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

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In the Matter of:

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ET Docket No. 97-99  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

- 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 )

**MOTION FOR EXPEDITED RESOLUTION OF  
THE MILLIMETER WAVE CARRIER ASSOCIATION, INC.**

The Millimeter Wave Carrier Association, Inc. ("MWCA"), by its attorneys, hereby files a motion seeking expedited review of the Commission's March 14, 1997, order in this docket.<sup>1</sup>

The petitions for reconsideration and applications for review in this docket present, at their core,

<sup>1</sup> 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, 12 FCC Rcd 3471 (1997) ("*DEMS Relocation Order*"). A related order was also issued on June 24, 1997, implementing rule changes adopted in the *DEMS Relocation Order*. See 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, DA 97-1285 (June 24, 1997) ("*Licensing Order*"); see also Petition for Reconsideration of BellSouth Corporation, ET Docket No. 97-99 (filed June 5, 1997); Petition for Reconsideration of DirecTV Enterprises, Inc., ET Docket No. 97-99 (filed June 5, 1997); Petition for Partial Reconsideration of the Millimeter Wave Carrier Association, Inc., ET Docket No. 97-99 (filed June 5, 1997) ("MWCA Petition"); Petition for Reconsideration of WebCel Communications, Inc., ET Docket No. 97-99 (filed June 5, 1997); Petition for Clarification of WinStar Communications, Inc., ET Docket No. 97-99 (filed June 5, 1997); Joint Opposition to Petitions for Reconsideration, Partial Reconsideration, and Clarification of Digital Services Corporation, Microwave Services, Inc., and Teligent, L.L.C., ET Docket No. 97-99 (filed July 8, 1997) ("Teligent Opposition"); Consolidated Opposition of Teledesic Corporation to Petitions for Reconsideration, ET Docket No. 97-99 (filed July 8, 1997) ("Teledesic Opposition").

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a single legal issue for the Commission's consideration—the propriety of using the national security exemption to the Administrative Procedure Act (“APA”) to dispense with notice and comment procedures in allocating spectrum and adopting transition rules for Digital Electronic Message Service (“DEMS”) use of the 24 GHz band. Because, notwithstanding the gravity of the legal issues at stake, the *Licensing Order* has been issued and now allows DEMS incumbents to move forward with deploying services in the 24 GHz band, every day of inaction on the petitions for reconsideration and applications for review places other millimeter wave carriers at a further competitive disadvantage. Under the circumstances, MWCA urges the Commission to act promptly on the petitions for reconsideration and the applications for review or, in the alternative, to freeze deployment of new facilities in the 24 GHz band.

On March 14, 1997, the Commission adopted the *DEMS Relocation Order* under the national security exemption to the APA's notice and comment requirements. This order took steps to transition DEMS licensees out of the 18 GHz band to avoid interference with military earth stations in that band. With the exception of two areas, however, DEMS incumbents may continue to operate in the 18 GHz band until January 1, 2001. Although MWCA has not challenged the use of the national security exemption to reallocate 18 GHz spectrum for military earth stations in the 18 GHz band, MWCA has argued that the use of that exemption is unlawful to allocate spectrum in the 24 GHz band and to adopt transition rules for 18 GHz DEMS incumbents.

Four petitions for reconsideration or partial reconsideration of the *DEMS Relocation Order* were filed, all contesting the legality of the use of the national security exemption. Notwithstanding these petitions, and a separate letter from WebCel explicitly urging the Commission not to grant the contemplated license modifications until after the petitions for

reconsideration were resolved,<sup>2</sup> the Public Safety and Private Wireless Division, on delegated authority, issued the *Licensing Order* on June 24, 1997, immediately allowing DEMS incumbents to deploy facilities and offer service in the 24 GHz band. MWCA is filing, on this day, an application for full Commission review of the *Licensing Order*, and it anticipates that similar applications will be filed by other petitioners in this docket.

The principle issue before the Commission in these cases is well-defined and the few cases that exist are simple and direct. Both sides in this dispute, in fact, have agreed that the *Bendix* case should govern the legality of the Commission's action.<sup>3</sup> The only other case relevant to the legal issue before the Commission is *Independent Guard*,<sup>4</sup> which sets explicit boundaries on the use of the national security exemption. Both of these cases have been extensively briefed in the petitions for reconsideration and the applications for review.<sup>5</sup> Because the *only* argument supporting the legality of the Commission's action is a patently incorrect reading of the *Bendix* case,<sup>6</sup> it is highly likely that the *DEMS Relocation Order* will ultimately be reversed, whether by the Commission itself or by the Court of Appeals. Under the

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<sup>2</sup> Letter from Glenn B. Manishin, Counsel for WebCel Communications, Inc. to Hon. Reed E. Hundt, Chairman, Federal Communications Commission, dated April 23, 1997.

