

LAW OFFICES
GOLDBERG, GODLES, WIENER & WRIGHT
1229 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036

HENRY GOLDBERG
JOSEPH A. GODLES
JONATHAN WIENER
W. KENNETH FERREE
SHERYL J. LINCOLN
HENRIETTA WRIGHT
THOMAS G. GHERARDI, P.C.
COUNSEL

ORIGINAL RECEIVED

(202) 429-4900
TELECOPIER:
(202) 429-4912

DEC 12 2000

December 12, 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

e-mail:
general@g2w2.com

BY HAND DELIVERY

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

EX PARTE OR LATE FILED

ORIGINAL

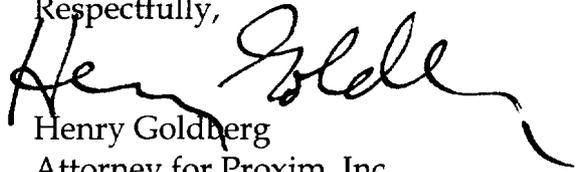
Re: ET Docket 99-231/(Petition for Reconsideration)
Wi-LAN Application for Review (DA 00-2317)
--- *Ex Parte Filing*

Dear Madam Secretary:

Today Kevin Negus and Leigh Chinitz of Proxim, Inc. and the undersigned met with Julius Knapp, Karen Rackley, John Reed, and Neal McNeil of the Office of Engineering and Technology to discuss the Petition for Reconsideration filed in ET Docket 99-231. The subjects discussed are set out in the attached ex parte letter, which is being filed contemporaneously herewith.

In addition, the Proxim, Inc. representatives discussed the Wi-LAN Application for Review (DA 00-2317). The subjects of this discussion are set out in Proxim's Opposition to the Application for Review.

Respectfully,


Henry Goldberg
Attorney for Proxim, Inc.

cc: Julius Knapp
Karen Rackley
John Reed
Neal McNeil

No. of Copies rec'd 0+3
List ABCDE

LAW OFFICES
GOLDBERG, GODLES, WIENER & WRIGHT
1229 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036

HENRY GOLDBERG
JOSEPH A. GODLES
JONATHAN WIENER
W. KENNETH FERREE
SHERYL J. LINCOLN
HENRIETTA WRIGHT
THOMAS G. GHERARDI, P.C.
COUNSEL

(202) 429-4900
TELECOPIER:
(202) 429-4912

e-mail:
general@g2w2.com

December 12, 2000

BY HAND DELIVERY

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

Re: ET Docket 99-231
Amendment of Part 15 of the Commission's
Rules Regarding Spread Spectrum Devices
--- *Ex Parte Filing*

Dear Madam Secretary:

On December 1, 2000, several parties (the "Petitioners") filed a "Joint Reply" to the Opposition of Proxim, Inc. ("Proxim") to a Petition for Reconsideration ("Petition") of the Report and Order ("R&O") in the above-referenced proceeding. As Proxim noted in its Opposition, the Petition did not, in fact, seek "reconsideration" of any aspect of the R&O, but rather proposed amendments to the Commission's rules wholly unrelated to the issues resolved in this proceeding. Accordingly, Proxim suggested that the rule changes requested by petitioners should be the subject of a separate rulemaking.

Now, in their Joint Reply, the Petitioners claim that no new rulemaking is required because the rule changes that they have proposed would be a "logical outgrowth" of the R&O. That claim, however, finds no support in law or fact.

To begin with, the Commission may, on reconsideration, make changes to a rule adopted following notice and comment procedures only if the changes are a "logical outgrowth" of the proceeding. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547-49 (D.C. Cir. 1983). The "logical outgrowth" test, however, is not, as portrayed by Petitioners, whether the final rule bears some relationship to the proposed rule. Rather, the question is whether a reasonable party "should have anticipated" the new rule, *id.* at 549, whether the notice was "sufficient to advise interested parties that comments directed" to the issue should have been made, Fertilizer Institute v. EPA, 935 F.2d 1303, 1311-12 (D.C. Cir. 1991), and "whether the notice given affords [the issue]

exposure to diverse public comment," Association of Am. RR v. DOT, 38 F.3d 582, 589 (D.C. Cir. 1994).

Using these standards, neither the original notice of proposed rulemaking nor the R&O, which amended the Part 15 rules to accommodate new wideband frequency hopping ("WBFH") systems, can be regarded as adequate notice that, as suggested in the Petition, frequency hopping spread spectrum ("FHSS") systems might be allowed to employ adaptive hopping techniques in the 2.4 GHz band. To the contrary, the restrictions on adaptive hopping at 2.4 GHz predate this proceeding, there was no suggestion in the notice of proposed rulemaking that those restrictions might be changed and the restrictions were not, in fact, affected by the rules adopted in the R&O. In short, prior to the filing of the Petition, there was no reason that any party "should have anticipated" that the Commission might change the rules regarding FHSS adaptive hopping at 2.4 GHz in this proceeding. "Something is not a logical outgrowth of nothing." Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

It is of no moment, moreover, that one might construe an *ex parte* letter filed in this proceeding as having suggested the possibility of FHSS adaptive hopping at 2.4 GHz. See Joint Reply at 2 (citing *ex parte* of Intersil Corporation, filed June 28, 2000). It is well settled that "comments by members of the public [do] not in themselves constitute adequate notice. Under the standards of the APA, notice necessarily must come — if at all — from the Agency." Shell Oil Co. v. EPA, 950 F.2d 741, 751 (D.C. Cir. 1992) (quotation omitted). For good reason. It is extremely unlikely that public comments, particularly an *ex parte* filing such as that referenced in the Joint Reply, ever will elicit "diverse public comment" or be "sufficient to advise interested parties that comments directed" to an issue should be filed.

This case highlights the point. The Petition proposes various new operating parameters for systems at 2.4 GHz, including the use of "no less than 15 non-overlapping hopping frequencies," a 30 second re-determination period, a specific dwell time, and the elimination of the 75 MHz total spreading requirement — all, the Petitioners claim, to "mitigate interference created by wideband frequency hopping devices." Joint Reply at 2. No party, however, ever has had an opportunity to comment on any of these proposed new operating parameters and the only analysis of the proposal that has been done is that provided by the Petitioners themselves.

As noted in its Opposition, Proxim is not necessarily opposed to the rule change outlined in the Petition. Proxim is concerned, however, with the process that is being proposed by Petitioners to change the rules. It is ironic that the very Intersil *ex parte*

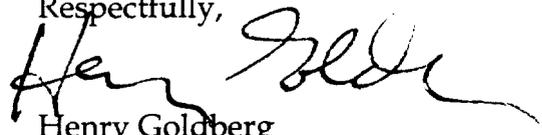
Ms. Magalie R. Salas, Secretary

December 12, 2000

Page 3

letter relied on by the Petitioners as putting the public on notice regarding the adaptive hopping issue is devoted principally to the need for procedural regularity in dealing with Part 15. That need is no less important in this instance.

Respectfully,

A handwritten signature in black ink, appearing to read "Henry Goldberg". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Henry Goldberg

Attorney for Proxim, Inc.

cc: Julius Knapp
Karen Rackley
John Reed
Neal McNeil