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Federal Communications Commission
Office of Secretary

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

Amendment of the Commission's Rules	)	
to Relocate the Digital Electronic Message	)	ET Docket No. 97-99
Service from the 18 GHz Band to the	)	
24 GHz Band and to Allocate the	)	
24 GHz Band for Fixed Service	)	

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PETITION FOR RECONSIDERATION

Glenn B. Manishin
Frank V. Paganelli
Stephanie A. Joyce
Blumenfeld & Cohen - Technology Law Group
1615 M Street, N.W. , Suite 700
Washington, D.C. 20036
202.955.6300
202.955.6460 fax

Counsel for WebCel Communications, Inc.

Dated: June 5, 1997

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SUMMARY

The March 14, 1997 Order in this proceeding, decided without public notice or comment and despite serious, unresolved questions as to the validity of Digital Electronic Message Service ("DEMS") licenses in most major U.S. markets, permits DEMS operators to receive an additional 300 MHz of spectrum in the 24 GHz Band, without charge, thereby subverting the auction process routinely used for all other wireless services and undermining competition in the wireless communications industry.

Because DEMS is a service controlled largely by a single licensee (Associated Group, Inc. and its affiliates)—which owns *all* DEMS licenses in eight of the top 10 and 16 of the top 24 SMSAs, and four-fifths of DEMS licenses in four other top 25 SMSAs—this Commission action provides a massive financial windfall to one firm without any public scrutiny or examination of the critical technical justification for a four-fold increase in spectrum allocation, purportedly to compensate for the attenuation problems DEMS operators would experience if relocated from 18 GHz to the higher 24 GHz frequency. The Commission has in the past (as in the PCS proceeding) allowed financial compensation for the direct costs of relocation, but has never allocated "compensating" bandwidth to a relocated licensee. And here, the Commission also failed to address or resolve Associated's qualifications to retain DEMS licenses under the build-out, utilization and related rules governing the service, notwithstanding prima facie documentation of the licensee's non-compliance which, under settled Commission precedent, required revocation of its licenses.

These serious public interest concerns are exacerbated by the Commission's conduct of this proceeding in secret, through extraordinary application of the "national security" exception

to the Administrative Procedure Act. There is no precedent for FCC invocation of military secrecy for decisions on commercial licensees. Notwithstanding two government earth stations currently operating at 18 GHz in two cities, national security certainly does not support non-public, off-the-record Commission consideration of DEMS relocation nationwide or treatment of the underlying technical issues and documentation for a 4:1 spectrum increase, which are plainly DEMS-specific, in a closed proceeding.

Although the Commission, NTIA and Associated have been engaged in ex parte meetings since at least December 1996, the supporting technical materials were released publicly just two days ago, thus preventing any objective review or critique of the basis for awarding hundreds of millions of dollars worth of spectrum to DEMS licensees free of charge. The legal and technical errors in the *DEMS Order* accordingly require that the Commission:

- Initiate a public proceeding to determine whether the 18 GHz DEMS licenses issued to Associated are valid or whether, in accordance with Commission precedent, these licenses should be revoked for non-compliance with the applicable DEMS service rules;

- Vacate Paragraph 12 (and implementing rules) of the *DEMS Order* and solicit public comment on the technical materials released on June 3 related to increased spectrum allocations for DEMS in the 24 GHz Band; and

- Address and decide whether additional spectrum for DEMS licensees should be awarded only through the use of auctions pursuant to Section 309(j) of the Communications Act.

Only in this way can the Commission cure the procedural defects in the *DEMS Order* and eliminate the appearance of impropriety that permeates this extraordinary, off-the-record decision.

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Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service	)))))	ET Docket No. 97-99

PETITION FOR RECONSIDERATION

WebCel Communications, Inc. ("WebCel"), by its attorneys and pursuant to Sections 1.4(b)(1), 1.106 and 1.429 of the Commission's Rules, 47 C.F.R. §§ 1.4(b)(1), 1.106, 1.429, hereby petitions for reconsideration of the March 14, 1997 Order in this docket, by which the Commission relocated and substantially expanded the spectrum allocated for Digital Electronic Message Service ("DEMS").[1]

INTRODUCTION

WebCel is a newly formed company dedicated to commercialization of wireless broadband services, including Local Multipoint Distribution Service ("LMDS"), and will be a participant in the LMDS spectrum auctions anticipated for November of this year.[2] WebCel therefore will be adversely affected by the March 14 *DEMS Order* because this Commission action—taken without public comment and despite serious, unresolved questions as to the validity of

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[1] *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service,* Order, ET 97-99, FCC 97-95, 12 FCC Rcd. 3471 (released March 14, 1997)*("DEMS Order"),* 62 Fed. Reg. 24,577 (May 6, 1997).

