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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

ORIGINAL

IN THE MATTERS OF)	
)	
NORCOM COMMUNICATIONS CORPORATION)	
ASS'N FOR EAST END LAND MOBILE COVERAGE)	
LMR 900 ASSOCIATION OF SUFFOLK)	WTB DOCKET No. 98-181
METRO NY LMR ASSOCIATION)	
NY LMR ASSOCIATION)	
WIRELESS COMM. ASSOCIATION OF SUFFOLK COUNTY)	

TO: HON. ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIK

REPLY TO CONSOLIDATED OPPOSITION

Norcom Communications Corp. ("Norcom"), by its attorneys and pursuant to section 1.294(c) of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.294(c) (1997), hereby submits the following Reply to the Consolidated Opposition To Motions to Delete ("Opposition"), filed by the Wireless Telecommunications Bureau ("Bureau") on December 21, 1998. Because the Opposition fails to rebut Norcom's claim that the *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture*, FCC 98-252, released October 14, 1998 ("HDO"), contains serious errors of law and fact, the Presiding Judge should grant Norcom's Motion to Delete.

The Presiding Judge's Authority. The Bureau mischaracterizes *Atlantic Broadcasting Co.*, 5 FCC 2d 717 (1996), to support its claim that the Presiding Judge is powerless to act in the face of material Commission error. However, an accurate review of that case, as well as the cases cited in Norcom's Motion, reveal that the Presiding Judge is empowered to delete

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issues in a hearing proceeding. In fact, in *Atlantic Broadcasting*, the Commission clearly stated:

We pointed out that, where there had been a thorough consideration of the particular question in the designation order, the subordinate officials would be expected, *in the absence of new facts or circumstances*, to follow our judgment as the law of the case. But we added that the *subordinate officials would be justified in reaching a different conclusion with respect to a particular question when it is established that we had not fully considered the matter in the designation order.*

Id at ¶ 9 (emphasis added). Thus, *Atlantic Broadcasting* clearly states that the Presiding Judge is authorized to modify or delete issues when: 1) there are new facts and circumstances presented to the presiding judge; or 2) when a matter had not been fully considered in the HDO. In this case, as demonstrated conclusively below, the FCC did not fully consider the correct legal standard applicable to questions involving the unauthorized transfer of control of private mobile radio service (“PMRS”) stations and did not fully consider the facts relating to the relationship between Norcom and the not-for-profit associations also subject to the HDO (the “Associations”). Because these issues were not fully considered, the hearing designation order contains significant errors or omissions, requiring deletion of the incorrectly posed questions.

The Inapplicability of Intermountain Microwave. The Bureau arrogantly claims that there is no question but that the *Intermountain Microwave* standard, upon which the HDO is based in material respects, applies to PMRS stations, and that even if it does not, Norcom has not shown the inconsistency between the *Intermountain Microwave* standard and the correct legal standard. The Opposition can only be characterized as an attempt to mislead the Presiding Judge.

The Bureau is simply wrong in its assertion that the Commission has not addressed the legal standard to judge whether there has been an unauthorized transfer of control of a PMRS station. The FCC has consistently and clearly stated that the *Intermountain Microwave* standard only applies to CMRS stations and the *Motorola* standard applies to PMRS stations. The following are the specific occasions when the FCC has spoken to this issue:

CMRS Third Report and Order, 9 FCC Rcd 7988, 226, n.434 (1994) (emphasis added).

[O]ur interpretation of these rules *has varied in the context of specific common carrier and private radio services*, particularly on the issue of management contracts. n434

n. 434: Compare *Intermountain Microwave*, 24 Rad. Reg. 983 (1963) (six-prong test of control for common carrier services) and *Applications of Motorola, Inc.*, File No. 507505, Order, para. 14 (July 30, 1985), announced by FCC News Release No. 6440 (Aug. 15, 1985) (test of control for SMR services).

Public Notice No. DA 96-1245, released August 10, 1996 (emphasis added).

J. Does *becoming a CMRS provider* affect my ability to enter into management arrangements for the operation of my stations? Yes. *Reclassified CMRS licensees* who have pre-existing contracts with management companies must continue to demonstrate that the licensee – not the management company – is in actual control of the license. In addition, the Commission will now consider the following six criteria to determine that a *CMRS licensee* has control: (i) does the licensee have unfettered use of the facilities?; (ii) who controls the day-to-day operations of the facilities?; (iii) who determines and carries out policy decisions?; (iv) who has responsibility for personnel matters?; (v) who has responsibility for financial matters; and (vi) who receives the financial gain from operating the facilities?

