

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

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MAY 16 2003

Federal Communications Commission  
Office of Secretary

In the Matter of: )  
)  
i2way Request for Declaratory Ruling )  
Regarding the Ten-Channel Limit )  
of Section 90.187(e) of the Commission's Rules )  
)  
Hexagram Petition to Deny i2way )  
Applications )

WT Docket No. 02-196

To: The Commission

**OPPOSITION TO APPLICATION FOR REVIEW**

i2way Corporation ("i2way"), by its attorney and pursuant to Section 1.115(f) of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission")<sup>1</sup>, hereby files this Opposition to the Application for Review filed by Hexagram, Inc. ("Hexagram") in the above-referenced proceeding.

INTRODUCTION

In its The April 1<sup>st</sup> Order in this proceeding,<sup>2</sup> the Commission dismissed a petition to deny filed by Hexagram against certain i2way applications. Hexagram subsequently filed an Application for Review of that decision.

Noted by the record 019  
DATE

<sup>1</sup> 47 C.F.R. § 1.115(f) (2002).

<sup>2</sup> Order (DA 03-1044), WT Docket No. 02-196, adopted March 31, 2003, released April 1, 2003, \_\_\_ FCC Rcd. \_\_\_\_\_ (2003).

## OPPOSITION

In its Application for Review, Hexagram advances several highly unconventional, if not bizarre, interpretations of the Commission's rules. Indeed, if the Commission were to accept Hexagram's "reading" of the rules, it would have the effect of throwing seventy years' worth of established telecommunications law and policy out the window.

In specific response to Hexagram's arguments, i2way states as follows:

**1. Hexagram Mischaracterizes i2way's Request.**

Hexagram suggests that i2way requested an exemption from the frequency coordination requirement. This is not true. At no time did i2way seek to "bypass" frequency coordination, as Hexagram contends. Indeed, in full compliance with the requirements of § 90.175 of the rules, i2way obtained frequency coordination for all of the applications that it filed with the Commission.

**2. Hexagram's Petition to Deny Was Filed Way, Way Out of Time.**

In a unique twist on well-established principles of administrative law, Hexagram argues that its petition to deny, which the Commission found to have been filed "nearly six weeks late," was actually not late—or, if deemed late, should have been accepted out of time. Hexagram states that it did not have actual notice of i2way's applications. In fact, Hexagram had the full degree of notice required by law, FCC rules and established precedent. The Commission cannot be put in the position of having to devise special provisions for parties that fail to take adequate measures to protect their own interests. "It is elementary that an agency must adhere to its own rules and regulations. . . . Simply stated, rules are rules, and fidelity to the rules is required."<sup>3</sup>

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<sup>3</sup> *Reuters Limited v. FCC*, 781 F.2d 946, 955 (D.C. Cir. 1986).

**3. Secondary Users, Such As Hexagram, Are Bereft of Protection.**

Hexagram expresses concern that, as a secondary user, it will be harmed by i2way's applications. The very essence of secondary status is that users licensed on that basis do not enjoy the same protections available to primary users. Hexagram would have the Commission believe that secondary users are entitled to protection from primary licensees. i2way is not aware of any case law or Commission policy that would support such a novel view.

**4. If Not Monitoring for Co-Channel Usage, Hexagram Is Failing Its Obligation As a Commission Licensee.**

From time immemorial, the Commission has interpreted the requirement placed upon licensees under Section 90.173 of the rules "to cooperate in the selection and use of frequencies" as a requirement to monitor for co-channel traffic before transmitting on a frequency. Hexagram asserts that it has no obligation to monitor a frequency before initiating transmissions. To the extent that it fails to do so, Hexagram is not conforming to its obligation to cooperate in the use of frequencies.

**5. i2way's Owes No Obligation to Hexagram.**

By the very nature of administrative law, it is incumbent upon i2way to satisfy any and all application standards imposed by the Commission. i2way has *no obligation* to satisfy standards that Hexagram might seek to impose. The Commission, not Hexagram, determines the necessary elements of a satisfactory application. As an applicant, i2way makes a commitment to the Commission, and the Commission then assesses whether that commitment serves the public interest. Contrary to Hexagram's assertions, commitments made in the context of an application do not constitute "promises" to other applicants or licensees. To insist otherwise is to undermine

the fundamental underpinnings of administrative law.

**6. Hexagram's Speculation Is Unfounded.**

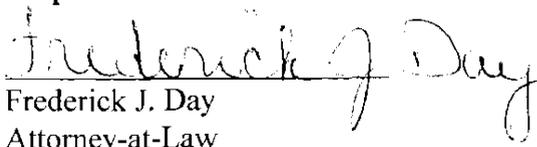
Without a scintilla of evidence, Hexagram reaches the conclusion that i2way “made its extraordinary offer of co-channel protection because it *knew* its applications otherwise presented an unacceptable risk of interference.”<sup>4</sup> In a pleading that is noteworthy only for the utter lack of case law to support a variety of outrageous rule interpretations, this statement by Hexagram is the most preposterous. If Hexagram would care to clarify how it *knew* what i2way *knew*, i2way would be pleased to comment. Lacking such clarification, i2way is left to observe only that Hexagram debases itself and its reputation when it makes such sophomoric misrepresentations.

CONCLUSION

The arguments presented in the Application for Review filed by Hexagram are neither persuasive nor credible. The Application for Review is devoid of meaningful case law to support grant of Hexagram's petition to deny. The Commission's earlier decision to dismiss the petition to deny was well-founded and should be sustained.

Respectfully submitted,

**i2way Corporation**

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May 16, 2003

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<sup>4</sup> Hexagram *Application for Review*, page 17 (emphasis added).

**Certificate of Service**

I, Frederick J. Day, counsel for i2way Corporation, certify that, on this 16<sup>th</sup> day of May 2003, I have sent the foregoing "Opposition to Application for Review" to the persons named below by means of First-Class U.S. Mail, postage prepaid:

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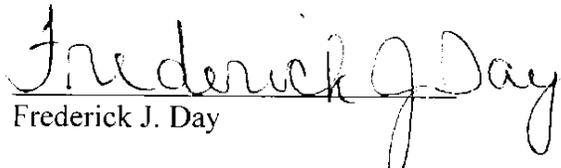
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