

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
The Boeing Company) DA 01-1631
) File Nos. 179-SAT-P/LA-97(16)
) 90-SAT-AMEND-98(20)
)
) IBFS Nos. SAT-LOA-19970926-00149
) SAT-AMD-19980318-00021
) SAT-AMD-20001103-00159
)
Celsat America, Inc.) DA 01-1632
) File Nos. 26/27/28-DSS-P-94
) 36-SAT-AMEND-95
) 65/66/67-SAT-AMEND-96
) 192-SAT-AMEND-97
) 88-SAT-AMEND-98
)
) IBFS Nos. SAT-A/O-19940408-00016/17/18
) SAT-AMD-19941125-00089
) SAT-AMD-19960124-00007/8/9
) SAT-AMD-19970925-00124
) SAT-AMD-19980113-00009
) SAT-AMD-20001103-00153
)
Constellation Communications Holdings, Inc.) DA 01-1633
) File No. 181-SAT-P/LA-97(46)
)
) IBFS Nos. SAT-LOA-19970926-00148
) SAT-AMD-19991230-00134
) SAT-AMD-20001103-00152
)
Globalstar, L.P.) DA 01-1634
) File Nos. 183/184/185/186-SAT-P/LA-97;
) 182-SAT-P/LA-97(64)
)
) IBFS Nos. SAT-LOA-19970926-00151/52/53/54
) SAT-LOA-19970926-00156;
) SAT-AMD-20001103-00154
)
ICO Services Limited) DA 01-1635
) File No. 188-SAT-LOI-97
)
) IBFS Nos. SAT-LOI-19970926-00163
) SAT-AMD-20000612-00107
) SAT-AMD-20001103-00155

Iridium LLC	)	DA 01-1636
	)	File No. 187-SAT-P/LA-97(96)
))
	)	IBFS Nos. SAT-LOA-19970926-00147
	)	SAT-AMD-20001103-00156
))
Mobile Communications Holdings, Inc.	)	DA 01-1637
	)	File No. 180-SAT-P/LA-97(26)
))
	)	IBFS Nos. SAT-LOA-19970926-00150
	)	SAT-AMD-20001103-00157
))
TMI Communications and Company, Limited Partnership	)	DA 01-1638
	)	File No. 189-SAT-LOI-97
))
	)	IBFS Nos. SAT-LOI-19970926-00161
	)	SAT-AMD-20001103-00158

MEMORANDUM OPINION AND ORDER

Adopted: January 23, 2003

Released: January 30, 2003

By the Commission:

1. In this *Order*, we deny an Application for Review filed by AT&T Wireless Services, Inc., Verizon Wireless, and Cingular Wireless LLC (collectively, the Wireless Carriers).¹ The Wireless Carriers seek review of decisions by the International Bureau (Bureau) and the Office of Engineering Technology (OET) that granted eight authorizations (hereinafter referred to as the *MSS Licensing Orders*)² to operate Mobile Satellite Service (MSS) systems in the 2 GHz band.³ Among other things, the

¹ Application for Review of AT&T Wireless Services, Inc., Verizon Wireless, and Cingular Wireless LLC (filed Aug. 16, 2001) (Application for Review).

² Six of the authorizations were granted to entities that filed applications for U.S. licenses and two authorizations were granted to entities that filed letters of intent to serve U.S. consumers from foreign-licensed systems. The domestic licenses are *The Boeing Company*, Order and Authorization, DA 01-1631, 16 FCC Rcd 13691 (Int'l Bur. 2001) (*Boeing 2 GHz MSS Order*); *Celsat America, Inc.*, Order and Authorization, DA 01-1632, 16 FCC Rcd 13712 (Int'l Bur. 2001) (*Celsat 2 GHz MSS Order*); *Constellation Communications Holdings, Inc.*, Order and Authorization, DA 01-1633, 16 FCC Rcd 13724 (Int'l Bur./OET 2001) (*Constellation 2 GHz MSS Order*); *Globalstar, L.P.*, Order and Authorization, DA 01-1634, 16 FCC Rcd 13739 (Int'l Bur./OET 2001) (*Globalstar 2 GHz MSS Order*); *Iridium LLC*, Order and Authorization, DA 01-1636, 16 FCC Rcd 13778 (Int'l Bur. 2001) (*Iridium 2 GHz MSS Order*); and *Mobile Communications Holdings, Inc.*, Order and Authorization, DA 01-1637, 16 FCC Rcd 13794 (Int'l Bur./OET 2001) (*MCHI 2 GHz MSS Order*). The spectrum reservation Orders are *ICO Services Limited*, Order, DA 01-1635, 16 FCC Rcd 13762 (Int'l Bur./OET 2001) (*ICO 2 GHz MSS Order*); and *TMI Communications and Company, Limited Partnership*, Order, DA 01-1638, 16 FCC Rcd 13808 (Int'l Bur. 2001) (*TMI 2 GHz MSS Order*). In this Order, we use the term "applications" to refer to all requests for authority to operate 2 GHz MSS satellite systems in the United States and the term "authorizations" to refer to both U.S.-licensed space stations, and non-U.S.-licensed systems that participated in the 2 GHz MSS processing round as letter of intent filers.

