ORIGINAL

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

In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use	)	IB Docket No. 98-172 RM-9005 RM-9118

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OFFICE OF THE SECRETARY

LOCKHEED MARTIN CORPORATION
CONSOLIDATED OPPOSITION TO PETITION
FOR INTERIM RELIEF AND EMERGENCY
REQUEST FOR IMMEDIATE RELIEF

Lockheed Martin Corporation ("Lockheed Martin") hereby submits its opposition to the Petition for Interim Relief filed by the Fixed Point-to-Point Communications Section, Wireless Communications Division of the Telecommunications Industry Association ("TIA Fixed Section") and the Emergency Request for Immediate Relief filed by the Independent Cable and Telecommunications Association ("ICTA") in the above-captioned proceeding.[1]

In their filings, ICTA and the TIA Fixed Section express concern about regulatory uncertainty resulting from proposed changes to the FCC's rules under consideration in this proceeding, and request the Commission to immediately resolve that uncertainty in favor of fixed

[1] Petition for Interim Relief, IB Docket No. 98-172, RM-9005, RM-9818 (filed Nov. 2, 1998) ("*TIA Petition*"); and Emergency Request for Immediate Relief, IB Docket No. 98-172, RM-9005, RM-9818 (filed Nov. 5, 1998) ("*ICTA Request*").

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service interests before the completion of its statutorily mandated notice and comment procedures. However, the regulatory uncertainty inherent in considering proposed changes to the Commission's rules cannot be resolved by simply modifying FCC proposals to favor certain interests at the expense of others in violation of the Administrative Procedure Act. Such uncertainty, which affects *all* potential users of the 18 GHz band, can only be resolved through expeditious resolution of the instant rulemaking proceeding.

I. INTRODUCTION

Nearly two years ago, on December 23, 1996, Lockheed Martin, AT&T Corp., Hughes Communications, Inc., Loral Space & Communications Ltd., and GE American Communications, Inc. filed a joint Petition for Rulemaking proposing blanket licensing for geostationary satellite orbit ("GSO") fixed-satellite service ("FSS") earth stations operating in Ka-band frequencies.[2] The Commission placed the petition on Public Notice on January 16, 1997, and accepted comments from interested parties at that time.[3] In addition, on September 5, 1997, the Commission issued a second Public Notice which requested comments on issues raised by the petition in order to refresh the record.[4] At that time, the TIA Fixed Point-to-Point Section of the Network Equipment Division, ICTA, and other fixed service ("FS") interests filed extensive comments opposing blanket licensing in the 18 GHz band.[5]

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2 *See* Routine Licensing of Large Numbers of Small Antenna Earth Stations Operating in the Ka-Band, Petition for Rulemaking, RM-9005 (filed Dec. 23, 1996).

3 *See Public Notice*, Rep. No. 2173 (rel. Jan. 16, 1997). Teledesic Corp. filed comments supporting the petition and proposed that the rulemaking proceeding be expanded to include non-geostationary satellite orbit ("NGSO") FSS earth stations operating at Ka-band. *See* Comments of Teledesic Corp., RM-9005 (filed Feb. 18, 1997).

4 *See Public Notice*, IN Rep. No. 97-27 (rel. Sept. 5, 1997).

5 *See, e.g.*, Comments of TIA Fixed Section, RM-9005 (filed Sept. 23, 1997); Comments of ICTA, RM-9005 (filed Sept. 24, 1997). With respect to the TIA Fixed Section's comments, it appears that the Fixed Point-to-Point Section which commented on the Petition for Rulemaking is in a different TIA division than the Fixed Point-to-Point Section which filed the Petition for Interim Relief (Network Equipment Division versus Wireless Communications Division).

On September 17, 1998, after extensive consideration of all the comments filed regarding the Petition for Rulemaking, the Commission issued a Notice of Proposed Rulemaking ("NPRM") to institute the requested rulemaking proceeding.[6] In the NPRM, the Commission tentatively concluded that "the public interest is best served by separating terrestrial fixed service operations from the operations of non-government ubiquitously deployed FSS earth stations into dedicated sub-bands."[7] Accordingly, among other measures proposed in the NPRM, the Commission proposed to downgrade co-primary FS allocations in the 18.3-18.55 GHz and 18.8-19.3 GHz bands to facilitate the ubiquitous deployment of GSO FSS and NGSO FSS earth stations in those bands, but proposed to grandfather FS operations which were licensed or for which applications had been filed as of the NPRM's release date.[8]

