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WALTER SONNENFELDT & ASSOCIATES
4904 Ertter Drive
Rockville, Maryland 20852
301-770-3299
Telecopier: 301-468-5953

October 1, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

HAND DELIVERED

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TWB-204
Washington, D.C. 20554

Re: ET Docket No. 95-183
PP Docket No. 93-253

JOINT MOTION FOR STAY

Dear Ms. Salas:

Transmitted herewith, on behalf of our clients Cambridge Partners, Inc., AA&T Wireless Services, Stevan A. Birnbaum, Linda Chester, HiCap Networks, Inc., Paul R. Likins, William R. Lonergan, PIW Development Corporation, Cornelius T. Ryan, SMC Associates, Southfield Communications LLC, Video Communications Corporation, and Wireless Telco is a Joint Motion For Stay of the Memorandum Opinion and Order (FCC 99-179) in the above-referenced rulemaking proceedings.

An original and nine (9) copies are attached to facilitate service to each of the Commissioners. A tenth copy is also attached for proof of filing stamp and return to our offices.

Kindly direct any inquiries concerning this submission to the undersigned.

Very truly yours,

Walter H. Sonnenfeldt
Counsel to the Joint Movants

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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 Bands	)	PP Docket No. 93-253

To: The Commission

JOINT MOTION FOR STAY

Of Counsel

Robert Corn-Revere
Catherine Stetson

Hogan & Hartson L.L.P.
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Walter H. Sonnenfeldt

Walter Sonnenfeldt & Associates
4904 Ertter Drive
Rockville, Maryland 20852
(301) 770-3299

Movants' Attorney

October 1, 1999

SUMMARY

Cambridge Partners, Inc., AA&T Wireless Services, Stevan A. Birnbaum, Linda Chester, HiCap Networks, Inc., Paul R. Likins, William R. Lonergan, PIW Development Corporation, Cornelius T. Ryan, SMC Associates, Southfield Communications LLC, Video Communications Corporation, and Wireless Telco, through their counsel, request a stay of the FCC's decision by Memorandum Opinion and Order FCC 99-179 in ET Docket No. 95-183 to dismiss and return "without prejudice" certain 38.6-40.0 GHz Microwave Radio Service applications and other related submissions.

These orders cover the following classes of applications, portions thereof, and voluntary amendments and dismissals pertaining thereto: (i) all applications with mutual exclusivity conflicts that were not resolved as of December 15, 1995; (ii) all applications that had not completed the statutory minimum thirty-day initial public notice period as of November 13, 1995; and (iii) mutually exclusive portions of certain applications, without consideration as to whether such conflicts were previously resolved by voluntary minor amendments and dismissals filed as a matter of right. Pursuant to delegated authority, the Licensing and Technical Analysis Branch of the Public Safety and Private Wireless Division of Wireless Telecommunications Bureau has begun to implement these dismissal policies with respect to specific applications filed by Movants, and by other similarly situated parties.

Movants seek to stay these dismissal policies and procedures pending the completion of directly related further review proceedings in the United States Court of Appeals For the District of Columbia. As shown herein, all requisite conditions are met, good cause exists for the stay requested herein, and grant of the requested relief will serve the public interest, convenience, and necessity.

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To: The Commission

JOINT MOTION FOR STAY

Cambridge Partners, Inc., AA&T Wireless Services, Stevan A. Birnbaum, Linda Chester, HiCap Networks, Inc., Paul R. Likins, William R. Lonergan, PIW Development Corporation, Cornelius T. Ryan, SMC Associates, Southfield Communications LLC, Video Communications Corporation, and Wireless Telco (the "Movants"), by their undersigned counsel, hereby request a stay of the FCC's decision by Memorandum Opinion and Order in the above-captioned proceeding (the "MO&O") to dismiss and return certain Microwave Radio Service applications, portions thereof, and to disregard voluntary amendments and dismissals pertaining thereto, proposing use of frequency assignments in the 38.6 - 40.0 GHz band (the "39 GHz" band).[1] Movants seek to stay the dismissal policies and procedures set forth in

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[1] See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Memorandum Opinion and Order, FCC 99-179 (July 29, 1999), 62 Fed. Reg. 45891 (August 23, 1999).

the MO&O (the "Dismissal Orders"), pending the completion of directly related further review proceedings in the United States Court of Appeals For the District of Columbia (the "Appeals Case").[2/] As shown below, all requisite conditions are met, good cause exists for the stay requested herein, and grant of the instant Motion will serve the public interest, convenience, and necessity.

I. DISCUSSION

The Dismissal Orders are the latest in a more than five-year pattern of arbitrary and capricious Commission actions relating to Movants' rights and interests. Among other things, these actions have operated to delay, and preclude wherever possible, the issuance of 39 GHz licenses to Movants and other similarly situated applicants. There is no legitimate justification for the Commission's departures from established law, policies, and precedent which now culminate in the Dismissal Orders.