Wireless Carriers claim that the licensing decisions were unreasoned, failed to resolve material questions of fact and were contrary to Commission rules. We deny the Wireless Carriers' Application for Review.

I. BACKGROUND

2. Between 1992 and 1994, three parties filed separate petitions for rulemaking that requested an allocation for MSS in the 2 GHz band.⁴ On April 8, 1994, one of those parties filed the first 2 GHz MSS application with the Commission.⁵ On January 30, 1995, the Commission adopted a Notice of Proposed Rulemaking seeking comment on allocation of spectrum to MSS to provide the public with access to new and competitive services and technologies.⁶ Approximately two years after issuing the 2 GHz Allocation Notice, the Commission allocated the 1990-2025 MHz and 2165-2200 MHz bands to MSS.⁷ Later, on March 19, 1998, the Commission released a public notice that identified and sought comment for applications to provide MSS in the 2 GHz band.⁸ Upon initial review, the Commission found nine requests for authority from potential 2 GHz MSS licensees to be acceptable for filing.⁹

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³ The term "2 GHz MSS Band" is used in this *Order* to refer to the 1990-2025 MHz (uplink) and 2165-2200 MHz (downlink) frequencies. These frequencies are allocated to MSS in the United States. 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, Notice of Proposed Rule Making, 10 FCC Rcd 3230 (1995); First Report and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 7388 (1997), *aff'd on recon.*, Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order, 13 FCC Rcd 23949 (1998), *further proceedings*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd 12315 (2000) (*2 GHz MSS Allocation Proceeding*).

⁴ The three petitions were filed by Celsat, Inc. (Celsat), TRW, Inc., and Personal Communications Satellite Corporation. *2 GHz MSS Allocation Proceeding (Notice)*, 10 FCC Rcd at 3230, ¶ 1.

⁵ Application of Celsat, Inc., File No. 26/27/28-DSS-P-94, IBFS No. SAT-A/O-19940408-00016/17/18 (Celsat Application), *amended*, File No. 36-SAT-AMEND-95, IBFS No. SAT-AMD-19941125-00089 (reporting transfer of control of Celsat, Inc. to Celsat America, Inc.), *further amended*, File No. 65/66/67-SAT-AMEND-96, IBFS No. SAT-AMD-19960124-00007/8/9 (reporting *pro forma* ownership changes).

⁶ See *2 GHz MSS Allocation Proceeding (Notice)*, 10 FCC Rcd 3230.

⁷ See *2 GHz MSS Allocation Proceeding (First Report and Order)*, 12 FCC Rcd at 7395, ¶ 14 (ordering the reallocation to MSS, effective January 1, 2000).

⁸ Public Notice, Report No. SPB-119 (rel. March 19, 1998), *available at* <http://ftp.fcc.gov/Bureaus/International/Public_Notices/1998/pnin8069.txt>.

