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

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In the Matter of	)	
	)	
Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands	)	ET Docket No. 95-183 RM-8533
	)	
Implementation of Section 309(j) of the Communications Act — Competitive Bidding, 37.0-38.6 GHz and 38.60-40.0 GHz Bands	)	PP Docket No. 93-253

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To: The Commission

PETITION FOR PARTIAL RECONSIDERATION OF ELAR CELLULAR

ELAR Cellular ("ELAR") petitions this honorable Commission to reconsider and revise, as specified herein, its Memorandum Opinion and Order in the above-captioned proceeding, released January 17, 1997, (hereinafter "January 17 *MO&O*").[1]

In issuing the January 17 *MO&O,* the Commission modified certain aspects (while affirming others) of the *MO&O*'s antecedent Notice of Proposed Rulemaking and Order, released December 15, 1995 ("December 15 *NPRM*").[2] For purposes of this petition, the January 17 *MO&O*'s most significant change to the December 15 *NPRM* was the determination to "resume processing" 39 GHz applications filed after November 13 but before December 15, 1995. ELAR will demonstrate that

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1/ FCC 96-486.

2/ Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands (Notice of Proposed Rulemaking and Order), 11 FCC Rcd 4930 (1995).

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this action was inadequate to rehabilitate the flawed December 15 *NPRM*. For this reason, the January 17 *MO&O* must be partially revised to state that the Commission will resume processing any amended, ripe 39 GHz application irrespective of the amendment's filing date.

I. STATEMENT OF INTEREST

Pursuant to authorizations issued by the Commission, ELAR has constructed 39 GHz systems in seven markets throughout the nation. ELAR also has twenty-five 39 GHz applications pending before the Commission. These applications were amended on December 15, 1995 -- to reduce the proposed service area. The cut-off established by the January 17 *MO&O* is likely to prejudice the filing of these pending applications and, as a result, gives ELAR standing to file this petition.

II. THE JANUARY 17 *MO&O*, THE DECEMBER 15 *NPRM* AND OTHER RELEVANT FACTS

The January 17 *MO&O* was precipitated by petitions for reconsideration filed with respect to the Commission's December 15 *NPRM* which, in turn, relates back to an order bearing the caption RM-8553, released November 13, 1995 ("*Freeze Order*").[3] The *Freeze Order* summarily banned filing of new 39 GHz applications pending action on the rulemaking petition bearing the RM-8553 designation. The December 15 *NPRM* proposed radical changes in licensing, operational and technical rules for the 39 GHz bands, advocating assignment of all unlicensed spectrum in this band according to competitive bidding. The December 15 *NPRM* also imposed an interim licensing policy declaring for the first time that, effective immediately, the Commission was holding in abeyance: (1) any application either subject to mutual exclusivity ("MX") or within the sixty (60)

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[3] DA 95-2341.

day MX period as of November 13, 1995; and (2) any pending 39 GHz application for which an amendment had been filed on or after November 13, 1995, *i.e.*, the date the *Freeze Order* was released.

The January 17 *MO&O* (at ¶17) states that amendments curing mutual exclusivity are "amendments of right" under Rule Sections 101.29 and 101.45, and are effective when filed without staff action. Did the December 15 *NPRM* disobey these rules by suspending processing of every 39 GHz application amended after the *Freeze Order's* release? Decidedly not, according to the January 17 *MO&O* (at ¶17):

> While the December 15 freeze suspended any further action on these amendments, this freeze. . . did not negate the effectiveness of these amendments.

Nor, according to the January 17 *MO&O*, was the processing suspension imposed by the December 15 *NPRM* an impermissible retroactive rule -- for the following reason:

> The freeze did not alter the past legal consequences of petitioners' instant applications, because the Commission has not yet rendered a final disposition of these applications and amendments.[4]

To recapitulate, the December 15 *NPRM's* freeze on applications amended on or after November 13, 1995 neither violates the effective upon filing provisions of Sections 101.29 and 101.45 nor constitutes a retroactive rule (because the Commission has yet to decide the amended applications' ultimate fate. Having purportedly demonstrated the December 15 *NPRM's* validity and benignity, the January 17 *MO&O* nonetheless proceeds to change it significantly, stating that ripe, non-mutually exclusive applications amended on or <u>after</u> November 13 but <u>before</u> December 15 will

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[4] January 17 *MO&O* at ¶11.

now be processed. The rationale for this retreat from the December 15 *NPRM's* freeze - - only the discovery (after further consideration) that these amended applications "are not materially different than the other non-mutually exclusive applications that we have decided to process."[5]

By vigorously defending the December 15 *NPRM*, on the one hand, while bestowing a valuable concession on those whose applications were frozen thereby, on the other, the January 17 *MO&O* is transparently unsustainable. Stated simply, the *MO&O* demonstrates neither rationality nor logical consistency. Accordingly on reconsideration, the Commission must revise the *MO&O* as set forth herein.

III. ARGUMENT

The January 17 *MO&O* must be revised so that any amended 39 GHz application that is otherwise ripe will be processed immediately, irrespective of the amendment's filing date. This change is compelled by each of the following attributes of the January 17 *MO&O*:

- it undermines application amendment rules for the 39 GHz band;
- its claim of non-retroactivity for the December 15 *NPRM* cannot be reconciled with the revision it imposes thereto; and
- assuming arguendo that the aforementioned revision was impelled by the inadequate notice provided by the December 15 NPRM, the January 17 *MO&O* fails to overcome that lapse in the December 15 freeze.