[2] *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services,* Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297 (released March 13, 1997).

most DEMS licenses in major U.S. markets—permits DEMS operators, who can provide a wireless communications service partially competitive with LMDS, to receive an additional 300 MHz of spectrum in the 24 GHz Band without charge, subverting the competitive bidding ("auction") process routinely applied for all other types of wireless services. The *DEMS Order* fails to recognize that because DEMS is a service controlled largely by a single licensee (Associated Group, Inc. and its affiliates),[3] this Commission action provides a massive financial windfall to one firm without any public scrutiny or examination of the critical technical justification for a four-times increase in spectrum allocation, purportedly to compensate for the attenuation problems Associated would experience at the higher 24 GHz frequency. The Commission has also failed to address or resolve Associated's qualifications to retain DEMS licenses in the first instance under the build-out, utilization and related rules governing the service. *See* Section I below.

These serious public interest concerns are exacerbated by the Commission's conduct of this proceeding in secret, through extraordinary application of the "national security" exception to the Administrative Procedure Act. There is no precedent for FCC invocation of the national security exemption for decisions on commercial licensees. Nor is there any reason why this docket need be exempt from public notice and comment merely because of two government

[3] Associated presently controls DEMS service in 36 markets in the United States, and will hold interests in a total of 74 markets as a result of the *DEMS Order*. Associated Group, Inc. 1996 Annual Report, at 1 (Attached as Exhibit "A"). Associated controls <u>all</u> DEMS spectrum in 8 of the top 10 SMSAs in the country and in 16 of the top 24 SMSAs: New York, Los Angeles, Chicago, Detroit, Dallas, Houston, Washington, D.C., Boston, Atlanta, Minneapolis, St. Louis, Phoenix, Seattle, Pittsburgh, Miami and Tampa. Except for Denver, Associated controls four-fifths (320 MHz out of 400 MHz) of the present DEMS spectrum allocation in almost all other top 24 markets. Associated Annual Report, at 2.

earth stations currently operating at 18 GHz, or because the 24 GHz Band to which DEMS will be relocated is presently used for military satellite operations. See Section II below.

In any event, national security certainly does not support non-public, off-the-record Commission consideration of DEMS relocation or treatment of the underlying technical issues and documentation, which are plainly DEMS-specific, in a closed proceeding. Nonetheless, the docket in this matter contains only the most cursory excerpts from the record and, until just two days ago, excluded all technical studies (both by OET and those submitted by Associated in support of its claims) related to 24 GHz DEMS. The Commission publicly released these underlying technical documents only on June 3, 1997, nearly two months after the *DEMS Order*.[4]

WebCel has previously urged the Commission not to issue modified DEMS licenses in the 24 GHz Band until after reconsideration of the *DEMS Order*.[5] We are gratified that the Commission refrained from acting precipitously to implement the *DEMS Order* until an orderly, public review of these questions can first take place. Accordingly, and for the reasons discussed in detail below, WebCel submits that the Commission should:

(1) Initiate a public proceeding to determine whether the 18 GHz DEMS licenses issued to Associated are valid or whether, in accordance with Commission precedent, these licenses should be revoked for non-compliance with the applicable DEMS service rules;

[4] *See* Memorandum from Chris Murphy, FCC International Bureau, to William F. Caton, Acting Secretary, June 3, 1997.

[5] Letter from Glenn B. Manishin, Counsel for WebCel, to FCC Chairman Reed E. Hundt, FCC, April 23, 1997 (Attached as Exhibit "B").

(2) Vacate Paragraph 12 (and implementing rules) of the *DEMS Order* and solicit public comment on the technical materials released on June 3 related to increased spectrum allocations for DEMS in the 24 GHz Band; and

(3) Address and decide whether additional spectrum for DEMS licensees should be awarded only through the use of auctions pursuant to Section 309(j) of the Communications Act.

DISCUSSION

I. THE DEMS ORDER IMPROPERLY RELOCATED THE PRINCIPAL DEMS LICENSEE WITHOUT RESOLVING SERIOUS QUESTIONS ABOUT THE VALIDITY OF THE UNDERLYING 18 GHz LICENSES

The *DEMS Order* completely fails to address, let alone resolve, serious prima facie allegations raised nearly nine months ago—and formally presented to the Commission—regarding the validity of Associated's 18 GHz DEMS licenses and Associated's standing under the Commission's DEMS service rules to maintain its 18 GHz licenses. Approaching this matter apparently as a mere private dispute among litigants, the Commission made no investigation or determinations whether Associated's 18 GHz licenses are in good standing despite a series of cogent, well-documented allegations put forth by Teledesic in its September 1996 "Consolidated Petition to Deny and Petition to Determine Status of Licenses."[6] *See DEMS Order* ¶¶ 9, 10.[7]

[6] *Consolidated Petition to Deny and Petition to Determine Status of Licenses*, FCC File Nos. 9607682, 1787-CE-P/L-94, 5385-CE-P/L-94 & 5386-CE-P/L-94, 306-CE-P/L-94 (September 6, 1996) ("Teledesic Petition"). This Petition, and the responsive pleadings by both Teledesic and Associated, were never placed on Public Notice or otherwise opened for public comment by the Commission.

