001) ("CTIA Petition").

[9] *Id.* at 5 & n.16.

[10] *Id.* at 4.

be awarded through a system of competitive bidding pursuant to Section 309(j) of the Communications Act.[11]

On June 13, 2001, the Wireless Carriers submitted an *ex parte* presentation in the MSS docket and each of the application/LOI proceeding files. Because the ICO filing showed a dramatic change in the MSS landscape from what was originally envisioned, the Wireless Carriers requested that any action on the applications be delayed. Specifically, the Wireless Carriers showed that given (i) ICO's admissions concerning the overall viability of MSS and (ii) the exponential increase in demand for wireless services, including 3G services, the Commission must consider whether there is an existing public interest basis for the original MSS spectrum allocation and whether the Commission's "best and highest use" spectrum policy requires CMRS redesignation of the spectrum.[12] Because any authorization of MSS would be "fundamentally at odds with the FCC's obligations to manage effectively the radio spectrum," the Wireless Carriers argued that any action on the pending MSS applications should be delayed until the broad spectrum policy and licensing issues raised by ICO are addressed. Likewise, the Wireless Carriers noted the importance of responding to the petition for rulemaking submitted by CTIA "*before*, not after, it grants any of the 2 GHz MSS authorizations." According to the Wireless Carriers:

> To do otherwise would take an ostrich-like approach of licensing services where available evidence indicates those services are simply not viable, and where there are critical unmet needs for spectrum. That approach would be particularly invalid here where

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[11] *Id.* at 6-7.

[12] *See* June 13, 2001 joint letter from AT&T Wireless Services, Inc., Cingular Wireless LLC, Sprint PCS, and Verizon Wireless ("*June 13 Wireless Ex Parte*").

> New ICO has itself warned the Commission that it will require a radically different grant in order to serve the public.[13]

Lastly, the Wireless Carriers asserted that if the Commission determines that the spectrum is suitable for terrestrial services, it must be made available to all interested users and be auctioned pursuant to Section 309(j).[14]

A follow-up *ex parte* submitted by Verizon Wireless in the MSS docket and each of the application/LOI proceeding files included a filing by CTIA that explained the concerns of the Wireless Carriers and the wireless industry:

> Given increasing spectrum needs for other services, the track record of underutilized MSS spectrum in other bands, the financial condition of numerous MSS companies, and the claims made by New ICO that MSS is not viable without terrestrial flexibility, the Commission should consider whether it is in the public interest to license an *additional* 70 MHz for MSS. In the long run, the most efficient course for all affected parties would be to consider, on an expedited basis, whether to reallocate the MSS spectrum in the 2 GHz band *before individual MSS licenses are granted.* If all indications are that the MSS industry may not need all or even most of the 2 GHz band, or that the underlying rationale for the 70 MHz MSS allocation is no longer justified, it makes little sense for the Commission to ignore this reality and proceed with licensing MSS providers.[15]

In each of the *MSS Licensing Orders*, the Bureau rejected the requests by the Wireless Carriers and others to defer its action on the applications until the Commission considered and solicited comment on the *March 8 ICO Ex Parte* and CTIA's petition for rulemaking, claiming a lack of "credible information" to call into question the Commission's prior MSS allocation

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[13] *See generally June 13 Wireless Ex Parte.*

[14] *Id.*

[15] *See* July 12, 2001 CTIA *ex parte* in IB Docket 99-81 and ET Docket 00-258 (emphasis added) ("*July 12 CTIA Ex Parte*"), appended to *ex parte* letter filed July 16, 2001.

decision.[16] Despite the new information questioning the viability of MSS systems, the orders held that the applicants "should be given the opportunity to succeed or fail in the market on their own merits." The orders left little of the 70 MHz unassigned for possible reallocation in the newly announced rulemaking to consider additional spectrum bands to support advanced services.[17] Two of the orders also rejected requests by applicants that other applicants' financial qualifications be considered: the *Constellation Order* rejects petitions by Boeing and Iridium seeking to require Constellation to demonstrate its financial qualifications and the *MCHI Order* rejects similar arguments by ICO and Iridium.

