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WOMBLE
CARLYLE
SANDRIDGE
& RICE

Sixth Floor
1401 Eye Street, N.W.
Washington, DC 20005

Telephone (202) 467-6900
Fax (202) 467-6910
Web Site www.wcsr.com

Howard J. Barr
Direct Dial (202) 857-4506
Direct Fax (202) 261-0006
E-mail hbarr@wcsr.com

October 27, 2003

Ms. Marlene Dortch
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

RECEIVED

OCT 27 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Wt Docket No. 03-203
Petition to Deny

Dear Ms. Dortch,

Transmitted herewith is an original and four copies of Instructional Telecommunications Foundation, Inc.'s Petition to Deny the applications for assignment of license submitted in the above-referenced docket.

Should any questions arise in connection with this matter, kindly contact the undersigned.

Respectfully submitted,

Howard J. Barr

Enclosures

0+4

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C 20554

RECEIVED

OCT 2 7 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re	)	
	)	
Applications to Assign Wireless	)	
Licenses from WorldCom, Inc.	)	WT Docket No 03-203
(Debtor-in-Possession) to Nextel	)	
Spectrum Acquisition Corp.	)	

To Chief, Wireless Telecommunications Bureau

PETITION TO DENY

Instructional Telecommunications Foundation, Inc ("ITF"), by counsel and in response to the Commission's Public Notice, DA 03-2948, released September 25, 2003, hereby petitions the Commission to deny the applications ("Applications") under consideration in the above-captioned docket.[1] ITF has standing to file this Petition. As set forth more fully herein, it has suffered a direct injury - or at a minimum stands to suffer injury -- by virtue of a continuing violation of the Commission's Rules [2] The following is submitted in support thereof:

Background

ITF is the licensee of Instructional Television Fixed Service Station WHR527, operating on the G Group of channels in Philadelphia, Pennsylvania For many years, WHR527 operated at its currently-authorized tower site, 216 Paoli Avenue, Philadelphia. WHR527 transmitted from an antenna which is over 1,050 feet above ground level, and operated as part of the Philadelphia

[1] The applications have been filed in furtherance of an Asset Purchase Agreement (the "Nextel Agreement") between WorldCom, Inc ("WorldCom") and Nextel Spectrum Acquisition Corp ("Nextel")

[2] This Petition is submitted under the Declaration under Penalty of Perjury of John B Schwartz, ITF's President *See* Exhibit One hereto

wireless cable system. Control of this system changed three times; during the bulk of this time the system was operated by CAI Wireless Systems ("CAI"), now a subsidiary of WorldCom Broadband Systems ("WBS" or "WorldCom") which, in turn, is a subsidiary of WorldCom

An excess capacity agreement between ITF and CAI provided WHR527 with the use of transmitters, as well as shared use of a combining network, transmission line, a transmitting antenna, tower space, and equipment space for tape playback operations This agreement was extended numerous times, but ultimately expired at the end of February, 1999. At that time, ITF ceased leasing excess capacity to CAI, but continued to operate on an instructional basis with the same shared facilities for a one-year "hold-over" period The hold-over period was provided for by the then expired agreement between ITF and CAI; during that year, there was no charge to ITF for use of these facilities.

During the period prior to the expiration of the CAI excess capacity lease, CAI and ITF had negotiated extensively for its renewal on a long-term basis, but were unable to reach an agreement

As early as 1997, ITF's management realized that WHR527 might have to secure tower space and other facilities independently of CAI ITF believed that in order to properly control adjacent-channel interference, it had to keep the WHR527 transmission facilities within the same antenna farm as the 216 Paoli Ave tower, located in the Roxborough neighborhood of Philadelphia [3] This approach was based upon Section 74.902(h) of the Commission's Rules.[4]

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3 The Commission has recognized the value of having adjacent channel ITFS/MMDS facilities located nearby in order to limit adjacent channel interference *See Amendment of Part 74 of the Commission's Rules and Regulations With Regard to the Instructional Television Fixed Service*, 101 FCC 2d 50, paragraphs 128, 130 (1985) ("Most commenters believe that only in rare situations would two separate educational entities find a common site mutually acceptable MDS operations, in contrast, would normally desire to operate from a single central location to serve a metropolitan area as efficiently as possible Therefore, although we are encouraging the use of colocation for ITFS, we realize that its benefits may be much more limited in ITFS than in MDS due to the fundamental differences between the two services")

At that time, and in subsequent periods, it proved impossible to obtain replacement tower space in the Roxborough antenna farm, due chiefly to the fact that local television stations had to add new transmitting antennas for digital operation, while maintaining their existing antennas for analog. Certain existing tower owners planned to build new towers, but such either were not available for rent to outside parties or were delayed repeatedly, chiefly due to local zoning proceedings and opposition from neighbors

The one-year hold-over period concluded on February 28, 2000. At that time, ITF was still unable to secure replacement tower space Instead, it negotiated an agreement with WBS, which by then had purchased CAI, to continue sharing the previously-free facilities for four additional months at a rent of $3,750 per month.

