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EX PARTE OR LATE FILED

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+ Admitted to Maryland only;  
practice limited to matters  
and proceedings before federal  
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(Non-lawyer)

January 21, 1999

**VIA HAND DELIVERY**

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
The Portals  
TW-A325  
445 Twelfth Street, S.W.  
Washington, DC 20554

RECEIVED  
JAN 21 1999  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

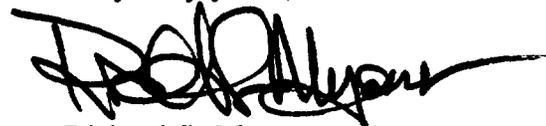
Re: 220 MHz Service  
PR Docket No. 89-552  
GN Docket No. 93-252 ✓  
PP Docket No. 93-253  
WT Docket No. 97-112

**WRITTEN EX PARTE PRESENTATION NOTICE**

Dear Ms. Salas:

On behalf of Petroleum Communications, Inc. ("PetroCom"), we are hereby giving notice that a written *ex parte* presentation was submitted to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau with courtesy copies to various members of the Commission's staff on January 20, 1999. The presentation was in response to the comments filed by Shell Offshore Services Company on December 16, 1998 in the above referenced proceedings. Please include the enclosed copies of the presentation in the record of the dockets listed above. If you have questions, please contact me at (202) 371-0789.

Very truly yours,



Richard S. Myers

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January 21, 1999

**VIA HAND DELIVERY**

Mr. Thomas J. Sugrue, Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W.  
Room 5002  
Washington, DC 20554

Re: 220 MHz Service  
PR Docket No. 89-552  
GN Docket No. 93-252  
PP Docket No. 93-253  
WT Docket No. 97-112  
**WRITTEN EX PARTE PRESENTATION**

Dear Mr. Sugrue:

On behalf of Petroleum Communications, Inc. ("PetroCom"), we are responding to the December 16, 1998 comments submitted by Shell Offshore Services Company ("SOSCo") in the above referenced dockets (with the exception of WT Docket No. 97-112) and various oral ex parte presentations throughout 1998 advocating that the Gulf of Mexico ("GOM") be included in the Phase II 220 MHz spectrum auction and re-auction.<sup>1</sup>

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<sup>1</sup> SOSCo Comments (filed Dec. 16, 1998); Oral *Ex Parte* Presentation on April 29, 1998 to Jonathan Cimko, Jr. (Chief, Policy Div., Wireless Telecomm. Bureau ("WTB")), Nancy Booker (Deputy Chief, Policy Div., WTB), Margaret Wiener (Chief, Legal Branch, Auctions & Industry Analysis Div., WTB), Martin Liebman, Bob Reagle, Linda Chang, and Scott Mackoul; Oral *Ex Parte* Presentation on June 4, 1998 to Daniel Pythyon (Chief, WTB), Amy Zoslov (Chief, Auctions & Industry Analysis Div., WTB), Jonathan Cimko, Jr. (Chief, Policy Div., WTB), and Nancy Booker (Deputy Chief, Policy Div., WTB); Oral *Ex Parte* Presentation on September 10, 1998 to Ramona Melson (Chief, Policy and Rules Branch, Commercial Wireless Div., WTB), Linda Chang, Wilbert Nixon, Jr., and Michael Ferrante; Oral *Ex Parte* Presentation on December 8, 1998 to Ari Fitzgerald (Legal Advisor to Chairman William Kennard), Daniel Connors (Legal Advisor to Commissioner Susan Ness), Paul D'Ari (Chief, Policy and Rules Branch, Commercial Wireless Div., WTB), Linda Chang and B.C. Jackson, Jr.

PetroCom makes three major points. First, SOSCo's December 16th comments amount to a late-filed petition for reconsideration and should not be considered by the Commission. Second, the Commission on its own motion cannot include the GOM as a geographic area in the 220 MHz auction at this stage without violating the "notice and comment" requirements of the Administrative Procedure Act ("APA").<sup>2</sup> Third, SOSCo has violated the Commission's ex parte rules by failing to disclose its presentations for inclusion into the record of the agency's rulemaking on licensing of other commercial mobile radio services ("CMRS") in the GOM, WT Docket No. 97-112.<sup>3</sup> Any proposal to license the 220 MHz band in the GOM must be addressed in Gulf-CMRS rulemaking. These points are set forth in more detail below.

