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GARDNER, CARTON & DOUGLAS EX PARTE OR LATE FILED

1301 K STREET, N.W.

SUITE 900, EAST TOWER

WRITER'S DIRECT DIAL NUMBER

WASHINGTON, D.C. 20005

CHICAGO, ILLINOIS

(202) 408-7201

(202) 408-7100

FACSIMILE: (202) 289-1504

May 2, 1994

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20036

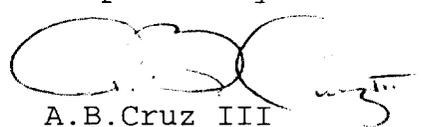
Re: PP Docket No. 93-253

Dear Mr. Caton:

Transmitted herewith for filing with the Commission, on behalf of the E.F. Johnson Company, are an original and ten (10) copies of its "Statement in Support of Certain Petitions for Reconsideration and/or Clarification of the Commission's First Report and Order" in the above-referenced proceeding.

If any additional information is required in connection with this matter, please contact the undersigned.

Respectfully submitted,

  
A.B. Cruz III

ABC:df  
Enclosures

cc: Amy B. Bromberg  
Robert H. Davies  
Richard Feser

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of )  
)  
Implementation of Section 309(j) ) PP Docket No. 93-253  
of the Communications Act )  
)  
Competitive Bidding )  
)  
To: The Commission

STATEMENT IN SUPPORT OF  
CERTAIN PETITIONS FOR RECONSIDERATION  
AND/OR CLARIFICATION OF THE  
COMMISSION'S FIRST REPORT AND ORDER

The E.F. Johnson Company ("E.F. Johnson" or the "Company"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby states its support of the petitions filed by the Land Mobile Communications Council ("LMCC"), the Personal Communications Industry Association ("PCIA"), the National Association of Business and Educational Radio, Inc. ("NABER"), Geotek Communications, Inc. ("Geotek"), and Southwestern Bell Mobile Systems Inc. ("SBMS") (collectively the "Petitioners") for reconsideration and/or clarification of the Commission's First Report and Order adopted in the above-captioned proceeding.<sup>1/</sup> As discussed more fully below, E.F. Johnson concurs with the conclusion reached by each of the Petitioners that the rules adopted in the Commission's Order extend far beyond the scope intended by Congress and are inconsistent with certain definitional parameters set forth in the Order. In

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<sup>1/</sup> First Report and Order, PP Docket No. 93-252, FCC 94-32, released February 4, 1994 ("Order").

addition, E.F. Johnson shares the concerns stated by one or more of the Petitioners that the FCC may be unable to protect the confidentiality of competitive and proprietary business information contained in agreements submitted by applicants, and that the transfer application disclosure rules will place an unnecessary administrative burden on both the Commission's staff and station licensees.

### **INTRODUCTION**

The Order in this proceeding was adopted in response to a Congressional directive contained in the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") that amended Section 309(j) of the Communications Act to require the Commission to "prescribe such transfer disclosures and antitrafficking restrictions and payment schedules as are necessary to prevent the unjust enrichment of recipients of licenses or permits as a result of . . . [random selection procedures]."<sup>2/</sup> In the Order, the Commission adopted rule changes requiring all applicants for voluntary transfer of control or assignment of a license acquired through a Commission lottery to file, along with the transfer application, the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration received in return for the transfer of the license.

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<sup>2/</sup> 47 U.S.C. § 309(i)(1)(C). Section 309(i) authorizes the Commission to resolve mutually exclusive license applications through the use of a system of random selection.

Order at ¶¶ 13-14. In addition, the Commission directed that "[t]his information should include not only a monetary purchase price, but also any future, contingent, in-kind or other consideration such as management or consulting contracts either with or without an option to purchase and below-market financing mechanisms." Id. at ¶ 14.

E.F. Johnson is a leading designer and manufacturer of radio communications and specialty communications products for commercial and public safety use. Founded over 70 years ago as an electronic components manufacturer, the Company entered the radio communications equipment market in the late 1940's and is currently one of the three largest providers of land mobile radio systems in the United States. E.F. Johnson produces base stations, vehicular-mounted and portable transmitters that operate in various portions of the radio spectrum that are used by a variety of entities engaged in the operation and/or provision of communications services.

Moreover, as has been widely reported in the trade press, E.F. Johnson has entered into an agreement with Securicor Relayfone Ltd. ("Securicor"), under which the company will manufacture products in the 220-222 MHz band for distribution in the United States using the Linear Modulation Technology developed by Securicor. The Company expects to be a significant participant in the 220-222 MHz marketplace through the manufacture and supply of equipment. The FCC used lotteries to issue all of the authorizations that will permit the use of this technology. The Company is also a major

provider of equipment in the 800 MHz and 900 MHz bands. Some of the spectrum in those bands were also licensed through the lottery process.