CMRS Fourth Report and Order, 9 FCC Rcd 7123, ¶ 20 (1994) (emphasis added).

[T]he guidelines set forth in *Intermountain Microwave* and its progeny provide workable standards for the Commission and licensees to use in assessing control issues. We believe that *these established guidelines should apply to all CMRS providers, including reclassified PMRS carriers* upon expiration of the transition period. Accordingly, we will continue to use the control factors set forth in the *Intermountain* decision when considering questions of de facto

control of a CMRS licensee in particular cases. Extending these control criteria to all CMRS providers will promote regulatory consistency and conformity among these licensees.

The Presiding Judge should note that the above-cited discussions are from the FCC's GN Docket No. 93-252 rule making proceeding in which the Commission carefully considered the regulatory obligations of CMRS carriers. PMRS carriers such as Norcom and the Associations were unaffected (unless reclassified, which Norcom and the Associations were not) by the decisions in that proceeding. The *Motorola* test for PMRS licensees has never been revised, overturned, or even criticized since it was first adopted in 1985.

The Bureau makes the unsupported claim that “in *Marc Sobel*, and in the HDO in this case, the Commission found that the *Intermountain Microwave* standard applies to PMRS stations. (citations omitted).” The Commission made no such finding. It may have erroneously misapplied the *Intermountain Microwave* standard in both instances. That misapplication is hardly the determination that the Bureau wishes occurred. Moreover, even if the FCC “found” that the *Intermountain Microwave* standard applied to PMRS licensees, such a finding would have been contrary to established precedent. Because the FCC cannot depart from established precedent without a full and rational explanation^{1/} such a departure would have been unlawful in any event.

Inconsistencies Between Motorola and Intermountain Microwave Tests. In its Opposition, the FCC makes the remarkable claim that “neither Norcom nor the Associations have shown that there is any inconsistency between” the tests. Opposition at 4. As an initial

^{1/} *Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

matter, Norcom brings to the Presiding Judge's attention the Bureau's hubris in asserting that it is Norcom's obligation to show that there is no difference between the correct legal standard governing the unauthorized transfer of control of PMRS stations and the *Intermountain Microwave* standard incorrectly cited by the Bureau. The Bureau plainly has the obligation to demonstrate that there is no difference. More importantly, the Bureau again misstates the facts. Norcom's Motion presented, in great detail, the differing nature of the two tests -- comparing them in a side-by-side table for the Presiding Judge's convenience.

Norcom also clearly stated:

The tests are not comparable. The *Intermountain Microwave* standard involves the licensee's relationship with others and evaluates such factors as unfettered access to facilities, employment decisions, and the payment of operating expenses, etc. The *Motorola, Inc.* standard, by contrast, focuses on such issues as how the licensee obtained its equipment and the licensee's ultimate ability to terminate the management contract.

Motion at 2.

The regulatory differences between CMRS and PMRS operations are no small matter and are not raised by Norcom simply for procedural advantage. CMRS operators are heavily regulated common carriers, covered by Title II of the Communications Act and include AT&T Wireless Services, Bell Atlantic Mobile, Sprint PCS, Iridium satellite phones, and Cellular One. By contrast, PMRS licensees employ their systems to meet internal communications requirements or to provide mobile wireless services that are limited in scope or nature. If the Presiding Judge were to apply the *Intermountain Microwave* test to Norcom and the Associations, it would turn Congress's carefully crafted regulatory scheme on its

head.^{2/} The Commission cannot impose the type of punishment envisioned in the HDO with an inapplicable legal standard, especially a more stringent standard.^{3/}

For-Profit vs. CMRS Status. The Bureau's Opposition erroneously alleges that, if the Presiding Judge rules that for-profit services were unlawfully provided by the Associations', the *Intermountain Microwave* test would apply. Opposition at 5. The Bureau's arguments are inapposite. First, the Bureau cannot rely on a legal standard based upon facts that have not yet been established. More importantly, even if those facts are established, the legal standard would still be incorrect. Even if the Associations offered for-profit services, they would still not be CMRS stations subject to the *Intermountain Microwave* standard. The statutory test for CMRS classification is the provision of (i) interconnected service, (ii) to the general public, (iii) on a for-profit basis. 47 U.S.C. § 332(d) (1997); 47 C.F.R. § 20.9 (1997) (emphasis added). Even if the Bureau were able to demonstrate that the Associations' services were intended to profit the Associations and that service was offered to the general public (contentions which Norcom vigorously contests), there is no question that the Associations' services were not interconnected to the public switched telephone network. Accordingly, the Opposition's suggestion that an adverse finding by the Presiding Judge on the issue of for-profit services will permit the Presiding Judge to apply the *Intermountain Microwave* test in this proceeding is simply legally wrong.

