DOCKET FILE COPY ORIGINAL

RECEIVED

NOV 19 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	ET Docket Nos. 00-258 and
Introduction of New Advanced Mobile and Fixed Terrestrial Services; Use of Frequencies Below 3 GHz	)	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-

COMMENTS OF AT&T WIRELESS SERVICES, INC.

Pursuant to the Commission's Public Notice,[1/] AT&T Wireless Services, Inc. ("AWS") hereby submits its comments in support of the Cellular Telecommunications Industry Association's ("CTIA's") Petition for Reconsideration the above-captioned proceeding.[2/] AWS agrees with CTIA that the Commission improperly denied CTIA's Petition for Rulemaking regarding the allocation of spectrum for mobile satellite service ("MSS") and third generation ("3G") wireless services.[3/]

As an initial matter, CTIA correctly observes that the Commission's action denying the Rulemaking Petition was procedurally flawed.[4/] For example, the Commission failed to assign the Rulemaking Petition a file number or to give public notice of its submission. Consistent with

1/ Public Notice Report No. 2511, rel. Oct. 29, 2001; 66 Fed. Reg. 55666 (Nov. 2, 2001).

2/ See Petition for Reconsideration of the Cellular Telecommunications Industry Association, ET Docket Nos. 00-258 and 95-18, IB Docket No. 99-81 (filed Oct. 15, 2001) ("Petition").

3/ See Petition for Rulemaking of the Cellular Telecommunications Industry Association, ET Docket Nos. 00-258 and 95-18, IB Docket No. 99-81 (filed May 18, 2001) ("Rulemaking Petition").

4/ Petition at 3.

the requirements of its rules,[5] the Commission has previously taken such preliminary procedural actions, even for rulemaking petitions that it later decides to dismiss for the reasons specified in section 1.401(e).[6] In this case, the Commission's treatment of the Rulemaking Petition was taken without the benefit of public comment, and the agency could not have reliably known what it otherwise asserted in its dismissal, namely that rejection of the Rulemaking Petition served the public interest.[7] Sealing off an important issue from public debate endangers the agency's policy development process and leads to irrational agency decisions because, without hearing the opinions of interested persons, the agency will almost certainly fail to consider important aspects of the issues it is attempting to resolve.[8]

Further, CTIA correctly notes the circuitous nature of the Commission's rejection of the Rulemaking Petition.[9] According to the Commission, it denied the Rulemaking Petition because the International Bureau had already granted licenses to MSS applicants. The Rulemaking Petition, however, was submitted approximately two months *before* the International Bureau's action was taken, and, as CTIA points out, CTIA specifically asked the Commission to defer licensing 2 GHz MSS systems until it had conducted the requested rulemaking. To now use the

---

[5] 47 C.F.R. § 1.403 (2000).

[6] See e.g., Amendment to Parts 73 and 90 of the Commission's Rules to Authorize the Transmission of Emergency Signals on Channel 200, Order, 16 FCC Rcd 2219 (2001) (dismissing a previously publicized petition for rulemaking based on the requirements of rule 1.401(e)).

[7] Petition at 4.

[8] See generally Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (describing agency action as arbitrary and capricious where the agency fails to rebut evidence before it, or fails to adequately consider a problem).

[9] Petition at 6-9; see also 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, including Third Generation Wireless Systems; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use By the Mobile-Satellite Service, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 01-224, ¶ 23, rel. Aug. 20, 2001 ("3G Further Notice").