⁹ The nine applications and letters of intent found acceptable for filing were submitted by The Boeing Company (File Nos. 179-SAT-P/LA-97(16) and 90-SAT-AMEND-98(20); IBFS File Nos. SAT-LOA-19970926-00149 and SAT-AMD-19980318-00021); Celsat America, Inc. (File Nos. 26/27/28-DSS-P-94, 36-SAT-AMEND-95, 65/66/67-SAT-AMEND-96, 192-SAT-AMEND-97, and 88-SAT-AMEND-98; IBFS Nos. SAT-A/O-19940408-00016/17/18, SAT-AMD-19941125-00089, SAT-AMD-19960124-00007/8/9, SAT-AMD-19970925-00124 and SAT-AMD-19980113-00009); Constellation Communications, Inc. (File No. 181-SAT-P/LA-97(46); IBFS File Nos. SAT-LAO-19970926-00148 and SAT-AMD-19991230-00134); Globalstar, L.P. (File Nos. 183 through 186-SAT-P/LA-97 and 182-SAT-P/LA-97(64); IBFS File Nos. SAT-LOA-19970926-00151 through SAT-LOA-19970926-00156); Iridium LLC (File No. 187-SAT-P/LA-97(96); IBFS File No. SAT-LOA-19970926-00147); Mobile Communications Holdings, Inc. (File No. 180-SAT-P/LA-97(26); IBFS File No. SAT-LOA-19970926-00150); ICO Services Limited (File No. 188-SAT-LOI-97; IBFS File No. SAT-LOI-19970926-00163); Inmarsat (continued....)

3. In November 1998, the Commission affirmed its decision to allocate the 1990-2025 MHz and 2165-2200 MHz bands to MSS,¹⁰ and in August 2000, the Commission adopted service rules for 2 GHz MSS systems.¹¹ Consistent with the requirements of the Commission's *2 GHz MSS Service Rules Order*, the MSS applicants amended their satellite system applications to meet the additional requirements that the Commission's *2 GHz MSS Service Rules Order* required them to observe.¹² On November 29, 2000, the Commission issued a public notice requesting comment on the amended MSS applications.¹³ In response, as in earlier stages of these proceedings, numerous parties filed comments, petitions to deny and replies on the amended applications. The period for comment on these amendments closed on January 16, 2001.¹⁴

4. On June 13, 2001, the Wireless Carriers submitted a letter to the Commission requesting that it defer licensing the 2 GHz MSS applicants on the grounds that, among other things, one of the eight pending 2 GHz MSS applicants, ICO Services Limited (ICO), had proposed that operators be permitted to use assigned frequencies to provide ancillary terrestrial components (ATCs) on March 8, 2001¹⁵ under certain conditions.¹⁶ The Wireless Carriers requested that the Commission suspend all 2 GHz MSS licensing until the Commission had responded to both ICO's proposal and a petition for rulemaking filed on May 18, 2001 by the Cellular Telecommunications and Internet Association (CTIA) seeking reallocation of 2 GHz MSS spectrum.¹⁷

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Horizons (File No. 190-SAT-LOI-97; IBFS File No. SAT-LOI-19970924-00098); and TMI Communications and Company, Limited Partnership (File No. 189-SAT-LOI-97; IBFS File No. SAT-LOI-19970926-00161).

¹⁰ *2 GHz MSS Allocation Proceeding (Memorandum Opinion and Order)*, 13 FCC Rcd at 23953-54, ¶ 10.

¹¹ *See Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, 15 FCC Rcd 16127 (2000) (*2 GHz MSS Service Rules Order*).

¹² The applicant's Report and Order amendments varied, but generally provided more information about the proposed satellite system, offered orbital-debris mitigation statements and requested authority to test satellites prior to placing them in their authorized orbital planes and orbit locations. *See, e.g.,* Amendment of Globalstar L.P., File No. SAT-AMD-20001103-00154 at 4-11 (filed, Nov. 3, 2000) (*Globalstar Amendment*).

¹³ Public Notice, Report No. SAT-00061 (rel. November 29, 2000), *available at* <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-207722A1.txt>. This Public Notice also announced that the Commission dismissed Inmarsat Horizons' pending letter of intent to provide 2 GHz MSS to the United States, at Inmarsat Horizons' request. *Id.* at 2.

¹⁴ *Constellation Communications Holdings, Inc., et al.*, Order, 16 FCC Rcd 10071 (Sat. Radiocomm. Div., Int'l Bur. 2000).

¹⁵ *See* New ICO Global Communications (Holdings) Ltd. *ex parte* letter in IB Docket No. 99-81 (2 GHz Service Rules) dated March 8, 2001 (ICO *ex parte* letter dated March 8, 2001). We note that over the course of this proceeding, ICO has filed under a number of names, including New ICO Global Communications (Holdings) Ltd. For purposes of our discussion, we use the name "ICO" in all references.

