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

In the Matter of	)	
	)	
Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico	)	WT Docket No. 97-112
	)	
Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules	)	CC Docket No. 90-6

SPRINT CORPORATION COMMENTS

Sprint Corporation, on behalf of its wireless operating division, Sprint Spectrum L.P., d/b/a Sprint PCS ("Sprint"), submits these comments in support of the reconsideration petition filed by VoiceStream Wireless Corporation ("VoiceStream") on April 3, 2002.[1]

I. INTRODUCTION AND SUMMARY

Sprint has a keen interest in this proceeding. It paid the federal government over $360 million for 12 coastal PCS licenses that include the right to provide commercial mobile services within the Gulf of Mexico, and it has paid additional millions in relocating microwave facilities in the Gulf in order to reduce interference from these Gulf systems and improve the quality of its CMRS services in and around the Gulf shoreline. Now, the Commission has suggested that Sprint's rights in certain areas of the Gulf are "secondary" only and that it may issue separate

[1] *See* Petitions for Reconsideration of Action in Rulemaking Proceeding, Report No. 2548, 67 Fed. Reg. 30926 (May 8, 2002).

PCS licensees in the Gulf in the future.[2] Sprint submits that such action would be unlawful and constitute a breach of the license contracts.

In addition, there is no evidence of a need for an additional separate mobile services allocation in the Gulf. Establishment of PCS licenses in the Gulf would likely replicate the intractable interference problems that cellular carriers have continued to encounter in the nearly 20 years since the Commission first authorized cellular licenses in the Gulf. If there arises a need for use of the PCS spectrum within the Gulf, that need can be satisfied most quickly and efficiently by having the service provided by the PCS licensee.

II. THE ESTABLISHMENT OF GULF PCS LICENSES WOULD BE UNLAWFUL, WOULD CONSTITUTE A BREACH OF CONTRACT, AND WOULD RENDER THE GOVERNMENT LIABLE IN DAMAGES

PCS licenses obtained at auction create a contract between the federal government and the PCS licensee. As the Commission advised the Supreme Court earlier this month, PCS licenses at minimum constitute executory contracts:

> Under FCC licenses, performances are owed by both the licensee and the FCC. While [licensees] must obey FCC rules and make the required [auction] payments, the FCC must protect [licensees'] exclusive right to the spectrum and refrain from authorizing others to use that spectrum. Courts generally conclude that analogous exclusive licensing arrangements made by private parties for commercial reasons are "executory."[3]

The Supreme Court has held that the government is liable for breach of contract, even when the contracting agency is prevented from honoring its bargain as a result of subsequent Congres-

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[2] *See Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico,* WT Docket No. 97-112 and CC Docket No. 90-6, *Report and Order,* FCC 01-387, at ¶¶ 45-46 (Jan. 15, 2002) ("*CMRS Gulf Order*").

[3] *FCC* v. *NextWave Personal Communications*, Nos. 01-653 and 01-657, Brief for the Federal Communications Commission, at 46 n.10 (May 6, 2002)(quotations in original; citations omitted).

sional enactments.[4] Sprint submits that the establishment of PCS licenses in the Gulf *after* the coastal PCS licenses had been awarded would constitute a breach of contract and that as a result, the government would be liable for all damages land-based PCS licensees would suffer from the breach.[5]

A central legal question is whether it was "reasonable for applicants in the original [PCS] auction[s] to have based their bidding strategy upon the assumption that, in the future, the Commission would not designate a Gulf service area or auction authorizations for such a service area."[6] VoiceStream demonstrates in its petition that bidders for PCS spectrum reasonably expected that the FCC would not establish separate PCS licenses in the Gulf and that PCS licenses along the Gulf included the right to serve all Gulf waters.[7] Among other things, at the time the Commission established PCS service, it specifically established PCS service areas (MTAs and BTAs) for several insular areas such as Guam, the Virgin Islands and American Samoa, but it did not establish separate PCS services areas for the Gulf of Mexico.[8] In addition, Commission technical rules limit emissions on the border of the PCS service area "unless the parties agree to

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[4] *See, e.g., Mobil Oil* v. *United States,* 530 U.S. 604; 120 S.Ct. 2423 (June 26, 2000)(Department of Interior breached oil lease contracts even though breach was caused by subsequent act of Congress); *United States* v. *Winstar,* 518 U.S. 839 (1996)(Government contractually liable for damages which arose when Congress amended the law, so as to deny certain savings and loans regulatory treatment to which the government had contractually committed itself); *Hughes Communications* v. *United States,* 998 F.2d 953 (Fed. Cir. 1993) (NASA financially responsible to satellite company for changes in policy triggered by sovereign government action).

