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January 4, 1999

98-172

Ari Fitzgerald, Esquire
Senior Legal Advisor to
Chairman William E. Kennard
Federal Communications Commission
1919 M Street, NW – Room 814
Washington, DC 20554

RE: 18 GHz proceeding

Dear Ari:

On December 8, 1998, Michael E. Katzenstein, Vice President & General Counsel of OpTel, Inc., and I as Executive Director of the Independent Cable and Telecommunications Association (ICTA), the trade association of private cable operators, [and others] met with you to discuss the pending proceeding. We focused on the unfairness and undesirability of the Commission's imposing a September 18 cut-off on the grandfathering of new or modified private cable operations in the 18 GHz band. You expressed surprise at our concerns, noting that the Commission frequently freezes applications for a particular service, while awaiting the outcome of a spectrum reallocation proceeding. We urged that the situation in the 18 GHz band is quite different from these past cases, and I offered to provide information to support this point. The purpose of this letter is to provide that information.

We submit that this is a quite different situation from other instances in which the Commission has imposed a freeze or a de facto freeze. First, there is no land-rush mentality such as characterized in so many other of the freeze cases in the past. Second, apart from the mentality of private cable operators, there are, in fact, only a limited number of private cable applications filed in this band each year. Third, in this case private cable users have no other spectrum home, nor even a reasonably imminent prospect of such a home, which it can use for expanding its services during

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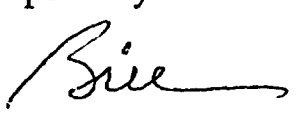
the pendency of the freeze. Fourth, the spectrum allocation proposal, which is the premise for the de facto freeze, has now been demonstrated by the pleadings of all principal parties to the proceeding to be fundamentally flawed. Therefore, this is not a situation where a freeze is justified in order to maintain the status quo while the finishing touches of a well-received allocation proposal are being crafted. Fifth, the de facto freeze here is an incentive for one set of spectrum users to refuse to negotiate a resolution of the issues at stake in the pending rulemaking proceeding. Sixth, private cable is in critical need of co-primary access to this spectrum in order to continue its progress in creating competition with franchised cable operators. In other freeze cases, there were no such countervailing public interest considerations.

For all these reasons, we strongly believe that the cut-off date for the grandfathering of new private cable operations in the 18 GHz band should be suspended until there is final resolution of the issues that assures an adequate home for new private cable operations.

* * *

Finally, I enclose "Examples of Prior [FCC] Freeze Decisions," Attachment C to ICTA's November 5 Emergency Request for Immediate Relief, and pages 7-9 of ICTA's December 21 Reply to Oppositions Filed Against ICTA's Emergency Request For Immediate Relief, both of which develop the above points in greater and more specific detail.

Respectfully submitted,



William J. Burhop
Executive Director

cc: Susan Fox, Esquire
Ms. Deborah Lathen/Eloise Gore, Esquire
Regina Keeney, Esquire
Mr. David Wye
IB Docket No. 98-172, RM-9005, RM-9118

ATTACHMENT C

Examples of Prior Freeze Decisions

The following are examples of instances in the past in which the Commission has imposed processing freezes on applications in other services. The circumstances which led the Commission to institute freezes in these examples are not present in the private cable context, and the absence of such circumstances illustrates why the Commission's "de facto" freeze on private cable applications is unwarranted. In the first and last examples, the services were plagued by spectrum speculators. In these instances, the Commission was flooded with applications filed by parties with no bona fide intention to construct and operate the licensed facilities. The investment of time, money and other resources required to prepare private cable applications for filing precludes this type of spectrum speculation in the private cable service. In the second and third examples, the freezes were instituted after the Commission had observed increased numbers of applications in the band, and they affected all of the services utilizing the bands. Thus, these freezes did not advantage certain spectrum users to the detriment of others. In the instant circumstances, the Commission's "de facto" freeze prejudices private cable operators and other current users of the band, and benefits operators of future satellite earth stations.

Other freeze scenarios are similarly distinguishable from the situation presented here. The purpose of the brief sampling below is to highlight that the dangers that have prompted the Commission to impose freezes in the past do not exist in the private cable context.

1. General Category Frequencies in 806-809.75/851-854.750 MHz Bands: In October 1995, the FCC instituted a freeze on new applications for General Category channels in the 806-809.75/851-854.750 MHz frequency bands. In the freeze order (10 FCC Rcd 13190), the FCC noted that there recently had been "a steep rise in demand for General Category frequencies, especially by SMR applications and licensees, as a result of regulatory actions affecting certain 800 MHz frequencies." Specifically, requests for General Category channels increased after the FCC sought comment on how to structure competitive bidding procedures to choose among mutually exclusive initial SMR applications. With respect to the freeze, the FCC reasoned: "unless we immediately freeze new applications the successful resolution of the spectrum allocation issues raised in PR Docket No. 93-144 could be compromised." The FCC emphasized that the freeze was a "temporary action" to be "of limited duration" to "preserve the current licensing landscape" while the regulatory issues were worked out.

