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April 2, 2001

Ms. Magalie R. Salas, Secretary
Federal Communications Commission
The Portals, 445 12th Street, S.W.
Washington, D.C. 20554

Re: ET Docket 98-153
Revision of Part 15 of the Commission's
Rules Regarding Ultra-Wideband
Transmission Systems
Ex Parte Filing

Dear Ms. Salas:

On March 27, 2001, several opponents of ultra-wideband, predominantly ultra-wideband ("UWB") that would operate on GPS frequencies, filed a joint *ex parte* letter urging the Commission to issue a further notice of proposed rulemaking in the above-referenced proceeding. The position expressed in the *ex parte* letter is that there has been inadequate notice under the Administrative Procedures Act ("APA") and that there is an inadequate record upon which to base a decision. With respect to UWB that will not operate on GPS frequencies, neither proposition can be supported in law or fact. To the extent the Commission wishes to wait for additional information regarding UWB operations on GPS frequencies, the appropriate course of action is to bifurcate the proceeding and move now to authorize UWB technologies that do not operate on GPS frequencies.

With respect to the adequacy of notice in this proceeding, the *ex parte* letter greatly overstates the requirements of the APA. Under the APA, an agency must publish a notice of proposed rulemaking which "shall include ... either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b) (emphasis added);

see *id.* § 553(c), (d). Contrary to the suggestion in the *ex parte* letter, there is no provision in the APA that requires the Commission to promulgate either specific terms of a proposed rule, or to adopt “tentative conclusions” upon which parties may comment.

Indeed, in the course of distinguishing the procedural requirements of the Clean Air Act from those of the APA, the D.C. Circuit has observed that “the Clean Air Act, unlike the APA, requires EPA to issue a ‘proposed rule.’ Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 519 (D.C. Cir. 1983). Similarly, “in contrast [to the APA], Clean Air Act § 307(d)(3) requires EPA to give a detailed explanation of its reasoning at the ‘proposed rule’ stage;” *i.e.*, to adopt tentative conclusions in its rulemaking notices. *Id.* Thus, the complaint lodged in the *ex parte* letter that there has been no opportunity to “comment on any Commission ‘proposed rules,’ as required by the Administrative Procedures Act” is based on a misunderstanding of the procedural requirements of the APA.¹

Interested parties have had a “meaningful opportunity to review and comment” with respect to authorizing UWB operation well away from GPS frequencies and the Commission is in a position to adopt final rules regarding such operations that would not necessarily deviate too greatly from the NPRM. The basic question under the APA is whether a rule adopted constitutes a “logical outgrowth” of the proceeding. Small Refiner, 705 F.2d at 547-49. The “logical outgrowth” test does not, however, require that each and every aspect of an issue under review be subject to public comment.

Rather, the question is whether notice was “sufficient to frame the subjects for discussion,” Omnipoint Corp. v. FCC, 78 F.3d 620, 631 (D.C. Cir. 1996), and to “afford interested parties a reasonable opportunity to participate in the rulemaking process,” Illinois Commerce Comm’n v. ICC, 776 f.2d 355, 361 (D.C. Cir. 1985). The “logical outgrowth” test also does not require that every alteration in course by an agency be reissued for notice and comment. “If that were the case, an agency could learn from the comments on its proposals only at the peril of subjecting itself to rulemaking without end.” First American Discount Corp. v. CFTC, 222 F.3d 1008, 1014 (D.C. Cir. 2000).

Focusing on the aspect of this proceeding that regards UWB technologies that would not operate on GPS frequencies, the position stated in the *ex parte* letter is unfounded. Using the proper legal standards, there has been more than adequate “notice” in this proceeding. To date, the Commission has requested comment on issues

¹ Indeed, it is not entirely clear how the Commission could satisfy the insistence upon specific proposed rules in this case, given that the issue in this proceeding involves authorizing UWB technologies under an existing set of rules. To the extent that the Commission will be required to adopt power level limits or measurement techniques for UWB technology, the NPRM in this proceeding already includes specific proposals along those lines.

relating to the use of ultra-wideband technologies not using GPS frequencies in three separate items, each exploring different aspects of UWB authorization and the questions it raises. See Public Notice, DA 01-171 (rel. Jan. 24, 2001) (requesting comment); Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems, 15 FCC Rcd 12086 (2000) (Notice of Proposed Rulemaking); Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems, 13 FCC Rcd 16376 (1998) (Notice of Inquiry).

In response to these items, parties with interests throughout the affected radio spectrum, and representing a wide range of industries, consumer groups, government radio users, and individuals, have filed comments, reply comments, *ex parte* letters, and engineering studies that, combined, now run into the thousands of pages. Virtually every aspect of UWB technical operation outside the GPS frequencies, interference characteristics, and service potential has been posited, argued, and counter-argued exhaustively. In short, the suggestion that the record in this proceeding is somehow deficient under the APA with respect to non-GPS band UWB operations could not be farther off the mark.

Indeed, there is ample record support for fast Commission action on non-GPS UWB technology, including numerous comments and *ex parte* filings submitted by a wide variety of public interest groups for quick Commission authorization of UWB operation outside of GPS frequencies.. Nonetheless, those who signed the *ex parte* letter seem dedicated to delaying the introduction of all UWB technologies, even though the impetus and logic of the *ex parte* letter applies only to UWB technologies that would operate on GPS frequencies. The studies and analyses that have yet to be commented upon, as well as the studies that still have not been submitted to the FCC and released for public comment, all relate to GPS issues. The record with respect to non-GPS UWB operations is, as noted above, more than sufficient for the Commission to proceed to adopt rules.

The Commission should not delay the introduction of low-cost, broadband UWB technologies that have the potential to revolutionize how people live and work, as well to foster the provision of education and health care services. Rather, the Commission should bifurcate this proceeding and move to adopt rules for UWB that does not

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operate on GPS frequencies. Indeed the *ex parte* letter itself, with its unfounded mixing of GPS and non-GPS issues, is a clear indication to the Commission that, unless it splits off and advances non-GPS-band use of UWB from GPS-band issues, it will be a long time before the public will benefit from *any* UWB technologies.

Sincerely,

/s/ Henry Goldberg

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