[7] The Commission has held that a non-party, such as WebCel, has standing to file a petition for reconsideration regarding issues in an original petition not addressed by the Commission. *See, e.g., Applications of Metromedia Inc.*, Memorandum Opinion and Order, 56 Rad. Reg. 2d 1198 (P&F) (July 26, 1984).

Among other things, Teledesic's September 1996 petition demonstrated that:

1. Violation of "Second Channel" DEMS Restrictions. Licensing of more than one DEMS channel pair to a single applicant in a standard metropolitan statistical area ("SMSA") is prohibited by the Commission's rules.[8] Nonetheless, DEMS licensees affiliated with Associated were issued licenses to operate on additional multiple channel pairs in their same markets, allowing Associated to aggregate a monopoly over DEMS service in almost all the top-25 SMSAs in the country. This occurred despite the fact that "DEMS applicants that are under common ownership or control are treated as the same applicant for § 21.502 (second channel rule) purposes."[9] Although Associated claims that the Commission has somehow "waived" the second channel restrictions and that its various joint ventures are not commonly controlled "affiliates,"[10] there are no reported FCC decisions waiving or modifying the single channel requirement, and the affiliation between Associated and its joint venture partners remains unresolved by the Commission.

2. Violation of DEMS License Utilization Requirements. Associated failed to meet the threshold DEMS requirement that it operate at or near expected capacity before receiving more than a single channel pair in an SMSA.[11] In promulgating the 1987 revisions to Part 21, the

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[8] *See* 47 C.F.R. § 21.502 (1995); 47 C.F.R. § 101.505 (1996).

[9] *Revision of Part 21 of the Commission's Rules*, 2 FCC Rcd. 5715, 5727 (1987), recon. granted on other grounds, 4 FCC Rcd. 2287 (1989).

[10] Contrary to its position in the 1996 briefings on the Teledesic Petition, Associated now admits that as a result of the *DEMS Order,* it "will manage or hold licenses to provide [DEMS] in 74 markets in the United States." Associated 1996 Annual Report at 1. These 74 markets include all those formally licensed to the parties that Associated claimed, in response to the Teledesic Petition, were "unaffiliated" entities.

[11] 47 C.F.R. § 101.505(b) (1996); *see also* 47 C.F.R. § 21.502(b) (1995) (identical language except the now-obsolete term "DTS" is used in lieu of "DEMS").

Commission concluded that the goals of curbing speculative applications, preventing spectrum warehousing and ensuring efficient spectrum usage would be "better served by using strict standards in applying the utilization requirement."[12] Associated has shown no significant utilization of its assigned spectrum and virtually no marketing of its services for the entire period through year-end 1996.[13] In fact, Associated's defense—that it had leased some network capacity to AT&T as a "hot backup" service in the event of failure in AT&T's own network[14]—demonstrates a prima facie violation of the DEMS service rules, because no actual DEMS service, or data transport of any sort, was in fact taking place.

3. Violation of DEMS Build-Out Requirements. Associated failed to meet the Commission's service rules mandating construction of a system and provision of actual service by DEMS licensees. The issuance of a DEMS license is conditioned upon the achievement of station construction within 18 months of the date of issuance.[15] Within five days of the expiration period, the licensee must file FCC Form 494A certifying that "the facilities as authorized have been completed and that the station is now operational and ready to provide service to the public."[16] In order to satisfy Section 21.43 a DEMS licensee must demonstrate that it has actually constructed a DEMS point-to-multipoint radio system,[17] and not just a highly directionalized point-to-point microwave path like those installed to date by Associated.[18] Section 21.43 also requires

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[12] *Revision of Part 21*, 2 FCC Rcd. at 5726.

[13] Teledesic Petition at 12.

[14] *Surreply of Microwave Services, Inc. and Digital Services Corp.*, FCC File Nos. 9607682 et al., at 5-6 (Sept. 30, 1996).

[15] 47 C.F.R. § 21.43(a)(2).

[16] *Id.*; *see also Revision of Part 21*, 2 F.C.C. Rcd. at 5718.

