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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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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

To: The Commission

BELLSOUTH REPLY TO OPPOSITION AND RESPONSE TO SURREPLY

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BELLSOUTH REPLY TO OPPOSITION AND RESPONSE TO SURREPLY

BellSouth Corporation ("BellSouth"), by its attorneys, hereby replies to Teligent's Consolidated Opposition[1] to the petitions for reconsideration of the Commission's *Modification Order*,[2] and responds to Teligent's Surreply.[3]

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[1] Digital Services Corporation, Microwave Services, Inc. and Teligent, L.L.C. ("Teligent," formerly Associated Communications, L.L.C.) Joint Consolidated Opposition to Petition for Reconsideration and Applications for Review to June 24, 1997 DEMS License Modification Order (filed August 7, 1997) ("Consolidated Opposition").

[2] *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, *Order*, (June 24, 1997)("*Modification Order*"). Those commenting in response to the *Modification Order* filed the following: BellSouth Petition for Reconsideration (filed July 18, 1997); DIRECTV Enterprises, Inc. Petition for Reconsideration (filed July 23, 1997); Millimeter Wave Carrier Association, Inc. Application for Review (filed July 23, 1997); WebCel, Inc. Application for Review (filed July 23, 1997).

[3] Digital Services Corporation, Microwave Services, Inc. and Teligent, L.L.C. ("Teligent," formerly Associated Communications, L.L.C.) Joint Surreply (filed August 7, 1997) ("Teligent Surreply"). To the extent necessary, BellSouth hereby requests leave to respond to the Surreply herein. The Surreply largely duplicates the Consolidated Opposition, but it addresses the Irving testimony in some detail, while the Consolidated Opposition does not. Given that Teligent both mischaracterizes the Irving testimony and accuses BellSouth of mischaracterizing it, the public interest would be served by entertaining BellSouth's response.

I. THE IRVING TESTIMONY MAKES CLEAR THAT THE REALLOCATION WAS NOT DRIVEN BY MILITARY NECESSITY

Teligent disputes BellSouth's claim that NTIA urged the Commission to relocate DEMS to 24 GHz at the FCC's instigation, in order to accommodate the competing and incompatible interests of satellite and DEMS licensees. Teligent claims that BellSouth mischaracterized the testimony of Larry Irving, the administrator of NTIA, taking it out of context, and that the driving force for NTIA's request was military necessity. In fact, it is Teligent, not BellSouth, that distorts Mr. Irving's testimony by ignoring the plain language of both the questions asked of Mr. Irving by Rep. Steve Largent and Mr. Irving's responses.

BellSouth relied on Mr. Irving's April 24, 1997 testimony in response to questions from Oklahoma Rep. Steve Largent before the House Subcommittee on Telecommunications, Trade, and Consumer Protection. Mr. Largent's opening question makes clear that the testimony specifically concerned how the NTIA became involved in a dispute between "*two private companies.*"[4] Mr. Largent wanted to know how "national security interests were raised" in a situation where one of "two companies" had spectrum "that [they] were fearful was going to be . . . impeded upon and so all of a sudden, the NTIA comes up and says, hey, we happen to have some spectrum available over here; we can accommodate everybody."[5]

Mr. Irving's response to Mr. Largent's query concerning those two companies was that there were "competing uses and they couldn't both fit in the same area."[6] Mr. Irving was clearly referring

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[4] *See* Reauthorization of the National Telecommunications and Information Administration, 1997: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce, 105th Cong., 1st Sess. 77-79 (1997) (statement of Larry Irving, Assistant Secretary for Communications for the National Telecommunications and Information Administration) ("Irving Testimony") (emphasis added).

[5] *Id.* at 77.

[6] *Id.*

to Teledesic and Teligent — two companies with a widely publicized conflict over sharing the 18 GHz band. The record shows that the FCC was in fact meeting with these companies and attempting to find a way to avoid the conflict between them before NTIA ever raised the incompatibility between military and DEMS use of the 18 GHz band as a concern.[7] Mr. Irving's repeated statements that the FCC solicited NTIA's help with a problem,[8] in response to Rep. Largent's question about the conflict between the two companies, makes clear that NTIA's action was an attempt to assist the FCC in resolving the civil dispute between Teligent and Teledesic, and not, as Teligent insists, to solve a conflict between "DEMS and the military satellite earth stations." Mr. Irving's straightforward testimony was that "[t]he FCC had a problem. *They came to us* and said they have to move somebody; is there a place you can move them to. They needed a relatively small portion of our spectrum to move."[9] He further testified that his agency attempted to accommodate the FCC by seeing if it was possible to free up some 24 GHz government spectrum for the FCC to use for resolution of the Teligent-Teledesic conflict:

> The *Commission* had a problem. *They* asked if there was a way *we* could move, we took a look, we asked the constituents in the Defense Department if it was possible to do it, they said it was, we made a shift and it solved a problem. . . . [W]e were trying very hard to make sure that commitments the Commission made were able to be honored and making sure that our national security needs were going to be met.[10]

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[7] The documents placed in the record by the International Bureau on June 3, 1997 show that proposals had been presented to the staff concerning resolution of the Teligent-Teledesic dispute as of December 5, 1996. NTIA's letter to the Commission was dated January 7, 1997.

