

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Part 15 of the)	ET Docket No. 99-231
The Commission's Rules Regarding)	
Spread Spectrum Devices)	

OPPOSITION OF PROXIM, INC.

Proxim, Inc. ("Proxim"), by its attorneys, hereby opposes the petition for clarification or, in the alternative, partial reconsideration filed by 3Com, *et al.* (the "Petitioners") on October 25, 2000 (the "Petition"), of the Report and Order, released August 31, 2000, in the above-captioned proceeding (the "R&O").

The Petitioners have asked the Commission to "clarify" that the Part 15 rules allow frequency hopping spread spectrum ("FHSS") systems in the 2.4 GHz band to employ adaptive hopping techniques. In the alternative, the Petitioners request "reconsideration" of the R&O to permit the use of adaptive hopping by FHSS systems at 2.4 GHz.

No "clarification" of the Commission's Part 15 rules is required or warranted. It is clear that those rules do not permit FHSS systems to use fewer than 75 MHz of spread bandwidth at 2.4 GHz¹ under any condition if the channel bandwidth equals or exceeds 1 MHz. Further, the Petitioners do not, in fact, seek "reconsideration" of any aspect of the R&O. To the contrary, the rule changes that Petitioners propose involve amendments to Part 15 wholly unrelated to the issues that have been resolved in this proceeding.

Although Proxim does not reject outright the intent of the rule changes proposed by Petitioners, the changes have not been thoroughly evaluated and analyzed in a

¹ See 47 CFR 15.247(a)(1)(ii) & (iii).

proceeding in which the Commission has given notice and provided the public an opportunity for informed comment. The rule changes requested by petitioners should, therefore, be the subject of a separate petition for rulemaking.

DISCUSSION

I. No Clarification Of The Commission's Part 15 Rules Is Necessary Or Warranted.

The Commission will clarify a rule or policy to make it more understandable or to render its application more predictable.² “Clarifications” are not, however, an appropriate vehicle for making substantive changes in Commission rules. Although the Petitioners have styled their request for relief, in the first instance, as a request for clarification of the Commission’s rules, in fact there is little dispute that the current rules do not permit the type of operation contemplated by the Petition.

Under the current rules, a 125 mW FHSS device that uses a channel bandwidth of 1 MHz or greater is required to spread over at least 75 MHz of spectrum. The change proposed in the Petition, however, would allow the same device to operate over a smaller portion of the band, *i.e.*, to use the same amount of power in less bandwidth. Thus, the “clarification” sought by the Petitioners would in fact involve a new, substantive change to permitted operating parameters under Part 15.

Unfortunately, because the Petitioners have proposed this change in the context of a purported rule “clarification,” they offer no justification for a substantive change in the rules and many technical questions relating to proposed operating parameters remain unexplored. For example, petitioners have provided no support regarding the minimum amount of spectrum that should be used by hopping technologies. They also

² See 47 C.F.R. § 1.2 (Commission may issue declaratory rulings to remove “uncertainty”); see also, *e.g.*, Biennial Regulatory Review 13 FCC Rcd 21027 (1998) (clarification not for substantive change); Amendments of Parts 73 and 74 of the Commission’s Rules, 12 FCC Rcd 12371 (1997) (clarification appropriate to make objective of rule better understood); Revision of part 22 of the Commission’s Rules, 9 FCC Rcd 6513 (1994) (clarification to make rule “easier to follow”).

have not justified how long a unit (and other related units) should remain in the “adapted” spreading pattern before returning to full spreading once a reduced spectrum hopping sequence is established. Moreover, the Petitioners have not demonstrated whether a power reduction to 125 mW is appropriate for this type of operation. Most importantly, the Petitioners entirely have ignored the issue of what criteria should be used to determine when adaptive hopping devices may enter into a mode of operation where, as Petitioners would have it, they are excused from meeting the Commission’s longstanding requirements for spreading bandwidth.

In short, the Petitioners offer no detailed supporting analysis upon which the Commission and other parties might rely. Adaptive hopping in different forms has long been used by frequency hopping systems at 2.4 GHz when channel bandwidths are less than 1 MHz and, more recently, when channel bandwidth is 1 MHz or greater. However, the Petitioners are, in effect, arguing that the current Part 15 rules are defective to the extent that they do not permit their version of adaptive hopping at 2.4 GHz for the type of FH system that they wish to deploy. Whether or not they are correct in that view, the changes they have proposed go far beyond merely clarifying existing rules and, instead, would create new standards, rules, and policies under Part 15.

