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

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APR 16 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
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Allocation and Designation of Spectrum for Fixed Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz, and 48.2-50.2 GHz Frequency Bands; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band; Allocation of Spectrum in the 46.9-47.0 GHz Frequency Band for Wireless Services; and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40.5 GHz for Government Operations	)	IB Docket No. 97-95 RM-8811

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Hughes Communications, Inc. ("HCI") hereby replies to the Opposition of the Fixed Wireless Communications Coalition[1] ("FWCC") to HCI's Petition for Reconsideration of the Commission's Report and Order in the above-captioned proceeding.[2]

At its core, HCI's Petition has two central arguments: (i) that, in view of the demonstrated need of the satellite industry for V Band spectrum, the record in this proceeding does not support the Commission's unequal apportionment of spectrum at 36 - 51.4 GHz ("*V Band*") in favor of terrestrial wireless users at the expense of satellite users and (ii) that the Commission failed to adequately explain its unequal apportionment of spectrum in the V Band

1 *Opposition to Petitions for Reconsideration of the Fixed Wireless Communications Coalition*, IB Docket 97-95 (filed April 6, 1999) ("*Opposition*").

2 *Allocation and Designation of Spectrum for Fixed Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz, and 48.2-50.2 GHz Frequency Bands*, 64 Fed. Reg. 2585 (January 15, 1999) (the "*V Band Order*").

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Order. Each of these deficiencies renders the V Band Order infirm under the Administrative Procedure Act ("*APA*"). FWCC's Opposition does not in any way rebut HCI's first argument -- in fact, the Opposition lends support to the argument -- and the Opposition completely fails to address HCI's second position. Thus, the Commission should reject FWCC's Opposition and should grant HCI's Petition for Reconsideration by designating at least 6 GHz of V Band spectrum for satellite use.

FWCC makes four ineffective arguments in an attempt to support the Commission's unequal designation of V Band spectrum. As a threshold matter, however, none of these arguments even addresses the central issue: that the satellite industry, through its pleadings in this proceeding and, more importantly, through the fifteen, definitive system applications that the satellite industry has filed to use V Band spectrum, has simply shown a much greater need for V Band spectrum than the terrestrial wireless industry. Thus, the Commission should reject FWCC's arguments, which are designed to deflect the Commission from this core issue.

FWCC's first claim is that the Commission's division of spectrum "cost the wireless services a higher percentage of their shared spectrum than the FSS -- 50% vs. 42%."[3] These percentages are misleading and do not prove the proposition for which they are apparently cited by FWCC. The percentages only calculate as they do because the Commission designated for terrestrial wireless use 1.5 GHz of spectrum -- 41.0 - 42.5 GHz -- that was previously allocated on a primary basis *only* for satellite use. Thus, while terrestrial interests lost access to 3.5 GHz of formerly-shared spectrum and gained exclusive access to 3.6 GHz of formerly-shared

[3] Opposition at 2.

spectrum, they also gained exclusive access to 1.5 GHz of spectrum to which they only had secondary access before. In contrast, satellite interests lost access to 3.6 GHz of formerly-shared spectrum *and* lost access to 1.5 GHz of spectrum of formerly-primary spectrum. Thus, despite FWCC's attempt to manipulate the numbers, the critical fact remains that of the 9.6 GHz of V Band spectrum that the Commission designated for commercial use in the V Band Order, the Commission designated 5.6 GHz, or 58%, for terrestrial wireless use and 4.0 GHz, or 42%, for satellite use.