I. SOSCo's comments amount to a late-filed petition for reconsideration.

The Commission's Rules defining the geographic areas for the 220 MHz auction and re-auction are final. On February 19, 1997, the Commission released a Third Report & Order promulgating the rules governing the future operation and licensing of the 220 MHz service.<sup>4</sup> The Commission neither proposed that the GOM be designated for competitive bidding nor adopted rules to define the GOM as such.<sup>5</sup> SOSCo did not file comments in the proceeding.<sup>6</sup> Further, SOSCo did not timely file a petition for reconsideration following the release of the Third Report & Order. SOSCo did, however, initiate a series of ex parte presentations to the Commission's staff throughout 1998 in an attempt include the GOM in the auction after-the-fact. The Commission properly declined to include the GOM in the initial Phase II 220 MHz Service auction which closed on October 22, 1998.<sup>7</sup>

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<sup>2</sup> 5 U.S.C. § 553.

<sup>3</sup> In the Matter of Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico; Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, WT Docket No. 97-112, CC Docket No. 90-6, Second Further Notice of Proposed Rulemaking, 12 FCC Rcd 4576 (1997) [hereinafter Gulf-CMRS Rulemaking].

<sup>4</sup> Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Third Report and Order; Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943 (1997) [hereinafter Third Report & Order]. The Fifth NPRM proposed rules for partitioning and disaggregating licenses in the 220 MHz service and was unrelated to designating geographic areas for the auction.

<sup>5</sup> Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Second Memorandum Opinion and Order; Third Notice of Proposed Rulemaking, 11 FCC Rcd 188 (1995) [hereinafter Third NPRM].

<sup>6</sup> See Third Report & Order, 12 FCC Rcd at 11155.

<sup>7</sup> Public Notice, "Phase II 220 MHz Service Auction Closes," DA 98-2143 (rel. Oct. 23, 1998).

On November 24, 1998, the Wireless Telecommunications Bureau ("WTB") issued a public notice announcing the auction of 225 Phase II 220 MHz service licenses to begin on June 8, 1999. In conjunction with announcing the re-auction, WTB requested comment on procedural issues relating to the upcoming re-auction, including the reserve price or minimum opening bid, auction sequencing, upfront payments, structure of the bidding rounds, and other issues.<sup>8</sup> In response, SOSCo filed comments requesting once again that the GOM be included in the auction, and stated that a GOM licensee could be subject to the same interference criteria as land licenses.<sup>9</sup> SOSCo's comments are outside the scope of the proceeding, because they go beyond mere auction procedures and address the substance of what is to be auctioned and rules for licensee operations. In reality, SOSCo's comments are an untimely filed petition for reconsideration of the Third Report and Order.<sup>10</sup>

II. The Commission cannot include the GOM in the auction on its own motion.

Further, at this stage of the 220 MHz service re-auction, the Commission cannot on its own motion include the GOM without running afoul of the Commission's rulemaking procedures and the "notice and comment" requirements of the APA.<sup>11</sup> The APA requires that an agency provide the public with notice of "the terms or substance of the proposed rule" and an opportunity for interested persons to participate in the rulemaking.<sup>12</sup> SOSCo argues that the Commission can now include the GOM as a "logical outgrowth" of the underlying Phase II licensing proposal.<sup>13</sup> However, the Phase II licensing rules have already been adopted in the Third Report & Order and are final.<sup>14</sup> Therefore, there are no proposed rules pending from which inclusion of the GOM in the 220 MHz service can be a "logical outgrowth" thereof. The public notice released on November 24 requests comment on the day-to-day auction procedures and does not give notice

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<sup>8</sup> The Balanced Budget Act of 1997 requires that the Commission provide notice and comment of proposed auction procedures prior to conducting an auction. 47 U.S.C. § 309(j)(3)(E)(i). The purpose of the requirement is to "ensure that potential bidders have adequate time to familiarize themselves with the specific provisions that will govern the day-to-day conduct of an auction." Public Notice, DA 98-2143 at 2.

<sup>9</sup> SOSCo Comments at 3-7.

<sup>10</sup> Federation of American Health Systems, 12 FCC Rcd 2668, 2669-70 (1997); In the Matter of Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Eighth Report and Order, 11 FCC Rcd 1463, 1533 (1995); Association of College and University Telecomms Adm'r, 8 FCC Rcd 1781, 1782 (1993).

<sup>11</sup> 5 U.S.C. § 553; 47 C.F.R. §§ 1.411-1.429.