As a result, these changes cannot be made without strict compliance with the Administrative Procedure Act (“APA”), which requires substantive rule changes and amendments to be made using notice and comment procedures.³ Indeed, both the Commission and the courts have suggested that a rulemaking proceeding is the appropriate procedural route to follow in determining whether an existing rule or policy is defective in some way.⁴ Rather than seek “clarification,” therefore, the

³ 5 U.S.C. § 553. See also *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993) (change that creates new law, rights, or duties not exempt from notice and comment as an interpretive rule).

⁴ See, e.g., *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5888 (1996) (a notice and comment proceeding is the proper forum to reexamine the daily newspaper cross-ownership rule);

Petitioners should seek the initiation of a notice and comment rulemaking proceeding, which would allow all affected parties an opportunity to review and comment on their proposed changes.

II. The Rule Changes Proposed By The Petitioners Should Not Be Made In The Context Of A Petition For Reconsideration.

The relief requested by the Petitioners also goes well beyond any “reconsideration” of the R&O. Under the Commission’s rules, a party seeking reconsideration of a Commission decision must “state with particularity the respects in which petitioner believes the action taken should be changed.”⁵ As the Commission has noted countless times in the past, issues that go beyond the “action taken” are not properly addressed in a petition for “reconsideration.”⁶

In this case, the “action taken” in the R&O has nothing whatever to do with the restrictions on adaptive hopping protocols addressed by the Petition. Indeed, those restrictions predate this proceeding and they remain unaffected by the new wideband frequency hopping rules adopted in the R&O. Under the circumstances, then, a petition for reconsideration is not the proper vehicle to address the issues raised by the Petitioners.

Instead, as noted above, the rule changes requested by the Petitioners should be the subject of a separate rulemaking proceeding. The Petition proposes various new operating parameters for FHSS systems at 2.4 GHz, including the use of “no less than 15 non-overlapping hopping frequencies”, a 30 second re-determination period, a dwell time of 0.4 seconds within a period of 0.4 seconds times the number of hopping

Consumer Energy Council of America v. FERC, 673 F.2d 425, 446-47 & n.79 (“question of whether [a] regulation[is] defective is one worthy of notice and an opportunity to comment”).

⁵ 47 C.F.R. § 1.429(c).

⁶ See, e.g., Biennial Regulatory Review, Second Memorandum Opinion and Order, WT Docket No. 98-20 (rel. Aug. 7, 2000) (dismissing petition for reconsideration to the extent that it “seeks reconsideration of actions taken by the Commission prior to this docketed proceeding”); Implementation of Sections 3(n) and 322, 15 FCC Rcd 5231 (2000) (dismissing petitions for reconsideration raising issues “outside the scope” of the order on reconsideration).

channels, and by inference the elimination of the 75 MHz total spreading requirements for interference conditions that are not even described.⁷ The only analysis of the proposal that so far has been done is that provided by the Petitioners. No record has been developed in this proceeding on the proposed operating parameters, and no independent analysis has been done of the Petitioners' technical assertions.

Indeed, contrary to the suggestion in the Petition, it is far from obvious that the proposed rule change would reduce interference in the band. Because the proposed change will lead to increased power spectral densities in some portions of the band, it may be that the proposed rule change would result in more • not less • interference to other frequency hopping devices at 2.4 GHz.

Although Proxim is not rejecting outright the intent of the rule changes proposed in the Petition, the proposed changes have not been thoroughly evaluated and analyzed in a proceeding in which the Commission has given notice and provided the public, including small business, an opportunity for informed comment.⁸ Given the significant potential for negative interference implications, Proxim therefore opposes the Petition to the extent that it seeks to have these changes made on "reconsideration" in this proceeding. Proxim would not object, however, to the initiation of a rulemaking proceeding in which the possible use of adaptive hopping techniques at 2.4 GHz could be thoroughly considered.

⁷ Petitioner's proposed new rule section 15.247(a)(1)(iv).

⁸ The Regulatory Flexibility Act ("RFA") requires that agencies publish, at the time of issuance of a notice of proposed rulemaking, an initial regulatory flexibility analysis ("IRFA") "describe[ing] the impact of the proposed rule on small entities." 5 U.S.C. § 603(a). As Commissioners Ness and Furchtgott-Roth noted in their Joint Statement on the R&O, the IRFA in this matter was "unquestionably terse." Although the final regulatory flexibility analysis more than compensated for that terseness, the prospect now of making further rule changes without analyzing the impact of those changes on small businesses, and without allowing small businesses a full and fair opportunity to comment on the proposed changes, might raise substantial questions regarding Commission compliance with the RFA.

CONCLUSION

For the reasons stated herein, Proxim opposes the above-referenced Petition for clarification or, in the alternative, reconsideration.

Respectfully submitted,

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