QUESTIONS PRESENTED FOR REVIEW

The Wireless Carriers present the following questions for review: (i) whether the Bureau's failure to defer licensing of the 2 GHz MSS applications constitutes unreasoned decisionmaking; (ii) whether the Bureau's failure to resolve substantial and material questions of fact is contrary to Section 309 of the Communications Act and established principles of administrative law; (iii) whether the Bureau's specific grant of ICO's application is arbitrary and contrary to FCC regulations; and (iv) whether the Bureau erred in adopting a band plan that

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[16] *See, e.g., ICO Order* at ¶¶ 30-31.

[17] The FCC contemporaneously adopted a *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* (FCC 01-224) to consider additional sources of spectrum for new advanced services, *see FCC News Release*, "FCC Examines Additional Spectrum Bands to Support Advanced Wireless Services" (rel. Aug. 9, 2001) ("*Advanced Wireless News Release*") (seeking comment on reallocating "some spectrum" in the 1990-2025/2165-2200 MHz bands for new advanced wireless services), as well as a *Notice of Proposed Rulemaking* (FCC 01-225) in a separate proceeding to examine the proposals of ICO and Motient Services, Inc. ("Motient") to incorporate ATC into their MSS networks. *See FCC News Release*, "FCC Initiates Rulemaking on Flexibility in Delivery of Mobile Satellite Services" (rel. Aug. 9, 2001) ("*2 GHz MSS News Release*").

effectively will reserve spectrum solely for MSS use, notwithstanding the recent initiation of rulemakings to explore alternate uses of the MSS bands.

As shown below, each of these questions should be answered in the affirmative. Accordingly, these questions warrant Commission consideration because the action taken by the Bureau conflicts with statute, regulation, and case precedent and contains erroneous findings as to important and material questions of fact.[18] The Wireless Carriers therefore seek vacation of the *MSS Licensing Orders* and remand to the Bureau with instructions to hold the applications in abeyance pending action on the separate rulemaking in response to CTIA's petition.[19]

I. THE BUREAU'S FAILURE TO DEFER LICENSING CONSTITUTES UNREASONED DECISIONMAKING.

It is well established that the FCC must engage in reasoned decisionmaking under the Administrative Procedure Act.[20] Thus, "an agency must cogently explain why it has exercised its discretion in a given manner" and that explanation must be "sufficient to enable [a court] to conclude that the [agency's action] was the product of reasoned decisionmaking."[21] The Bureau's failure to defer licensing of the MSS applications pending a determination of whether the 70 MHz spectrum allocation remains in the public interest, or whether the public interest

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[18] 47 C.F.R. § 1.115(b)(2).

[19] Such action is consistent with the approach adopted by the Commission in the DEMS proceeding. *See Freeze on the Filing of Applications for New Licenses, Amendments, and Modifications in the 18.8-19.3 Frequency Band*, 11 F.C.C.R. 22363, 22365-66 (WTB & IB 1996) (action on pending applications frozen pending action by Commission on spectrum reallocation and licensing matters).

[20] 5 U.S.C. § 706(2)(A); *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[21] *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995) (internal citation omitted) (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 48, 52).

would best be served by reallocating the MSS spectrum to its highest and best use, fails this test. Simply put, the Bureau's decision to grant the applications is fundamentally at odds with its "best and highest" use spectrum management policy.[22]

The FCC has specifically acknowledged that "[s]pectrum management is one of the Commission's core functions."[23] The Commission is charged with the task of managing the spectrum to "advance the pro-competitive goals of the Communications Act of 1934 and the Telecommunications Act of 1996, while at the same time ensuring that other public interest goals are met."[24] Congress also amended the Communications Act "to ensure that scarce spectrum is put to its highest and best use."[25] Given these obligations, and recognizing that spectrum is a valuable and finite public resource, the Commission has stated that spectrum "must be allocated and assigned in a manner that will provide the greatest possible benefit to the American public."[26]

ICO's filing has called into question whether the current 2 GHz MSS allocation will provide any benefit to the public. While the original allocation was based upon the promised

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[22] The Wireless Carriers are not suggesting that no MSS allocation is warranted, or that no MSS system is in the public interest; rather, given the serious viability issues raised since the *2 GHz MSS Order* was adopted, and the spectrum shortages in other services, prudent spectrum planning required thorough review of the allocation as a whole *prior* to grant of the MSS applications.