^{2/} It would make no more sense to apply television broadcast policies to Norcom and the Associations. The wrong standard is the wrong standard; coming "close" simply does not count.

^{3/} See *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994) ("The Commission's piecemeal picking and choosing of 'relevant' control criteria, and its uneven application of those criteria, is not 'reasoned decision making, but the very sort of arbitrariness and capriciousness we are empowered to correct.'").

Abuse of Process. The Bureau claims that the abuse of process issue should not be deleted because “Norcom did not make a full disclosure of its relationship with the Associations at the time the Associations’ original applications were filed.” Opposition at 5. Again, the Bureau misleads the Presiding Judge. The Bureau pretends that it is aware of what happened in 1991-92 – over six years ago. However, this claim is specious. For example, in response to Norcom’s recent request for inspection of records pursuant to the Freedom of Information Act (“FOIA”), the Bureau admitted that it no longer possesses any licensing records from that time period pertaining to the Associations’ applications. See FOIA Control No. 98-311.^{4/} Similarly, Norcom provided the sworn statement of Robert Nopper, stating under penalty of perjury that as recently as September 28, 1998, senior staff of the Wireless Telecommunications Bureau were seemingly unaware of the existence of the 1992 negotiated agreement between the Associations and the FCC (“Agreement”). In its Opposition, the Bureau does not dispute the point that the full Commission was not aware of the Agreement.

Thus, it is clear that the Bureau has been unaware of the critical events that occurred in 1991-1992 until Norcom offered the key documents in its Motion to Delete. The Bureau avoids this issue by claiming that the matter is not settled and that it “intends to offer evidence at the hearing” on this issue. Instead, it appears that the Bureau has no evidence about what happened in 1991-92; if the Bureau had any adverse evidence, it would have presented those materials forth in the instant Opposition. The Bureau apparently hopes to uncover damaging materials in the discovery phase of this proceeding. The Bureau’s suggested approach to administrative due process, puts the conclusory cart in front of the evidentiary horse. Thus,

^{4/} A copy of the FCC’s response to Norcom FOIA request is attached as Exhibit A.

because the Agreement was unknown to the FCC when it adopted the HDO, it is clear that “material information” was “overlooked, misconstrued, or not considered in the determination to specify the issue.” *Community Broadcasting Company*, 48 FCC 2d 487, ¶ 3 (Rev. Bd. 1974).

* * *

Norcom is prepared to attend the hearing and present evidence on the issues properly specified by the Commission. However, in its Motion, Norcom proved that the “unlawful transfer of control” standard specified in the HDO simply does not apply in this proceeding. Similarly, Norcom demonstrated that the FCC overlooked material facts when specifying the “abuse of process” issue. The Presiding Judge should not permit the Bureau to proceed with issues that were specified as the result of significant legal error and lost FCC records. Because the burden in this proceeding is on the Commission, the Presiding Judge should delete the issues specified herein and hold a hearing on whether Norcom and the Associations violated FCC rule section 90.179(f).

WHEREFORE, THE PREMISES CONSIDERED, Norcom requests that the Presiding Judge delete the issue of unlawful transfer of control and abuse of process. Norcom is prepared to attend the hearing and defend its alleged violation of FCC rule section 90.179(f), pertaining to the not-for-profit use of shared radio facilities above 800 MHz.