A July 1998 MO&O and Order on Reconsideration (1998 FCC LEXIS 3889) explained in a little more detail the history leading up to the freeze order. Before the FCC instituted the freeze, a number of application preparation companies has "used television commercials and telemarketing solicitations to promote SMR licenses as 'investment opportunities' for individuals with little or no experience in the communications industry." The Order goes on: "In a typical solicitation, the company representative would tout the potential value of SMR licenses, representing that, once obtained, the licenses could be resold for a profit. The representative would then offer to prepare license applications for a substantial fee, usually $7,000 per application. Typically, the company representative did not disclose obligations and restrictions that the Commission's rules imposed on SMR licensees." Thus, the "steep" increase

in applications seems to have been linked to blatant spectrum speculation encouraged by application preparation companies which took advantage of ignorant investors.

2. Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz Bands: In April 1995, the FCC instituted a freeze on new applications for inter-category sharing of frequencies in the 806-821/851-866 MHz band, allocated to the Public Safety, Industrial/Land Transportation ("I/LT") and Business Radio Services. The FCC noted that pressure from the increased number of SMR applications in the 800 MHz band had caused increasing numbers of Business and I/LT entities to file applications, on an inter-category basis, for 800 MHz Public Safety frequencies. The FCC noted that the freeze was not a final resolution of the matter, but rather was "an action adopted for a limited time in order to prevent compromising the resolution of significant spectrum allocation issues. Rather than causing any irreparable harm to Business or I/LT eligibles, they remain able – as do Public Safety entities – to address their spectrum needs through in-category frequencies. In this respect, all eligibles in these services are treated on an equal basis." In contrast, the "de facto" freeze imposed here advantages one set of users (future satellite earth stations) at the expense of another set (private cable operators and other current users of the band).

3. 39 GHz Licensees in the Common Carrier and Operational Fixed Point-to-Point Microwave Radio Services: In November and December 1995, the FCC instituted an "interim processing freeze" on applicants for certain mutually-exclusive 39 GHz licenses. The freeze was instituted pending resolution of a petition for rulemaking filed by TIA which proposed a channeling plan and technical rules for the 37 and 39 GHz bands intended to better accommodate emerging technologies. The FCC reasoned that "the increasing number of applications (over 2,100 filed from January to November of 1995) constituted a burden on Commission resources and processing them could limit the impact of new technological, operational, and licensing requirements the Commission might ultimately adopt in response to TIA's petition." As in the immediately preceding example and unlike the situation here, the interim processing freeze in the 39 GHz band affected all prospective users of the spectrum similarly.

4. MDS in the 2.1 and 2.5 GHz Band: In April 1992, the FCC adopted an NPRM regarding the use of the 2.1 and 2.5 GHz band, and imposed a "short-term, temporary freeze on the filing of all applications for MDS channels." The FCC determined that "a freeze on new filings is absolutely imperative because it is the only means by which the deluge of incoming applications, which are being filed at the rate of 1000 per month, can be controlled." This "torrent of MDS filings, the majority of which are believed to be speculative," had created a backlog of approximately 20,000 MDS applications. The FCC reported: "Our records reflect that in Fiscal Year 1990 almost 6,000 MDS applications were filed, and that approximately 12,000 applications were filed in Fiscal Year 1991. Applications are currently being filed at the rate of approximately 1,000 per month. The filing of MDS applications appears to be particularly appealing to application mills in part because our existing rules authorize lotteries and settlement groups." As in the SMR context, the freeze on applications in the MDS service was preceded by a high volume of speculative applications generated by so-called "application mills."

IV. COMMISSION PRECEDENT DOES NOT SUPPORT THE PROPOSED SEPTEMBER 18 CUT-OFF.

Opponents' attempts to justify the *Notice's* proposed cut-off on other prior freeze decisions rendered by the Commission do not avail. As ICTA demonstrated in its request for immediate relief, the circumstances present in other proceedings in which the Commission imposed freezes are demonstrably different from private cable's situation.[18]

Opponents rely on the Commission's freeze on additional Digital Electronic Message Services ("DEMS") applications in the 18.8-19.3 GHz band, claiming the proceeding presented "many of the issues also presented here."[19] However, in the DEMS proceeding, the Commission froze additional DEMS applications due to the high volume of applications filed *the day after* its decision to redesignate the 18 GHz band.[20] As ICTA emphasized in its emergency request petition, the investment of time, money and other resources required to prepare private cable applications for filing precludes private cable operators from filing hundreds of 18 GHz applications in a matter of days after proposed regulatory action. Thus, the DEMS proceeding presents more of a case for differential treatment here than it does for a *de facto* freeze.