By the Dismissal Orders, the Commission has acted to dismiss and return "without prejudice" the following classes of 39 GHz applications (or portions thereof): (i) all applications with mutual exclusivity conflicts that were not resolved as of December 15, 1995;

[2/] See Bachow Communications, Inc. v. Federal Communications Commission, Case No. 99-1346 (and consolidated cases) (DC Cir., 1999). With the exception of William R. Lonergan, Movants are all parties to these Court proceedings by virtue of their status as Appellants and Petitioners in consolidated Case Nos. 99-1361 and 99-1362, respectively. Mr. Lonergan has intervened in the Court proceedings.

(ii) all applications that had not completed the statutory minimum thirty-day initial public notice period as of November 13, 1995; and (iii) mutually exclusive portions of certain applications, without consideration as to whether such conflicts were previously resolved by voluntary minor amendments and dismissals filed as a matter of right.[3] The Dismissal Orders also invalidate without justification all voluntary amendments and dismissals to 39 GHz applications that were tendered on or after December 15, 1995.[4] Pursuant to delegated authority, the Licensing and Technical Analysis Branch of the Public Safety and Private Wireless Division of Wireless Telecommunications Bureau has begun to implement the Dismissal Orders with respect to specific applications, albeit in a very limited fashion to date.[5] For the reasons stated below, Movants respectfully request that the Commission stay all specific bureau-level dismissal actions that have already occurred as of the submission of the instant Motion, as well as any pending dismissals arising from the MO&O.[6]

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[3] MO&O, at ¶¶ 2 & 28.

[4] See MO&O, at ¶¶ 29-38.

[5] See FCC Wireless Telecommunications Bureau Weekly Public Notice, Report Nos. 2053-2056. Based on a review of subsequent Public Notices and other FCC records, there apparently have been only a limited number of 39 GHz dismissal or partial dismissal actions taken since August 31, 1999.

[6] At a minimum, in the unlikely event that the Commission decides not to grant the specific relief requested herein, Movants request that any subsequent action on specific 39 GHz applications be taken in the form of consolidated Commission-level Orders covering all outstanding applications filed by given applicant. Such Orders should be issued for all applicants at the same time, or alternatively, a single unified review proceeding should be afforded for all actions relating to all application-specific 39 GHz actions taken by the Commission. In this way, (continued...)

A. Legal Requisites For A Stay

The Commission has traditionally reviewed requests for stays of its decisions based upon the following: (i) whether issuance of the requested stay will serve the public interest, convenience, and necessity; (ii) whether the issuance of a stay will substantially harm other parties interested in the proceedings; (iii) whether movant has shown that without grant of the requested relief, it will be irreparably harmed; and (iv) whether movant makes a strong showing that it is likely to prevail on the merits.[7/] As shown herein, all requisite showing thresholds are met, and the Commission should grant the instant stay request.

B. Issuance Of The Requested Stay Will Serve The Public Interest, Convenience, and Necessity

Issuance of the stay requested herein will clearly serve the public interest, convenience, and necessity. Although the other three showing standards are also amply satisfied, the public

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[6/](...continued)
Movants, other similarly situated applicants, and the Commission will be afforded a far more efficient means to resolve application-specific disputes.

[7/] See Virginia Petroleum Jobbers Association v. FPC., 259 F. 2d 921, 925 (D.C. Cir. 1958). See, also, In the Matter of Price Cap Regulation of Local Exchange Carriers Rate-of-Return Sharing and Lower Formula Adjustment, 10 FCC Rcd 11979, 11986 (1995).

interest implications alone form sufficient justification for grant of the instant Motion.[8] The stated central public interest objectives of the above-captioned proceedings are to ... "provid[e] for a more orderly structure for the licensing process ... place 39 GHz licenses in the hands of those who value them most, encourage the creation and deployment of new services, ... [and] foster efficient and expeditious use of the 39 GHz spectrum."[9]

Rather than meeting these laudable objectives in service of the public interest, the Dismissal Orders and the related rulings in the MO&O yield the exact opposite results. Movants and other similarly situated 39 GHz applicants whose applications were dismissed under the Dismissal Orders are, in fact, the parties who have placed the highest value on the use of 39 GHz spectrum, as evidenced by their pioneering vision and substantial financial and in-kind commitments. But for *more than four years* of application processing delays resulting from the above-captioned proceedings and perpetuated now by the Dismissal Orders, the public would have already long ago been reaping the benefits of long-term efforts and investments by Movants and other 39 GHz applicants. These parties have stood willing and

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[8] A dispositive showing on all four prongs is not a necessary pre-requisite for grant of a stay. A "sliding scale" is often utilized in evaluating the merits of a stay request. If a particularly strong showing is made on only one prong, the requested relief should still issue. See Citified Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir 1995). See, also, Serono Labs, Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1997), Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F. 2d 841, 843 (D.C. Cir. 1977)Serono Labs, Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1997).