Apparently dissatisfied with the Commission's implementation of the Administrative Procedure Act's notice and comment rulemaking procedures, the TIA Fixed Section filed a "Petition for Interim Relief" and ICTA filed an "Emergency Request for Immediate Relief" under Section 1.41 of the Commission's rules. As discussed below, the informal requests for "relief" are procedurally infirm and should be treated as early filed comments in the rulemaking

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Although it cannot be certain, Lockheed Martin presumes that these TIA Fixed Sections would promote the same or similar FS interests and will hereafter refer to them collectively as the "TIA Fixed Section"). Lockheed Martin is certain, however, that neither Fixed Section represents the interests of TIA or its member companies as a whole. Lockheed Martin understands, for example, that the TIA Spectrum and Orbit Utilization Section of the Satellite Communications Division has prepared an Opposition to the Petition for Interim Relief filed by the TIA Fixed Section.

6 *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, Notice of Proposed Rulemaking, IB Docket No. 98-172, RM-9005, RM-9118 (rel. Sept. 18, 1998) ("NPRM").

7 NPRM ¶ 1.

8 *See* NPRM ¶¶ 30-31, 40. The Commission also proposed to downgrade the GSO FSS allocation in the 17.7-18.3 GHz band, in addition to other regulatory changes.

proceeding. To the extent that these pleadings constitute cognizable requests for relief, they should be denied.

II. THE PLEADINGS OF THE TIA FIXED SECTION AND ICTA SHOULD BE TREATED AS COMMENTS

The requests of the TIA Fixed Section and ICTA directly challenge the FCC's discretion not only to implement, but also to *propose*, changes in Commission regulation pursuant to a rulemaking proceeding. In its NPRM, the Commission proposed to implement certain regulatory measures and requested comments from interested parties on those proposals. Dissatisfied with specific aspects of the Commission's proposal, the TIA Fixed Section and ICTA petition the Commission to modify the NPRM because its proposal may have adverse consequences on certain FS interests.[9]

Without discussing the merits of these claims (which are addressed below in Section III), the pleadings constitute a transparent attempt to short-circuit this rulemaking proceeding and unfairly alter the content of the Commission's NPRM before other interested parties have had an opportunity to comment. Indeed, ruling on the merits of the TIA Fixed Section's and ICTA's claims would invite countless other parties to improperly utilize Section 1.41 to challenge the Commission's regulatory proposals, effectively establishing an additional preliminary round of comments in rulemaking proceedings. Moreover, permitting parties to challenge regulatory proposals in this manner -- instead of through the public comment process as required under the Commission's rules -- would undermine the rulemaking process and would have a chilling effect on the Commission's ability to act pursuant to its statutory rulemaking authority.

In addition, the relief requested by the TIA Fixed Section and ICTA is not cognizable under Section 1.41 because the Commission has not implemented any regulatory change from which relief can be granted. The NPRM contains mere proposals which are currently under consideration by the Commission. Although the proposals may have incidental adverse

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9 *See generally TIA Petition* and *ICTA Request*.

consequences on the interests of certain parties, the Commission cannot grant "relief" from regulations that have not yet been implemented.

At their core, the pleadings of the TIA Fixed Section and ICTA are merely comments against the Commission's proposal to downgrade the FS allocation and grandfather certain FS operations in the 18.3-18.55 GHz and 18.8-19.3 GHz bands. As such, the Commission should decline to consider these pleadings at this time, and instead treat them as early filed comments to be considered along with the comments of other interested parties in this proceeding.

III. TO THE EXTENT THE PLEADINGS OF THE TIA FIXED SECTION AND ICTA CONSTITUTE COGNIZABLE REQUESTS FOR RELIEF, THEY SHOULD BE DENIED

The TIA Fixed Section and ICTA have had ample opportunity to comment on the issues under consideration in this rulemaking proceeding. The TIA Fixed Section, in particular, has argued that FS sharing with ubiquitous FSS earth stations is generally unworkable and strongly opposed the petition for rulemaking.[10] The Commission considered these and other comments and tentatively concluded that the public interest is best served by the measures proposed in the NPRM, including the downgrade of certain FS allocations and the grandfathering of existing FS operations. Of course, the Commission will revisit these and other proposals included in the NPRM in light of comments it receives as it develops a final order. Because it can consider the comments of all interested parties only after the rulemaking's normal pleading cycle is complete, the FCC should deny the requests of the TIA Fixed Section and ICTA to modify the NPRM.