[17] 47 C.F.R. § 21.2 (1995)

[18] Notifications on FCC Form 494A filed by Microwave Services, Inc., FCC File Nos. 5385-CE-P/L-94 (San Francisco, CA) & 5386-CE-P/L-94 (Los Angeles, CA); Notifications on FCC Form 494A filed by Digital Services Corporation, FCC File Nos. 306-CE-P/L-94 et al.

licensees to show that they are "ready to provide service to the public" by commencing commercial operations prior to the expiration of the 18-month construction period.[19] *In representing to the Commission that "no wide-area 18 GHz networks are in operation" as of 1996*[20] *and in its public statements that it expected to be in service "in the second quarter of 1997,"*[21] *Associated has clearly failed to meet these DEMS build-out requirements.*

4. Violations of The 18 GHz Freeze. Associated's applications for an additional 174 DEMS station licenses should not be granted because they were inconsistent with the Commission's freeze in the 18 GHz band. The Commission ruled in August 1996 that it would grant applications for multiple DEMS nodal stations only upon a specific showing of demonstrable need, i.e., that the licenses are "necessary to meet customer demands for [the applicant's] DEMS service"[22] a threshold not even attempted by Associated in its additional applications or in 1996.[23] Nonetheless, the *DEMS Order*, which rescinds the 18 GHz freeze, appears to grant Associated's 174 nodal station license applications without first determining whether Associated satisfied either the "customer demand" requirement of the *Freeze Order* or Section 21.502 (47 C.F.R. § 21.502) of the Commission's DEMS service rules. See *DEMS Order* ¶ 16.

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[19] *See Revision of Part 21*, 2 FCC Rcd. at 5725 (licensees "will be given a maximum 18 months to put each proposed station into operation"); Conditional License Issued to MSI, FCC File Nos. 9405385 & 9405386 (May 12, 1995) (requirements that the licensee "construct and operate" the station within 18 months mean that the licensee must "carry customer traffic" within that period).

[20] *See* application of DMT, L.L.C., FCC Form 494, Exhibit M, pp. 1,3 (July 2, 1996).

[21] *See* Naik, *Mandl's Move to Tiny Start-Up Spotlights Wireless Rush*, Wall Street Journal, August 21, 1996, at B1 (quoting Associated's CEO). Associated's general counsel stated publicly after release of the *DEMS Order* that as of year-end 1996, "[t]he company began offering business customers point-to-point service connecting their premises to the long distance company" and "plans to offer point-to-multipoint service" at the earliest by "the end of 1997." Carlson, "New Options for WLL Service," Wireless Week, March 24, 1997, at 27.

[22] *Freeze on the Filing of Applications for New Licenses, Amendments and Modifications in the 18.8-19.3 GHz Band*, Order, DA 96-1481 (Aug. 30, 1996).

[23] Teledesic Petition at 13.

There is no question under Commission precedent that any "settlement" of these allegations between the private parties, Teledesic and Associated, does nothing to relieve the Commission from its obligation of acting on the Teledesic petition. As the FCC held squarely in 1976:

> [A] petitioner is always free to withdraw its challenge, but such an action does not necessarily dispose of the issues raised in the petition. Once a petition to deny is filed, the Commission is bound to consider its merits, a petitioner's request to withdraw notwithstanding.

Booth American Company, 58 F.C.C 2d., 554 (1976)(emphasis supplied); accord, Agreements Between Broadcast Licensees and the Public, 57 F.C.C.2d, 42 (1975). As recently as 1995, the Commission again confirmed that "consistent with our precedent, we will consider the merits of [a petition to deny] against applications to insure that the public interest will be served by grant of those applications."[24]

The Commission is therefore "bound" to consider the merits of the Teledesic petition and decide, in the first instance, whether Associated's licenses are in good standing or are held in violation of the applicable DEMS service rules. This determination plainly must precede any conclusion as to Associated's right to relocate to 24 GHz DEMS, because if Associated is not in compliance with the Commission's service rules, its licenses are "forfeited automatically" and must be revoked. 47 C.F.R. § 21.44(a). Where an FCC licensee "has failed to satisfy [an] express condition of its construction permit, the permit is null and void by its own terms." Advanced Communications Corporation, Memorandum Opinion and Order, 10 FCC Rcd. 13337,

[24] *Applications of Stockholders of CBS Inc. and Westinghouse Electronic Corp.*, 11 FCC Rcd. 3733, 3741 (1995) (emphasis supplied).

13343 (1995). As in the case of Advanced's DBS license, if Associated has failed to comply with the DEMS construction, utilization, build-out and second channel requirements, its licenses are void, and the appropriate Commission remedy is to auction the licenses to the highest bidder under the competitive bidding procedures of Section 309(j) of the Act.

