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June 14, 1996

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OUR FILE NO.
25062.74419

VIA MESSENGER

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation
ET Docket No. 95-183, RM-8553

Dear Mr. Caton:

On June 13, 1996, representatives of Milliwave L.P. ("Milliwave") met with Jackie Chorney of Chairman Hundt's office and David Siddall of Commissioner Ness' office to discuss issues related to the above-referenced proceeding. Representing Milliwave were Lex Felker and Milliwave's undersigned counsel. The attached materials outlining the topics discussed were distributed at the meetings.

An original and one copy of this notice are being submitted for inclusion in ET Docket No. 93-183 pursuant to Section 1.1206(a)(2) of the Commission's rules.

Very truly yours,

Carl W. Northrop
of PAUL, HASTINGS, JANOFSKY & WALKER

Enclosure

cc: Jackie Chorney, Esquire
David Siddall, Esquire

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Background

Milliwave L.P.'s principals are experienced telecommunications professionals with significant resources and communications expertise

- Tom Domencich
- Dennis Patrick
- Lex Felker

Milliwave L.P. was an early participant in 39 GHz licensing and now holds licenses in 88 markets, including most of the top 100 markets.

Milliwave is building a competitive LEC and CAP business, not just a link business.

Milliwave is actively marketing its services, purchasing equipment and proceeding with the construction of its stations. It will be operational in its first 34 markets by September 1996.

The company is about to conclude a major round of outside financing.

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The Proposed Construction Standard for Incumbents of 1 Link Per 10 Square Miles in 18 Months is Patently Unreasonable

No commenter supported the proposed standard; no incumbent said it could meet the proposed standard.

The costs of compliance are astronomical.

- Milliwave would be forced in just 18 months to install an average of approximately 400 links in each market, at an aggregate cost of $750 million dollars. If this was possible, it would be an imprudent deployment of capital.

- From an industry perspective, meeting the standard would require incumbents to invest over $10 billion in infrastructure in 18 months. This exceeds the total capital investment that was made in the cellular industry, arguably the most successful telecommunications business in history, after 10 years of operation.

Equipment availability and obsolescence are serious concerns.

- Equipment suppliers likely will be unable to deliver sufficient equipment on a timely basis to meet the industry's needs.

- No manufacturer said it supports the proposal. Instead, they urged the Commission to adopt a reasonable standard.

- Artificial front-loaded construction requirements will lock in current technology and stifle innovation in equipment design.

There is **no correlation** between the proposed number of links and the realities and needs of the marketplace.

- The same number of links is mandated in the New York City and Topeka, KS markets.
- CLEC and CAP uses call for much different deployment than PCS backhaul networks.

There Is No Public Policy Basis for Having One Standard for Incumbents and Another Standard for Auction Winners

All licensees have the same market-based, competitive incentives to develop their services fully, regardless of how the licenses were obtained.

There is no evidence of spectrum warehousing by incumbent licensees. In fact, the construction deadlines for most licenses have not yet expired.

Imposing discriminatory construction standards will skew the marketplace.

- Milliwave will be required to purchase and install thousands of links, while auction winners will be allowed to respond to market needs.
- Unlike auction winners, incumbents would be tied to "old" equipment at a time when technology is rapidly evolving.

Discriminatory Construction Obligations May Be Found to be Illegal

Section 309(j)(6)(D) of the Act envisions regulatory parity between licensees who get their licenses at auction and those who do not. It states that no provisione of Section 309(j) "shall be construed to convey any rights . . . that differ from the rights that apply to other licensees within the same service that are not issued" by auction. 47 U.S.C. Section 309(j)(6)(D) The legislative history of this provision clearly instructs the Commission that the use of auctions was intended to have "no effect on the requirements, obligations, or privileges of the license holders."

Recapturing spectrum for auction through burdensome, retroactively-applied construction standards exceeds the Commission's auction authority which is expressly limited to "initial" licenses. 47 U.S.C. § 309(j)(1)

Adopting the proposed standard would be arbitrary and capricious in the absence of any record support for the 1 link per 10 square mile standard.

The mandate for the Commission to ensure the participation of small businesses and other designated entities in the communications industry is undermined by the unduly burdensome construction requirement which would have serious adverse effect on incumbent 39 GHz licensees who are small businesses.

The proposal also constitutes an unlawful retroactive application of new rules that creates a burdensome new obligation and substantially harms the reliance interests of incumbents.

There is no precedent for the proposed new burden on incumbents. The Commission has converted to, or is considering converting to, wide-area license auctions for 800 MHz SMR, 900 MHz SMR, 220 MHz SMR, IVDS, MDS, and paging -- and never has proposed such draconian and punitive requirements for existing licensees.

A "Substantial Service" Performance Requirement Should Apply to All 37 and 39 GHz Licensees

There is broad support among all commenters for a reasonable substantial service standard for all 37 and 39 GHz licensees.

A certain minimum number of links would be acceptable as a "safe harbor" (i.e. an unrebuttable presumption that construction of a predetermined reasonable number of links will be deemed "substantial").

- The NPRM's alternative proposal of 15 links in top 10 markets, 10 links in markets 11-25, and five links in all other markets, is a reasonable safe harbor.

Licensees could satisfy the substantial service requirement either by operating the requisite number of links or by making an alternative showing that their operations are substantial.

The compliance date should be the date of renewal, which is February, 2001 for all incumbent licenses. Demonstration of compliance should result in a renewal expectancy.

The initial construction obligation of current rules -- one link within 18 months of license grant -- should not change.

The Decision of the Commission to Cease Processing Application Amendments as of November 13, 1995 is Sustainable

The Decision is Lawful

The Courts have consistently upheld the authority of the FCC to dismiss applications when it changes its rules. See Hispanic Information and Telecommunications Network v. FCC, F.2d 1289, 1294-95 (D.C. Cir. 1989) (Commission may change substantive standards, thus making a previously acceptable application no longer qualified and therefore subject to dismissal). "The filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed." Id. (Citing Storer Broadcasting, 351 U.S. at 197).

The Communications Act requirement that the Commission use "engineering solutions" to "avoid" mutual exclusivities (47 U.S.C § 309(j)(6)(E)) does not require that the 11th hour amendments be processed.

- Existing 39 GHz application processing rules satisfy the statutory standard by requiring prior frequency coordination to avoid frequency conflicts.

- The applicants are not seeking to "avoid" mutual exclusivities, they are seeking to resolve mutual exclusivities. The Commission is entitled to cut off settlement negotiations at some point. If it could not, presumably there would never be an auction.

The Decision is Equitable

Processing currently "frozen" amendments generated by last minute settlement agreements will, as a general matter, benefit applicants who did not initially abide by the "one-to-a-market" rule and the prior frequency coordination rules. This will inure to the detriment of applicants, like Milliwave, who scrupulously adhered to the Commission's directives.