Moreover, contrary to the assertions of the TIA Fixed Section and ICTA, the Commission has not "frozen" FS use of the 18.3-18.55 GHz and 18.8-19.3 GHz bands. In the NPRM, the Commission proposed:

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10 *See generally* Comments of TIA Fixed Section, RM-9005 (filed Sept. 23, 1997). In addition, FS interests have been on notice that band segmentation and spectrum reallocation may be necessary at 18 GHz as a result of industry meetings which have been addressing 18 GHz issues since January 1998.

> to grandfather terrestrial fixed service operations that have been either licensed or for which applications are pending, as of the release date of this NPRM, for [the 18.3-18.55 GHz and 18.8-19.3 GHz bands] [] proposed to be designated for fixed satellite service use on a primary basis. Under this proposal, new terrestrial fixed service applications could continue to be filed and granted after the NPRM release date, but the licensees would have only secondary status in those bands designated for fixed satellite service use on a primary basis.[11]

Although FS interests and satellite licensees would doubtless have written the NPRM differently had they had the opportunity, the Commission's proposal represents its best judgment as to a reasonable starting point for the development of a fair and workable 18 GHz band plan. In this connection, the Commission proposes to *protect* existing FS investment in the bands which it seeks to designate as sole primary FSS spectrum, an option that could greatly constrain FSS operations in these bands.

As the Commission makes clear in the NPRM, FS operators would not be precluded from operating in these bands or from filing new applications in these bands. Indeed, FS operators would enjoy unfettered use of the band for several years until Ka-band FSS systems become commercially operational. However, consistent with its proposal to downgrade certain FS allocations to facilitate the deployment of ubiquitous FSS earth stations, the Commission has proposed to limit the number of FS operations that will be grandfathered (*i.e.*, remain co-primary) to those which were licensed or had applications pending as of the date of the NPRM.[12]

This grandfathering proposal is the *least burdensome option* on FS operators that the Commission could have adopted to provide FSS licensees with access to the subject spectrum for

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11 NPRM ¶ 40.

12 By proposing that newly filed FS applications in these bands may be authorized only on a secondary basis, the Commission apparently attempts to preserve the ability of FSS systems to deploy ubiquitous earth stations in the 18.3-18.55 GHz and 18.8-19.3 GHz bands, and to encourage FS systems to deploy new operations in band segments that are proposed for FS use on a sole primary basis.

ubiquitous earth station operations.[13] For example, the Commission could have frozen new FS application and/or proposed to eliminate the FS designation in this spectrum. The grandfathering proposal does the opposite -- *protecting* both existing FS operations and those with applications on file as of the NPRM release date, to the detriment of U.S. Ka-band satellite licensees.

Moreover, the very premise of the ICTA and the TIA Fixed Section filings -- that the band plan unfairly constrains the development of the CARS industry -- is simply wrong. Not only did the Commission's proposal indicate that sufficient spectrum would be made available for CARS expansion, but the fact is that *every* potential user of the 17.7-19.7 GHz band is constrained in its development until a final band plan is adopted. For example, Lockheed Martin's Astrolink™ System cannot issue a final design specification for its satellites until it knows what downlink bands are licensed and what the interference/sharing environment will be in those bands. Indeed, the constraints resulting from such regulatory uncertainty impact FSS licensees to a far greater degree than FS operators, largely because the costs and time involved in deploying satellite systems are orders of magnitude greater than deploying FS links.

Even if the TIA Fixed Section and ICTA were correct in their assertion that the NPRM imposes a "*de facto* freeze" on applications for new FS operations in the relevant bands, Commission precedent clearly supports the imposition of such a freeze.[14] The Commission has imposed freezes on the filing of new applications to preserve its regulatory options in successfully resolving spectrum designation issues among multiple applicants and services.[15]

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13 The Commission tentatively concluded that the public interest will be best served by separating FS and ubiquitous FSS earth station operations, and that FSS systems require a sole primary designation in spectrum in which they intend to operate ubiquitous user terminals. *See* NPRM ¶ 19.