II. THE *DEMS ORDER* IS PROCEDURALLY DEFECTIVE UNDER THE ADMINISTRATIVE PROCEDURE ACT AND IS BASED ON AN INCORRECT TECHNICAL ANALYSIS OF LICENSEE ECONOMIC "RIGHTS"

The *DEMS Order* applied the APA's "national security" exemption to justify relocation of DEMS from 18 GHz to 24 GHz, claiming that protection of two military earth stations in only two cities operating in the 18 GHz Band required a change in the entire DEMS allocation.[25] Proceeding without public comment under this theory, the Order further concluded that DEMS licensees required 400 MHz of spectrum—an increase of 300 MHz from the current allocation—in the 24 GHz Band in order to "maintain equivalent information capacity."[26] Neither of these findings comports with proper administrative procedure or Commission precedent. To the contrary, the *DEMS Order's* non-public treatment of both the spectrum relocation and "information equivalency" issues is contrary to established law and finds little, if any, support in the meager technical materials released to date by the Commission.

A. Application of the APA's "National Security" Exemption Is Not Supported by the Record in this Docket

The *DEMS Order's* reliance on the national security exemption to the APA, 5 U.S.C. § 553(a)(1), cannot be harmonized with settled precedent governing administrative procedure.

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[25] *DEMS Order* ¶¶ 1, 4, 18.
[26] *Id.* ¶ 12.

DEMS Order ¶ 18. Exemptions to the APA must be construed narrowly in order to protect the public's right to participate in agency rulemakings. New Jersey Dept. of Environmental Protection v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980).[27] Like all other APA exemptions, the national security provision "is not an 'escape clause' in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published." Id., quoting S. Doc. 248, 79th Cong., 2d Sess. 200 (1946). Because "Congress intended the military function exception to have a narrow scope," the exception applies "only 'to the extent that the excepted subjects are directly involved.'" Independent Guard Association of Nevada v. O'Leary, 57 F.3d 766, 769 (9th Cir. 1995)(legislative history citation omitted).

There is nothing involved in the relocation of DEMS from 18 GHz to 24 GHz which "directly involves" national security or military affairs. The *DEMS Order* makes clear that there are two government earth stations dedicated to military uses, currently in the 18 GHz Band, and relies on NTIA's conclusion that sharing of this spectrum with DEMS is no longer technically feasible. *DEMS Order* ¶¶ 5, 8. As the Order concedes, however, these two locations could be addressed separately, and the licensees relocated (thus completely protecting existing military usage), in order to "accomplish" any national security needs. Id. ¶ 11. If there is any legitimate national security issue in this docket, it applies only to DEMS licenses in Washington, D.C. and Denver, the markets in which there is existing military usage of the 18 GHz Band. National

[27] The *DEMS Order* cites the need for a nationwide DEMS service and the asserted requirement for expedited relocation as "good cause" for proceeding without notice and comment under the APA. *Id.* ¶¶ 5, 11, 18, citing 5 U.S.C. § 553(b)(3)(B). Yet in New Jersey Dept. of Environmental Protection, the D.C. Circuit found that the EPA erred in declining to open a rulemaking proceeding to public notice and comment, even though the agency
(Footnote continued on next page)

security simply cannot justify excluding the entire issue of DEMS relocation, in all markets nationwide, from public notice and comment.

The *DEMS Order* improperly bootstraps the narrow question of national security in two identifiable markets into a general exception to on-the-record rulemaking for DEMS relocation nationwide. The only reason provided by the Commission for exempting DEMS relocation from the APA is the economic impact of relocation on the market for DEMS network and customer premises equipment ("CPE"). As the Order states, the Commission believes that for economic reasons (equipment manufacturing costs), DEMS must be maintained "on a unified frequency band nationwide." *DEMS Order* ¶ 11. Because in the Commission's view DEMS service in two different frequency bands is not "practical" and would be an "inconvenience to subscribers," id., the *DEMS Order* extends the exception from the two specific 18 GHz military facilities to all 18 GHz uses nationwide. Yet such practical considerations—which find no support in the record and are, at best, highly debatable—have no relation to military functions and clearly fall far short of the "good cause" otherwise needed to depart from the APA's requirement for public notice and comment.[28]

Moreover, despite its repeated recitations that DEMS should be a "nationwide service," id. ¶¶ 11, 18, the *DEMS Order* cannot cite to any Commission decision authorizing DEMS as a national service, because no such decision exists. Since the 1987 Part 21 Revisions, the Commission has only addressed 18 GHz operations in the context of the LMDS rulemaking and

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there faced a statutory deadline. The court held that time constraints do not constitute "good cause" that satisfies the narrow APA exception to notice and comment rulemaking. 626 F.2d at 1045.