Bureau's *subsequent* grant of the MSS licenses as justification for denial of the Rulemaking Petition cannot be considered reasoned decision-making. Moreover, in the same document in which it denied the Rulemaking Petition, the Commission goes on to consider other (albeit, less comprehensive) reallocation options for MSS spectrum that could undo or partially undo the International Bureau's actions in any case.[10/]

As AWS recently pointed out in its comments on the Commission's 3G Further Notice,[11/] the agency is obligated to revisit or re-assess its actions that are based on predictive judgments when those judgments may no longer hold true. This is particularly the case with MSS allocations, in which the Commission had little allocation experience, and overestimated the demand for MSS by a wide mark. The Rulemaking Petition was the perfect opportunity for the Commission to revisit its earlier predictions, yet the agency ignored the evidence put before it by CTIA. The Commission is now unfairly attempting to let its Bureau's licensing action stand as a *fait accompli* that justifies dismissal of the Rulemaking Petition.

AWS will not exhaustively revisit the underlying issues raised in the Rulemaking Petition here. The Commission should note, however, that there is now ample evidence before the agency that suggests that its 70 MHz MSS allocation no longer serves the public interest given the self-described failures of most of the MSS licensees' business plans and the dramatic needs of the CMRS industry. Much of that evidence was recently presented to the Commission in comments and reply comments responsive to its 3G Further Notice.[12/] Further evidence appears

---

[10/] 3G Further Notice at ¶ 24 ("We seek comment on two possible approaches to making this [MSS] spectrum available for advanced wireless services . . . .").

[11/] See Comments of AT&T Wireless Services, ET Docket No. 00-258, 8-9, n. 21 (filed Oct. 22, 2001).

[12/] One commenter, VoiceStream Wireless Corporation, demonstrated in its Reply Comments that MSS systems provide service to 4,386 customers per MHz, while CMRS systems provide service to 648,000 customers per MHz. See Reply Comments of VoiceStream Wireless Corporation, ET Docket No. 00-258, 8-9 (filed Nov. 8, 2001). MSS VoiceStream's dramatic illustration of the remarkably inefficient use of MSS-allocated spectrum underscores the need for the Commission to consider the Rulemaking Petition.

frequently. For example, after reporting dismal third quarter 2001 results, MSS licensee GlobalStar last week announced that it will seek bankruptcy protection.[13/] As AWS has previously stated, the Commission cannot shut its eyes to these marketplace realities,[14/] illogically ignoring -- at the same time -- the explosive growth in the CMRS industry and the relative consumer disinterest in MSS offerings.[15/] As CTIA notes, a substantial and material question was raised about whether licensing of spectrum for MSS would put that spectrum to its highest and best use. The Commission's decision to ignore the Rulemaking Petition in the face of that evidence and to proceed with MSS licensing disserved the public interest, violated Commission spectrum policies, and constituted unreasoned decision-making.

[13/] "GlobalStar To File For Chapter 11 Protection," Communications Daily, Nov. 15, 2001.

[14/] See Comments of AT&T Wireless Services, ET Docket No. 00-258, 8 (filed Oct. 22, 2001).

[15/] The Commission has raised the question of whether it allocated too much spectrum for MSS in another proceeding. See Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band, Notice of Proposed Rulemaking, IB Docket No. 01-185, ¶ 28, rel. Aug. 17, 2001. Thus, because the agency is obviously interested in learning whether its 1997 MSS allocation decision remains rational in light of marketplace developments, it should grant CTIA's Petition and revive the Rulemaking Petition.

CONCLUSION

Based on the foregoing, AWS urges the Commission to grant CTIA's Petition and consider the Rulemaking Petition.

Respectfully submitted,

AT&T WIRELESS SERVICES, INC.

Douglas I. Brandon
Vice President-External Affairs
David P. Wye
Director, Spectrum Policy
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 223-9222

Howard J. Symons
Sara F. Leibman
Russ Taylor
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Of Counsel

Dated: November 19, 2001

CERTIFICATE OF SERVICE

I, Tawana Simpson, hereby certify that on this 19th day of November, 2001, a copy of the foregoing Comments of AT&T Wireless Services, Inc. were hand delivered to the following:

Michael Altschul
Senior Vice President, General Counsel
Cellular Telecommunications &
Internet Association
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Tawana Simpson