

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

In the Matter of)	
)	
Amendment of Part 2 of the Commission's Rules)	ET Docket No. 00-258
to Allocate Spectrum Below 3 GHz for Mobile)	
and Fixed Services to Support the Introduction of)	
New Advanced Wireless Services, Including Third)	
Third Generation Wireless Systems)	
)	
Amendment of Section 2.106 of the Commission's)	ET Docket No. 95-18
Rules to Allocate Spectrum at 2 GHz for Use by)	
the Mobile-Satellite Service)	
)	
The Establishment of Policies and Service Rules)	IB Docket No. 99-81
for the Mobile-Satellite Service in the 2 GHz Band)	

To: The Commission

REPLY OF ICO GLOBAL COMMUNICATIONS

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REPLY OF ICO GLOBAL COMMUNICATIONS

Pursuant to Section 1.429(g) of the Commission’s rules,¹ ICO Global Communications (Holdings) Ltd. (“ICO”)² submits this reply in support of the oppositions filed in response to the Cellular Telecommunications & Internet Association (“CTIA”) petition for reconsideration (“Petition”) filed on October 15, 2001.

The Petition seeks reconsideration of the Commission’s denial of CTIA’s petition for rulemaking insofar as it requested reallocation of the entire 2 GHz mobile satellite services

¹ 47 C.F.R. § 1.429(g).

² ICO, a Delaware corporation, is the parent of ICO Services Limited, a UK company that is authorized to provide 2 GHz mobile satellite service in the United States.

("MSS") band.³ Oppositions filed by The Boeing Company ("Boeing") and Globalstar, L.P. ("Globalstar") demonstrate that (1) CTIA's rulemaking petition did not require public notice and comment;⁴ (2) the Commission's denial of the request to reallocate all 70 MHz of the 2 GHz MSS band was adequately explained and was reasonable because there has been no change in the viability or spectrum needs of 2 GHz MSS systems;⁵ and (3) the International Bureau was not required to defer action on the 2 GHz MSS license applications pending resolution of the Petition.⁶ Accordingly, the Commission should promptly deny the Petition.

I. THE FCC HAD BROAD DISCRETION TO DENY CTIA'S RULEMAKING PETITION WITHOUT FIRST SEEKING PUBLIC COMMENT

The Commission did not violate its procedural rules by failing to place CTIA's petition for rulemaking on public notice. Section 1.401(e) of the Commission's rules provides the Commission with broad discretion in addressing a petition for rulemaking. Specifically, the rule states that petitions for rulemaking "which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner."⁷ Moreover, the Commission may dismiss or deny these petitions without first placing them on public notice or seeking public comment.⁸ In fact, when the Commission amended Section 1.401(e) in 1980 to permit summary action for petitions for rulemaking, it concluded that:

³ As used herein, the terms "2 GHz MSS band" and "2 GHz MSS spectrum" will refer to spectrum at 1990-2025 MHz and 2165-2200 MHz.

⁴ See Opposition of Boeing, ET Docket No. 00-258, at 5-9 (Nov. 19, 2001). All pleadings filed in this docket will hereinafter be short cited.

⁵ See *id.* at 7-13; Opposition of Globalstar at 4-6.

⁶ See Opposition of Boeing at 9-14.

⁷ 47 C.F.R. § 1.401(e).

⁸ See *Application for Review of McKinnon Broadcasting Co.*, Memorandum Opinion and Order, 7 FCC Rcd 7554, 7554 ¶ 3 (1992) (denying petition for rulemaking without seeking public comment) ("*McKinnon*").

Where initial staff examination indicates that...the petition will almost certainly be dismissed or denied, notice and comment on the petition itself is a needlessly burdensome step which imposes unwarranted demands of time and expense on both private parties and Commission staff, with no offsetting contribution to regulatory fairness or efficiency. Nor is notice and comment on rule making petitions required under the APA [Administrative Procedure Act].⁹

Furthermore, the courts have long acknowledged the Commission's broad discretion to deny requests to initiate rulemaking proceedings¹⁰ and have overturned an agency's refusal to institute a rulemaking "only in the rarest and most compelling of circumstances."¹¹ Moreover, the courts have found these rare and compelling circumstances to exist only when: (1) an agency has committed "plain errors of law, suggesting that the agency has been blind to the source of its delegated power,"¹² or (2) "a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed."¹³

CTIA, AT&T Wireless, and Cingular all fail to demonstrate that any of these circumstances exist. Specifically, none of these parties has cited any specific Congressional mandate requiring the Commission to reconsider its 2 GHz MSS allocation policy. Moreover, the only change of circumstances that these parties have proffered in support of the rulemaking

⁹ *Amendments to Part 0, § 0.281(b)(6), and Part 1, §§ 1.401 and 1.405(d), of the Commission's Rules, with Respect to the Delegation of Authority to the Chief, Broadcast Bureau, and Procedures Regarding Petitions for Rule Making*, Memorandum Opinion and Order, 79 FCC 2d 1, 2 ¶ 3 (1980).