[28] *See* note 27 above.

Teledesic's related application to use 18 GHz for fixed satellite services. Moreover, DEMS is structured as a local service, for which roaming and other characteristics of "national" wireless services, such as CMRS and PCS, are inapplicable. The Commission certainly has the authority to craft a "new DEMS" service as a national wireless service, but to do so it must act in a notice-and-comment rulemaking pursuant to the APA. No such rules have been proposed or promulgated.

The Commission's reliance on Bendix Aviation Corp. v. FCC, 272 F.2d 533 (D.C. Cir. 1959), cert. denied, 361 U.S. 965 (1960), does not change these conclusions because Bendix is completely different from this proceeding. First, Bendix was not an APA case, and does not construe the scope or proper application of the APA's national security exemption.[29] Second, in Bendix the only issue raised was allocation of frequencies already used exclusively by military (non-commercial) operations.[30] Here, in contrast, the question is whether continued shared use of the 18 GHz Band by both military and commercial DEMS licensees is feasible. Because the 18 GHz Band was initially allocated to DEMS without any invocation of national security, repeal of that shared usage by relocation of DEMS cannot be covered in the overbroad cloak of military secrecy.[31]

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[29] Bendix arose under Section 154(j) of the Act, which authorizes the Commission to "withhold publication of records or proceedings containing secret information affecting the national defense," 47 U.S.C. § 154(j), and was based on a secrecy finding and classification made under since-repealed Executive Order 10,460. Bendix, 272 F.2d at 539.

[30] These frequencies in the 420-450 Mc Band were allocated exclusively to the Office of Defense Management in order "to fill radio-positioning requirements which have increased significantly in recent years due to the international political climate and the advent of the 'space age.'" 272 F.2d at 536.

[31] Under the APA's national security exemption it is not relevant "whether the overall nature of the agency promulgating a regulation is 'civilian' or 'military,'" but rather only "the function being regulated." O'Leary, 57 F.3d at 769. Thus, because the commercial uses of 18 GHz and their relocation to 24 GHz can be addressed separately from the Washington, D.C. and Denver 18 GHz military locations, they are just like the civilian security guards at Department of Energy nuclear installations discussed by the Ninth Circuit in O'Leary, as to whom rules

(Footnote continued on next page)

Finally, the Order's repeated references to the need for expedited relocation (see ¶ 12 and Appendix B) are not supported by the facts and are completely different from the "necessity or emergency" required to depart from the APA. There has been no showing that any DEMS licensees, including Associated, have any appreciable existing operations or customers that would be adversely affected by a move to 24 GHz, much less that justify expedited relocation. Moreover, there are at least two 24 GHz locations (Washington, D.C. and Newark, New Jersey) in which government usage will not be decommissioned, and thus not available for DEMS operations, for several years (1998 and 2000, respectively). *DEMS Order* ¶ 15. Indeed, as the record reveals, the Commission, NTIA and the parties (Teledesic and Associated) have been conducting ex parte meetings to discuss potential DEMS relocation since at least December 6, 1996, more than three months before release of the *DEMS Order,*[32] demonstrating that there was ample time for submission and consideration of public comments. Accordingly, even if a "need for speed" can justify an agency's refusal to conduct public notice and comment rulemaking, see New Jersey Dept. of Environmental Protection v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (statutory agency deadline does not support invoking APA "good cause" exemption), there is no record basis for dispensing with public proceedings in this case.

were permissible only if the agency first complied with the public notice and comment requirements of the APA.

[32] *See* December 6, 1996 facsimile from Larry Williams, Teledesic, to Steve Sharkey, FCC (Document 1 of the set of documents submitted by Chris Murphy of the International Bureau for inclusion in the record on June 3, 1997).

B. The "Technical Explanation" for An Increase in the Allocated DEMS Spectrum from 100 MHz to 400 MHz is Inconsistent With Valid Engineering Considerations and with Licensee Compensation Rights in Cases of Frequency Relocation

The principal finding of the *DEMS Order* is that DEMS licensees should be allocated 400 MHz in the 24 GHz Band, an increase of 300 MHz from the current allocation, in order to maintain what the Order characterizes as "equivalent information capacity." *DEMS Order* ¶ 12. This determination, supported by a one-page, superficial "Technical Analysis" (Appendix B), cannot be harmonized with valid communications engineering principles and misconstrues the legal (and equitable) rights of licensees to "compensation" in cases of frequency relocation.