Respectfully submitted,

NORCOM COMMUNICATIONS CORPORATION

By: 
Russell H. Fox
Russ Taylor
GARDNER, CARTON & DOUGLAS
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
(202) 408-7100

Dated: December 28, 1998

CERTIFICATE OF SERVICE

I, Donna Fleming, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 28th day of December, 1998, caused to be sent by facsimile, a copy of the foregoing Reply to the following:

Honorable John M. Frysiak
Administrative Law Judge
1250 Maryland Avenue
Room 1-C860
Federal Communications Commission
Washington, D.C. 20554

Judy Lancaster
Federal Communications Commission
Wireless Telecommunications Bureau
2025 M Street, N.W.
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Washington, D.C. 20554
Counsel for Wireless Telecommunications Bureau

George Petrutsas
Fletcher Heald & Hildreth, PLC
1300 North 17th Street
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Rosslyn, VA 22209-3801


Donna Fleming

Exhibit A

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

December 10, 1998

IN REPLY REFER TO:
2000D-TF

Russ Taylor, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Re: FOIA Control No. 98-311

Dear Mr. Taylor:

This is in response to the referenced Freedom of Information Act (FOIA) request on behalf of Norcom Communications Corporation. Your FOIA request consists of eight parts. For convenience, we have reproduced each part of your FOIA request in bold typeface followed by the Wireless Telecommunications Bureau's search results and ruling.

(1) Documents relating to any FCC field inspection of Norcom's or the Associations' radio stations.

We have located three documents pertaining to this portion of your request. These documents are internal Commission communications and include: two internal memoranda prepared by Judah Mansbach, who is a Commission engineer, and an internal electronic mail message sent by Mr. Mansbach. As provided in Section 0.457(e) of the Commission's Rules, 47 C.F.R. § 0.457(e), the Commission will make an internal communication available for inspection "[o]nly if it is shown [in the FOIA request] that such a communication would be routinely available to a private party through the discovery process in litigation with the Commission." As explained in Section 0.457(e), "Normally such papers are privileged and not made available to private parties through the discovery process, since their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and, in some cases, would involve premature disclosure of their contents." You have made no showing that the documents pertaining to this portion of your request would be made available to you through the discovery process in litigation with the Commission. On the contrary, because these documents contain recommendations, opinions, judgments, thought processes, and/or professional work product, they would not be made available through the discovery process. Accordingly, the three documents pertaining to this portion of your request will be withheld in their entirety pursuant to FOIA Exemption 5, 5 U.S.C. § 552(B)(5) and Section 0.457(e) of the Commission's Rules, 47 C.F.R. § 0.457(e). In addition, disclosure of these documents would interfere with the on-going investigation in WTB Docket 98-181. Accordingly, they are also being withheld pursuant to FOIA Exemption 7(a), 5 U.S.C. § 552(B) (7) (a) and Sections 0.457(g)(1) of the Commission's Rules, 47 C.F.R. § 0.457(g)(1). We note that, to the extent Mr. Mansbach may testify in the hearing proceeding involving Norcom, release of any statements of Mr.

Mansbach would be governed by Section 1.362 of the Commission's Rules, 47 C.F.R. § 1.362.

(2) Reports, documents or records obtained, prepared or compiled by FCC investigative personnel relating to Norcom or the Associations. In particular, Norcom seeks any reports prepared by the FCC's New York field office staff, as well as any documents prepared by the FCC's enforcement personnel in the Washington, D.C., office.

We have located six documents pertaining to this portion of your request. These documents include the three documents described above in Part (1) and three additional documents: an internal memorandum prepared by Thomas D. Fitz-Gibbon, a Commission Attorney; an internal electronic mail message sent by Mr. Fitz-Gibbon; and an internal memorandum signed by Daniel Phythyon, a former Chief of the Wireless Telecommunications Bureau ("Bureau"). The three additional documents contain recommendations, opinions, judgments, thought processes, and/or lawyer work product. You have not shown that these documents would be made available to you through the discovery process in litigation with the Commission. Accordingly, these additional documents will be withheld in their entirety pursuant to FOIA Exemption 5, U.S.C. § 552(B)(5) and Section 0.457(e) of the Commission's Rules, 47 C.F.R. § 0.457(e). In addition, disclosure of these additional documents would interfere with the on-going investigation in WTB Docket 98-181. Accordingly, they are also being withheld pursuant to FOIA Exemptions 7(a), 5 U.S.C. § 552(B) (7) (a) and Sections 0.457(g)(1) of the Commission's Rules, 47 C.F.R. § 0.457(e).

(3) Statements from non-FCC witnesses that relate to Norcom or the Associations.

We have located two documents pertaining to this portion of your request. These documents are letters dated May 14, 1996, from Mr. Alexander Sabosto to the Commission together with their attachments. Both of these documents are available for your inspection.

(4) Memorandum or other communications between FCC staff relating to Norcom or the Associations.