These defects are discussed, in sequence, below:

A. Offending Application Amendment Rules

The January 17 *MO&O* insists on claiming that suspending processing of validly amended applications in no way compromise rules making the amendments immediately effective

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[5] January 17 *MO&O* at ¶17 (footnote omitted).

without any staff action whatsoever.[6] But what Commission objective is served by suspending amended applications, notwithstanding the amendments' immediate effectiveness? The suspension gives the Commission subsequent opportunity it would not normally have to dismiss these applications or to redefine them as nothing more than auction admission tickets. Absent the intention to pursue these two options, the Commission has no reason to hold amended applications in abeyance.

Either option, however, is irreconcilable with the Commission's claim that the December 15 freeze "did not negate the effectiveness of these amendments."[7] The sole purpose of amendments to 39 GHz applications is to make the applications immediately grantable by eliminating mutual exclusivity and/or by conforming the application to technical requirements for the 39 GHz band. By facilitating the amended applications' dismissal or coerced reincarnation (as admission tickets), the December 15 *NPRM and January 17 MO&O* shatter the amendments' effectiveness, thus doing violence to Sections 101.29 and 101.45 of the Commission's Rules. For this reason alone, the January 17 *MO&O* must be revised.

B. Implausible Claim of Non-Retroactivity

To the petitioners who argued that the December 15 *NPRM* constituted an impermissible retroactive rule, the January 17 *MO&O* responds that the Commission has yet to render "a final disposition" with respect to the amended-applications whose processing has been suspended.[8] Stated differently, the eventual dismissal or transformation (into auction tickets) of the suspended-amended-

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[6] January 17 *MO&O* at ¶¶11, 17.

[7] Id.

[8] Id. At ¶11.

applications is no certainty. Thus, the December 15 freeze escapes the scourge of "retroactivity."

There are ample grounds for doubting the plausibility and sincerity of this theory. First, if suspending processing of amended applications fails to constitute a retroactive rule, why does the January 17 *MO&O* relax the pre-existing freeze, extending the cut-off for application amendments from November 14 up to and including December 14, 1995. Under the January 17 *MO&O* rationale, the Commission could toughen the December freeze, reaching back in time and suspending processing of any amended applications, provided it had "not yet rendered a final disposition" of these amended applications.

Second, were the Commission sincere in its inference that applications amended on December 15 and thereafter could still be granted, the January 17 *MO&O* would have provided that any auction or other order to the contrary will be automatically stayed. A self-executing stay will allow disappointed applicants to bring suit alleging that the December 15 *NPRM* and January 17 *MO&O* violated the applicants' amendment rights without the pressure of an impending 39 GHz spectrum auction. The Commission's disregard for this basic procedural accommodation costs doubt on the view that the fate of suspended applications remains undecided.

Third, the January 17 *MO&O* fails to offer a single example where applications previously frozen are processed and granted upon introduction of competitive bidding rules. This lack of precedent further undermines the tacit claim that amended applications now held in abeyance may ultimately be granted.

Notably, the January 17 *MO&O* (at ¶17) offers a reason for loosening the freeze established by the December 15 *NPRM*. According to ¶17, applications amended on or after November 13 but before December 15, 1995 "are not materially different than the other non-mutually exclusive

applications that we have decided to process" (footnote omitted). If these two sets of applications are "not materially different, "then it follows that applications like ELAR's that were amended on December 15, 1995 (and applications amended thereafter) are materially different from the other non-MX applications the Commission's processing. The January 17 *MO&O*, however, provides no clue as to the identity of these material differences. Moreover, it is difficult to fathom what these differences could be or now they came to exist.

In all the foregoing respects, the January 17 *MO&O* is devoid of logical consistency and fails to satisfy the requirements of reasoned decision making.

C. Continuing Problems With Notice

The sole remaining explanation for the leeway in amended application processing granted by the January 17 *MO&O* is the lack of notice to the class of affected applicants provided by the December 15 *NPRM*. Nevertheless, the January 17 *MO&O* is silent on this subject, and private litigants have no duty to surmise the rationale for Commission actions or to fill-in lacunae in the reasoning in Commission decisions.

Assuming arguendo the extension to (but not including) December 15, 1995 for insulated-amended-applications declared by the January 17 *MO&O* was intended to overcome inadequate notice of the freeze imposed by the former, the problems remain uncured. The Commission's rules specifically provide that no person is expected to comply with any Commission requirement unless he has "actual notice" of that requirements.[9] Actual notice of a published document (like the December 15 *NPRM)* can occur no earlier than release of that document.

Under Section 1.4(b)(1) of the Rules, documents in rulemaking proceedings are "released"

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[9] See Section o.445(e) of the Rules.

upon publication in the Federal Register. The December 15 *NPRM* was published in the Federal Register on January 26, 1996. Therefore, the January 17 *MO&O* should have provided, at a minimum, that the Commission would resume processing all applications amended on or after November 13, 1995 but before January 26, 1996. By establishing December 15, 1995 as the amendment "cut off," the January 17 *MO&O* runs roughshod over the "actual notice" provisions of the Commission's Rules.

The validity of this conclusion is unimpaired by a determination that Rule 1.4(b)(1) is inapplicable here. The December 15 *NPRM* was unobtainable from the FCC Office of Public Affairs by 5:30 pm (EST) on December 15, 1995. Nor was the December 15 *NPRM* included with the FCC's Daily Digest, its appearance deferred until January 11, 1996. Thus, at a bare minimum, the January 17 *MO&O* should have determined that the Commission would resume processing all applications amended on or after November 13, 1995 but before January 11, 1996.

IV. CONCLUSION

The premises above considered, the January 17 *MO&O* should be revised to provide that the Commission will resume processing any amended, ripe 39 GHz application irrespective of the amendment's filing date.

Respectfully submitted,

ELAR CELLULAR

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