¹⁶ *See* Letter to The Honorable Michael K. Powell, Chairman, Federal Communications Commission *from* John T. Scott, III, Verizon Wireless, *et al.* (June 13, 2001). CTIA, a trade association for the mobile wireless industry, also filed an *ex parte* presentation similar to the Wireless Carriers', five days prior to issuance of the 2 GHz MSS licenses. CTIA did not seek review of the *MSS Licensing Orders*.

¹⁷ CTIA's petition for rulemaking sought the reallocation of the entire 70 megahertz available for the licensing of the 2 GHz MSS system for terrestrial use. *See* Petition for Rulemaking of the Cellular Telecommunications and (continued....)

5. On July 17, 2001, the Bureau and OET granted eight MSS applications in the *MSS Licensing Orders*.¹⁸ Each of the eight *MSS Licensing Orders* addressed the Wireless Carriers' *ex parte* filing by stating that nothing in ICO's or CTIA's requests cast doubt upon the public interest in expeditiously licensing the 2 GHz MSS applicants.¹⁹ The *ICO 2 GHz MSS Order*, containing the extensive analysis referenced by other *MSS Licensing Orders*, found that the Wireless Carriers provided no credible information calling into question the findings concerning the continued importance of MSS to regional, national and global communications, rural and Native American areas and the American economy.²⁰ The *ICO 2 GHz MSS Order* also stated that the MSS licensees "should be given the opportunity to succeed or fail in the market on their own merits after expending vast resources over nearly a decade of effort in the ITU and through regulatory proceedings to get this opportunity" to commence mobile satellite services.²¹ And, citing one of the Commission's decisions to license the Personal Communication Service (PCS), the *ICO 2 GHz MSS Order* found that a "delay in issuance of the licenses would not be in the public interest where it would adversely affect the introduction of competition and new services."²² Finally, it stated that the issues that ICO, CTIA and the Wireless Carriers had raised were better addressed in the context of current and planned Commission rulemaking proceedings.²³

6. The Commission adopted two notices of proposed rulemaking on August 9, 2001: (1) the *MSS Flexibility Notice*,²⁴ and (2) the *Advanced Wireless Services Further Notice*.²⁵ In the *MSS Flexibility Notice*, the Commission sought comment on proposals from both ICO and an MSS licensee in another

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Internet Association (filed, May 18, 2001) (CTIA Petition for Rulemaking). CTIA argued that the premise behind the Commission's 70 megahertz allocation to 2 GHz MSS systems, the creation of a satellite service that would cover rural areas, was no longer realistic in light of statements made by ICO and MSV in support of their request for regulatory flexibility for MSS systems. CTIA requested that the Commission defer licensing 2 GHz MSS systems until the Commission reaffirmed the viability of these systems.

¹⁸ See *supra* footnote 2.

¹⁹ See *ICO 2 GHz MSS Order*, 16 FCC Rcd at 13773-74, ¶¶ 29-31; accord *Boeing 2 GHz MSS Order*, 16 FCC Rcd at 13707, ¶ 43 (denying the Wireless Carriers' request to defer licensing for the reasons stated in the *ICO 2 GHz MSS Order*) (citation omitted); *Celsat 2 GHz MSS Order*, 16 FCC Rcd at 13719, ¶ 22 (same); *Constellation 2 GHz MSS Order*, 16 FCC Rcd at 13733-34, ¶ 24 (same); *Globalstar 2 GHz MSS Order*, 16 FCC Rcd at 13756-57, ¶ 47 (same); *Iridium 2 GHz MSS Order*, 16 FCC Rcd at 13789, ¶ 33 (same); *MCHI 2 GHz MSS Order*, 16 FCC Rcd at 13808, ¶ 25 (same); *TMI 2 GHz MSS Order*, 16 FCC Rcd at 13814-15, ¶ 19 (same).

²⁰ See *ICO 2 GHz MSS Order*, 16 FCC Rcd at 13774, ¶ 31.

²¹ *Id.*

²² *Id.* (citing *Deferral of Licensing of MTA Commercial Broadband PCS*, PP Docket No. 93-253, ET Docket No. 92-100, Memorandum Opinion & Order, 11 FCC Rcd 17052 (1996) (*PCS Licensing Deferral Order*)).

²³ See *ICO 2 GHz MSS Order*, 16 FCC Rcd at 13774, ¶ 30.

²⁴ *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*, IB Docket No. 01-185, Notice of Proposed Rulemaking, 16 FCC Rcd 15532 (2001) (*MSS Flexibility Notice*).

