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February 5, 1999

Magalie Salas, Esquire
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Room TWB204
Washington, D.C. 20554

Re: Norcom Communications Corp.
WTB Docket No. 98-181

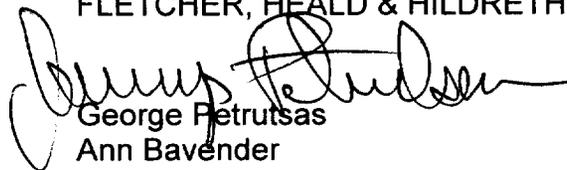
Dear Ms. Salas:

On behalf of Metro NY LMR Association and Wireless Communications Association of Suffolk, we are filing an original and six (6) copies of their Joint Motion for Permission to Appeal in the above-referenced proceeding.

If additional information is required, please communicate with us.

Very truly yours,

FLETCHER, HEALD & HILDRETH, PLC



George Petrutsas
Ann Bavender
Counsel for
Metro NY LMR Association
Wireless Communications Association
of Suffolk

GP:cej
Enclosures
cc: Honorable John M. Frysiak (w/enc.)
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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEB - 5 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
NORCOM COMMUNICATIONS CORPORATION)
ASS'N FOR EAST END LAND MOBILE COVERAGE)
LMR 900 ASSOCIATION OF SUFFOLK)
METRO NY LMR ASSOCIATION)
NY LMR ASSOCIATION)
WIRELESS COMM. ASSOCIATION OF SUFFOLK)
COUNTY)

WTB Docket No. 98-181

To: Honorable Administrative Law Judge John M. Frysiak

**JOINT MOTION FOR
PERMISSION TO APPEAL**

Metro NY LMR Association and Wireless Communications Association of Suffolk (hereinafter "Prior Parties"), by counsel and pursuant to Section 1.301(b) of the Commission's Rules, 47 C.F.R. § 1.301(b) (1997), hereby move the Presiding Judge to permit the Prior Parties to appeal the Judge's Memorandum Opinion and Order ("Order"), FCC 99M-8, issued in the above-captioned proceeding on February 2, 1999. The Order denied the motion of the Prior Parties to terminate the proceeding as to them pursuant to 47 C.F.R. 1.92(c) and ordered them to respond to the Request of the Wireless Telecommunications Bureau for Admissions.

As set forth below, the Motion should be granted and the Prior Parties should be allowed to appeal the issue to the Commission for resolution at this juncture rather than at the end of the proceeding as an exception because the Presiding Judge's Order is contrary to law and will result in a remand of his initial decision. Moreover, it would be

improper and prejudicial to require the Prior Parties to continue participating in this hearing proceeding from which they have withdrawn.

Background

On January 8, 1999, the Wireless Communications Association of Suffolk County and the Metro NY LMR Association, the Prior Parties, filed in the proceeding a Withdrawal of Appearance and Waiver of Hearing, addressed to the Presiding Judge, withdrawing their respective earlier notices of appearance and waiving their right to a hearing in this matter.¹ On January 21, 1999, the Bureau filed Comments Regarding Filings by Associations in which the Bureau argued, without citing any rule or precedent, that as long as the Prior Parties are licensees, they should remain parties in the proceeding. On January 22, 1999, the Bureau also filed a Motion requesting that the Presiding Judge declare that the matters set forth in the Bureau's pending Request for Admissions be deemed admitted or, in the alternative, require the Prior Parties to respond to the Bureau's Request for Admission. To clear up the Bureau's apparent misunderstanding of the facts, the Prior Parties filed a Motion on January 27, 1999, pointing out, among other things, that the Prior Parties had withdrawn from the hearing and had waived the right to a hearing so that the matters alleged against them must now be resolved by the Commission pursuant to the procedures prescribed in Section

¹A day earlier, on January 7, 1999, at the pre-hearing conference in the proceeding, counsel for the Prior Parties advised the Presiding Judge and Bureau counsel that the Prior Parties would be withdrawing from the hearing and would be giving up their right to a hearing. Bureau counsel did not raise any objections to the planned withdrawal of the Prior Parties from the hearing.

1.92 of its Rules, 47 C.F.R. 1.92. To settle the matter further, the Prior Parties also asked the Presiding Judge to terminate the hearing proceeding as to them.²

Surprisingly, the Presiding Judge denied that request and ordered the Prior Parties to respond to the Bureau's Request for Admissions. It is respectfully submitted that that Order is inconsistent with the Commission's Rules and would be reversed by the Commission if an appeal is permitted.

Argument

The Presiding Judge's Order is inconsistent with the Commission's Rules and beyond the Judge's jurisdiction. As such, it is likely that the Order in question, unless modified, will require remand of the initial decision in this case if the appeal is deferred and the issues are raised as exceptions to the Judge's initial decision in the case. In support, the following is shown.