[23] *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, 14 F.C.C.R. 19868, ¶ 6 (1999) ("*Spectrum Policy Statement*").

[24] *Spectrum Policy Statement* at ¶ 7.

[25] H.R. Conf. Rep. No. 105-217, at 6173 (1997).

[26] *Spectrum Policy Statement* at ¶ 7.

ability of MSS applicants to provide service to rural and underserved areas, ICO states that such service is not economically viable under the Commission's existing rules.[27] Likewise, Motient recently filed an application in which it concluded that "a satellite-only system is ideal for rural areas but has insufficient capacity and poor urban coverage, particularly near the inside buildings, to be affordable and competitive."[28] Motient has therefore also requested authority for a satellite system "supplemented by terrestrial base stations."[29] Moreover, the financial viability of several of the applicants has been challenged, which only highlights ICO's crucial admission. Both ICO and Iridium have already declared bankruptcy, Globalstar is facing cash shortfalls and possible default, and the ability of Constellation and MCHI (both of whom have announced plans to join ICO) to "get their services off the ground" is doubted by industry analysts.[30]

At the same time, the immediate spectrum needs of other sectors of the telecommunications industry are well documented. In the pending proceeding to allocate

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[27] Other applicants challenged ICO's assertions. Nevertheless, as discussed in Section II, below, ICO's filing raises substantial and material questions of fact regarding the viability of all MSS proposals which require further examination in the context of a broader spectrum reallocation proceeding before the application grant should be allowed to become final.

[28] Motient Service Inc. and Mobile Satellite Ventures Subsidiary LLC, Application for Assignment of Licenses and for Authority to Launch and Operate a Next-Generation Mobile Satellite Service System, at iii (filed Mar. 1, 2001).

[29] *Id.*

[30] Malcom Spicer, "Mobile-Satellite Providers Get Toll-Free Access," Washington Insider, Jul. 23, 2001; "MSS Hopefuls Get OK to Deploy Systems," Satellite News, Jul. 23, 2001; *see also* "Globalstar Says It Needs More Cash to Last Into 2002, Will Cut 175 Jobs," Wall Street Journal, Aug. 14, 2001 (noting that Globalstar only has sufficient cash reserves "to continue operation through the end of the year"); Michael C. Barr, "Globalstar Debt Seen 'Liquidation or a Litigation' Play," Dow Jones Newswires, Aug. 14, 2001 (viewing Globalstar default as "'imminent'"); Andrew Backover and Paul Anderson, "Companies Get Free Spectrum Licenses," USA Today, Jul. 17, 2001 ("Satellite service has produced some big failures. Iridium recently emerged from bankruptcy protection. Globalstar is reeling.").

spectrum for advanced wireless terrestrial services, for example, the record reflects an immediate need for an additional 200 MHz of spectrum to offer 3G services.[31] Today, wireless carriers are faced with burgeoning demand for existing services. Despite the fact that Europe and Japan have already allocated and largely licensed 3G spectrum, efforts in the U.S. have been hampered by the fact that the two initially targeted bands are encumbered by military and MDS/ITFS uses.[32] The Commission has therefore delayed the July 2001 3G spectrum allocation and September 2002 auction deadlines.[33] Evidence of the intense need for additional CMRS spectrum can also be found in the recent Auction No. 35 results, where carriers bid $16.9 billion for additional spectrum. Access to that spectrum, however, is uncertain given the recent D.C. Circuit decision in the *NextWave* case.[34]

Collectively, these developments call into question whether a full 70 MHz allocation for MSS is warranted and in the public interest. Accordingly, given the serious questions that were

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[31] *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; *see generally 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*, ET Docket No. 00-258, *Notice of Proposed Rulemaking and Order*, 16 F.C.C.R. 596, 607-625 (2001); *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Notice of Proposed Rulemaking*, 15 F.C.C.R. 24203, 24204-05 (2000).