Of course, as indicated in HCI's Petition, it is not the Commission's unequal designation of spectrum in itself that runs afoul of the APA. Instead, the Commission's decision is infirm because of the complete absence of record support for a larger designation of spectrum to terrestrial wireless uses and the overwhelming record evidence contrary to a smaller designation of spectrum for satellite use. FWCC's second argument attempts to rehabilitate these failures in the Commission's decision by mischaracterizing HCI's argument regarding the terrestrial industry's comments in this proceeding. FWCC states that HCI "inaccurate[ly]" claims "that the Fixed Service industry has been virtually silent in this proceeding."[4] HCI's clear claim was not that terrestrial interests did not participate in the V Band proceeding, but instead that they did not express a need or even a desire for spectrum designations "*outside of the 38.6 - 40.0 GHz band.*"[5] FWCC makes no attempt to rebut HCI's actual argument or to provide evidence of terrestrial wireless interest in spectrum above 40.0 GHz . Indeed, Winstar, which is the only other terrestrial wireless interest filing in the phase of the proceeding, continues its sole focus on the 38.6 - 40.0 GHz band in its Opposition to the Petitions for Reconsideration of GE

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4 Opposition at 4.

5 Petition for Reconsideration of Hughes Communications, Inc. at 5 (emphasis added) ("*Petition*").

American Communications and TRW.[6] Winstar did not oppose HCI's Petition or HCI's argument that the Commission should redesignate more spectrum above 40.0 GHz to satellite use. Furthermore, the Fixed Wireless Section of the Telecommunications Industry Association, which was the only terrestrial interest to suggest a proposed band plan for spectrum above 40.0 GHz in this proceeding did not oppose HCI's Petition.

In addition to mischaracterizing HCI's argument, FWCC does attempt to supply a reason for the absence of record support for designations of terrestrial spectrum above 40.0 GHz. FWCC claims that this absence of record support simply reflects "the nature of [the terrestrial wireless] industry" and that most terrestrial wireless organizations lack "the necessary resources to fil[e] comments."[7] Leaving aside the question of whether organizations that lack the resources or interest to file comments in a Commission proceeding have the wherewithal or motivation to exploit a new spectrum band with the challenges that V Band presents, FWCC's argument ignores the Commission's obligation, under the APA, to have record support for its decision.[8] While the Commission's rulemaking process is certainly not an "election"[9] where the industry that files the most pleadings wins, the Commission must have a reasoned basis and record support for its decision. At bottom, the indifference or inattention of the terrestrial wireless industry to spectrum above 40.0 GHz simply cannot supply this reasoned basis and record support. Thus, the current record, which includes a strong showing by the satellite industry of its need for V Band spectrum, but no similar showing from the terrestrial wireless industry, does not support the Commission's unequal apportionment of V Band spectrum.

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6 *Opposition of Winstar Communications, Inc. to Petitions for Reconsideration*, IB Docket 97-95 (filed April 6, 1999).

7 Opposition at 5.

8 *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1341, 1343 (D.C. Cir. 1988).

9 Opposition at 5.

Moreover, to the extent FWCC represents these terrestrial wireless providers who lack the resources to file pleadings with the Commission, FWCC's Opposition was an opportunity to make their case for retaining the full 5.6 GHz of spectrum designated for terrestrial wireless use in the V Band Order. Yet, FWCC's Opposition completely fails to supplement the record in this proceeding or to demonstrate that terrestrial wireless interests need or desire spectrum above 40.0 GHz. FWCC's failure is especially stark when viewed in comparison with the extensive pleadings submitted by the satellite industry in this proceeding, and more importantly, the fifteen, definitive satellite system applications that request substantial V Band spectrum. Indeed, HCI has spent has spent substantial sums of time and money, including more than $1 million on FCC filing fees alone, to pursue its V Band applications.

FWCC's third argument attempts to justify the Commission's unequal apportionment of V Band spectrum by citing "re-allocations from the Fixed Service to satellite services in several other bands."[10] This argument is a *post-hoc* justification on which no reliance should be placed and in any event provides no basis for the Commission's disparate apportionment of V Band spectrum. This justification is not in the Commission's record, as no terrestrial wireless commenter raised any of the "reallocation" examples cited by FWCC as a reason for designation of spectrum above 40.0 GHz for terrestrial wireless use. Nor is there any evidence in the record -- or in FWCC's Opposition -- to suggest that spectrum above 40.0 GHz is suitable replacement spectrum for the frequency bands cited by FWCC. The mere fact that the Commission may[11] have reallocated spectrum in other spectrum bands from terrestrial wireless

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10 Opposition at 3.