As a manufacturer and supplier of 220 MHz, 800 MHz and 900 MHz land mobile equipment, any regulations imposing additional or unnecessary burdens on equipment users, service providers or station licensees, may ultimately impact E.F. Johnson's ability to sell its products. The Company fully appreciates the shared objective of Congress and the Commission to prevent the "unjust enrichment" or "profiteering" which can occur when a license acquired through a lottery is assigned or transferred for substantial profit prior to providing service to the public. Nevertheless, as demonstrated by the Petitioners, the rules adopted in this proceeding are inconsistent with Congressional directive and, because they are overly broad, will not advance the policy objectives of this proceeding.

#### **DISCUSSION**

As noted by each of the Petitioners, the rules adopted by the Commission to thwart "unjust enrichment" are inconsistent with the text of its own Order and go well beyond the scope intended by Congress. The Petitioners generally share the view that the text of Order, rather than the rules themselves, more closely approximates the intent of Congress with respect to its goal of preventing unjust enrichment by lottery recipients. See e.g., LMCC

Petition at 3-4; NABER Petition at 2. Consistent with Congressional intent, the text of the Order limits the concept of unjust enrichment to those instances where a license acquired by lottery is transferred "for substantial profit prior to providing service to the public." SBMS Petition at 3, citing, Order at n.4 (emphasis added). Because in the 220 MHz, 800 MHz and 900 MHz bands, licenses may not be transferred until such time as the underlying system is constructed, the approach stated in the text of the Order would comport with Congressional intent without being burdensome upon legitimate service providers and other licensees.

Despite the clear Congressional statement of the context in which transfer application disclosure requirements are to apply, the rules adopted by the Commission extend to all applicants for voluntary transfer of control or assignment of an authorization acquired by lottery regardless of whether the transferor commenced delivery of communications services to the public. Geotek Petition at 4. Thus, the rules, as adopted in this proceeding, are applicable to transactions by legitimate operators not engaged in profiteering, and as such clearly exceed the scope of Congress' directive to the Commission.

To make the rules consistent with legislative intent, several of the Petitioners believe that the transfer disclosure requirements should be limited to transactions involving authorized facilities that have not yet been constructed or where there has

been no delivery of service to the public. PCIA Petition at 2;<sup>3/</sup> Geotek Petition at 5; SBMS Petition at 4. E.F. Johnson strongly agrees with this suggested change in the regulations, so that the rules are consistent with Congressional directive and not otherwise inconsistent with the current prohibition against the assignment or transfer of facilities prior to the time of construction.

NABER suggests that the retroactive application of the transfer disclosure rules may also be contrary to Congressional intent. NABER Petition at 2-3. As NABER points out, "the entire thrust of the Budget Act was to recognize fully the need for auctions to apply to future application proceedings in order to prevent instances of 'unjust enrichment' by lotteries which have occurred in the past." Id. at 3. Both LMCC and NABER note that to apply the reporting requirements retrospectively to licensees whose authorizations may have been granted over ten years ago would create unnecessary administrative burdens on both licensees and the Commission.<sup>4/</sup> Id.; LMCC Petition at 5, n.5.

Indeed, LMCC points out that it may not be possible for the Commission to determine by reviewing its records for an authorization whether or not a particular frequency was issued

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<sup>3/</sup> PCIA also believes that the transfer disclosure requirements should not be applied to transfers or assignments that are merely pro forma in nature. See PCIA Petition at 3.

<sup>4/</sup> Because retroactive application of the transfer disclosure requirements would create unnecessary administrative burdens on licensees who may have been awarded their licenses through a lottery at a time when the Commission did not have auction authority, NABER believes that the unjust enrichment rules should only be applied to those licenses acquired by lottery after July 26, 1993. NABER Petition at 3.

pursuant a lottery. LMCC Petition at 5-6. Furthermore, the rules adopted in the Order would require the submission of documentation even where the transfer of a single lottery frequency is just a small part of a larger transaction, such as the sale of an entire business, and where communications systems are clearly secondary to the primary business of the licensee. Id. at 7-8. Here, the documents pertaining to the sale of a business would likely contain voluminous, mostly extraneous information from which specific reference to the consideration to be paid for a single lottery frequency may be difficult to extract. Moreover, as LMCC concludes, it is clear that the disclosure requirement would overstep Congressional intent in situations where the licensee uses its lottery frequency solely to promote internal operational efficiencies rather than as an independent profit center. Id. at 8. E.F. Johnson agrees with the position of LMCC and others that the administrative burden created by the new rules were not anticipated by the Congressional action.