We have located seven documents pertaining to this portion of your request. These documents include the six documents described above in Part (1) and Part (2) and one additional document: an internal electronic mail message from John Borkowski, who is Chief of Policy and Rules Branch of the Public Safety and Private Wireless Division. It contains recommendations, opinions, judgments, thought processes, and/or lawyer work product. You have not shown that this document would be made available to you through the discovery process in litigation with the Commission. Accordingly, this additional document will be withheld in its entirety pursuant to FOIA Exemption 5, 5 U.S.C. § 552(B)(5) and Section 0.457(e) of the Commission's Rules, 47 C.F.R. § 0.457(e). In addition, disclosure of this additional document would interfere with the on-going investigation in WTB Docket 98-181. Accordingly, it is also being withheld pursuant to FOIA Exemptions 7(a), 5 U.S.C. § 552(B) (7) (a) and Sections 0.457(g)(1) of the Commission's Rules, 47 C.F.R. § 0.457(g)(1).

(5) FCC Memorandum or other communications between FCC staff, relating to the FCC's review and consideration of the initial applications that resulted the grant of stations WPAT918, WNXT323, WPAZ643, WPAP734, & WPAT910. The applications were granted in 1992.

We have not located any documents pertaining to this portion of your request.

(6) Correspondence, documents or records received by the FCC from third parties, relating to Norcom or the Associations.

We have located three documents pertaining to this portion of your request. These documents include the two documents described above in Part (3) and one additional document: a facsimile (including attachments) from Mr. Alexander Sabosto. This additional document is available for your inspection

(7) Draft copies of the FCC's Order No. FCC 98-252, released October 14, 1998.

We have located three documents pertaining to this portion of your request. The documents are drafts of FCC Order No. 98-252. These documents contain recommendations, opinions, judgments, thought processes, and/or lawyer work product. You have not shown that these documents would be made available to you through the discovery process in litigation with the Commission. Accordingly, these documents will be withheld in their entirety pursuant to FOIA Exemption 5, U.S.C. § 552(B)(5) and Section 0.457(e) of the Commission's Rules, 47 C.F.R. § 0.457(e).

(8) FCC internal (not publicly released) documents relating to the propriety or validity of, or licensing of, Part 90 multiple licensed land mobile radio systems ("FB4s"), and cost-shared, not for profit land mobile systems ("FB7") since 1991. In particular, any staff memoranda available pertaining to these matters, relating to Wireless Bureau Order No. DA 96-903, *Viking Dispatch Services*. We also request any documents in which the FCC's licensing staff is instructed not to process applications for FB7 systems.

We have located approximately 600 documents pertaining to this portion of your request. Three of these documents are lists compiled from information in the public record and are available for your inspection. The remaining documents include drafts, internal memoranda, internal electronic mail messages and notes of meetings. These remaining documents contain recommendations, opinions, judgments, thought processes, and/or lawyer work product. You have not shown that these documents would be made available to you through the discovery process in litigation with the Commission. Accordingly, the remaining documents in this group will be withheld in their entirety pursuant to FOIA Exemption 5, 5 U.S.C. § 552(B)(5) and Section 0.457(e) of the Commission's Rules, 47 C.F.R. § 0.457(e).

As a commercial use requester, you are required under the provisions of Commission Rule 0.470, 47 C.F.R. § 0.470, to pay the full direct cost of searching for and reviewing the records associated with your requests. Your FOIA request indicates that you are prepared to pay a maximum search fee of \$5,000. The search and review costs for your FOIA request total \$2,169.23 (11 hours by two GS-15 employees at \$50.70 per hour; 29 hours by seven GS-14 employees at \$43.10 per hour; 5 hours by a GS-13 employee at \$36.47 per hour; 5 hours by a GS-12 employee at \$30.67 per hour), and 1 1/2 hours by a GS-7 employee at \$17.29 per hour. You will receive an invoice in the amount of \$2,169.23 under separate cover.

The undersigned official is responsible for the partial denial of your FOIA request. You may file an application for review of this decision with the Commission's Office of General Counsel within 10 days pursuant to Section 0.461 of the Commission's Rules, 47 C.F.R. § 0.461.

Sincerely,

A handwritten signature in black ink that reads "Catherine Seidel" followed by a small flourish.

Catherine Seidel
Chief, Enforcement and Consumer Information Division
Wireless Telecommunications Bureau