<sup>3</sup> 272 F.2d 533, 541 (D.C. Cir. 1959), *cert. denied sub nom. Aeronautical Radio, Inc. v. United States*, 361 U.S. 965 (1960) ("*Bendix*"). See Teligent Opposition at 11 (stating *Bendix* is "the only applicable precedent.>").

<sup>4</sup> 57 F.3d 766 (9<sup>th</sup> Cir. 1995) ("*Independent Guard*").

<sup>5</sup> See, e.g., MWCA Petition at 6-14; Teligent Opposition at 9-21; MWCA Reply at 5-17.

<sup>6</sup> See Teligent Opposition at 9-21.

circumstances, the Commission should be able to issue a decision on the legal merits of the use of the national security exemption expeditiously and without delay.

MWCA also submits that every day of delay in this case perpetuates legally cognizable injuries to the parties in this case. MWCA's members, in particular, are millimeter wave carriers competing with Teligent, which, by virtue of the *DEMS Relocation Order* and the subsequent *Licensing Order*, received a virtual monopoly over DEMS spectrum in most major markets in the country.<sup>7</sup> The remaining spectrum in that band will not be available for licensing to other entities until after the Commission completes a notice-and-comment rulemaking on competitive bidding of 24 GHz licenses—a proceeding that has not yet even been initiated.<sup>8</sup> Competitors should not be permitted to move forward with deploying facilities in a band improperly established through a private proceeding. The Commission has previously recognized, and attempted to limit, the competitive harms caused by irrational regulatory headstarts.<sup>9</sup>

Moreover, every day that passes in this proceeding provides Teligent with further opportunities to construct facilities that it will undoubtedly argue, for equitable reasons, it should be permitted to keep notwithstanding the near-certain eventual reversal of the *DEMS Relocation Order*. At a minimum, the Commission should explicitly state on the record that any

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<sup>7</sup> MWCA Reply at 17-19.

<sup>8</sup> *DEMS Relocation Order* at ¶ 16. Because the *DEMS Relocation Order* effectively creates a new service, rather than merely relocating 18 GHz DEMS, MWCA does not object to continued deployment by Teligent of facilities in the 18 GHz band consistent with that order.

<sup>9</sup> See, e.g., *Cellular Communication Systems*, 86 F.C.C.2d 469, 511, 642 (1981), *modified* 89 F.C.C.2d 58 (1982), *further modified* 90 F.C.C.2d 371 (1982), *appeal dismissed sub nom. U.S. v. FCC*, C.A. No. 82-1526 (D.C. Cir. Mar. 8, 1983).

construction by Teligent premised on the legally-infirm *DEMS Relocation Order* is at Teligent's own risk and that the Commission will not subsequently protect any reliance interests of Teligent in the event the *DEMS Relocation Order* is reversed and subject to further administrative proceedings.

MWCA urges the Commission to decide the reconsideration petitions in this docket within 30 days of the close of the pleading cycle, or by August 22, 1997.<sup>10</sup> In the alternative, MWCA believes the Commission should place an immediate freeze on any further construction or deployment of facilities in the 24 GHz band. Because DEMS licensees are permitted to continue to utilize the 18 GHz band until January 1, 2001, no harm should be caused to incumbents. At a very minimum, the Commission should explicitly state that, in view of the serious legal issues raised regarding the *DEMS Relocation Order* and DEMS incumbents' ability to continue to use the 18 GHz band, no reliance interests will be granted to Teligent in the event the *DEMS Relocation Order* is reversed and remanded.

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<sup>10</sup> MWCA notes that, in the *Bendix* case, the Commission's decided the reconsideration petitions within 100 days of Federal Register publication. See 23 Fed. Reg. 2698 (Apr. 23, 1958) (attached as Ex. B to the MWCA Reply); Amendment of Parts 2, 4, 7, 8, 9, 10, 11, 12, 16, and 21 of the Commission's Rules and Regulations To Reallocate Certain Frequency Bands Above 24 Mc, Now Designated for Exclusive Amateur or Other Non-Government Use, to Government Services On a Shared or Exclusive Basis, and Conversely To Reallocate to Non-Government Use Certain Bands Now Designated for Government Use, 17 Rad. Reg. (P & F) 1587 (1958) ("*July Order*") (Attached as Exhibit C).

For the foregoing reasons, MWCA urges the Commission to take promptly all necessary actions to expedite resolution of the legal issues in this case.

Respectfully submitted,

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Dated: July 23, 1997

## CERTIFICATE OF SERVICE

I, Bonita Walker, hereby certify that on this 23<sup>rd</sup> day of July, 1997, I caused copies of the foregoing "Millimeter Wave Carrier Association, Inc. Motion for Expedition" to be served, by First Class Mail, postage pre-paid, on the following:

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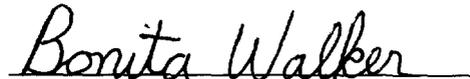
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