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January 27, 2000

BY ELECTRONIC COMMENT FILING SYSTEM

Mr. Thomas Sugrue
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Response to Public Notice DA 00-31: *Public Comment Sought on Issues Related to Guard Bands in the 746-764 MHz and 776-794 MHz Spectrum Block*, WT Dkt. No. 99-168 (Jan. 7, 2000)

Dear Mr. Sugrue:

On behalf of our client, Microsoft Corporation, this letter responds to the Wireless Bureau's request for further public comment on certain issues that were identified in the Public Notice referenced above.¹ Several of the issues concern whether the Commission should place restrictions on licensees of the 6 MHz "guard band" spectrum, and if so, what those restrictions should be, *e.g.*, whether certain types of operations or equipment should be restricted or required.

Although the Public Notice generally frames these issues in technical terms, the Commission's resolution of the issues will necessarily implicate important legal and policy questions. While Microsoft will leave the detailed technical issues to those companies in the radio design field, we wish to point out what we believe are equally important legal tenets and long-term policy objectives that the Commission should follow in adopting service rules for these guard bands. Microsoft's main concerns are that the final rules should neither: (1) implicitly nor explicitly discriminate against any type of operator; nor (2) work to preclude the deployment of advanced technologies that, either now or in the future, could address the Commission's concerns about adjacent channel interference.

¹ According to the Public Notice, the *ex parte* deadline in this proceeding was January 25, 2000. Because the Commission was closed on January 25 and 26, we are submitting this letter on January 27. See 47 C.F.R. § 1.4(e)(1).

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If the final rules were to discriminate against classes of operators or technologies, the Commission would establish a precedent very harmful to the nation's long-term interest in promoting innovative, efficient spectrum usage. By taking such action, the Commission would effectively create a presumption that, whenever spectrum is set aside for public safety use, certain adjacent channel operators or operations must be forbidden. We believe such a presumption is over-broad and would create disincentives to resolve interference concerns through innovative solutions. For the reasons explained below, regardless of the interference limitations the Commission may find appropriate to protect public safety users of adjacent frequencies, the Commission should allow all operators who agree to comply with the restrictions to bid on the guard band spectrum.

The Commission should promote broad eligibility for the guard band spectrum

There is significant legal precedent that should discourage the Commission from adopting rules that either implicitly or explicitly forbid a type of operator from being licensed in the guard bands. In particular, the Commission must justify any criteria that effectively exclude a group of potential licensees by credibly explaining how the criteria will promote a legitimate policy objective. If it cannot do so, a reviewing court will invalidate the rules as arbitrary and capricious.

In *Aeronautical Radio, Inc., v. FCC*,² for example, the U.S. Court of Appeals for the District of Columbia Circuit found an eligibility rule for Mobile Satellite Service ("MSS") applicants to be arbitrary and capricious. The eligibility rule stemmed from the Commission's conclusion that, rather than trying to select the most qualified MSS applicant, it would require all qualified applicants to form a consortium, which would hold the license. To test applicants' financial qualifications, the Commission required each applicant to contribute \$5 million to the consortium. Any applicant that did not make the payment before the license was awarded would be considered financially unqualified, and its application would be dismissed.³

The Court of Appeals, unpersuaded by the Commission's attempt to justify the \$5 million payment requirement, wrote:

We find . . . that the Commission's requirement . . . was not the product of reasoned decision-making. . . . [T]he Bureau never adequately explained why a cash deposit was necessary to demonstrate financial qualification.[⁴] . . . Any financial eligibility requirement imposed upon

² 928 F.2d 428, 445 (D.C. Cir. 1991).

³ *Id.* at 432-33.

⁴ *Id.* at 446 (footnotes omitted).

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license applicants must bear some reasonable relationship to true financial fitness. . . . [T]he reimposition of a cash-only requirement bore no apparent relation to true financial fitness. *Instead, [it] appears to have been nothing more than an arbitrary device by which the Commission was able to winnow the applicant field. . . .*"^{5]}

In contrast to the foregoing, in the *Telocator* proceeding,⁶ the Commission adopted reasonable licensing criteria that credibly advanced legitimate objectives, and accordingly, were upheld by the Court of Appeals.⁷ Indeed, certain elements of that proceeding provide a useful template for the Commission's action in this docket.