[5] Additionally, the Fifth Amendment to the U.S. Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

[6] *Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico,* WT Docket No. 02-68, *Notice of Proposed Rulemaking,* FCC 02-101, at ¶ 11 (May 3, 2002)("*MDS/ITFS Gulf NPRM*").

[7] *See* VoiceStream Reconsideration Petition at 2-3.

[8] *See PCS Reconsideration Order,* 9 FCC Rcd at 4969 n.23. *See also* 47 C.F.R. § 24.202(a)(1)-(5).

a higher field strength."[9] Because the Commission did not establish separate PCS licenses in the Gulf, bidders for the coastal PCS licenses reasonably set their bids with the expectation they would never have to protect any seaward licensees.

Further, even if there was room for debate, the Bureau removed any ambiguity when is stated several months before the first 10 MHz PCS auction:

> Unlike cellular mobile service, there is no PCS licensee for the water areas of the Gulf of Mexico. *Entities eligible to serve the Gulf of Mexico are the licensees of BTAs bordering the Gulf.*[10]

In summary, PCS licensees along the Gulf coast reasonably expected that the Commission would never establish separate PCS licensees in the Gulf and that the licenses they obtained at auction included the right to serve the Gulf using their frequencies. Establishment of PCS licenses now, after the fact, would constitute a breach of contract, subjecting the government to damages liability.

III. ALTERNATIVELY, ESTABLISHING SEPARATE PCS LICENSES IN THE GULF WOULD BE CONTRARY TO THE PUBLIC INTEREST

Establishment of PCS licenses in the Gulf of Mexico would disserve the public interest even if the Commission determines that such action would not constitute a breach of contract.

First, there is no evidence of a need for an additional spectrum allocation in the Gulf. There is ample spectrum allocated for fixed microwave services. The Commission has also allocated 50 MHz of cellular spectrum to meet the need for mobile uses in the Gulf (*e.g.,* people residing on oil drilling platforms), and there is no record evidence demonstrating that this allocation is insufficient to meet all the mobile service needs in the Gulf.

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[9] 47 C.F.R. § 24.236.

[10] *Mobil Oil Telcom*, 11 FCC Rcd 4115, 4116 n.10 (1996)(emphasis added). Although the Bureau referenced only BTA licenses, there is no reason in logic and policy to treat MTA licenses differently.

Second, the record evidence is undisputed that coastal PCS licensees will cause interference to any Gulf system using the same PCS frequencies – even though they are operating their systems within authorized levels. The Commission recently described the phenomenon of "ducting," whereby a radio signal is "trapped within and between stratified layers of the atmosphere."[11] The Commission has noted that there is a "*certainty* that ducting will occur between Gulf and land-based stations" and that ducting results in radio signals being propagated "for distances of tens to hundreds of miles."[12] Thus, an existing PCS licensee along the Gulf may cause interference to a radio transreceiver using its spectrum in the Gulf even though the carrier's base stations along the coastline comply fully with all Commission emission rules.

Third, it is a virtual certainty that any radio transreceiver using PCS spectrum in the Gulf will cause interference to PCS networks along the Gulf cost.[13] The same "ducting" phenomenon works in reverse: radio signals transmitted in the Gulf can be propagated "for distances of tens to hundreds of miles."[14] As Sprint has previously explained, CDMA systems can receive signals at or near the noise floor:

> CDMA works by spreading all signals across the same broad frequency band and assigning a unique code to each traffic channel. The receiver discerns the dispersed signals by synchronizing with the base transmitter code. This dispersal of signals over a broad frequency band results in a relatively low energy per Hertz.[15]

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[11] *See MDS/ITFS Gulf NPRM* at ¶ 39.

