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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

In the Matter of

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Amendment of the Commission's Rules)	ET Docket No. 97-99
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)	

APPLICATION FOR REVIEW

1. WebCel Communications, Inc. ("WebCel"), by its attorneys and pursuant to 47 U.S.C. § 155(c)(4), hereby applies for Commission Review of the June 24, 1997 Order in this docket,¹ issued under delegated authority by the Public Safety and Private Wireless Division of the Wireless Telecommunications Bureau, by which the Commission modified the licenses of those licensees authorized to operate a Digital Electronic Message Service ("DEMS") in the 18.82-18.92 GHz and 19.16-19.26 GHz bands to allow operation in the 24.25-24.45 GHz and 25.05-25.25 GHz Bands.

INTRODUCTION

2. The Bureau's modification of the DEMS licenses under delegated authority exceeds the authority granted to the Commission by the Communications Act and should be set

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 Docket No. 97-99, DA 97-1285, 12 FCC Rcd. __ (released June 24, 1997) ("*June Order*").

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aside. The fundamental validity of the licenses modified by the Bureau in the *June Order* are the heart of a petition for reconsideration filed previously in this docket.² The Communications Act precludes the Commission from delegating the function of disposing of a petition for reconsideration. Even if the Bureau's *June Order* is not in fact a response to petitions for reconsideration, then at a minimum it inappropriately limits the responses available to the Commission, and should be voided. Finally, by formally allowing DEMS licensees to bundle ownership of DEMS channels, the *June Order* creates a new telecommunications service, via past ad hoc considerations and waivers, without public notice or comment. This is an expansion of delegated authority far beyond the scope contemplated by the Communications Act and must be reversed.

DISCUSSION

I. DECISIONS ON A PETITION FOR RECONSIDERATION OF A COMMISSION ORDER CANNOT BE DECIDED ON DELEGATED AUTHORITY

3. The *June Order's* modification of the DEMS licenses is a violation of the Commission's delegation authority because it is a *de facto* resolution of issues raised under reconsideration of a previous Commission Order. Under Sections 155 and 405 of the Communications Act, the Commission is *explicitly prohibited* from delegating authority for the granting or denying of any petition for reconsideration. 47 U.S.C. § 155(c)(1); 47 U.S.C. 405(b)(1).

² *WebCel Petition For Reconsideration*, ET Docket No. 97-99 (June 5, 1997)(“WebCel Petition”).

4. The *June Order*'s modification of the DEMS licenses to authorize use of the 24 GHz band is in fact a denial of WebCel's Petition for Reconsideration filed in response to the Commission's March 14, 1997 *DEMS Order*.³ The Bureau's *June Order* promise that the Commission will subsequently address issues raised on reconsideration, *June Order* at 3 n.10, is a procedural slight of hand included for the sole purpose of justifying license modification on delegated authority. Regardless of the Commission's impending response to petitions for reconsideration, the *June Order* in fact substantively addresses and answers significant threshold issues raised in those filings. In its Petition, WebCel challenged the *DEMS Order* on the ground that the Commission had failed to properly investigate publicly filed challenges against the validity of the original DEMS licenses. WebCel Petition at 4. WebCel argued that the Commission is

bound to consider the merits of the Teledesic petition and decide, in the first instance, whether [Teligent's] licenses are in good standing or are held in violation of the applicable DEMS rules. This determination plainly must *precede* any conclusion as to [Teligent's] right to relocate to 24 GHz DEMS, because if [Teligent] 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).

Id. at 8 (emphasis included).

5. The issue resolved by the Bureau through the *June Order*'s modification of the DEMS licenses is the very same issue raised by WebCel on reconsideration — whether the Commission can transfer the DEMS licenses without first investigating the charges made against

³ *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).

their validity. By taking the affirmative step of modifying the DEMS licenses, the Bureau has, without discussion or analysis, decided this issue. However, under Sections 155 and 405 of the Communications Act, the validity of the DEMS licenses, having been timely raised on reconsideration of a Commission order, cannot be resolved under delegated authority. The Commission should immediately set aside the *June Order* and address *all* of the issues raised by the various parties on reconsideration.