11 HCI notes that at least half of the "reallocations" listed by FWCC are only Commission *proposals*, and not final rules. In addition, in at least one of the situations listed by FWCC, the Commission's 18 GHz proposal, terrestrial wireless interests would benefit by having exclusive access to formerly *shared* spectrum, much like the Commission's V Band segmentation proposal.

use does not entitle the terrestrial wireless industry to a disproportionally large portion of the V Band spectrum. The record must demonstrate that terrestrial wireless interests *deserve* a larger apportionment of spectrum at the expense of the satellite industry. Neither FWCC nor the previous terrestrial-industry pleadings make that case.

Lastly, FWCC attempts to denigrate the satellite industry's requests for V Band spectrum by characterizing satellite technology as utilizing "wasteful" modulation techniques. This argument is a "red herring," as a simple comparison of modulation techniques and bit rates ignores both (i) the unique conditions under which satellites operate and (ii) the unique public interest benefits that satellites systems provide in comparison with terrestrial wireless systems. As the Commission is well aware, satellite systems must operate in the highly demanding space environment. Thus, power usage and reliability are key considerations for any satellite system. Furthermore, satellite systems must deliver high reliability signals over great distances and complex paths to earth terminals in a variety of settings. Terrestrial wireless systems do not face these complexities to anywhere near the same degree. In addition, the key efficiency, as well as public interest benefit, of satellite systems is the ubiquity of coverage that they provide. Terrestrial wireless systems simply do not provide the same ubiquitous coverage that satellite systems offer.

Finally, FWCC makes a half-hearted attempt to argue that the Commission adequately explained its unequal apportionment of spectrum in the V Band Order. FWCC recites two of the factors that the Commission offered to support its decision and simply states that

"both points are unarguably true."[12] FWCC provides no further support for these factors beyond its conclusory statement. Furthermore, FWCC does not in any way address HCI's criticisms of these two factors[13] or HCI's more fundamental criticisms of the Commission's failure to explain its decision given the lack of record evidence supporting the decision.[14]

* * * *

Thus, FWCC completely fails to rebut HCI's arguments (i) that the Commission's apportionment of spectrum between satellite and wireless services is not supported by the record, (ii) that the Commission also completely failed to explain its unequal apportionment of spectrum and (iii) that each of these failings is a separate infirmity under the APA. Importantly, FWCC completely fails to address the point that the satellite industry has simply shown a greater need for V Band spectrum than the terrestrial wireless industry. Thus, the Commission should reject FWCC's Opposition and should follow HCI's request to rebalance the amounts of V Band spectrum designated for satellite and terrestrial wireless use by designating at least 6 GHz of V Band spectrum for satellite use.

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12 Opposition at 2. The two factors are (i) "an exclusive designation permits more effective use of the spectrum" and (ii) "FSS interests can, if they wish, acquire spectrum from the wireless allocation at auction." *Id.*

13 Petition at 6-8. Regarding the Commission's argument that satellite providers benefit from band segmentation at V Band, HCI argued that the Commission's argument ignores the fact that band segmentation at V Band benefits terrestrial wireless providers as well as satellite service providers. Thus, the argument does not provide a reason for allocating less V Band spectrum to satellite use. Regarding the ability of satellite systems to win at auction access to the band segments designated for terrestrial wireless services, HCI argued that, especially in view of the infirmities in Commission's proposals with respect to the 47.2 - 48.2 GHz band, there is no reason to believe that satellite systems will have a realistic opportunity to utilize any portions of the V Band that the Commission has designated for wireless services.

14 Petition at 3, 6.

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Dated: April 16, 1999

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I hereby certify that I have this sixteenth day of April, 1999, caused a true copy of the foregoing "Reply to Opposition to Petition for Reconsideration" to be served by first class mail, postage prepaid, on the following:

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