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

JUN - 4 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of the Commission's Rules) GN Docket No. 96-228
to Establish Part 27, the Wireless)
Communications Service ("WCS"))

**OPPOSITION TO
FURTHER PETITION FOR PARTIAL RECONSIDERATION**

Metricom, Inc. ("Metricom"), pursuant to Section 1.429(f) of the Commission's rules, by its attorneys, hereby submits this Opposition to the Further Petition for Partial Reconsideration ("Petition") by the Wireless Cable Association International, Inc. ("WCA").^{1/} The WCA Petition requests reconsideration of the Commission's decision to "sunset" WCS licensees' obligation to bear full financial responsibility for resolving certain interference to MDS/ITFS downconverters, installed by August 20, 1998, through February 20, 2002.^{2/} WCA alleges that the existing sunset provision must be extended for an additional five years because it does not sufficiently protect the useful life of MDS/ITFS downconverter equipment. Metricom is opposed to this Petition because it proposes to impose a new, more onerous requirement on

^{1/} Public Notice of the filing of the Petition appeared at 62 Fed. Reg. 27603 (May 20, 1997). The FCC Public Notice indicating the Petition was filed was released on May 15, 1997 (Report No. 2196).

^{2/} See Memorandum Opinion and Order, Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, FCC 97-112 (rel. April 2, 1997) ("MO&O").

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successful WCS bidders than that which was in place, and upon which WCS bidders relied, at the time the WCS auction commenced.

I. BACKGROUND

1. Metricom is a young, rapidly growing wireless telecommunications company based in Silicon Valley. Metricom, a pioneer in the development of leading edge, wireless data transmission systems, was the fourth highest bidder in the recent WCS auction. Metricom had winning bids for WCS licenses in St. Louis, Portland, and Seattle Major Economic Areas, in addition to regional licenses in the Northeast, Central and West Regional Economic Area Groupings.^{3/}

2. Metricom bid on these licenses, and invested significant sums of money, time and energy to formulate strategies for bidding at, and participating in, the WCS auction. In performing this undertaking, Metricom and other auction participants relied upon the Commission's WCS rules which provided that WCS bidders would be financially responsible to resolve certain MDS/ITFS downconverter interference through February 20, 2002. The Commission provided no indication that this sunset period might be extended for an additional five years as WCA now requests nor did WCS licensees have any reason to believe that such an extension might be requested. Metricom and other participants in the auction may have formulated different strategies for the WCS auction or may have elected not to participate in the auction had they known that the

^{3/} See FCC Public Notice, "WCS Auction Closes", DA 97-886 (rel. April 28, 1997).

sunset date would be extended. High bidders in the WCS auction are now left with no choice; down payments have been made, and there is a commitment to make final payments.

II. THE PETITION REQUESTS WHAT AMOUNTS TO AN IMPERMISSIBLE RETROACTIVE APPLICATION OF A NEW RULE

3. Metricom vehemently opposes WCA's proposal to extend the sunset date contained in the Commission's rules adopted just two weeks before the WCS auction was to commence. The current sunset date was, in fact, adopted pursuant to an Emergency Motion filed by WCA. In adopting the date, the Commission provided that it would become effective immediately upon publication in the Federal Register.^{4/} Obviously, the Commission decided to follow this unusual procedure so that potential bidders would know what rules would be in place for WCS prior to the commencement of the WCS auction. Despite these extraordinary efforts by the Commission in response to WCA's request, WCA now requests that the rules existing at the time of the auction be modified notwithstanding the fact that participants in the auction relied on the existing rules.

4. Because the WCA auction participants relied upon recently adopted rules effective at the time of the commencement of the auction, the change in the rules as suggested by WCA would have the same effect as a retroactive application of a new rule.^{5/}

^{4/} See MO&O, ¶ 34. In the absence of extenuating circumstances, rules become effective 30 days after publication in the Federal Register. See 47 C.F.R. § 1.427(a).

^{5/} See DIRECTV, Inc. v. FCC, 110 F.3d 816, 825-26 (D.C. Cir. 1997), citing Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (there are three ways in which a rule can be retroactive: if it "impair[s] rights a party possessed when he acted, increase[s] a

Therefore, because the impact of a change in the rule would be the same as a retroactive application of a new rule, it is instructive to examine precedent relating to retroactive application of rules by the Commission.^{6/} The Commission has repeatedly stated that it will rely on an analysis of five factors before deciding to apply a new rule retroactively.^{7/} These factors, first established by the U.S. Court of Appeals for the D.C. Circuit in Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB,^{8/} include: (1) whether the particular case is one of first impression; (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in any unsettled area of law; (3) the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of the burden which a retroactive order imposes on a party; and, (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. An analysis of these factors viewed in

party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." (emphasis added)).

^{6/} See Air Transport Ass'n of America v. C.A.B., 732 F.2d 219, 227 n. 16 (1984) ("The Board's 'offsetting' procedure effectively imposes on air carriers obligations that did not exist when the fees originally were paid. Imposing such obligations is tantamount to retroactive rulemaking and is destructive of the carriers' justifiable reliance on the fee schedule as it previously read.").

^{7/} See, e.g., Fox Television Stations, Inc., Second Memorandum Opinion and Order, 11 FCC Rcd 5714, 5726 (1995); Adelphia Cable Partners, L.P., Memorandum Opinion and Order, 11 FCC Rcd 2461, 2464 (1995).