LMCC, PCIA, Geotek and SBMS correctly point out that many of the documents required to be submitted to the Commission under the new disclosure rules would necessarily contain confidential and/or proprietary business information in connection with legitimate, non-speculative transactions. LMCC Petition at 8-9; PCIA Petition at 6; Geotek Petition at 3-4; SBMS Petition at 6-7. Such information would likely be of little value to the Commission, but could prove damaging to an applicant if the public and business competitors gained access to the documents. LMCC Petition at 9.

Although in its Order, the Commission states that the confidentiality of documents submitted pursuant to the transfer disclosure rules can be protected under Section 0.459 of the Commission's Rules,<sup>5/</sup> both LMCC and NABER are uncertain whether or not such information can be protected from disclosure to the public under the Freedom of Information Act. Id.; NABER Petition at 4. E.F. Johnson shares LMCC's view that disclosure of sensitive business information may "seriously disadvantage the parties required to provide it, without yielding any countervailing public interest benefit." Id. Thus, the Company believes that the protection of disclosure information filed by an applicant must be assured, and that such assurance must be more clearly delineated in the new disclosure rules.

Furthermore, as articulated by Geotek, implementation of Section 0.429 of the Commission's Rules to protect the confidentiality of documents submitted to the Commission for review would require dedication of already scarce agency resources to handle, in addition to the transfer or assignment application itself, any related request for confidentiality. Geotek Petition at 7-8. Geotek also asserts that the Commission erroneously concluded that the Paperwork Reduction Act does not apply to the new transfer disclosure rules, and is therefore barred by the Paper Reduction Act from implementing the transfer disclosure rules because the Office of Management and Budget ("OMB") has not had an opportunity to review the information collection request. Geotek Petition at

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<sup>5/</sup> Order at ¶ 14.

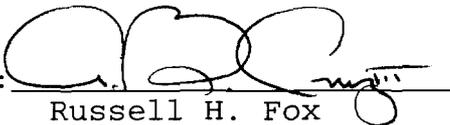
9. To the extent that the Commission failed to seek the requisite OMB approval, E.F. Johnson supports Geotek's request for reconsideration of the Commission's actions.

**CONCLUSION**

For the reasons stated above, E.F. Johnson supports the individual requests of the Petitioners, and respectfully urges the Commission to modify its rules to correctly reflect Congress' directive and make them consistent with the Commission's own interpretation of its obligations as set forth in the Order.

Respectfully submitted,

**THE E.F. JOHNSON COMPANY**

By:   
Russell H. Fox  
A.B. Cruz III

Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900, East Tower  
Washington, D.C. 20005  
(202) 408-7100

May 1, 1994

Its Attorneys

**CERTIFICATE OF SERVICE**

I, Donna B. Fleming, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 2nd day of May, 1994, caused to be sent by first-class U.S. mail, postage-prepaid, a copy of the foregoing to the following:

John B. Richards, Esq.  
Keller & Heckman  
1001 G Street, N.W.  
Suite 500-W  
Washington, D.C. 20001

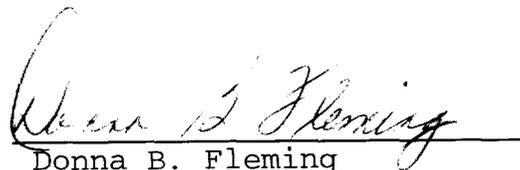
Elizabeth R. Sachs, Esq.  
Lukas, McGowan, Nace & Gutierrez  
1819 H Street, N.W.  
Suite 700  
Washington, D.C. 20006

Thomas A. Stroup, Esq.  
Mr. Mark J. Golden  
PCIA  
1019 - 19th Street, N.W.  
Suite 1100  
Washington, D.C. 20036

David E. Weisman, Esq.  
Alan S. Tilles, Esq.  
Meyer, Faller, Weisman & Rosenberg  
4400 Jenifer Street, N.W.  
Suite 380  
Washington, D.C. 20015

Thomas J. Casey, Esq.  
Skadden, Arps, Slate, Meagher & Flom  
1440 New York Avenue, N.W.  
Washington, D.C. 20005

Wayne Watts, Esq.  
Linda M. Hood, Esq.  
17330 Preston Road  
Suite 100-A  
Dallas, TX 75252

  
Donna B. Fleming