The licensing rule at issue in *Telocator* expanded, rather than limited, the pool of potential license applicants. Specifically, to increase the opportunity for competitive entry of new radio common carriers ("RCCs"), the Commission adopted an "open entry" policy that would allow licensees to share certain frequencies and *to work out their own* "technical coordination plan" for the most efficient use of the spectrum they shared.⁸ Compliance with the technical coordination plan was a condition of each license. In other words, rather than excluding potential operators on the basis of prejudgments regarding their technical capabilities, the Commission left the technical details necessary to share frequencies to the discretion of the licensees, but conditioned their licenses on compliance with the technical parameters they established. The Commission should follow a comparable course here by establishing non-interference

⁵ *Id.* at 447 (emphasis added). See also *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). Bechtel involved a "preference," rather than an exclusionary rule. Under the so-called "integration preference," mass media applicants who proposed to integrate ownership and management received a comparative advantage over competing applicants who did not propose such integration. *Id.* at 877. Although the integration preference had been in place for some 45 years, the U.S. Court of Appeals for the District of Columbia Circuit struck it down because the Commission could not justify it. The Commission attempted to justify the licensing preference as a way of predicting which applicant would best foster certain FCC policy objectives, such as responding to community needs. *Id.* at 879-80. When the Commission could produce no evidence that the preference had furthered its objectives, it argued that the Court should defer to the agency's 'predictive judgments.' *Id.* at 880. But the Court failed to see the connection between the preference and the objectives it was ostensibly intended to promote; rather, "the predictions at the root of the integration policy seem rather implausible." *Id.* The Court found the licensing preference to be "peculiarly without foundation" and therefore arbitrary and capricious. *Id.* at 887.

⁶ See, e.g., *Amendment of Part 21 (now part 22) of the Rules to Reflect the Availability of Land Mobile Channels in the 470-512 MHz Band in 13 Urbanized Areas of the United States*, Memorandum Opinion and Order, 77 F.C.C.2d 201, 215 (1980).

⁷ *Telocator Network of America v. FCC*, 691 F.2d 525 (D.C. Cir. 1982).

⁸ *Id.* at 531.

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and/or coordination requirements for the guard bands and allowing any commercial entity to bid on those frequencies, conditioned on compliance with those requirements.

The Commission's efforts to protect public safety users should not impede technological development

Not only must the Commission avoid unreasonable eligibility restrictions, it should be careful not to contravene the clear congressional policy aimed at promoting the development of innovative technologies. In particular, in Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), Congress has required the Commission to implement its competitive bidding processes in a manner that will promote, among other things, “the development and rapid deployment of new technologies,”⁹ “economic opportunity . . . competition and . . . innovative technologies,”¹⁰ and “efficient and intensive use of the . . . spectrum.”¹¹

As a corollary, the Commission’s licensing decisions should not discourage technological innovation, especially at a point in time when improvements in radio and computing technology are occurring so quickly. We are fearful that, if the Commission locks in a particular technology for use in the guard bands, or bans a class of technologies from that spectrum, it will violate this principle. All parties in this proceeding recognize that the spectrum at issue has extremely useful propagation characteristics. Those characteristics act only as a further incentive for licensees to find effective ways of using the spectrum in a way that avoids interference. The Commission’s rules should foster such technological progress.

⁹ 47 U.S.C. § 309(j)(3)(A).

¹⁰ *Id.*, § 309(j)(3)(B).

¹¹ *Id.*, § 309(j)(3)(D).

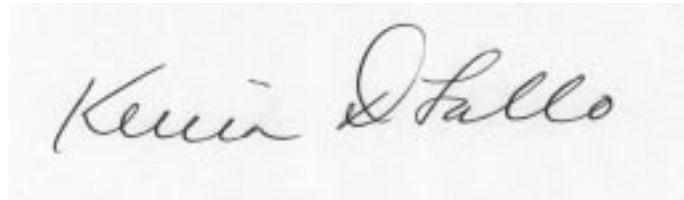
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The Commission's actions in this docket represent a positive step toward greater accessibility of high data-rate services and advanced technologies. We encourage the Commission to continue on this course, without exceeding its authority or emphasizing policies that are inconsistent with Congress's and the Commission's long-term goal of promoting innovative uses of the radio spectrum.

Respectfully submitted,

A rectangular box containing a handwritten signature in cursive script that reads "Kevin DiLallo".

Kevin DiLallo
Stephen J. Rosen

Counsel to Microsoft Corporation

cc via e-mail: Hon. William E. Kennard
Hon. Susan Ness
Hon. Harold W. Furchtgott-Roth
Hon. Michael K. Powell
Hon. Gloria Tristani
Mr. James Schlichting
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