¹⁰ *See, e.g., Action for Children's Television v. FCC*, 564 F.2d 458, 460 (D.C. Cir. 1977) (the FCC "has considerable latitude in responding to requests to institute proceedings or to promulgate rules"); *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987) ("[judicial] [r]eview under the 'arbitrary and capricious' tag line, however, encompasses a range of levels of deference to the agency, and...an agency's refusal to institute rulemaking proceedings is at the high end of the range").

¹¹ *WWHT v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981).

¹² *State Farm Mutual Automobile Insurance Co. v. Dep't of Transportation*, 680 F.2d 206, 221 (D.C. Cir. 1982), *vacated on other grounds*, 463 U.S. 29 (1983); *see also American Horse Protection Ass'n*, 812 F.2d at 6-7 (finding unambiguous Congressional objective and evidence strongly suggesting that Secretary of Agriculture was "blind to the nature of his mandate from Congress").

¹³ *WWHT*, 656 F.2d at 819; *see also Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979) (ordering FCC to re-examine whether rules adopted pursuant to a consensus agreement continued to serve the public interest, long after the factual predicate for the agreement ceased to exist).

petition consists of references to the financial difficulties of some MSS licensees, which purportedly constitute evidence that the entire MSS industry is not viable and does not require the full 2 GHz MSS allocation.¹⁴ The International Bureau, however, rejected this same argument when it denied the request of certain terrestrial wireless carriers, including AT&T Wireless and Cingular, to defer action on the then-pending 2 GHz MSS license applications.¹⁵ The Bureau specifically found that CTIA's rulemaking petition did not warrant deferral of the applications, noting that there was "no credible information to demonstrate that the findings made by the Commission last year that 2 GHz MSS is in the public interest are called into question."¹⁶

The full Commission, in turn, properly relied on this sound reasoning when it denied CTIA's rulemaking proposal to reallocate the entire 2 GHz MSS band. The Commission thus correctly recognized that the financial difficulties of a few MSS licensees do not and cannot form the factual predicate for its 2 GHz MSS allocation policy. In the absence of any unambiguous Congressional mandate or change of a significant factual predicate, the only interests sought to be protected by CTIA are "primarily economic."¹⁷ These interests "without more, do[] not present the unusual or compelling circumstances that are required in order to justify a judgment...overturning a decision of the Commission not to proceed with rulemaking."¹⁸

¹⁴ See Comments of Cingular at 2-3 (Nov. 19, 2001); Comments of AT&T Wireless at 3-4 (Nov. 19, 2001); CTIA Petition for Rulemaking at 2-4; CTIA Petition for Reconsideration at 7-9.

¹⁵ See, e.g., *ICO Services Limited*, Order, 16 FCC Rcd 13762, 13774 ¶ 31 (2001).

¹⁶ *Id.*

¹⁷ *WWHT*, 656 F.2d at 819.

¹⁸ *Id.*; see also *Nat'l Customs Brokers & Forwarders Ass'n of America v. United States*, 883 F.2d 93, 97 (D.C. Cir. 1989) (refusing to overturn agency's refusal to grant request for rulemaking because it "involves no...crystalline congressional objective and the interests at stake are 'primarily economic.'").