14 *See Kessler v. Federal Communications Commission*, 326 F.2d 673, 680-81 (D.C. Cir. 1963) (the Commission has broad authority to impose freezes "on the filing of new applications pending the consideration, and possible promulgation, of new rules following notice and a public hearing.").

15 *Freeze on the Filing of Applications for New Licenses, Amendments, and Modifications in the 18.8-19.3 GHz Frequency Band*, Order, 11 FCC Rcd 22363, 22366 (Wireless Telecom.

The Commission has also imposed freezes where, as in the instant proceeding, the development of new services would be impeded.[16] Therefore, precedent strongly supports the Commission's proposal to authorize newly filed FS applications in certain portions of the 18 GHz band on a secondary basis to FSS services, even if this proposal could be considered a *de facto* freeze on FS application filings in these bands.

In support of its request for the Commission to alter the NPRM, the TIA Fixed Section relies on only one Commission case -- *930 MHz Private Paging*.[17] In that proceeding, the Commission concluded that an absolute freeze on the processing of new paging applications was necessary to protect its ability to grant exclusive spectrum channels to private carrier paging ("PCP") systems.[18] However, the Commission soon determined that its freeze was impairing the ability of PCP operators -- the very class that the freeze was intended to protect -- from developing or expanding their systems.[19] Because the freeze was impairing the provision of

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Bur. and Int'l Bur. 1996) (freeze was "intended to maintain the Commission's regulatory options in the band pending the resolution of [the rulemaking] issues."); *Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHz Bands*, Order, 10 FCC Rcd 13190 (Wireless Telecom. Bur. 1995) ("[U]nless we immediately freeze new applications the successful resolution of the spectrum allocation issues raised in [the docket] could be compromised.").

16 *See Reallocation of Television Channels 60-69, the 746-806 MHz Band*, Report and Order, 12 FCC Rcd 22953, 22970 (1998) (imposed freeze on existing systems' modifications seeking to increase their service areas because "the planning and development of new services would be impeded."); *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, Order, 76 Rad. Reg. 2d (P&F) 843 (1987) ("In our judgment, [the freeze] would preserve spectrum options in areas where we believe that additional [] assignments would unduly restrict possibilities for providing additional spectrum for [new services].").

17 *See Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz*, Notice of Proposed Rulemaking, 8 FCC Rcd 2227, 2233 (1993) ("*930 MHz Private Paging*"). ICTA cites *no* Commission caselaw to support its request for the Commission to modify its NPRM and, instead, merely attempts to distinguish inapplicable FCC "freeze" decisions. *See ICTA Request* at Attachment C.

18 *See 930 MHz Private Paging*, Notice of Proposed Rulemaking, 8 FCC Rcd at 2233.

19 *See Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz*, Order, 8 FCC Rd 2460 (1993).

paging service by the class of carriers it was designed to protect, the Commission reasonably concluded that the public interest benefits of imposing the freeze were outweighed by the negative impact on the inability of PCP operators to provide services to the public.[20]

The *930 MHz Private Paging* case is wholly inapposite to the 18 GHz rulemaking. First, the Commission has not imposed a freeze on the filing of FS applications in the 18.3-18.55 GHz and 18.8-19.3 GHz bands, but has merely proposed to downgrade the FS allocation from co-primary to secondary for newly filed applications. Second, this limitation on FS applications is being proposed to protect a *separate class* of Commission licensees, namely FSS operators. Unlike the *930 MHz Private Paging* case, lifting the limitation will not promote the service it was intended to protect (FSS), but instead will substantially harm it by allowing new FS operations in the 18.3-18.55 GHz and 18.8-19.3 GHz bands, thereby making it more difficult, if not impossible, for FSS operators to ubiquitously deploy earth stations in these bands. In fact, ICTA and the TIA Fixed Section are asking the Commission to allow *new* FS *applications* to further constrain *existing* FSS *licensees*.

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20 *Id.*

V. CONCLUSION

For the reasons set forth above, the Commission should treat the pleadings filed by ICTA and the TIA Fixed Section as early filed comments in this rulemaking proceeding. Alternatively, the requests should be denied.

Respectfully submitted,

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November 12, 1998

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Lockheed Martin Corporation Consolidated Opposition to Petition for Interim Relief and Emergency Request for Immediate Relief** was sent this 12th day of November, 1998, by first-class mail (except where hand delivery is denoted by an asterisk), to the following persons:

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