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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

August 8, 2000

**BY HAND DELIVERY**

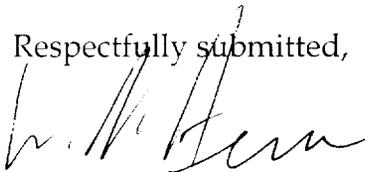
Ms. Magalie R. Salas, Secretary  
Federal Communications Commission  
The Portals, 445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: ET Docket No. 99-231,  
Amendment of Part 15 of the Commission's  
Rules Regarding Spread Spectrum Devices  
--- *Ex Parte Filing*

Dear Ms. Salas:

Copies of the attached previously submitted *Ex Parte* of August 2, 2000 in the above referenced docket, 99-231, are being hand delivered, this date, to Julius Knapp, Gregory Czumak and Joe Dichoso of the Office of Engineering Technology.

If there are any questions in this regard, please contact the undersigned.

Respectfully submitted,  


W. Kenneth Ferree  
Attorney for Proxim, Inc.

Attachment

cc: Julius Knapp  
Gregory Czumak  
Joe Dichoso

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List A B C D E

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FEDERAL COMMUNICATIONS COMMISSION  
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99-2311

EX PARTE

Ms. Magalie R. Salas, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: Amendment of Part 15 of the Commission's  
Rules Regarding Spread Spectrum Devices  
ET Docket 90-231

Dear Ms. Salas:

In a recent *ex parte* letter, WECA<sup>1</sup> suggested that the Commission may not replace its current "CW jamming margin" test with the more reliable "Gaussian Noise" test — as advocated by Proxim, Inc. and others in their comments — because such action would be "outside of the scope" of the notice of proposed rulemaking in this proceeding.<sup>2</sup> To the contrary, however, replacing the "questionable"<sup>3</sup> CW jamming margin test with a more reliable measure of processing gain for direct sequence spread spectrum systems is precisely what the Commission was seeking to do in this rulemaking.

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<sup>1</sup> The Wireless Ethernet Compatibility Alliance.

<sup>2</sup> WECA *Ex Parte*, ET Docket No. 99-231 (July 6, 2000) at 2.

<sup>3</sup> Amendment of Part 15 of the Commission's Rules Regarding Spread Spectrum Devices, 14 FCC Rcd 13046, 13050 (1999) (the "NPRM").

An agency's notice must "fairly apprise interested persons of the subjects and issues" involved in the rulemaking,<sup>4</sup> but even if the final rule deviates from the proposed rule, "[s]o long as the final rule promulgated by the agency is a logical outgrowth of the proposed rule, . . . the purposes of notice and comment have been adequately served."<sup>5</sup> In this case, the NPRM more than "fairly apprised" interested persons of the fact that the Commission might replace the flawed CW jamming margin test.

The Commission noted in the NPRM that the CW jamming margin test was of "questionable" reliability and that a number of parties had challenged the validity of the test.<sup>6</sup> Further, the Commission noted that an earlier request for declaratory ruling had been filed asking that the Commission either prohibit certain types of direct sequence systems for which the CW jamming margin test was unreliable or that it modify the test to provide for more accurate results.<sup>7</sup> Although the Commission denied the request for declaratory ruling, it specifically noted that it would address the issues it raised in this proceeding.<sup>8</sup>

In dealing with this issue, the Commission might, as had earlier been suggested, prohibit certain types of direct sequence systems for which the CW jamming margin test is unreliable or it might modify the test to provide for more accurate results. Another logical alternative, however, and one that was suggested by "some spread spectrum device manufacturers" would be to use a different test entirely.<sup>9</sup> Indeed, the Commission tentatively concluded in the NPRM that the use of "a Gaussian noise interferer, instead of a CW interferer, would be more suitable."<sup>10</sup>

It is hard to imagine that an interested party would not take from this NPRM the possibility that the Commission would replace the widely criticized CW jamming margin test with a more reliable measure of processing gain for direct sequence systems. The possibility of such a change is much more than a "logical outgrowth" of the NPRM — it is the very essence of the NPRM.

Moreover, it is of no particular moment that the "proposed rule" in Appendix B to the NPRM is phrased only in terms of allowing parties to use an alternative to the CW jamming margin test. As the courts have recognized on numerous occasions, "a final rule may properly differ from a proposed rule . . . when the record evidence

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<sup>4</sup> Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983) (quotation omitted).

<sup>5</sup> Appalachian Power Co. v. EPA, 135 F.3d 791, 804 n.22 (D.C. Cir. 1998) (quotation omitted).

<sup>6</sup> NPRM, 14 FCC Rcd at 13050.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

warrants the change."<sup>11</sup> "An agency, after all, must be free to adopt a final rule not described exactly in the [NPRM] where the difference is sufficiently minor, or agencies could not change a rule in response to valid comments without beginning the rulemaking anew."<sup>12</sup>

In this case, the text of the NPRM describes the widespread dissatisfaction in the spread spectrum industry with the CW jamming margin test and it tentatively concludes that a different test would be "more suitable." In response to the NPRM, "[a]t least one filing ... asked the Commission to eliminate altogether the presently-permitted CW jamming margin test in favor of the proposed Gaussian test."<sup>13</sup> It is, therefore, well within the scope of the NPRM for the Commission now, based on these comments and the record developed in the proceeding, to modify its proposed rule accordingly.

There is, in short, no procedural bar to replacing the flawed CW jamming margin test with the more reliable Gaussian test, as suggested by Proxim.

Sincerely,



W. Kenneth Ferree  
Attorney for Proxim, Inc.

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<sup>11</sup> E.G., United Steelworkers of America, AFL-CIO v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1981).

<sup>12</sup> Transmission Access policy Study Group v. FERC, 2000 WL 762706 (D.C. Cir., June 30, 2000) (quoting National Cable Television Ass'n v. FCC, 747 F.2d 1503, 1507 (D.C. Cir. 1984)).

<sup>13</sup> WECA Ex Parte, ET Docket No. 99-231 (July 6, 2000) at 1.