[32] *See, e.g.*, Lynnette Luna, "Spectrum Quandry Puts 3G at Risk; Policy Resolution Critical to Deployment of Next Generation Services," Telephony, Jul. 23, 2001 (describing "a spectrum allocation policy that is in shambles" in the United States). Moreover, the 700 MHz proceeding has also been put off because of spectrum occupancy problems. *See FCC Public Notice*, "Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) is Postponed," Report No. AUC-01-31-B, DA 01-1546 (WTB rel. July 11, 2001).

[33] *See* "FCC Delays Wireless Airwaves Allocation," USAToday.com, Jun. 27, 2001.

[34] *See NextWave Personal Communications, Inc. v. FCC*, Case No. 00-1402 (D.C. Cir. decided June 22, 2001) (motion to stay mandate pending filing of petition for certiorari pending).

raised concerning the fundamental public interest rationale for the MSS allocation and the possible alternative disposition of this spectrum proposed by CTIA, it was not reasoned decisionmaking for the Bureau to proceed with licensing prior to resolution of those issues. Moreover, moving directly to licensing was also unreasoned given arguments by the applicants themselves that alternative, *i.e.*, terrestrial, uses of the spectrum were necessary to prop-up MSS and would represent better spectrum management.[35] Once the premise underlying the original allocation was called into question by certain applicants, the Bureau had no choice but to revisit the basis for the 2 GHz MSS allocation.[36] Its decision to move forward with licensing was therefore error.[37]

II. THE BUREAU'S FAILURE TO RESOLVE SUBSTANTIAL AND MATERIAL QUESTIONS OF FACT IS CONTRARY TO SECTION 309 AND ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW.

Under Section 309 of the Communications Act, the Commission may only grant an authorization if, on the basis of the application, the pleadings, and other matters which it may officially notice, it has resolved any "substantial and material question[s] of fact" and finds that a

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[35] *See June 13 Wireless Ex Parte* at 2.

[36] *See Radio-Television News Directors Association v. FCC,* 184 F.3d 872 (D.C. Cir. 1999); *Graceba Total Communications, Inc. v. FCC,* 115 F.3d 1038 (D.C. Cir. 1997);*Cincinnati Bell Telephone Co. v. FCC,* 69 F.3d 752 (6th Cir. 1995); *American Horse Protection Association v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987); *Geller v. FCC,* 610 F.2d 973, 977-80 (D.C. Cir. 1979); *Functional Music, Inc. v. FCC,* 274 F.2d 543, 549 (D.C. Cir. 1958); *see also United States v. Storer Broadcasting Co.,* 351 U.S. 192, 205 (1956) (Commission is entitled to codify its view of the public interest through rulemaking, but must nevertheless review the premises underlying its rules when it is asked to waive or amend rules); *NARUC v. FCC,* 525 F.2d 630, 638 (D.C. Cir.) ("The Commission retains a duty of continual supervision"), *cert. denied,* 425 U.S. 992 (1976).

[37] *Cf.* Letter from Michael K. Powell, Chairman, FCC to the Honorable Donald L. Evans, Secretary of Commerce (Jun. 26, 2001) ("I believe that the public interest would be best served by additional time for informed consideration, even if this results in some delay in reaching allocation decisions.").

grant will serve the public interest.[38] In the case of the *2 GHz MSS License Orders*, the Bureau failed to resolve major factual issues on which its original public interest finding and licensing decisions depended.

There were a variety of factual issues concerning the viability of MSS operations and questions of fact about specific applicants' ability to construct:

- The *March 8 ICO Ex Parte* raised significant issues concerning the ability of MSS licensees to provide the service for which spectrum had been allocated, claiming that without a terrestrial augmentation MSS service — including service to rural and underserved areas MSS — "will disappear" because MSS systems are "simply not economically viable."

- Boeing and Iridium filed petitions raising questions of fact concerning Constellation's financial ability.

- ICO and Iridium filed petitions raising questions of fact concerning MCHI's financial ability.

- The *March 8 ICO Ex Parte* pointed to the financial difficulties experienced by Iridium, Globalstar, and ICO itself, all of which are a matter of public record.

- The Bureau also had official notice that MCHI's financial ability was in doubt, given that less than two months ago it issued an order declaring MCHI's LEO authorization null and void for failure to meet a construction milestone requiring it to have a binding contract for satellite construction.[39]

Resolution of the foregoing factual issues was necessary because such resolution is central to any finding that the public interest will be served by grant of the MSS authorizations.