As discussed in Section II below, the Commission's partial denial of CTIA's rulemaking petition for rulemaking was reasonable because the request to consider reallocating the entire 2 GHz MSS band was repetitive, frivolous, and did not warrant any consideration. Consequently, the Commission had full authority under Section 1.401(e) to deny summarily CTIA's rulemaking petition without first seeking public comment. In any event, any suggestion that the lack of public notice deprived any interested party of an opportunity to submit comments on CTIA's rulemaking petition is specious. The parties objecting to the Commission's partial denial of CTIA's rulemaking petition (i.e., CTIA, AT&T Wireless, and Cingular) in fact filed comments and replies in response to the rulemaking petition.¹⁹

II. THE FCC'S PARTIAL DENIAL OF CTIA'S RULEMAKING PETITION WAS REASONABLE

CTIA's contention that the Commission's partial denial of its rulemaking petition was unreasonable lacks merit. Boeing and Globalstar correctly observe that the existing 2 GHz MSS allocation policy was carefully considered and developed over the last decade, codified in 1997, and subsequently reaffirmed by the Commission on a number of occasions, including as recently as a year ago when the Commission established its 2 GHz MSS licensing and service rules.²⁰ Since the adoption of the existing 2 GHz MSS allocation, the Commission on at least one prior occasion expressly considered and rejected a request similar to CTIA's rulemaking petition for

¹⁹ The Commission considered and specifically cited comments filed by AT&T Wireless, Cingular, and other parties, as well as CTIA's response to the comments, when it denied CTIA's rulemaking petition. *See 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*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 16043, ¶ 20 n.63 (2001) ("*Advanced Wireless FNPRM*").

²⁰ *See* Opposition of Boeing at 2; Opposition of Globalstar at 4-6.

reallocation of 2 GHz MSS spectrum.²¹ Thus, in view of its previous consideration of other proposals to reallocate 2 GHz MSS spectrum for other uses, the Commission properly rejected the rulemaking petition as repetitive and frivolous.²²

In addition, CTIA, as well as AT&T Wireless and Cingular, had ample opportunities to challenge the 2 GHz MSS allocation and assignment of spectrum to individual 2 GHz MSS systems, but failed to do so. In particular, none of these parties filed any petition for reconsideration of the order adopting the 2 GHz MSS allocation in March 1997, the order reaffirming the 2 GHz MSS allocation in November 1998, or the order establishing the 2 GHz MSS licensing and service rules in August 2000. Although the 2 GHz MSS license applications were pending for more than four years and subject to public comment periods occurring as recently as last year, none of these parties raised any objections at any time during these periods. Globalstar thus correctly asserts that CTIA's request is untimely.²³

Furthermore, CTIA's rulemaking petition failed to present any new evidence, facts, or circumstances warranting a partial, let alone wholesale, reversal of the current 2 GHz MSS allocation. In fact, comments and reply comments filed in the pending rulemaking proceeding to consider reallocating 10 to 14 MHz of 2 GHz MSS spectrum fail to provide any specific data regarding the amount of additional spectrum that terrestrial Third Generation mobile wireless ("3G) services may need in the United States, the projected demand for these services, or the

²¹ See *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 Third Notice of Proposed Rule Making and Order, 13 FCC Rcd 23949, 23954 ¶ 11 (1998) (denying a petition for reconsideration of decision to allocate 70 MHz of spectrum to MSS in the 2 GHz band).

²² See *McKinnon*, 7 FCC Rcd at 7554 ¶ 3 (denying rulemaking petition as repetitious and frivolous because FCC previously considered and rejected similar proposals to change rules); *Amendment of Section 90.611(d) of the Commission's Rules Governing the Application Processing Procedures for the 900 MHz Private Land Mobile Radio Band*, Order, 4 FCC Rcd 511, 511 ¶ 5 (dismissing rulemaking petition as repetitious because the Commission previously dismissed similar proposals and petitioner failed to proffer new evidence warranting a change in rules).

expected launch of these services.²⁴ These filings also demonstrate that the public interest benefits of 2 GHz MSS are undisputed.²⁵ In view of the fully developed record supporting the current 2 GHz MSS allocation, CTIA's proposal to reallocate the entire 2 GHz MSS band does not warrant consideration. Consequently, the Commission's partial denial of CTIA's rulemaking petition was eminently reasonable.

CONCLUSION

For the reasons set forth above, ICO urges the Commission promptly to deny CTIA's petition for reconsideration and expressly reaffirm that CTIA's rulemaking petition to reallocate the entire 2 GHz MSS band is repetitive, frivolous, and does not warrant consideration.

Respectfully submitted,

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²³ See Opposition of Globalstar at 4-6.

²⁴ See Reply Comments of New ICO Global Communications at 4-5.

²⁵ *Id.* at 3-4.

CERTIFICATE OF SERVICE

I, Gwendolynne M. Chen, do hereby certify that I have on this 29th day of November 2001, had copies of the foregoing **REPLY OF ICO GLOBAL COMMUNICATIONS** electronically delivered, except as otherwise indicated, to the following:

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