²⁵ 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*, ET Docket No. 00-258, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 16043 (2001) (*Advanced Wireless Services Further Notice*).

band segment to permit re-use of their assigned MSS frequencies to operate terrestrial base stations for the purpose of extending their communications services to locations where the satellite signal is attenuated, and an alternative proposal to award separate licenses for any operator to offer terrestrial mobile services either in conjunction with MSS or as an alternative mobile service.²⁶ In the *Advanced Wireless Services Further Notice*, the Commission sought comment on reallocating spectrum for use by advanced wireless systems from bands currently allocated to, *inter alia*, MSS.²⁷ Within the MSS spectrum, the Commission sought comment on whether to reallocate portions of the 1990-2025 MHz and 2165-2200 MHz bands from MSS to advanced wireless services.²⁸

7. On August 16, 2001, the Wireless Carriers filed a joint Application for Review of the grants of authority to the MSS applicants. The Wireless Carriers argue, among other things, that the Bureau engaged in unreasoned decisionmaking by granting the authorizations before resolving questions concerning viability of MSS raised by the CTIA Petition for Rulemaking.²⁹ Each of the eight MSS licensees filed Oppositions to the Wireless Carriers' Application for Review, both on procedural grounds and the merits.³⁰ The Wireless Carriers replied to the oppositions.³¹

II. DISCUSSION

8. The MSS licensees challenge the standing of the Wireless Carriers to seek Commission review of the *MSS Licensing Orders*. Notwithstanding this issue, we have the discretion to consider their Application for Review and related filings to ensure that the Orders for which they seek review examine the relevant data and articulate a satisfactory explanation for their actions, including a "rational connection between the facts found and the choice made."³² In this case we do so. We conclude that the Bureau and OET acted correctly and find no grounds sufficient to reverse the *MSS Licensing Orders*.

9. The Wireless Carriers contend that the *MSS Licensing Orders* demonstrate that the Commission staff (1) engaged in unreasonable decision making in refusing to defer licensing of the 2 GHz MSS operations; (2) violated section 309 of the Communications Act and principles of administrative law in failing to resolve questions of fact; (3) acted in an arbitrary and capricious manner in granting the ICO

²⁶ *MSS Flexibility Notice*, 16 FCC Rcd at 15532, ¶ 1 and 15548, ¶ 37.

²⁷ *See Advanced Wireless Services Further Notice*, 16 FCC Rcd at 16050-59, ¶¶ 14-35.

²⁸ *Id.*

²⁹ Application for Review, *supra* note 1.

³⁰ *See* Opposition of ICO Services Limited; Opposition of Constellation Communications Holdings, Inc.; Opposition of the Boeing Company; Opposition of Iridium LLC; Opposition of Globalstar, L.P.; Opposition of Celsat America, Inc.; Opposition of TMI Communications and Company, L.P., Opposition of Mobile Communications Holdings, Inc. (each filed on Aug. 31, 2001).

³¹ Reply to Opposition of AT&T Wireless Services, Inc., Verizon Wireless, and Cingular Wireless LLC (filed Sept. 13, 2001).

³² *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

application; and (4) erred in adopting a band plan that effectively would reserve spectrum for MSS notwithstanding recent initiation of rulemakings to explore alternative uses of the MSS bands.³³

10. The record and reasoning in the *MSS Licensing Orders* fully support the decision not to delay action on the 2 GHz MSS authorizations pending action on the CTIA Petition for Rulemaking or on other requests to alter the band. The grant of authorizations was pursuant to established Commission policy.³⁴ The Commission found clear public interest benefits in providing for 2 GHz MSS ten months before the license grants. In its *2 GHz MSS Service Rules Order*, the Commission provided a comprehensive statement of the agency's rationale for licensing the 2 GHz MSS systems.³⁵ In addition to noting the Commission-level affirmation of its 2 GHz MSS decisions, the *MSS Licensing Orders* explain in detail how the Wireless Carriers' requested delay in licensing would harm competition, prevent new services and disserve the public interest.³⁶ The Commission staff correctly noted that CTIA's request to reallocate the 2 GHz MSS bands for other uses did not require deferral of action because the CTIA Petition for Rulemaking did not contain credible evidence to call into question the Commission's findings that 2 GHz MSS is in the public interest.³⁷ Their finding that the 2 GHz MSS applicants continued to pursue their proposed systems is consistent with the Commission's *2 GHz MSS Service Rules Order*, and based upon the record. They correctly concluded that ICO's *ex parte* letter proposing additional MSS licensing flexibility was not a major amendment requiring notice and comment because ICO did not seek authority to provide ATC in the context of the application process.³⁸ That filing was made in the Commission's service rules proceeding and requested amendment of the rules to permit 2 GHz MSS operators to provide ATC.³⁹

³³ Application for Review at 7-8.