[8] Irving Testimony at 78.

[9] *Id.* (emphasis added).

[10] *Id.* (emphasis added).

Teligent never acknowledges the fact that Mr. Irving repeatedly stated that the FCC approached NTIA in an attempt to solve the *FCC's* problem — which involved incompatibility between Teligent's and Teledesic's use of 18 GHz spectrum — by asking NTIA to move some governmental spectrum users to other bands and make that spectrum available for allocation by the FCC. The testimony reflects that NTIA's decision to make 24 GHz spectrum available for nongovernment use was strictly an attempt to accommodate the FCC in resolving that problem. Notably absent from Mr. Irving's testimony is any assertion that the decision to make 24 GHz spectrum available to the FCC was driven by military needs. The fact that the FCC came to NTIA for assistance, and not the other way around, eliminates any doubt that the problem centered around two private companies, and not a military problem or need.

Teligent puts a spin on Mr. Irving's testimony to divert attention from this fact, but its spin will not stand scrutiny. First, Teligent claims that "[w]hen Mr. Irving stated '[y]ou had some competing uses and they both couldn't fit in the same area,' he was referring to DEMS and the military satellite earth stations, and not to the Teledesic/DEMS band sharing matter."[11] This assertion is clearly false. Mr. Irving was responding to a question about a conflict between two companies, not between one company and the military, and his response made clear that the FCC wanted to move one of the two companies to spectrum that was currently reserved for government.[12]

Teligent nevertheless claims that its story is "the most plausible interpretation"[13] because of Mr. Irving's statement that "[w]e had to make the move nationally, however, because all of the

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[11] Surreply at 4 (footnotes omitted).

[12] Irving Testimony at 77-78.

[13] Surreply at 5.

equipment the military used was national equipment and it had to be useful anywhere."[14] Given that Mr. Irving was speaking of government — indeed, *military* — equipment "mak[ing] the move," and not private equipment, it is clear that Mr. Irving was referring not to DEMS but to the incumbent 24 GHz government spectrum users that would be changing frequency assignments for the benefit of Teligent. The simple fact is that government users cleared the 24 MHz band so that the FCC could make that band available to Teligent, as the FCC requested. No military equipment moved out of the 18 GHz band.

Next, Teligent claims that "when Mr. Irving stated that the Commission 'came to us and said, we have to move somebody; is there a place you can move them to,' he was referring to the Commission's need to relocate DEMS in order to comply with NTIA's request to eliminate interference from DEMS facilities to government earth stations in the 18 GHz band."[15] This is demonstrably false. Mr. Irving was responding to a question about why NTIA sent its letter to the FCC. He said the NTIA letter was prompted by the FCC's request for NTIA help. Since the FCC request preceded the NTIA letter, it is obvious that "NTIA's request to eliminate interference from DEMS facilities to government earth stations" did not exist when NTIA was trying to accommodate the FCC. The NTIA letter requesting DEMS relocation came only after NTIA decided to move incumbent government users of the 24 GHz band so that there would be someplace to move DEMS.

Finally, Teligent twists Mr. Irving's testimony beyond recognition in asserting that Mr Irving "clarif[ied] that NTIA's principal concern was to obtain primary status in the 18 GHz band vis-a-vis DEMS licensees"[16] when he said:

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[14] Irving Testimony at 78, *quoted in* Surreply at 5.

[15] Surreply at 4-5 (footnote omitted).

[16] Surreply at 5.

> We moved our people to other bands that we already had, and we have lots of shared uses and there are occasions when we move from primary to secondary status. There are occasions when we ask for primary status working with the FCC. All this [amounted to] was a change in status. It was a shared spectrum. We didn't have exclusive use, as I understand it.[17]

Here, Mr. Irving was speaking about what NTIA did to make the 24 GHz band available for nongovernment use in response to the FCC's request — namely, NTIA was able to make spectrum available for FCC primary allocation to DEMS by moving government users to other bands. His reference to "primary" and "secondary" status had nothing to do with 18 GHz, as Teligent asserts. It was an explanation of the tools available for managing the shared use of the band NTIA made available to the FCC, the 24 GHz band, and other bands to which government users were moved.

