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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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April 13, 1998

VIA MESSENGER

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222; Stop Code 1170
Washington, D.C. 20554

Re: 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-8553

Dear Ms. Salas:

On behalf of James W. O'Keefe, enclosed herewith for filing in the above-referenced rulemaking proceeding are the original and four copies of his Reply. By this pleading, Mr. O'Keefe replies to the Consolidated Opposition and Comments of Winstar Communications, Inc. which it filed on April 6, 1998.

An extra copy of this filing is enclosed for date-stamping by the Commission. Please address any inquiries regarding this filing to the undersigned counsel for Mr. O'Keefe.

Very truly yours,

Andrea S. Miano

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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-8553
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz	)	PP Docket No. 93-253

REPLY

Pursuant to Section 1.429(g) of the Rules, 47 C.F.R. § 1.429(g), James W. O'Keefe ("O'Keefe") replies to the Consolidated Opposition and Comments of Winstar Communications, Inc. ("Winstar") which it filed on April 6, 1998 in the above-captioned rulemaking proceeding.[1] A portion of Winstar's pleading opposed O'Keefe's March 9, 1998 petition for reconsideration ("Petition for Reconsideration") of the Report and Order and Second Notice of Proposed Rulemaking, 8 C.R. 3002 (1997) (hereinafter "Report and Order") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.

By this pleading, O'Keefe seeks to correct a factual misrepresentation contained in Winstar's Opposition concerning O'Keefe's Petition for Reconsideration. Specifically, Winstar's Opposition states

> Because O'Keefe's petition addresses specific authorizations granted to Winstar, this proceeding is not the proper forum to address O'Keefe's concerns. That is especially true as O'Keefe's petition in this proceeding is

[1] Hereinafter referred to as the "Opposition."

> simply a rehash of the arguments raised in his more recently filed Petition for Reconsideration of the Commission's grant of various WinStar 39 GHz applications.

Opposition at 4 (citations omitted).[2]

While Winstar may encourage the Commission to disregard the linkage between the subject rulemaking proceeding and the Winstar Licensing Proceeding, the two are inextricably linked. Specifically, within the context of the subject rulemaking proceeding, the Commission announced its decision to dismiss *all* pending mutually exclusive 39 GHz applicants *without prejudice*.[3] By granting the mutually exclusive applications of Winstar, however, the Commission has effectively dismissed O'Keefe with prejudice. O'Keefe will not be able to apply for these licenses in accordance with the revised licensing regime adopted by the Commission in the subject rulemaking proceeding because those licenses have already been awarded to Winstar, contrary to the policy articulated in the Report and Order. Thus, assuming *arguendo*, that the Commission is permitted to dismiss pending mutually exclusive 39 GHz applicants in this proceeding,[4] the manner in which it has implemented this policy is in direct violation of Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

As established in the Petition for Reconsideration, even assuming that it was appropriate for the FCC to dismiss mutually exclusive 39 GHz applicants, it did so in contravention of legal

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[2] The separate proceeding in which O'Keefe has contested the grant of licenses to Winstar will hereinafter be referred to as the "Licensing Proceeding." See FCC File No. 9404165 (lead).

[3] Report and Order at ¶ 90 (The Commission held that "the best approach for processing pending mutually exclusive applications is to dismiss them without prejudice, and to allow these applicant to submit new applications under the competitive bidding rules established in this proceeding.").

[4] As O'Keefe established in the Petition for Reconsideration, the Commission failed to provide a concise or reasoned explanation for this decision anywhere in this proceeding as is required by legal precedent. Petition for Reconsideration at 6-8.

precedent.[5] The Commission has stressed throughout this proceeding that its overarching goals were "to foster competition among different service providers, to promote maximum efficient use of the spectrum, and to provide efficient service to customers by improving the licensing procedure . . .."[6] The Commission justified its decision to dismiss all pending mutually exclusive applicants without prejudice and allow them to reapply for licenses pursuant to its revised geographic licensing regime on these very principles. As noted above, however, when it issued licenses to Winstar, the Commission effectively denied O'Keefe's applications with prejudice, in violation of the requirements of Ashbacker.

O'Keefe's Petition for Reconsideration did not address the merits of Winstar's subject applications.[7] In fact, the Petition for Reconsideration specifically noted that the grant of Winstar's applications would "be addressed by O'Keefe in a separate Petition for Reconsideration pleading,"[8] which was filed by O'Keefe on March 12, 1998.[9] O'Keefe intentionally refrained from raising in this proceeding any issues in his Petition for Reconsideration with respect to the fact that the grant of licenses to Winstar was in blatant violation of the Commission's rules and policies. However, in order to establish the prejudicial manner in which the Commission had applied its 39 GHz licensing policy, it was necessary to raise the fact that the Commission erroneously granted some mutually exclusive applications (i.e. Winstar's) and not others.

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5 Id. at 8-9.

6 Report and Order at ¶ 87.

7 Opposition at 4.

8 Petition for Reconsideration at note 15.

9 See FCC File No. 9404165 (lead). O'Keefe also filed a Reply to Winstar's Opposition to the Petition for Reconsideration in that proceeding on April 1, 1998. O'Keefe established that his applications were timely filed within the "cut-off" period triggered by a major amendment to applications Winstar was acquiring from Avant-Garde Telecommunications, Inc. Reply at 3-6.

For the reasons described above, that portion of Winstar's Opposition pertaining to O'Keefe is without merit, and should be ignored by the Commission in this proceeding. Moreover, for the reasons detailed in the Petition for Reconsideration, the Commission must reconsider its decision in its Report and Order to dismiss all pending mutually exclusive 39 GHz applicants.

Respectfully submitted,

JAMES W. O'KEEFE

By: _____

John J. Salmon, Esquire
David C. Leach, Communications Industry Advisor
Andrea S. Miano, Esquire

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Counsel for James W. O'Keefe

Dated: April 13, 1998

CERTIFICATE OF SERVICE

I, Andrea S. Miano, do hereby certify that on this 13th day of April, 1998, a copy of the foregoing Reply has been mailed first class mail, postage prepaid, to the following:

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