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January 27, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: ET Docket No. 94-32
Ex Parte Presentation

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Apple Computer, Inc. today sent a copy of the attached document to Ms. Ruth Milkman, Mr. Bruce Franca, and Mr. David Siddall, Ms. Jill Luckett, and Mr. Rudy Baca. Two copies of this letter and the attached document are hereby submitted for the public record in this proceeding, pursuant to 47 C.F.R. § 1.1206(a)(1).

If there are any questions in this regard, please contact the undersigned.

Sincerely,

Henry Goldberg

cc: Ruth Milkman
Bruce Franca
David Siddall

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A question has been raised about whether, under the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") and the Administrative Procedure Act (the "APA"), the Commission may make a final allocation of the 2390-2400 MHz band to unlicensed Data-PCS and adopt its existing unlicensed Data-PCS service rules for that band without issuing a Further Notice of Proposed Rulemaking.

The Budget Act required that the Commission allocate, and propose regulations to assign, the 50 megahertz of immediately available spectrum being reallocated by NTIA no later than 18 months after its enactment. This initial 50 MHz of reallocated includes the 2390-2400 MHz band.

In enacting this provision, Congress recognized that spectrum assignments generally are distinct from spectrum allocations, and that generally the regulations governing assignment can be developed only after an allocation has been made. (For example, the Commission can determine whether auctions may be used to assign licenses only after it has determined whether the spectrum being licensed will be used for commercial, subscriber-based services.)

The Congress recognized that it would be nearly impossible for the FCC to propose allocations, decide upon allocations, propose assignment rules, and decide upon assignment rules within the 18-month period specified in the Budget Act. It, therefore, required that the Commission complete spectrum assignments, and propose rules for spectrum allocations, within the 18-month window.

The Congress' goal, however, was to ensure that the Commission would complete its rulemaking process as quickly as possible. Nothing in the Act prohibited the Commission from moving more speedily than Congress anticipated, completing both allocation and assignment rules within the 18 month period. The Budget Act specified a minimum the Commission must meet, not a maximum.

Moreover, nothing in the Budget Act required that the Commission propose assignment rules for an unlicensed service that does not need, and has

never had, assignment rules. Such an action would be inconsistent with the Budget Act's overall goals, as well as with the Commission's obligations to act in the public interest. Unlicensed PCS requires no license assignment rules because no entity is ever given the rights to use a particular frequency or block of frequencies — there are, by definition, no licenses to operate on unlicensed frequencies. Rather, the band is and at all times remains open to use by all devices that comply with the Commission's technical requirements.

To the extent that service rules are, for unlicensed services, the equivalent of assignment rules, the Commission can satisfy the Budget Act's requirement by adopting the existing Data-PCS service rules for the 2390-2400 MHz band in its upcoming decision. As discussed below, under the APA the Commission may lawfully adopt these rules without repeating its notice and comment process on them. Moreover, as discussed above, the Budget Act's requirement that the FCC propose assignment rules by the 18-month deadline does not preclude the FCC from adopting assignment rules by this deadline.

For these reasons, an immediate, final order allocating the 2390-2400 MHz band to unlicensed Data-PCS and adopting the existing unlicensed Data-PCS rules for this band would satisfy the requirements of the Budget Act.

Such an order would also be consistent with the APA. Paragraph 14 of the NPRM expressly stated that the Commission was considering allocating the 2390-2400 MHz band to unlicensed PCS. Moreover, the Commission expressly referred to its order on reconsideration in the PCS proceeding, in which it had discussed the need for an additional unlicensed PCS allocation. No party could make a colorable claim that the NPRM did not provide notice that the 2390-2400 MHz band might be allocated to unlicensed PCS.

With respect to an allocation specifically for Data-PCS, there is general agreement that unlicensed voice and unlicensed Data-PCS cannot share spectrum. Thus, any allocation for "unlicensed PCS" would have to be devoted either to voice or data, or split between the two. Several commenting parties (including Apple, SPA, and Compaq) urged the Commission to allocate the band to Data-PCS and provided data and other information justifying such an allocation. In contrast, not a single commenting party — during either the original comment round or the reply round — suggested that the Commission allocate this band, in whole or in part, to unlicensed voice PCS. As a result, it is entirely consistent with the APA to allocate the 2390-2400 MHz band to Data-PCS immediately.

With respect to service rules for Data-PCS, there is no question that when the NPRM referred to unlicensed PCS, it was referring to the services governed by Sections 15.300 et seq. of the Rules. There is no other FCC service, actual or proposed, that carries this name. Moreover, the Commission's reference to its

commitment in the PCS proceeding to seek additional spectrum for unlicensed PCS made this fact abundantly clear.

Thus, the NPRM proposed allocating the 2390-2400 service to a particular service governed by existing service rules. No commenting party suggested that these rules be changed. The only difference between the existing unlicensed asynchronous rules and those that would apply to the 2390-2400 MHz band would be that certain of the existing rules, which govern clearing of the 2 GHz band and coordinated deployment in advance of band clearing, are inapplicable to the 2390-2400 MHz band (which does not require clearing of incumbent users) and, therefore, would not apply to this band. Indeed, an order in this proceeding would not adopt new service rules for the 2390-2400 MHz band, but rather would merely add references to this band to the rules already set forth in Sections 15.300 et seq.

Thus, no party could make a colorable claim that under the APA the FCC is required to repeat the process it just concluded in its PCS proceeding and re-adopt the service rules for Data-PCS. Under the APA, the Commission may use the notice and comment process to decide whether to add a new spectrum band to an existing service without specifically proposing, or requesting comment on, each of the existing rules governing that service.

In light of the foregoing, the Commission should style its decision as a Report & Order/Further Notice. It should include in the Report & Order portion of the decision the spectrum allocations, and should included in the Further Notice portion of the decision proposed licensing rules for any licensed service that is allocated spectrum. The decision should expressly state that, because assignment rules are not required for unlicensed services, nor further actions or proceedings are required with respect to any spectrum allocated for use on an unlicensed basis.