In short, both Rep. Largent's questions and Mr. Irving's responsive testimony leave no question but that the FCC was the driving force behind NTIA's request to clear the 18 GHz spectrum, as BellSouth has previously demonstrated.[18] Under these circumstances, the purported reliance on the APA's "national security" or "military affairs" exemption must fail.

II. WITHOUT EXPLANATION, TELIGENT NOW CLAIMS *BENDIX V. FCC.* PREVIOUSLY ITS "BENCHMARK" CASE, IS "INAPPLICABLE" SINCE *BENDIX* DID NOT INVOLVE EXEMPTION FROM RULEMAKING

In its July 8 opposition to the petitions for reconsideration, Teligent claimed that the *Bendix Aviation Corp. v. FCC*[19] decision was the "benchmark case" concerning the APA's military affairs exception and, accordingly, governed this proceeding.[20] Now Teligent apparently realizes that in

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[17] Irving Testimony at 78, *quoted in* Surreply at 5.

[18] BellSouth Reply, at 4-9.

[19] *Bendix Aviation Corp. v. FCC*, 272 F.2d 533 (D.C. Cir. 1959) ("*Bendix*"), *cert. denied sub nom. Aeronautical Radio, Inc. v. U.S.*, 361 U.S. 965 (1960).

[20] Digital Services Corp., Microwave Services, Inc., and Teligent, L.L.C. (formerly Associated Communications, L.L.C.) (collectively, "Teligent") Opposition to Petitions for Reconsideration,

Bendix the FCC *did* issue a notice of proposed rulemaking; as a result, Teligent can no longer maintain that this decision permits the Commission to proceed with a spectrum reallocation without notice and comment rulemaking. Teligent does not confess its error, however. Instead, Teligent claims that the Commission's reasons for proceeding through rulemaking in *Bendix* are "inapplicable to the instant case,"[21] never once acknowledging that it was doing an about face.

In the space of one month, *Bendix* has gone from being "the only applicable national security precedent" to irrelevant. Although Teligent previously claimed that the "Commission relocated DEMS to 24 GHz in *exactly* the same manner" as it had in *Bendix*,[22] Teligent now believes *Bendix* to be non-controlling here because in *Bendix* there was no pressing government need for an immediate need for reallocation, while DEMS had to be moved "immediately . . . in order to satisfy NTIA's national security concerns."[23] In *Bendix*, according to Teligent, there was time to conduct a rulemaking, while there is no such time here.

Teligent's attempt to distinguish what had been its controlling precedent fails, however. First, there was no military need to relocate DEMS from the 18 GHz spectrum nationwide. As Mr. Irving testified, "[t]here were only two areas in which there was going to be an interference problem."[24] These limited problems could easily have been addressed by modifying or conditioning the licenses at issue. If there was an *urgent* interference concern to the military in two markets, the DEMS licenses in those markets could have been assigned new frequencies without rulemaking,

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Partial Reconsideration, and Clarification at 11 (filed July 8, 1997) ("July Opposition").

[21] Surreply at 12; Consolidated Opposition at 9.

[22] July Opposition at 13.

[23] Surreply at 12; Consolidated Opposition at 9.

[24] Irving Testimony at 79, *quoted in* Surreply at 16 and Consolidated Opposition at 13.

leaving DEMS in the 18 GHz band elsewhere. Second, there was no need for immediate action to accommodate the military. The FCC adopted a lengthy transition period, which clearly could have been accomplished through notice and comment rulemaking. Finally, even if clearing DEMS out of the 18 GHz band had been justified on military grounds, the establishment of a new 24 GHz civilian allocation and the relocation of the 18 GHz DEMS licensees to the new band was not required on military grounds.[25] Under *O'Leary*,[26] the military affairs exception is clearly inapplicable where the rule change is not directly required for military purposes.