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[38] *See* 47 U.S.C. § 309(a), (e). General principles of administrative law require the same result. *See USTA v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000); *City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153, 1167-69 (D.C. Cir. 1987).

[39] *See Mobile Communications Holdings, Inc.*, DA 01-1315 (IB May 31, 2001).

The Bureau attempted to avoid the need to resolve these issues by relying on the Commission's determination in the *2 GHz MSS Order* that the public interest is served by not requiring showings of financial qualifications and to rely instead on construction milestones.[40] That policy, however, was premised on licenses granting entities authorization to seek financing to construct a preexisting system design. It was not designed to grant sham licenses, give licensees years to refine their sham system designs and, inevitably when the sham is exposed, seek milestone extensions. Accordingly, the Bureau erroneously employed the "construction milestones" policy here.

Moreover, the existence of significant unresolved questions of fact as to whether any company can carry out its plans to provide MSS necessarily upsets the principal premise on which the very allocation of spectrum to the service is based: that MSS is "an excellent method for quickly extending basic and advanced telecommunications services to rural and unserved areas"[41] If MSS simply is not viable, then rural service "will be available to none."[42] If MSS is not a viable service, reliance on milestones only postpones the inevitable and keeps valuable spectrum tied-up for years as companies try to change the scope of the allocation and reorganize in bankruptcy. In short, falling back on a prior determination for a public interest justification cannot be sustained if the premises of that public interest justification are now invalid. There are now factual issues calling into question the current validity of those policy determinations.

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[40] *See 2 GHz MSS Order* at ¶¶ 46-48.

[41] *2 GHz MSS Order* at ¶ 34.

[42] *March 8 ICO Ex Parte* at 6.

Accordingly, the grant of 2 GHz MSS authorizations does not comport with the statutory obligation to grant authorizations only in the public interest, after resolving any substantial and material questions of fact. The Bureau's total reliance on the *2 GHz MSS Order* raises a question for review by the full Commission as to whether the Bureau failed to consider and resolve new facts of decisional significance.

III. THE BUREAU'S GRANT OF ICO'S APPLICATION IS ITSELF ARBITRARY AND CONTRARY TO FCC REGULATIONS.

A. The Bureau Erred in Granting Authorization Before Commission Review of ICO's Proposal to Offer Terrestrial Service.

The Bureau granted the MSS authorization without allowing the Commission to address whether it would allow the terrestrial service that ICO proposed in its March 8 letter, stating that the Commission "will decide separately whether and how to proceed with consideration of ICO's" proposed terrestrial component.[43] The Bureau erred, however, in authorizing MSS service before the Commission could consider ICO's terrestrial service proposal. ICO has stated in no uncertain terms that MSS service is not financially viable without the use of a terrestrial component.[44] As indicated above, the language in ICO's March 8 letter could not be more stark: "Without [a terrestrial component]," ICO asserts, "2 GHz MSS systems are simply not economically viable."[45] By refusing to defer to the Commission, the Bureau has authorized a

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[43] *ICO Order* at ¶ 30.

[44] *March 8 ICO Ex Parte* at 16.

[45] *Id.* ICO hammers this point home on numerous occasions throughout its filing, acknowledging that "capital markets have simply lost confidence in mobile-satellite service projects," and arguing that the "billions of dollars of additional investment" required for the deployment of MSS "simply cannot be justified unless the Commission provides the MSS licensees the flexibility [to establish terrestrial service]." *Id.* at 4, 6.

service that ICO is unwilling and incapable of providing.[46] Essentially, the Bureau has granted an authorization which they know cannot be effectuated in its current form. This is the essence of unreasoned decisionmaking.

B. Because the ICO Letter Represents a Substantial Amendment, the Bureau Erred in Not Complying with Appropriate Comment Procedures.