The Commission's decisions to impose freezes in the 39 GHz proceeding, in the MDS proceeding and with respect to FM translator stations are similarly inapplicable.[21] In the 39 GHz proceeding, the Commission instituted the freeze in response to the "increasing number

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18 *See* ICTA's Emergency Request For Immediate Relief, Attachment C.

19 Hughes Opposition, p. 6; *see also* Lockheed Martin Opposition, p. 7.

20 *See Freeze on the Filing of Applications for New Licenses, Amendments, and Modifications in the 18.8-19.3 GHz Frequency Band*, 11 FCC Rcd 22363 (1996); *see also Amendment to 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 for Fixed Service*, 12 FCC Rcd 3471 (1997) (same proceeding) (noting that 174 applications were filed for DEMS links the day after the Commission rendered its decision).

21 *See* Hughes Opposition, pp. 7-9 (citing *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40 GHz Bands*, 11 FCC Rcd 1156 (1995) & 12 FCC Rcd 2910 (1997); *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266 (1992); *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 3 FCC Rcd 3664 (1988)).

of applications" (over 2,100 filed from January to November 1995) "that burdened Commission resources."[22] In the case of FM translator applications, the Commission imposed a freeze in light of "the volume of applications for FM translators . . .which could overburden our processing resources."[23] Likewise, in the MDS proceeding, the Commission determined a freeze was "absolutely imperative because it is the only means by which the deluge of incoming applications, which are being filed at the rate of 1000 per month, can be controlled."[24] As emphasized above, private cable operators must invest substantial time and resources for each MDU they wish to serve. Thus, as a practical matter, they cannot file a large volume of applications in order to preserve spectrum claims. Accordingly, these prior Commission decisions do not support retaining the September 18 cut-off on private cable co-primary designations in the 18.3-18.55 GHz band.

Opponents claim there are "many other cases where the Commission has frozen applications pending the resolution of a significant rulemaking proceeding."[25] Yet, aside from the cases cited above, opponents reference only the Commission's decisions to freeze modifications in Television Channels 60-69, freeze the TV Table of Allotments in thirty metropolitan areas, and freeze low power applications above a certain channel number.[26] None of these decisions, however, threatened the continued growth and viability of a new industry that

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22 *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40 GHz Bands*, 11 FCC Rcd 1156, ¶ 2.

23 *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 3 FCC Rcd 3664, ¶ 62.

24 *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266, ¶ 19.

25 Hughes Opposition, p. 7.

26 *See* Lockheed Martin Opposition, p. 8; Hughes Opposition, p. 7 (citing *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, 12 FCC Rcd 22953, 22970 (1998); *Advanced Television Systems and their Impact on the Existing Television Broadcast Service*, 76 Rad. Reg. 2d (P&F) 843 (1987); *Review of Technical and Operational Requirements: Part 74-E Aural Broadcast*, 2 FCC Rcd 3129 (1987)).

is a vital source of competition to entrenched franchised cable operators.[27] Indeed, when faced with circumstances akin to those involved in the present proceeding, the Commission has lifted freeze orders. For example, in the *930 MHz Private Paging* proceeding, once the Commission recognized that the freeze it imposed was "impairing the ability of some PCP operators to develop or expand their systems based on plans formulated prior to the adoption of the Notice," it lifted its previously-imposed freeze.[28]

Recognizing that the Commission should lift a freeze "when the negative impact of the freeze outweighs its benefits," Hughes argues that "in this case, the benefits of the Commission's licensing approach clearly outweigh its negative impacts."[29] However, Hughes has made no showing to this effect. In contrast, ICTA has demonstrated that the negative impacts are disastrous for private cable and that the benefits for satellite operators are negligible. In addition, Hughes recognizes that the "Commission's tentative band segmentation proposal has several serious shortcomings."[30] Because Hughes and the other satellite opponents consider the *Notice's* band redesignation proposal to be flawed, their hollow statements concerning the benefits of the *Notice's* proposal should be disregarded.

V. SATELLITE OPPONENTS FOCUS SOLELY ON THEIR INTERESTS, NOT THE PUBLIC INTEREST.

Satellite opponents would like the Commission to regard this proceeding with only a concern as to how their interests can be served. According to Hughes, "by definition, this proceeding is about how ubiquitous satellite earth stations can be licensed in the 18 GHz band."[31]

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[27] In addition, with respect to channels 60-69, the Commission decided to freeze modification requests to increase service areas of TV channels 60-69 "as of six months after the release date of the Report and Order." This is vastly different from the proposed September 18 cut-off in this proceeding.

[28] *See Amendment of the Commission's Rules To Provide Channel Exclusivity To Qualified Private Paging Systems at 929-930 MHz*, 8 FCC Rcd 2460 (1993).

[29] Hughes Opposition, p. 9.

[30] Hughes Comments, p. 13.

[31] Hughes Opposition, p. 10.