III. STANDING

Teligent, the party directly benefitting from the Commission's decision to reallocate it vast public spectrum without notice and comment or an auction, continues to press its strained argument that BellSouth lacks standing to challenge the FCC's failure to provide notice and an opportunity

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[25] Teligent claims that the Commission could not have simply terminated the licenses of 18 GHz DEMS licensees upon deletion of the spectrum allocation for military purposes. Surreply at 12 n.31; Consolidated Opposition at 9 n.19. Teligent is incorrect, however. The Commission does have the authority to delete existing licenses, either at the end of their license terms, *see Transcontinental Television Corp. v. FCC*, 308 F.2d 339, 343-44 (D.C. Cir. 1962), or during their terms. *See FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 282 (1933) (Commission's "broad authority plainly extended to the deletion of existing stations if that course was found to be necessary to produce an equitable result."); *accord Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969) (citing *Nelson Bros.* for proposition that "the power to grant and deny licenses and to *eliminate existing stations*" is "unquestionabl[e]") (emphasis added). Under the Communications Act, the federal government is vested with control over spectrum usage, and licensees receive no rights to their spectrum assignment against the regulatory power of the United States. 47 U.S.C. §§ 301, 304; *see Nelson Bros.*, 289 U.S. at 282, *Red Lion*, 395 U.S. at 394. Moreover, the Commission has the authority under 47 U.S.C. § 316 to modify a license during its term as may be required by the public interest, provided it give the licensee notice and an opportunity to be heard. *See Transcontinental*, 308 F.2d at 343 ("We construe section 316(a) as having reference to a modification which interferes with rights of a licensee during the term of its license."). Accordingly, the Commission could have given Teligent notice that the expiration dates of its licenses would be greatly foreshortened, with no opportunity for renewal given the deletion of the 18 GHz spectrum allocation for DEMS.

[26] *Independent Guard Association of Nevada v. O'Leary*, 57 F.3d 766 (9th Cir. 1995).

to comment.[27] Teligent's attempt to keep the Commission's behind closed doors is meritless. Any potential commenter is aggrieved when deprived of its right to participate in notice and comment proceedings prior to a Commission decision. Teligent completely ignores the dispositive case on this very point, cited by BellSouth in its reply. In *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994), the Court held:

> [I]n a case of this sort, neither standing nor ripeness issues are of significant concern. We have held the unequivocally that when a party complains of an agency's failure to provide notice and comment prior to acting, it is that failure which causes "injury"; and interested parties are "aggrieved" by the order promulgating the rules.

The Court's decision is on all fours with the instant case. BellSouth is an interested party that was deprived of an opportunity to comment on the use and allocation of the spectrum. That denial, in and of itself, constitutes "injury" and thereby confers standing on BellSouth. Moreover, BellSouth also has standing because it is affected by the FCC's grant of spectrum without an auction to a competing company.[28]

Moreover, Teligent erroneously argues that BellSouth request for a freeze on licensing at 24 GHz "should be dismissed as late-filed" because it should have been filed in response to the *24 GHz Order*.[29] BellSouth in fact asked, in its timely-filed petition for reconsideration, that the Commission reconsider its *24 GHz Order* "by vacating it immediately."[30] If the Commission had done so, no license modification order would have issued. The Commission did not vacate its order immediately, however, thus making it necessary for BellSouth to ask the Commission to suspend

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[27] Teligent Opposition, (filed July 8, 1997) at 22-25; Teligent Consolidated Opposition (filed Aug. 7, 1997) at 3-4.

[28] BellSouth incorporates by reference its Reply (filed July 23, 1997), at 12-14.

[29] Teligent Consolidated Opposition at 2.

[30] BellSouth Petition for Reconsideration at ii (filed June 5, 1997).

its licensing efforts in the 24 GHz band by freezing that band. The *24 GHz Order* only had concrete effect when the *Modification Order* was released, actually authorizing the construction of facilities. A petition for reconsideration of the *Modification Order*, then, is an appropriate place to ask for a freeze, because that order prejudices reconsideration of the 24 GHz Order.

CONCLUSION

For the foregoing reasons, the Commission should vacate its allocation of spectrum to DEMS at 24 GHz and its modification of 18 GHz DEMS licenses.

Respectfully submitted,

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August 19, 1997

CERTIFICATE OF SERVICE

I, Lafonn P. Knight, do hereby certify that copies of the foregoing "BellSouth Reply" were served by U.S. first-class mail, postage prepaid, on this 19th day of August 1997, upon the following:

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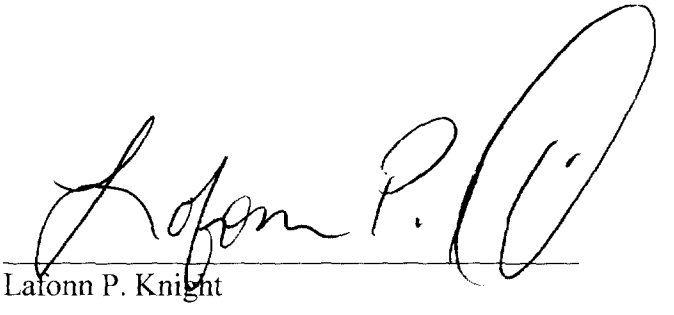

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