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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**

To: The Commission

OPPOSITION OF WINSTAR COMMUNICATIONS, INC.

Winstar Communications, Inc. ("Winstar"), pursuant to Section 1.429(h) of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"), hereby submits this Opposition ("Opposition") in response to the Petition for Partial Reconsideration ("Petition") filed by Hughes Electronics Corporation ("Hughes") in the above captioned matter[1] on October 6, 2000.[2]

I. Discussion.

1. Winstar disagrees with the constant theme throughout the Hughes Petition regarding the Commission's alleged violations of the Administrative Procedure Act ("APA"). While not commenting on the specific complaints raised in the Hughes

[1] *Petition for Partial Reconsideration*, IB Docket Number 98-172, Hughes Electronics Corporation (filed October 6, 2000) ("Hughes Petition").

[2] Report and Order, *Redesignation of the 18 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in Ka-Band, and the Allocation of Additional Spectrum for Broadcast Satellite Service Use*, IB Docket No. 98-172, 65 Fed. Reg. 54,155 (September 7, 2000) ("Order").

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Petition – and being generally supportive of the Order overall[3] – Winstar finds that the arguments raised by Hughes are overly broad, unduly vague and legally unsustainable.

2. Throughout the Petition, Hughes makes countless references to actions by the Commission that are allegedly "contrary to the requirements of the [APA]." Amazingly, however, of seven issues addressing supposed violations of the APA only one reference is ever made to any specific provision. The remainder of the Petition merely protests in the most general terms the so-called arbitrary and capricious nature of the Commission's Order.

3. In the singular instance actually addressing a specific provision of the APA, the legal analysis of the alleged violation is simply incorrect. Hughes asserts that the Commission's "Legacy List" provision of the Order does not comply with Section 553(b) of the APA.[4] The "Legacy List" provision is a coordination process whereby existing terrestrial fixed service ("FS") licensees utilizing the 18.3 – 18.8 GHz band within 2 degrees of the geostationary arc, and experiencing any interference, would have a method of recourse. The provision was inserted by the Commission in response to concerns regarding potential interference from satellite licensees operating within this band. Hughes strongly objects to this provision, because satellite licensees are required to

[3] Winstar also filed a *Petition for Clarification and Partial Reconsideration* in the above referenced manner on October 10, 2000. While Winstar generally agrees with the Commission's decisions in the Order, it requested reconsideration and clarification on various matters. Specifically, Winstar sought clarification on whether an incumbent licensee is required to relocate if comparable facilities are not offered by the incoming licensee and whether license assignments and transfers of control by incumbent licensees will result in a loss of primary status. Additionally, Winstar argued for the right of incumbent licensees to return to previous facilities, and the establishment of a voluntary negotiation period. Finally, the failure of the Commission to address the explosive growth within the FS industry, and its impact, was also addressed in Winstar's filing.

[4] See Hughes Petition at 15.

pay for the alleviation of any interference they cause to terrestrial FS licenses. Hughes asserts a violation of the APA since Section 553(b) requires that the "terms or substance of the proposed rule or a description of the subjects and issues involved" be published in the Federal Register.[5]

4. Hughes contends that the 18 GHz Notice of Proposed Rulemaking ("NPRM") provided no "notion that the Commission would break from its long-standing interpretation" and adopt such a rule.[6] Hughes makes this contention despite the fact that they themselves addressed the possibility of the proposed rule change in comments filed with the Commission long before the release of the final Order.[7] They attempt to avoid the effect of their own filing by claiming that the Commission may not bootstrap the notice requirement from comments filed in establishing the rule.[8] Instead, their argument goes, notice should have been provided by the Commission itself at the beginning of the proceeding.