[9] MO&O, at ¶ 25.

ready for all of this time to take the necessary steps to transform what for many years has been fallow spectrum into a premier facilities-based broadband service alternative.

All of the controlling issues in contention arising from the Dismissal Orders and other elements of the MO&O are now the subject of the Appeals Case. Thus, these matters will ultimately be resolved in Court, and not through actions on specific applications. Nevertheless, sub-Bureau-level implementation of the Dismissal Orders commenced even before the MO&O reached Final Order status. This attempt to apply the Dismissal Orders to applications on an individual basis only adds yet another cumbersome layer to law and policy disputes that, in fact, cannot and will not be resolved until the Appeals Case is concluded.[10/]

The piecemeal issuance of individual sub-Bureau-level Orders carrying out the rulings set forth in the MO&O is doing nothing but creating a quagmire of additional unnecessary litigation, unjustifiable and unrecoverable expense, and needless further delays. The exponential increase in litigation on specific applications that is resulting and will continue to manifest itself if the Commission continues to issue individual dismissal orders needlessly strains the Commission's limited resources. Based on an analysis of 39 GHz records, Movants estimate that disputable results stemming from the Dismissal Orders could affect on the order of nine hundred (900) separate 39 GHz applications. Absent a consolidated treatment of these disputes in the Appeals Case, this in turn could lead to the absurdly

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[10/] Absent issuance of the stay requested herein, Movants necessarily must seek review and reversal of every improper processing action stemming from the Dismissal Orders in order to preserve their rights and interests.

cumbersome result of 900 separate protests, all dealing with the same or very similar issues. The piecemeal issuance of hundreds of dismissal orders also imposes unnecessary burdens and unrecoverable expenses on Movants and other similarly situated parties. Of even greater concern, the additional delays that will be caused by the piecemeal approach currently being pursued, in turn, are causing further delays in the delivery to the public of important new facilities based competitive local services. All of these results clearly contravene the long-espoused public interest objectives of the Commission and the Congress.

Issuance of the stay requested herein will mitigate these detrimental circumstances and inject efficiency, order, and timeliness into proceedings that will otherwise be wasteful and chaotic. The added layers of litigation that will ensue if the instant Motion is not granted are redundant, unnecessary, a waste of scarce Commission resources, and injurious to Movants and the public at large. Accordingly, continued application of the Dismissal Orders to specific applications contravenes the public interest, and grant of the instant Motion will serve the public interest, convenience, and necessity.

C. Grant Of The Relief Requested By Movants Will Not Harm Any Party, and Indeed Will Benefit the Commission

No party will suffer any substantial harm if the relief requested in the instant Motion is granted by the Commission; indeed, a stay will only <u>benefit</u> all parties, including the Commission. As previously shown, the matters in contention regarding the Dismissal Orders

are already the subject of ongoing review proceedings in the Appeals Case. Thus, regardless of the outcome of disputes relating to the disposition of particular applications under the Dismissal Orders, the ultimate resolution will come from the outcome of the Court case.

Rather than harming any party in any material fashion, grant of the stay requested herein will expedite the resolution of matters in dispute, thereby benefitting all concerned applicants, the Commission, and the public at large. Resolving the conflicts in a unified fashion in the Court proceedings will clearly yield the most efficient and timely result. Absent issuance of the stay requested herein, all affected parties will be burdened with the costs and time consumption of additional unnecessary litigation and delay. Accordingly, the second prong of the legal requisites for grant of the instant Motion is clearly met.

D. Absent Grant of the Requested Relief, Movants & All Other Similarly Situated Parties Will Be Irreparably Harmed

Absent grant of the relief requested in the instant Motion, Movants and all other similarly situated parties will be irreparably harmed. The Commission has repeatedly characterized the actions being carried out under the Dismissal Orders as "without prejudice".[11/] According to the Commission, applicants suffering dismissals under the Dismissal Orders are free to seek licenses in the soon-to-be-implemented competitive bidding

[11/] MO&O, at ¶ 2.

process. As previously stated, Movants maintain that such a result clearly would prejudice their rights. The market positioning losses caused by the lengthy delays in these proceedings already have caused a degree of irreparable harm, and that harm will only increase if the Commission proceeds with individual licensing actions before the Appeals case is completed. Moreover, assuming *arguendo* that Movants were to "replace" the authorizations lost through the Dismissal Orders by participating in and winning the relevant auction, and subsequently prevail on the merits in the Appeals Case, Movants will have been compelled to pay for licenses that they should have properly received without charge under the pre-existing rule structure.