^{8/} 466 F.2d 380, 390 (1971) (hereinafter referred to as "Retail, Wholesale").

conjunction with the impact created by the WCA request, if granted, clearly illustrates that the WCA Petition must be denied.

A. This is Not a Case of First Impression

5. This is not a case of first impression, but rather, a case of second impression. In response to WCA's request, the Commission explicitly considered factors related to the potential for interference to MDS/ITFS downconverters by proposed WCS operations, and held, among other things, that the financial responsibility to resolve the interference would terminate on February 20, 2002.^{9/} Accordingly, the Commission has already considered the sunset provision which WCA seeks to extend.

B. The Petition Requests An Unnecessarily Abrupt Departure From A Recently Established Rule

6. Changing the Commission's rules at this time, after the auction has been completed, represents an abrupt departure from well established practice. Existing Commission precedent does not permit what amounts to a retroactive change in the rules such as that requested by WCA. Furthermore, the Commission adopted the sunset date in the MO&O after providing interested parties with notice and an opportunity to comment on WCA's Petition for Expedited Reconsideration of the first WCS Order.^{10/} After

^{9/} MO&O, ¶ 15.

^{10/} See FCC Public Notice, "Expedited Pleading Cycle Established for Oppositions and Replies to Oppositions to Petitions for Reconsideration filed by the Wireless Cable Association International, Inc. and by PACS Provider Forum and DigiVox Corporation", DA 97-548 (rel. March 13, 1997).

It must be noted that the MO&O was released on April 2, 1997, and the auction was scheduled to commence on April 15, 1997.

considering all of the pleadings filed in the proceeding, the Commission clearly set forth the guidelines for dealing with potential interference to MDS/ITFS downconverters caused by WCS operations in its MO&O.

C. Metricom Relied on the Sunset Provision as Set Forth in the MO&O

7. Metricom relied upon the rules established in the MO&O not only in deciding to participate in the WCS auction, but also in deciding how much to bid for WCS authorizations. To change the rules now, after the auction has closed and payments for WCS licenses are committed, would be unfairly detrimental to those who participated in the WCS auction based, justifiably, on rules existing at the commencement of the auction. As the court noted in Retail, Wholesale, "unless the burden of imposing the new standard is de minimis ... the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon, must preclude its retroactive effect" ^{11/}

Nevertheless, WCA made no attempt to immediately seek reconsideration of the MO&O. WCA was certainly aware of procedures to seek immediate action by the Commission as it had done so in its original Petition for Expedited Reconsideration (and its Emergency Motion for a Stay) which led to the issuance of the MO&O. Furthermore, WCA offers no explanation as to why it waited until April 14 to file its Further Petition, or how WCS auction participants could have known about the filing of the Petition just hours before the auction was to commence.

^{11/} 466 F.2d at 392.

D. The WCA Position Would Create an Unreasonable Burden

8. Retroactive modification of the rules adopted in the MO&O, as proposed by WCA, would impose a substantial and unreasonable burden on Metricom because it would increase its potential financial responsibility for resolving downconverter interference for an additional five years. This was not contemplated, nor could it have been contemplated, when Metricom established its business plan and bidding strategies based on existing rules. A change in the rules at this time would place an additional financial burden on successful WCS bidders, and may cause them involuntarily to have to modify their business plans -- something they may have chosen not to do if they had known of the extended sunset provision. This, in turn, could result in a delay in the provision of commercial WCS service to the public, contrary to the Commission's goal of expediting service to the public.

E. There is No Statutory Interest in Adopting the WCA Proposal

9. Nothing has changed in the statutory framework which would justify the application of a retroactive-like rule change. The statutory framework is the same now as when the Commission considered WCA's original request, and there is no statutory reason for the Commission to reconsider its decision in the MO&O on the sunset provision. As the court stated in Retail, Wholesale, "unless newly discovered statutory design compels the retroactive application of a new standard, authoritatively established rules

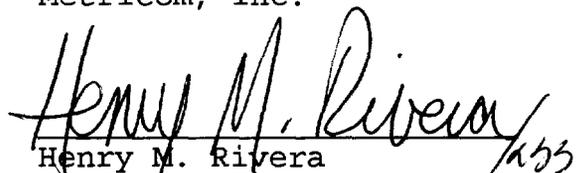
may fairly be relied upon and must preclude any retroactive application of new standards."^{12/}

III. CONCLUSION

Metricom relied upon the sunset provision requiring it to bear financial responsibility for certain interference to MDS/ITFS downconverters when it chose to participate in the WCS auction. Any action which would have the effect of retroactively extending the sunset provision for five years would be contrary to existing precedent, and patently unfair to those who participated in the WCS auction and justifiably relied upon the rules effective at the commencement of the auction. Accordingly, Metricom respectfully requests that the WCA Petition be denied in an expedited manner so that its plans for the provision of WCS service to the public can proceed.

Respectfully submitted,

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^{12/} 466 F.2d 392.

CERTIFICATE OF SERVICE

I, Candice Eliopoulos, a secretary at the law offices of Ginsburg, Feldman & Bress, Chtd., hereby certify that on this 4th day of June, 1997, a copy of the foregoing Opposition To Further Petition For Partial Reconsideration was mailed, first class postage prepaid, to:

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