5. Hughes, however, misses the point. Adequate notice *was* provided by the Commission through the release of its NPRM. Not only did the Commission address the fact that it was considering co-primary sharing between GSO/FSS and FS services within 18.55 – 18.8 GHz band, but comments regarding the resolution of possible interference

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[5] See 5 U.S.C.A. § 553(b)(3).
[6] See Hughes Petition at 15.
[7] See Hughes Petition at 15 (referencing its written *Ex Parte* Presentation in IB Docket 98-172 at 3 (filed February 22, 2000, and which implies that terrestrial FS licensees were placed on clear notice of potential interference from satellite licensees.)).
[8] See Hughes Petition at 15 (citing *American Federation of Labor v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985).

between the two services were also solicited.[9] The Legacy List provision was one which any interested party associated with this proceeding would have seen as a very real and distinct possibility. Indeed, the issue was sufficiently raised in the NPRM to the extent that Hughes itself filed Comments responsive to it.

6. The Commission has no need to bootstrap notice from the Hughes Comments since adequate notice was clearly provided in the NPRM. This so-called 'bootstrapping' is nothing more than a smoke screen being employed by Hughes to obscure the reality of the Commission's adequate notice.

7. More importantly, however, under applicable case law the issue should not be framed solely in the context of whether notice was adequate, but also, whether the Commission's final rule is a "logical outgrowth" of the NPRM.[10] A thorough reading of the Commission's NPRM and Order clearly illustrate that both of these elements are met. Based on the original NPRM, Hughes and others could have – and in fact did – anticipate the possibility of the Commission's final rule.[11] Hughes, however, simply chooses to ignore that fact.

8. Finally, Hughes makes a general assertion that the Commission's 18 GHz Order is "arbitrary and capricious." As a general rule, the Supreme Court grants great deference to decisions of administrative agencies, long recognizing "that considerable weight should be accorded to an executive department's construction of a statutory

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[9] See Notice of Proposed Rulemaking, *Redesignation of the 18 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in Ka-Band, and the Allocation of Additional Spectrum for Broadcast Satellite Service Use*, IB Docket No. 98-172, at ¶¶ 32 and 34.

[10] See *National Mining Association v. Mine Safety and Health Administration*, 116 F.3d 520, 531 (D.C. Cir. 1997).

scheme it is entrusted to administer."[12] Further, the Court will not disturb an agency's decision if the choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute."[13]

9. Clearly, the Commission's decision-making process contained in the Order falls under the broad protection established by the Court in *Chevron*. The 18 GHz Proceeding was the outgrowth of the Commission's efforts to implement the 1996 Telecommunications Act ("the Act"). This proceeding resulted in the release of a series of complex Notices and Orders as early as 1998 directly soliciting the comments and thoughts of all interested parties. The countless issues surrounding the redesignation of this spectrum have been discussed, evaluated and scrutinized *ad nauseum* in almost 300 separate filings by a myriad of distinct parties. Each of these filings has been received, reviewed and considered by the Commission. Ultimately, the Commission refined this mass of information into a logical, reasonable and generally well thought-out Order.

10. Instead of being criticized for alleged APA violations, the Commission should be praised for its Herculean efforts in this proceeding. They have spent the better part of four years soliciting information and comments from various parties and analyzing this data in a thoroughly intelligent and reasonable manner. Hughes' efforts to discredit the Order as "arbitrary and capricious" is nothing more than a weak attempt to question an Order that represents a sound accommodation of differing policies in an intelligent and equitable manner.

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[11] See Id. (quoting *Anne Arundel County v. EPA*, 963 F.2d 412 (D.C.Cir. 1991).
[12] See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).
[13] Id. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382 - 383 (1961).

II. Conclusion.

Accordingly, Winstar urges the Commission to disregard the arguments set forth in the Hughes Petition by recognizing that the various elements contained in the Order were achieved through full compliance with the APA.

Respectfully Submitted,

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November 13, 2000

CERTIFICATE OF SERVICE

I, Tammy Hines, do hereby certify that on this 13th day of November, 2000, I have caused a copy of the foregoing "Opposition of Winstar Communications, Inc.", in IB Docket No. 98-172 to be served by first-class mail upon the persons listed below.

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