It was also not rational for the Bureau to grant the authorization because ICO's submissions reflect a fundamental amendment to its original application and LOI that required prior notice and comment. There can be no question that ICO's latest request represents a substantial departure from its original application and associated representations to the Commission.[47] In effect, ICO's revelations amount to a major amendment of ICO's LOI, because the changes it proposes are "substantial" and increase the potential for interference.[48] By ICO's own description, the ability to provide terrestrial service is central to the viability of its enterprise. Moreover, the proposed interweaving of satellite and terrestrial communications could present harmful interference to adjacent channel licensees, such as those operating in the

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[46] *Id.* at 16.

[47] Indeed, before March, no mention was made of any terrestrial component – now claimed to be necessary for MSS operators' "economic viab[ility]" – in any of ICO's prior filings or, notably, in the March 1998 public notice accepting ICO's Letter of Intent for filing. *See Public Notice,* Report No. SAT-00061, "Satellite Policy Branch Information; Amendments to 2 GHz Mobile Satellite Service Applications and Letters of Intent" (rel. Nov. 29, 2000); *see also,* FCC file number SAT-AMD-20001103-00155. To the contrary, ICO consistently asserted that its system would utilize the existing PCS/cellular terrestrial networks for any terrestrial component. *See e.g.,* FCC file number 188-SAT-LOI-97 at 12. Thus, the recent filings of ICO clearly demonstrate that the factual underpinnings of ICO's September 26, 1997 Letter of Intent and of the public notice have been substantially altered. *See also* FCC file number 188-SAT-LOI-97.

[48] *See* 47 C.F.R. § 25.116(b) and (b)(4).

PCS band below 1990 MHz. Thus, it was unreasonable for the Bureau to take the position that the ATC proposal did not have the effect of amending the letter of intent. The grant of an MSS-only authorization was, accordingly, arbitrary.

Moreover, the Bureau has violated Commission rules and consistent practice requiring that any substantial amendment to a pending satellite application receive full public comment prior to final Commission action. For example, Section 25.151(a)(7) dictates that information deemed of public significance be placed on public notice.[49] Even in cases where the Commission has determined that minor conforming amendments are required for satellite systems, the FCC has nonetheless placed such amendments on public notice.[50] In fact, the public notice process serves the valid purpose of permitting the Commission to gather needed information on whether requested amendments or modifications to satellite systems are indeed major or minor. More fundamentally, all of these statutory and regulatory provisions are precisely aimed at preventing the sort of regulatory "bait-and-switch" which ICO has invoked.

Nor is ICO relieved of these legal requirements by attempting to style its proposal as a "request for amendment of the 2 GHz service rules." ICO's filing is an attempt to modify the terms by which ICO will deploy MSS from those originally set forth in its LOI. Indeed, despite its previous representations, ICO says that it cannot viably provide MSS service absent employment of a terrestrial component. Although ICO failed to submit its proposal to utilize terrestrial components as an "amendment" to its initial application, ICO is seeking to amend the

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[49] *See* 47 C.F.R. § 25.151(a)(7).

[50] *See e.g., Public Notice,* Report No. SAT-00061, "Satellite Policy Branch Information; Amendments to 2 GHz Mobile Satellite Service Applications and Letters of Intent" (rel. Nov. 29, 2000).

terms by which it will provide service. By submitting proposed modifications to its system architecture as an *ex parte* filing in a rulemaking proceeding, ICO has essentially disregarded the Commission's application processing requirements. The Commission cannot ignore the practical effect of ICO's *ex parte* filing and sanction an end-run around its application filing procedures,[51] simply because the document was not *labeled* as an amendment.

C. The Bureau Erred in Ignoring Evidence That Build-Out Dates Would Be Missed.

The ICO Letter serves essentially as an admission that ICO will not meet the milestones for construction for the MSS system that it proposed in its application. Because ICO has made it clear that it does not intend to construct the system for which it applied, and that any deployment plans that it has are contingent on the outcome of the Commission's terrestrial service proceeding, the grant of the license only invites inevitable delays and extensions of the milestones. Where, as here, the Commission has clear evidence that construction milestones will inevitably be missed, the agency should not wait for those lapses to actually occur.

D. If the Commission Subsequently Permits Terrestrial Use of 2 GHz MSS Spectrum, ICO and Others Must Comply with the Auction Statute.