[12] *Id.* at ¶¶ 39 and 42 (emphasis in original). The problem with ducting is complicated because it is "a weather-related phenomenon and is thus highly variable both in location and intensity throughout the Gulf area." *Id.* at ¶ 43. In addition, ducting "occurs for a relatively short duration, making it very difficult to identify the carrier generating the signal and to troubleshoot with that carrier to resolve the interference." Sprint Petition to Deny, *Rigs Telephones, d/b/a Datacom,* File No. 9707403, at 4 (Oct. 21, 1998).

[13] To serve the Gulf coast, PCS licensees must transmit both inland and Gulfward, and this, in turn, makes their licensed systems especially vulnerable to interfering signals transmitted from the Gulf.

[14] *Id.* at ¶ 39.

[15] *See* Sprint Petition to Deny, *Rigs Telephones, d/b/a Datacom,* File No. 9707403, at 5 n.13 (Oct. 21, 1998). *See also id.* at Attachment A, Declaration of Tony Sabatino at ¶ 3.

The record evidence is uncontroverted that interference from Gulf systems using PCS frequencies would "disrupt service to Sprint PCS' customers, resulting in dropped calls, blocked calls, and degraded call quality."[16]

The Commission stated earlier this month in another proceeding that it "intend[s] to fully protect the rights of all current . . . licensees to serve their BTAs, including those portions of the BTAs, which border directly on the Gulf of Mexico," noting that coastal licensees "must have as much flexibility as possible to design their systems to achieve maximum coverage."[17] Sprint concurs fully in this observation. Sprint submits, however, that the Commission has a legal obligation to protect existing PCS licensees from any harmful interference as well.

Fourth, the public interest is served when spectrum is put to valuable use as quickly as possible. The Commission suggested in its *CMRS Gulf Order* that the use of PCS spectrum in the Gulf would be addressed on a case-by-case basis.[18] This process could easily entail several years (*e.g.,* an allocation rulemaking and resulting legal challenges). Sprint submits there is a better approach. If the Commission reaffirms that coastal PCS licensees have the right to serve the Gulf, anyone in the Gulf believing there is a need for additional service in the Gulf can approach the carriers holding coastal PCS licenses about meeting this need. Such an arrangement would not only avoid the difficult issues of what constitutes acceptable levels of interference, but would also allow for the expeditious provision of services in the Gulf.

Finally, any reduction of coastal PCS licensee spectrum rights and the establishment of separate Gulf-based PCS licenses would impugn the integrity of the auction process and undermine the valuation process in future spectrum auctions. Firms will question the wisdom of par-

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[16] *Id.* at Attachment A, Declaration of Tony Sabatino at ¶ 3.

[17] *MDS/ITFS Gulf NPRM* at ¶ 45.

ticipating in future auctions if the Commission begins to establish a precedent of re-assigning auctioned frequencies to others. The Commission has devoted enormous efforts in recent years to protect the integrity of the auction process. Sprint submits that narrowing spectrum rights after those rights were established would equally impugn the integrity of the auction process.[19]

IV. CONCLUSION

The Commission has spent nearly 20 years attempting to resolve the interference and other problems raised by issuing separate cellular licenses for the Gulf of Mexico. Even ignoring the fact that the Commission has already authorized existing coastal PCS licensees to serve the Gulf, the last thing the Commission should consider entertaining is replicating this ongoing, and seemingly intractable, controversy into the PCS arena.

For the foregoing reasons, Sprint Corporation respectfully requests that the Commission grant the VoiceStream reconsideration petition and reaffirm that existing PCS licensees along the Gulf of Mexico already possess the right to use their licenses throughout the Gulf on a primary basis.

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[18] *See CMRS Gulf Order* at ¶ 45.

[19] Sprint agrees with VoiceStream that if the Commission decides coastal licensees do not already have the right to serve the Gulf, PCS license boundaries in the Gulf should be based on federal law rather than state law that could change over time. *See* VoiceStream Reconsideration Petition at 8-9.

Respectfully submitted,

SPRINT CORPORATION, Wireless Division

Luisa L. Lancetti by RCS

Luisa L. Lancetti
Vice President, PCS Regulatory Affairs
Sprint Corporation
401 9th Street, N.W., Suite 400
Washington, D.C. 20004
202-585-1923

Joseph Assenzo
General Attorney, PCS Regulatory Affairs
Sprint Corporation
6450 Sprint Parkway
Mail Stop: KSOPHN0212-2A503
Overland Park, KS 66251
913-315-9141

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