The procedure to be followed after a licensee waives hearing in a license revocation proceeding is set out in Section 1.92 of the Commission's Rules, 47 CFR 1.92 (1997). It was explained in a 1977 letter from the Commission to Eugene F. Mullins, Esquire, in response to a letter of inquiry related to Docket No. 21312, a revocation proceeding, as follows:

Section 1.92 of our rules governs the procedure to be followed in a revocation proceeding after a hearing has been

²It is emphasized that the request to terminate the hearing proceeding as to the Prior Parties was gratuitous and mainly a matter of procedural comity in that, as it is demonstrated below, upon the filing of the waiver of the hearing, the hearing proceeding was effectively terminated by rule, the matters thereafter to be conducted exclusively pursuant to the provisions of Section 1.92 of the Commission's Rules.

waived. The course of action which the Bureau intends to follow as set forth in its letter to you of October 25, 1977, comports with §1.92 of the rules and the legislative history of that rule and its predecessor, §1.78. Section 1.92(d) provides, in part, that when a hearing is waived, "[t]he Commission will determine on the basis of all of the information available to it from any source including such further proceedings as may be warranted if a revocation order should issue . . ." In adopting §1.78, the Commission made clear that neither formal hearing procedures nor separation of functions would be required after waiver of hearing. Order in Matter of Amendment of Part 1 of the Commission's Rules Concerning Revocation and Cease and Desist Proceedings, FCC 60-1464, 25 FR 12602, published December 9, 1960. The legislative history of §1.78 also makes clear that, after waiver of hearing, the case will be brought to the Commission by the staff as a normal non-hearing agenda item. Consequently, the procedure which the Bureau contemplates, i.e., presenting the case as a normal non-hearing agenda item, is fully consistent with the rules. (Emphasis added)

Mullins, Connor, & Rhyne, 41 RR 2d 1681 (1977).

Thus, when a hearing is waived the matter reverts back to the Commission and it is the Commission that determines if a revocation order should be issued. The Presiding Judge no longer has jurisdiction in the matter, except for certifying the case to the Commission as required by Section 1.92(c). Here, once the Prior Parties withdrew, the Presiding Judge should have dismissed the hearing proceeding as to them and should have certified the matter to the Commission for disposition as he is required to do by Section 1.92(c)³ "as a normal, non-hearing item." The Presiding Judge lacked

³Section 1.92(c) provides that whenever a hearing is waived . . . the Presiding Officer ". . . shall, at the earliest practical date, issue an order . . . terminating the hearing proceeding, and certifying the case to the Commission.

jurisdiction to issue the orders he issued, including his order to the Prior Parties to Respond to the Bureau's Request for Admissions, since that Request was submitted to the Prior Parties as parties to a hearing from which they have withdrawn.

There can be no question but that the Prior Parties have an absolute right to waive their right to a hearing⁴ and they have done so unequivocally. They have the right to withdraw from the hearing whether or not they also surrender their license for cancellation.⁵ The Order takes the erroneous position that the Prior Parties may not withdraw from the hearing unless they also surrender their respective licenses. It is respectfully submitted that this is reversible error. Moreover, the Presiding Judge's Order to the Prior Parties to Respond to the Bureau's Request for Admission is beyond the Judge's authority to issue since the Prior Parties are no longer parties to the hearing proceeding.⁶

WHEREOF the Premises Considered, the Presiding Judge is respectfully requested to grant the Prior Parties leave to appeal to the Commission, pursuant to

⁴See Section 312(c) of the Communications Act of 1934, as amended, 47 USC 312(c), which prescribes the license revocation procedures, where the right of respondent licensees to waive a hearing is recognized. Under Section 312, the right to a hearing belongs to respondent licensees. The statute does not empower the Commission to compel respondent licensees to remain parties to a revocation hearing against their will.

⁵The Wireless Communications Association of Suffolk surrendered its license for cancellation on January 8, 1999. Metro NY LMR Association is also surrendering its license for cancellation.

⁶Since the Prior Parties are no longer parties to the hearing proceeding, compelling them to respond to the Bureau's Request for Admission and, worse, declaring that the facts recited therein are to be deemed admitted if the parties fail to respond, raise serious due process issues and may amount to violation of their privilege against self incrimination. In view of these issues, the appeal contemplated herein may be available to the Prior Parties as a matter of right within the scope of Paragraph (2), of Section 1.301(a)

Section 1.301(b), his Memorandum Opinion and Order, FCC 99M-8, issued in the proceeding on February 2, 1999, or, in the alternative, modify his Order to delete the requirement that the Prior Parties respond to the Bureau's Request for Admissions.

Respectfully submitted

METRO NY LMR ASSOCIATION
WIRELESS COMMUNICATIONS ASSOCIATION
OF SUFFOLK COUNTY

By: 
George Petrutsas
Ann Bavender

Their Attorneys

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Date: February 5, 1999

CERTIFICATE OF SERVICE

I, Chellestine Johnson, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C. do hereby certify that true copies of the foregoing Joint Motion for Permission to Appeal were sent this 5th day of February, 1999, by facsimile and first-class United States mail, postage prepaid, to the following:

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