<sup>12</sup> 5 U.S.C. § 553(b)-(c).

<sup>13</sup> SOSCo *Ex Parte* Presentation at Attachment 2 (Dec. 8, 1998).

<sup>14</sup> AT&T Corp. v. FCC, 113 F.3d 225, 229 (D.C. Cir. 1997); Jerome Thomas Lamprecht, 7 FCC Rcd 6794 (1992); In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion & Order, 102 FCC 2d 849, 862 (1985).

as to new licensing rules.<sup>15</sup> Designating additional geographic areas for licensing at this juncture without even issuing a Notice of Proposed Rulemaking would be improper and in violation of the APA. The Commission has decided to deal with future CMRS licensing in the GOM in WT Docket No. 97-112. SOSCO's proposal should be addressed in that proceeding.

III. SOSCo has violated the *ex parte* rules.

On April 16, 1997, the Commission released an order requesting comments on licensing possibilities for other CMRS services in the Gulf, which includes the 220 MHz service.<sup>16</sup> SOSCo filed comments in that proceeding advocating that the Commission license Specialized Mobile Radio ("SMR") service in the GOM.<sup>17</sup> The Gulf-CMRS rulemaking is a "permit-but-disclose" proceeding for purposes of *ex parte* presentations, and the Commission has yet to render an order in the proceeding.<sup>18</sup> Section 1.206(b) of the Commission's rules requires that individuals who make oral or written *ex parte* presentations disclose such communications in writing to the Secretary for inclusion into the record of the proceeding to which the presentations pertain. The written notice "shall clearly identify the proceeding to which it relates, including the docket number."<sup>19</sup> A presentation is defined as "a communication directed to the merits or outcome of a proceeding."<sup>20</sup> Communications by SOSCo to the Commission's staff requesting that the 220 MHz service, which is a CMRS service, be licensed in the GOM is directly related to the merits of the Gulf-CMRS rulemaking. However, SOSCo has failed to identify WT Docket No. 97-112 in its *ex parte* notices submitted to the Secretary even though it has previously participated in that proceeding. Thus, participants in the Gulf-CMRS rulemaking have not been officially notified by the Commission that SOSCo has made *ex parte* presentations to the staff that go to the merits of WT Docket No. 97-112, which runs counter to the purpose of ensuring fairness in agency proceedings that is incorporated into the *ex parte* rules.<sup>21</sup> The Commission should take appropriate

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<sup>15</sup> The APA requires that changes or amendments to the Commission's Rules not involving matters related to the agency's internal procedures be adopted following the release of a Notice of Proposed Rulemaking. 5 U.S.C. § 553(b); 47 C.F.R. § 1.412(b).

<sup>16</sup> Gulf-CMRS rulemaking, 12 FCC Rcd at 4601. The Commission specifically requested that in support of licensing additional CMRS in the Gulf a commenter should include "an analysis of the demand for such service, detailed definitions of potential Gulf service areas, service and coverage requirements, and interference standards that will adequately protect land-based service providers." *Id.* SOSCo has failed to meet this burden in its comments and *ex parte* presentations to justify licensing the 220 MHz service in the GOM.

<sup>17</sup> SOSCO Comments at 6 (filed July 2, 1997).

<sup>18</sup> 47 C.F.R. § 1.1206(a)(1).

<sup>19</sup> 47 C.F.R. § 1.1206(b)(1)-(2).

<sup>20</sup> 47 C.F.R. § 1.202(a).

<sup>21</sup> In the Matter of Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings, GC Docket No. 95-21, Report and Order, 12 FCC Rcd 7348 (1997).

Mr. Thomas J. Sugrue  
January 21, 1999  
Page 5

action to ensure that participants in the Gulf-CMRS proceeding are given notice as to SOSCo's presentations regarding 220 MHz Service in the Gulf. Two copies of this presentation will be submitted to the Secretary for inclusion into each docket referenced above as required by the Commission's Rules.

Very truly yours,

A handwritten signature in black ink, appearing to read "Richard S. Myers", written over a horizontal line.

Richard S. Myers

cc: Magalie Roman Salas, Secretary  
Paul D'Ari  
Nancy Booker  
Linda Chang  
Jonathan Cimko, Jr.  
Daniel Connors  
Michael Ferrante  
Ari Fitzgerald  
B.C. Jackson, Jr.  
Martin Liebman  
Wilbert Nixon, Jr.  
Scott Mackoul  
Ramona Melson  
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Wayne V. Black