The Commission should also not countenance any additional "bait and switch" efforts by ICO or any other applicants to avoid compliance with the requirements in Section 309(j). Such a result would occur if the Commission were to allow an applicant to obtain spectrum excluded from the auction process based on its proposed satellite uses and then subsequently reclassify the spectrum to permit the provision of terrestrial services. Allowing MSS spectrum to be used for

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[51] *See Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 687 (D.C. Cir. 2001) (admonishing that "the Commission must follow its own rules."); *see also Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986).

terrestrial purposes without permitting non-satellite applicants to submit applications and then requiring an auction in the event of mutual exclusivity effectively circumvents statutory requirements to auction such spectrum, deprives others of the opportunity to compete for spectrum they are able to use, and deprives the public of revenues from the auction of this public resource.

While the 2000 Orbit Act precludes the Commission from assigning spectrum "used for the provision of international or global satellite communications services" by auction,[52] such preclusion is limited on its face to spectrum "used" — not allocated — for the provisioning of satellite service. The use of MSS spectrum for non-satellite, *i.e.*, terrestrial, purposes clearly does not fall within the scope of the Orbit Act. Nor can such use be deemed purely ancillary on several grounds, including New ICO's own statements to the Commission that terrestrial service is a condition precedent to viable MSS service. Accordingly, any MSS spectrum used for terrestrial purposes must be subject to auction pursuant to Section 309(j).[53]

IV. THE BUREAU ERRED IN ADOPTING A BAND PLAN THAT EFFECTIVELY WILL RESERVE SPECTRUM SOLELY FOR MSS USE.

In granting the 2 GHz MSS licenses, the Bureau determined that each licensee should be assigned 3.5 MHz in each direction, for a total of 7 MHz per licensee. It concluded that it would not, at this time, implement that portion of the Commission's *2 GHz MSS Order* that would give the MSS licensees access to the additional 14 MHz of spectrum that has not yet been assigned.[54]

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

[53] 47 U.S.C. § 309(j).

[54] *See e.g., ICO Order* at ¶ 8.

Rather, it determined that this additional spectrum should be "reserved" in consideration of new proposals for use of the 2 GHz MSS band and the expressed intent of the Commission to review such proposals.[55]

However, in specifying the manner in which individual MSS licensees would choose their "Selected Assignment," the Bureau determined that the licensees shall do so "such that the band edge of the assignment is an integer multiple of 3.88 MHz from the band edge of the 2 GHz MSS band, which will allow the Commission to address the proposals before it."[56] As a result, the Bureau has created small 0.38 MHz orphaned spectrum blocks in between the 3.5 MHz allocations. Because these orphaned blocks are small and dispersed throughout the MSS spectrum, they could practically only be used by MSS licensees. The only remaining viable reserve spectrum would be a 3.96 MHz block along with the 0.38 MHz from the last MSS spectrum assignment. Therefore, rather than the 14 MHz of reserve spectrum at issue in the Commission's *Further Notice of Proposed Rule Making*,[57] there is actually only 8.68 MHz of spectrum to consider for other purposes.

The Wireless Carriers respectfully submit that the Commission should review the Bureau's band plan decision. In the interest of efficient spectrum allocation and utilization practices, the Commission should reject the Bureau band plan and adopt a band plan that, in the first instance, ensures that there is actually 14 MHz of reserve spectrum that could be considered for other uses. Further, such band plan should ensure that any "recovered" MSS spectrum,

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[55] *See Advanced Wireless News Release* (seeking comment on CTIA Petition), *supra*.

[56] *See e.g., ICO Order* at ¶ 8.

[57] *See Advanced Wireless News Release, supra*.

namely that which is attributable to applications which are not granted, such as for the reasons set forth herein, or which is reclaimed, is able to be used in efficient combination with the 14 MHz of reserve spectrum. Any other potential result would obviously frustrate the Commission's efforts to ascertain the most appropriate use of this valued spectrum.

CONCLUSION

Based on the foregoing, the Wireless Carriers seek vacation of the *2 GHz MSS License Orders* and remand to the Bureau with instructions to hold the applications in abeyance pending action on CTIA's petition to reallocate the spectrum and a related rulemaking examining the provisioning of terrestrial service over the band.

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