The Commission's technical analysis was concededly truncated, because the Office of Engineering and Technology applied only "a very narrow set of parameters" in assessing spectrum equivalency at 18 GHz and 24 GHz. *DEMS Order* ¶ 12. This fundamental error again stems from the Commission's conclusion, not supported by the facts or the record, that expedited consideration was necessary. Id. As a consequence of this rushed analysis, the Commission overlooked or mistakenly applied several basic legal and engineering principles ordinarily applicable to frequency relocation.

1. Licensees Have No Compensable Right to Any "Information Capacity" or Throughput. The *DEMS Order* assumes that 18 GHz DEMS licensees must be "made whole" for any loss in "information capacity," i.e., throughput and system coverage, arising from operation at the higher frequency of 24 GHz. Id. However, it is black-letter law that FCC licensees hold their licenses subject to Commission regulation, and enjoy no constitutional or statutory right to any specific usage of their allocated spectrum. 47 C.F.R. § 21.3(a); *see* Vidcom Marketing, Inc.,

6 FCC Rcd. 1945, 1947 (1991); Associated Information Services Corp., 3 FCC Rcd. 5617 (1988). Therefore, whether or not Associated or any other DEMS licensee could support the same "information capacity" at 24 GHz is completely irrelevant to relocation. The Commission has never before found that relocation creates even an equitable claim to a "compensating" increase in bandwidth. Rather, incumbent licensees have been awarded, at most, the financial costs directly related to relocation to another frequency band.[33] In the case of broadband PCS, for instance, the Commission required that PCS licensees enter into cost-sharing arrangements with fixed microwave licensees to cover the direct costs of relocation, but did not even consider whether reductions in "information capacity" justified increased spectrum in the new frequencies allocated for incumbents.[34] Because the *DEMS Order* encompasses more than the direct costs arising from frequency relocation and does not require cost-sharing between incumbent and new 18 GHz licensees, it is inconsistent with the Commission's settled approach to frequency relocations.

2. Propagation and Attenuation Losses at 24 GHz Can Be Offset by Increased Transmit Power Authorization for DEMS. The *DEMS Order* explicitly recognizes that attenuation losses resulting from propagation characteristics at 24 GHz can be offset by increases in transmission power authorized for DEMS licensees. *DEMS Order,* Appendix B.[35] However, the Commission's "technical analysis" ignored this approach based on the assumption that DEMS licensees

[33] *See, e.g., Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies,* First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd. 6886 (1992).

[34] *Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation,* Memorandum Opinion and Order, 11 FCC Rcd. 9394 (1996).

[35] Attenuation losses can also be offset by decreasing hub spacing, another approach that the *DEMS Order* appears to have overlooked or improperly rejected.

would use "the same or similar equipment" at 24 GHz. Id. This assumption is erroneous for two reasons. *First*, the ground for ignoring power increases was the Commission's invalid conclusion, discussed previously, that a "rapid" transition to 24 GHz required expedited treatment. Id. *Second*, the "technical analysis" implicitly assumes, without any evidence of record, that Associated and other 18 GHz DEMS licensees have already deployed substantial amounts of "existing equipment" that will need to be modified in order to operate in the 24 GHz Band. Id. ¶ 10. To the contrary, however, through all of 1996 and early 1997, Associated did not have a network in place and was not serving any significant customer base. Thus, there is no appreciable quantity of installed 18 GHz network equipment or CPE for which modifications are necessary in order to commence 24 GHz operations.

3. Equipment Costs are Irrelevant to This Consensual, Privately-Compensated Relocation. Even if DEMS licensees had any significant installed equipment, the *DEMS Order* concedes that this is a "consensual" relocation, involving only Teledesic and Associated. Id. ¶ 14 n.20. As part of this consensual relocation, Teledesic has agreed "to reimburse licensees which are required to modify existing equipment in order to operate in the 24 GHz Band." Id. ¶ 10.[36] Consequently, there is no basis whatsoever for the Commission's reliance on possible increases in DEMS equipment costs, whether to justify relocation of all DEMS licensees nationwide (not limited to the two locations potentially interfering with existing 18 GHz military operations) or to support an increase in the spectrum allocated to DEMS at 24 GHz. *Because Associated's CPE*

[36] *See* Letter from Russell Daggett, President, Teledesic Corporation, and Laurence Harris, Counsel for Associated Communications, L.L.C., to Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, and Donald H. Gips, Chief, International Bureau, Feb. 27, 1997.

and network equipment costs, if any, will be reimbursed by Teledesic, the Commission's "assumption" that DEMS licensees will use "the same or similar equipment" at 24 GHz—and with it the basis for the "technical analysis" supporting a 4:1 spectrum equivalency—collapses of its own weight.