³⁴ See, e.g., *Teledesic LLC v. FCC*, 275 F.3d 75, 85 (D.C. Cir. 2001) (citing *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989)).

³⁵ See *2 GHz MSS Service Rules Order*, 15 FCC Rcd at 16128-29, ¶ 1; *id.* at 16145-46, ¶¶ 33-34.

³⁶ See, e.g., *ICO 2 GHz MSS Order*, 16 FCC Rcd at 13744, ¶ 30; see also, e.g., *PCS Licensing Deferral Order*, 11 FCC Rcd 17052 (declining to defer grant of A and B block PCS licenses pending the outcome of the C block PCS auction on the basis that the request to defer was an untimely attempt to seek reconsideration of the PCS licensing rules and that the requester had failed to meet the test for determining whether stay of a proceeding is appropriate); *Amendment of Part 74, Subpart D (Remote Pickup Broadcast Stations) of the Commission's Rules and Regulations*, Docket No. 20189, RM-1735, Memorandum Opinion and Order, 62 FCC 2d 127 (1976) (denying request to defer effective date of Commission order amending Remote Pickup Broadcast Service Rules, rejecting contention of petitioning party that the Commission should not have issued the order before acting on petitioner's petition for rulemaking seeking to reallocate certain frequencies from the Remote Pickup Broadcast service to the Business Radio Service); *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*, ET Docket No. 00-258, Memorandum Opinion and Order, 16 FCC Rcd 7636, 7638, ¶ 8 (Mass Media Bur. 2001) (concluding that issuance of notice of proposed rulemaking to consider the possibility of introducing new advanced mobile and fixed services in 2500-2690 MHz band, which is occupied by MDS and ITFS licenses, does not require Commission to defer action on MDS and ITFS two-way applications).

³⁷ *ICO 2 GHz MSS Order*, 16 FCC Rcd at 13774, ¶ 31.

³⁸ *Id.* at ¶ 30.

³⁹ See ICO *ex parte* letter dated March 8, 2001.

11. Further, the Commission staff acted reasonably in rejecting the Wireless Carriers' claim that new factual issues had been raised that undermined the Commission's original decision to allocate spectrum in the 2 GHz band to MSS. This claim was primarily predicated upon ICO's *ex parte* filing. In that filing, ICO noted early MSS failures, continued difficulty in obtaining financing for prospective MSS operators, and questioned the future viability of MSS unless operators were given flexibility to provide ATC.⁴⁰ ICO did not, however, state that it was abandoning its proposed 2 GHz MSS system and reaffirmed the public benefits that it believed would result from its proposed system. Other 2 GHz MSS applicants submitted letters stating that ICO did not speak for them, emphasizing that they were not relying upon ICO's ATC concept, and confirming their intention to pursue their proposed systems.⁴¹ The comments of a 2 GHz MSS applicant taken into consideration with other *ex parte* filings in the service rules proceeding provided no basis to change the Commission's conclusions that the proposed 2 GHz MSS systems could provide public interest benefits to rural and unserved areas. The status of early generation MSS systems was well known to the Commission when it developed its 2 GHz MSS service rules. Nor was there information that called into question the applicant's qualifications under the service rules established by the Commission. In making its findings, the Commission's staff found the applicants qualified under these rules. We find that the staff properly did not consider allegations as to the financial viability of 2 GHz MSS, because the Commission specifically rejected financial qualifications as part of the licensing criteria for 2 GHz MSS systems.⁴² Instead, the Commission required that licensees be subject to milestones to ensure that they construct and operate in a timely fashion.⁴³ The *MSS Licensing Orders* imposed milestones on the 2 GHz MSS licensees consistent with Commission policy.

