

ORIGINAL
FILE

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

In the Matter of)
)
Redevelopment of Spectrum to)
Encourage Innovation in the)
Use of New Telecommunications)
Technologies)

ET Docket No. 92-9

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To: The Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION OF APPLE COMPUTER, INC.
FOR CLARIFICATION OR RECONSIDERATION

Apple Computer, Inc. ("Apple"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for clarification or reconsideration of the Commission's First Report and Order and Third Notice of Proposed Rulemaking (the "FCC Decision" or "Decision") in the above-captioned proceeding.¹

It is unclear whether, despite the many issues that are unresolved concerning transition in the 2 GHz band, the FCC Decision intended to implement transition rules at this time. If transition rules were not adopted, the Commission should so clarify. If, however, transition rules were adopted, the rules should be held in abeyance pending resolution of the transition issues as to which the FCC Decision solicited comments.

¹ Apple has participated actively in this proceeding. Apple filed comments directing the Commission's attention to elements of its proposed transition plan that would preclude the development of non-licensed PCS in a timely manner, and urged the Commission to implement procedures that would quickly clear microwave incumbents from the 2 GHz frequencies that would be devoted to non-licensed PCS.

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List A B C D E

A. If the FCC Did Not Intend To Adopt Transition Rules, the Commission Should Explicitly State That Rules Are Not in Effect.

The FCC Decision consisted of both a First Report and Order and a Third Notice of Proposed Rulemaking. The First Report and Order made spectrum available in the 2 GHz band for emerging technologies. The Third Notice of Proposed Rulemaking reached at least tentative conclusions concerning various elements of a transition plan for reaccommodating existing 2 GHz fixed microwave operations, and solicited comments concerning other elements of the transition plan. It is unclear, however, whether the Commission actually adopted transition rules in the action reflected in the Decision.

There are two sets of rule changes addressed by Appendix A of the FCC Decision. The first set concerns changes to Part 2 of the Commission's Rules that allocate various frequencies in the 2 GHz band to emerging technologies. Appendix A refers to these rule changes as "proposed," even though the Commission's intent seems to be to adopt these rule changes as part of its First Report and Order. On the other hand, it is also stated in Appendix A that Title 47 "is amended" in connection with transition plan rule changes that appear to amount to nothing more than a proposal.

The "rules" that are set forth in Appendix A are tentative in nature. Although Appendix A states that Title 47 of the Code of Federal Regulations "is amended" to include various transition rules and the Decision states (§ 23) that the Commission is "adopting rules" concerning "involuntary relocat[ion]," the actual text of the transition "rules" in Appendix A lacks material provisions that bracketed language identifies as yet to be decided upon. Among other essential items, these "rules" are missing the date that the transition period will begin and the length of the transition period.

In sum, it is unclear what the Commission intended. If the Commission did not intend to adopt transition plan rules, it should clarify its intention for all concerned.

B. If Transition Rules Were Adopted, The Rules Should Be Held In Abeyance Pending Resolution Of The Transition Issues Specified In The Third Notice.

It would be premature at this stage to adopt transition rules, because key elements of a transition plan have yet to be resolved. The Commission, for example, has not determined when the transition period will commence or how long it will last. FCC Decision, ¶ 27. The Commission also has not yet resolved whether it would be appropriate to dispense with a transition period for some services (*e.g.*, unlicensed PCS), or whether a minimum time period for voluntary negotiations ought to be provided after the Commission issues a license to an emerging technology service provider. *Id.* ¶¶ 27-28.

Similarly, the Commission still is contemplating what the appropriate standards should be for determining whether relocated microwave licensees have received "comparable alternative facilities," and has not decided what dispute resolution procedures should apply if disagreements arise between incumbent licensees and emerging technologies service providers. *Id.* ¶ 25.

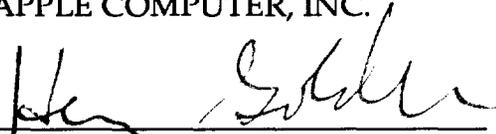
Adopting transition rules at this stage also would violate the Administrative Procedure Act ("APA"). The APA requires that agencies conducting informal rulemaking proceedings make "publication or service of a substantive rule . . . not less than thirty days before its effective date." 5 U.S.C. § 553(d). Although the "effective date" for the rules adopted in the FCC Decision is upon us, material portions of the transition rules have not been published or served because they do not exist.

The APA also requires that agencies issue a "statement of . . . basis and purpose" enabling a reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." *Id.* § 553(c); Automotive Parts & Accessories Association v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). It is self-evident that a reviewing court would not be able to determine why the Commission reacted to major issues of policy as it did when some of those issues have yet to be resolved.

For the foregoing reasons, the Commission should not adopt transition rules at this time. If such rules have not yet been adopted, the Commission should clarify that rules are not in place. If transition rules were adopted, the Commission should hold them in abeyance until the remaining transition issues have been resolved.

Respectfully submitted,

APPLE COMPUTER, INC.

A handwritten signature in cursive script, appearing to read "Henry Goldberg", written over a horizontal line.

Henry Goldberg
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