4. The Technical Materials Released on June 3 Demonstrate that a 300 MHz Increase in the DEMS Allocation Dramatically Increases DEMS Capacity and Throughput. The "technical analysis" in Appendix B of the *DEMS Order* is hardly dispositive. In fact, this cursory treatment does not validate key assumptions, contains no references to published data or verifiable criteria, and has never been subject to independent scrutiny. The Commission, NTIA, and the private parties all shared both a common interest in achieving a "simple" solution that placated Associated without jeopardizing Teledesic's ability to use the 18 GHz Band for fixed satellite service downlinks, and a common incentive to arrive at an accommodation regardless of its technical merit. Because the technical submissions underlying Appendix B were released just two days ago and have not been subject to objective critique by third parties, there is little reason to believe the that a four-fold (4:1) spectrum equivalence—based on estimated attenuation losses that appear to be significantly overstated—can withstand scrutiny. Indeed, in its initial submissions to the Commission (before agreeing to the brokered deal memorialized in the *DEMS Order*), Teledesic concluded emphatically that as a result of modulation changes possible at 24 GHz, "the entire 400 MHz of spectrum could be utilized, effectively quadrupling the capacity

of DEMS compared to the 18 GHz allocation."[37] Thus, instead of making DEMS licensees "whole" for relocation to 24 GHz, the *DEMS Order* represents a radical change to the nature of DEMS service and a massive commercial and financial windfall for Associated, the principal DEMS licensee.

III. ANY ADDITIONAL DEMS SPECTRUM AT 24 GHz SHOULD BE ALLOCATED TO EXISTING LICENSEES ONLY THROUGH COMPETITIVE BIDDING UNDER SECTION 309(j) OF THE ACT

Spectrum auctions have been authorized since 1993. Under Section 309(j) of the Act, competitive bidding is required whenever a commercial (subscription) wireless service involves competing applications. Nonetheless, the *DEMS Order* fails to address whether auction of additional spectrum for DEMS licensees is either warranted or mandated under Section 309(j). In all other recent spectrum allocations (PCS, WCS, MMDS, IVDS and 800/900 MHz SMR), the Commission has issued licenses only through competitive bidding—either by opening a "filing window" to receive mutually exclusive applications, or by scheduling an auction without regard to the existence of competing applications.[38]

There is no legitimate reason to depart from spectrum auctions for 24 GHz DEMS service. The Commission has noted that spectrum auctions are the best means of ensuring efficient, highest-value use of the public resource of radio frequencies.[39] If in fact DEMS operations at 24 GHz require additional spectrum, basic economic principles of market efficiency yield the obvi-

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[37] "Technical Impacts of Operating DEMS in the 24 GHz Band," Memorandum from Mark Sturza to Russell Daggett, Teledesic, Dec. 5, 1996, at 3 (emphasis supplied) (attached to the Larry Williams facsimile referenced above in note 32).

[38] *See Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* Second Report and Order, 9 FCC Rcd. 2348 (1994).

[39] Id. at 2349; Gregory L. Rosston and Jeffrey S. Steinberg, "Using Market-Based Spectrum Policy to Promote the Public Interest," at 20 (Jan. 1997).

ous conclusion that incumbent licensees would value the spectrum higher than other potential bidders. In contrast, if the Commission persists in awarding additional spectrum to some wireless licensees without auction, while requiring PCS, WCS, LMDS and other competing wireless service providers to purchase their licenses at auction, the economic efficiency of and capital market support for the wireless industry could be fatally compromised. With the capital markets already hesitant to fund spectrum auctions in light of the financial difficulties affecting some larger PCS auction winners, the grant of 300 MHz of "free" spectrum to Associated—conservatively valued at $1-2 billion—will only further undermine the ability of competing wireless companies to secure the capital crucial to the creation of a truly competitive wireless communications industry.

CONCLUSION

For all these reasons, the Commission should (a) initiate a public proceeding to determine whether the 18 GHz DEMS licenses issued to Associated are valid or whether, in accordance with Commission precedent, these licenses should be revoked for non-compliance with the applicable DEMS service rules; (b) vacate Paragraph 12 (and implementing rules) of the *DEMS Order* and solicit public comment on the technical materials released on June 3 related to spectrum allocations for DEMS in the 24 GHz Band; and (c) address and decide whether

additional spectrum for DEMS licensees should be awarded only through the use of auctions pursuant to Section 309(j) of the Communications Act.

Respectfully submitted,

By: _____

Glenn B. Manishin
Frank V. Paganelli
Stephanie A. Joyce
Blumenfeld & Cohen - Technology Law Group
1615 M Street, N.W. , Suite 700
Washington, D.C. 20036
202.955.6300
202.955.6460 fax

Counsel for WebCel Communications, Inc.

Dated: June 5, 1997.

EXHIBIT A