12. Finally, contrary to the Wireless Carriers' claims, the filing of a petition for rulemaking or similar document does not require the Commission to freeze all administrative activity involving the subject of the pleading. Requiring cessation of all application processing whenever a petition for rulemaking happens to address changes to an applicants' particular frequency band or mode of operation would not only circumvent our carefully circumscribed rules governing petitions for stay,⁴⁴ but also

⁴⁰ See ICO *ex parte* letter dated March 8, 2001 at 1, 3-5 and 6.

⁴¹ See *ex parte* filing of Celsat America, Inc. filed June 25, 2001 in IB Docket No. 99-81; *ex parte* filing of the Boeing Company filed May 24, 2001 in IB Docket No. 99-81 at 2; *ex parte* filing of Globalstar, L.P. filed July 2, 2001 in IB Docket No. 99-81 at 2 (stating that "[a]lthough New ICO appears to believe that ancillary terrestrial service is essential to its MSS business plan, Globalstar does not").

⁴² *2 GHz MSS Service Rules Order*, 15 FCC Rcd at 16151-51, ¶¶ 46-48.

⁴³ *Id.* at 16177, ¶¶ 106-111.

⁴⁴ See generally, e.g., 47 C.F.R. §§ 1.44(e) ("Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading"), 1.45(d) ("Oppositions to a request for stay of any order or to a request for other temporary relief shall be filed within 7 days after the request is filed."). When considering requests for stay, the Commission follows the standard set forth in *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). See, e.g., *Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum*, Order, DA 02-2631, 17 FCC Rcd 19746, 19753, ¶ 12 (WTB 2002) (*Public Coast Auction Order*) (citing *Virginia Petroleum Jobbers*, 259 F.2d at 925; *WMATA*, 559 F.2d at 843). Under this test, a stay is warranted only if the movant can demonstrate that: "(1) it is likely to prevail on the merits; (2) it will suffer irreparable harm, absent a stay; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay." *Public Coast Auction Order*, 17 FCC Rcd at 19753, ¶ 12. In this case, the Wireless Carriers did not request a stay in licensing consistent with our rules and, in any case, failed to make a case under the criteria for issuance of a stay.

would greatly disrupt the agency's ability to function in carrying out established policies and undermine the regulatory certainty necessary for industry to rely upon agency decisions in making investments in new services. Moreover, in this case, the Wireless Carriers fail to demonstrate that they have been harmed by grant of the 2 GHz MSS applications. The Wireless Carriers speculate that, if the Commission's staff had not granted the pending 2 GHz MSS applications, the Commission might have reversed its prior decisions and reallocated the entire 70 MHz of 2 GHz MSS spectrum to other types of users including commercial mobile radio service or advanced wireless services.⁴⁵ This argument is tenuous, speculative, and wholly inadequate to justify the relief that is sought by the Wireless Carriers in their application for review. Moreover, subsequent to the *MSS Licensing Orders*, the Commission initiated two proceedings seeking comment on (1) whether MSS licensees in three different frequency bands should be authorized to offer ATC,⁴⁶ and (2) whether the amount of spectrum currently allocated to MSS at 2 GHz continues to be justified.⁴⁷ The Wireless Carriers therefore have been afforded an opportunity to put their views before the Commission on these issues.⁴⁸ At the same time, the 2 GHz MSS licenses have been given opportunity to pursue their proposed systems subject to the milestone conditions imposed as part of their licenses.

13. We find that the Commission staff properly exercised their discretion to resolve the issues of licensing without deferring action on the 2 GHz MSS applications pending Commission action on the CTIA Petition for Rulemaking or other requests to alter the band. We find that the Commission staff examined relevant data and rationally connected the facts found and the choice made when they issued the 2 GHz MSS authorizations. There is no basis to conclude that the Commission's staff acted improperly in granting the 2 GHz MSS applications.

14. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(g) of the Commission's rules, 47 U.S.C. § 1.115(g), the Application for Review filed by AT&T Wireless Services, Inc., Verizon Wireless, and Cingular Wireless LLC of the above-captioned authorizations is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁵ See generally Wireless Carriers Application for Review at 10-11 and Reply to Oppositions to Application for Review at 1-2.

⁴⁶ See *MSS Flexibility Notice*, 16 FCC Rcd 15532.

⁴⁷ See *Advanced Wireless Services Further Notice*, 16 FCC Rcd 16043.

⁴⁸ *Id.* at 16054-55, ¶¶ 22-23. The Commission granted to the extent indicated therein and otherwise denied the CTIA Petition for Rulemaking.