II. EVEN IF THE JUNE ORDER IS NOT CONSIDERED A DECISION ON RECONSIDERATION, IT IS INAPPROPRIATE FOR THE COMMISSION TO MODIFY DEMS LICENSES WHILE THE RULES FOR THOSE LICENSES ARE STILL BEING DETERMINED

6. The Commission's *DEMS Order* of March 14 started the administrative process by which certain spectrum licensees would immediately be prohibited from using the spectrum in the 18 GHz band, and would potentially be awarded the right to operate their service at the 24 GHz band. *DEMS Order* at 6. Many of the fundamental elements of that Order — such as the validity of the original licenses in question, the propriety of procedural steps taken by the Commission, the manner in which any new spectrum should be allocated, and the amount of spectrum DEMS licensees require at 24 GHz — have been rigorously questioned and remain in doubt, pending reconsideration. WebCel Petition at 4-18. The Bureau's resolution of any one of these or other issues raised by the parties during reconsideration, prior to full consideration of all the issues by the Commission, is premature and imprudent.

7. The Bureau should not be allowed to rush to a set of narrow conclusions — first that the DEMS licenses are valid and eligible for modification, and second that the *DEMS Order* was properly conducted pursuant to statutory procedural requirements — that dangerously

impact and hamper the Commission's ability to determine the issues raised by the parties on reconsideration. Until the rules for DEMS service at 24 GHz are final, any Bureau action awarding 24 GHz licenses is premature.

III. THE *JUNE ORDER* ESTABLISHES A NEW TELECOMMUNICATIONS SERVICE AND THEREFORE REQUIRES A PUBLIC RULEMAKING BY THE FULL COMMISSION

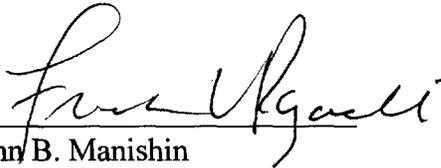
8. The *DEMS Order* is predicated upon Commission acceptance of one party's claim to legitimate control of multiple DEMS channels in several Statistical Metropolitan Statistical Areas ("SMSA's"), despite the Commission's specific one-license-per-market rule. 47 C.F.R. §§ 21.502; 101.505; *see* WebCel Petition at 5. The *June Order* is the implementation of that acceptance. As a result, by these two orders the Commission and the Bureau have in fact created a new, single-channel bundled telecommunications service of up to 400 MHz quite distinct from the multi-channel, 20 MHz services originally designed for DEMS common carriers. 54 R.R. 2d. 1091. DEMS licensees in possession of up to 400 MHz of bandwidth not only will have *complete control* of the DEMS market in many cities, contrary to the notion of multiple competitors originally established for DEMS, but they will also control enough bandwidth to offer substantially improved services to more customers. By any definition, this new "Super DEMS" set of licenses is a new wireless service improperly created on delegated authority by the Chief of the Public Safety and Private Wireless Division. What was originally designed as a single free license for 20 MHz per operator has been, by *ad hoc* Commission actions, transformed into a new service capable of offering up to 400 MHz in many cities nationwide. Thus the *June Order* concludes the award of a 20x increase in spectrum to DEMS licensees.

9. It is well settled that the creation of a new service for allocation of spectrum requires the full procedural steps of a formal rulemaking.⁴ The Commission has always respected this rule by deciding the scope and permitted service in specific spectrum bands via the rulemaking process, not by order or waiver granted under delegated authority. Because the *June Order* fails to meet the procedural requirements of a rulemaking, it is inappropriate and should be vacated. A formal rulemaking investigating the public interest in the creation of a new single-channel wireless service of 400 MHz located in the 24 GHz band should be initiated.

CONCLUSION

10. For all these reasons, the Commission should set aside the Bureau's June 24, 1997 Order until all of the issues raised on reconsideration can be heard and decided by the full Commission.

Respectfully submitted,

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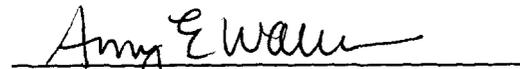
Counsel for WebCel Communications, Inc.

Dated: July 23, 1997.

⁴ See e.g. *Amendment of the Commission's Rule to Establish New Personal Communications Services*, GEN Docket No. 90-314, 5 FCC 3993 (June 28, 1990); *Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide for Interactive Video Data Services*, GEN Docket No. 91-2, 6 FCC 1368 (March 4, 1991).

CERTIFICATE OF SERVICE
ET Docket No. 97-99

I, Amy E. Wallace, do hereby certify on this 23rd day of July 1997, that I have served a copy of the foregoing document via first class mail, postage prepaid, to the parties below:



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