An added measure of irreparable harm will also result if the application-specific actions relating to the Dismissal Orders continue unabated. Movants and other affected applicants will have to shoulder the additional substantial and unrecoverable costs of litigating these individual actions. Movants and other parties in interest have already instituted review proceedings of these same issues in Court, and continued actions by the Commission pursuant to the Dismissal Orders in light of these circumstances signal a clear indication of impending irreparable harm to Movants and other similarly situated parties.

E. Movants Are Likely To Prevail On The Merits At Issue

As Movants will conclusively demonstrate in the Court of Appeals, the MO&O failed to provide a reasoned basis for departure from prior precedents and policies, violated due process, and was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law. Because the key rulings underlying the Dismissal Orders are patently flawed, movants are likely to prevail on the merits in this case in the Court of Appeals.

The Commission's decision in the MO&O to refuse to honor legally valid and effective voluntary amendments and dismissals that resolved mutual exclusivity conflicts, but that were filed on or after December 15, 1995, ignores (or ineffectually distinguishes) the applicable law, as well as the facts in this case. Among other things, the Commission's ruling incorrectly presupposes a meaningful correlation between the statutes and policies governing the legal effectiveness of amendments and dismissals of right, and the entirely different laws and policies governing the disposition of applications tendered for filing. The Dismissal Orders also violate the express terms of Section 309(j)(6)(E) of the Communications Act of 1934, 47 U.S.C. § 309(j)(6)(E), which cabins the Commission's auction authority by requiring it to satisfy its ... "obligation in the public interest to continue to use engineering solutions, negotiations, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." The Commission dismisses this weighty obligation with circular reasoning, explaining that it "considered" its Section 309(j) duties and had nonetheless decided to implement its decision. The Commission's statement

that it "considered" its statutory obligations is an empty recitation, because "consider[ing]" its obligations to Congress and the public is not nearly enough: the Commission must provide a rational explanation as to why the course of action it chose satisfies those obligations, and the Commission did not do so. The Commission's flat dismissal of its obligations under Section 309(j)(6)(E) is but one example of its across-the-board failure to address and resolve the issues relating to the disposition of pending 39 GHz applications in accordance with governing law and policy.

The Commission's determination that applications had to have completed the requisite 30-day protest period by November 13, 1995, was also issued with the same disregard for the law and the facts. Applicable law and Commission policies establish that the November 1995 cut-off date is of *no* relevance to the timing of deadlines for protest submissions. The Commission's fictional deadline also occurred more than one month *prior* to the initiation of the above-captioned rulemaking proceedings: thus, even if there was some rational connection between actions taken by the Commission on November 13, 1995, and the terminal dates for protest submissions on 39 GHz applications, those actions would on their face constitute retroactive rulemaking in contravention of the Administrative Procedure Act. Similarly, the decision to process *some,* but not *all*, partially mutually exclusive applications is also arbitrary and capricious on its face. This is particularly true in the many cases where voluntary amendments and dismissals of right -- legally effective when made, but ignored by the Commission -- have already *resolved* the partial mutual exclusivity. Finally, the

Commission's decision to dismiss and return all applications that do not comport with the processing and grant thresholds established in the MO&O was also arbitrary and capricious, because it rests on a series of decisions which are themselves fatally flawed.

In sum, many of the rulings comprising the Dismissal Orders are presented without reference to legal authority, or indeed to any other form of precedent. By relying on legal and factual distortions, and by failing to provide any other legitimate support or justification for these rulings, the Commission has continued its established pattern of arbitrary and capricious agency action in these proceedings. The Dismissal Orders sit on a precarious legal foundation that cannot and will not withstand review by the Court of Appeals. For all of the above-stated reasons, Movants are likely to prevail on the merits at issue in this case.

II. CONCLUSION

Movants satisfy all of the criteria necessary to warrant the stay they have requested. Accordingly, Movants respectfully request expedited action by the Commission to grant the relief they seek and to stay further action pending judicial review of the Commission's decision.

Respectfully submitted,

CAMBRIDGE PARTNERS, INC.

AA&T WIRELESS SERVICES

STEVAN A. BIRNBAUM

LINDA CHESTER

HICAP NETWORKS, INC.

PAUL R. LIKINS

WILLIAM R. LONERGAN

PIW DEVELOPMENT CORPORATION

CORNELIUS T. RYAN

SMC ASSOCIATES

SOUTHFIELD COMMUNICATIONS LLC

VIDEO COMMUNICATIONS CORPORATION

WIRELESS TELCO

Of Counsel

Robert Corn-Revere
Catherine Stetson

Hogan & Hartson L.L.P.
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

By: _____
Walter H. Sonnenfeldt

Walter Sonnenfeldt & Associates
4904 Ertter Drive
Rockville, Maryland 20852
(301) 770-3299

Movants' Attorney

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