At the conclusion of the four month term, ITF requested to continue operating at 216 Paoli Avenue at the same monthly rent and on the same other terms, but WBS refused to continue the arrangement. Continuation of this facilities rental would not have entailed any operational detriment to WBS, as WHR527 had shared this tower for many years. Further, continuation would have benefited WBS financially, as WBS incurred little or no expense in the rental, while ITF was paying WBS at the rate of $45,000 per annum in rent

WBS's motivation in refusing to extend the short-term facilities agreement was easily discernible. Its refusal was clearly designed to gain leverage over ITF in excess capacity agreement negotiations. In fact, control over a transmitting tower is often used as a tactic by an operator in order to secure an advantage over an ITFS licensee, especially when that licensee will have difficulty staying on the air

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[1] This section states "Where adjacent channel operation is proposed in any area, the preferred location of the proposed station's transmitting antenna is at the site of the adjacent channel transmitting antenna If this is not practicable, the adjacent channel transmitting antennas should be located as close as reasonably possible

This leverage is considerable. In addition to disrupting an ITFS licensee's instructional operations, knocking a station off the air could result in the loss of its FCC authorization. Section 74 932(d) of the Commission's rules states, in pertinent part· "In case of permanent discontinuance of operation of a station licensed under this subpart, authority to operate is forfeited and the licensee shall forward the station license to the Commission for cancellation. For the purposes of this section, a station which is not operated for a period of one year is considered to have been permanently discontinued "

ITF came within a whisker of being subjected to Section 74 932(d)'s mandate During the free hold-over period, and the ensuing four months, ITF continued its efforts to locate replacement tower space. Those efforts were unsuccessful. Consequently, WHR527 was forced to sign off the air on June 29, 2000 and discontinue its instructional service to schools in the Philadelphia metropolitan area

After WHR527 was forced to discontinue operation, ITF pursued a number of avenues to obtain tower space and return the station to the air Relatively little had changed between the time ITF had attempted to locate space in 1997, existing towers were fully loaded, and the long-anticipated new towers had not yet been built. After extensive efforts on a number of fronts, ITF obtained an offer of temporary space at the 216 Paoli Ave. from the tower's new owner, American Tower, and of eventual permanent space on a new Roxborough tower American planned to build

In order to minimize windload at the heavily-taxed 216 Paoli Avenue tower, American Tower required WHR527 to transmit at a much lower antenna height (with a new radiation center of only 602 feet above ground, as opposed to the prior 1,050') and restricted WHR527 to relatively low-diameter 1 5/8" coaxial cable, which produces high transmission line losses. The

effect of lower transmitting height was to restrict WHR527's line-of-sight coverage considerably. At the expected new tower, however, American offered a height of approximately 1,000 feet above ground and the use of much larger EW-20 elliptical waveguide, which produces lower line losses These new facilities at the anticipated new tower would allow similar coverage to that which WHR527 enjoyed in the past

On March 21, 2001, ITF applied to the Commission for special temporary authority ("STA") to operate WHR527 at the 216 Paoli Avenue tower, using the 602' transmitting antenna height [5] The Commission granted this application by a decision letter of May 1, 2001, and ITF certified that the STA facilities had been constructed as of June 26, 2001, a mere three days prior to having its authorization become forfeit due to Section 74 932(d).

While the STA facilities enabled ITF to resume instructional operations, the lower height meant that numerous schools which had received ITF's programming from the prior antenna height of 1,050' above ground level could no longer pick up the signal from the lower transmitting elevation. (The period of nearly a year off the air also contributed to the disruption of the relationship between ITF and the schools it had long served in the Philadelphia metropolitan area.

Because of lag time in American Tower's completing of its new Roxborough tower, ITF has sought and received several extensions to the STA for WHR527's temporary operations at the 602' level at 216 Paoli Avenue. WHR527 continues to operate pursuant to this STA.

On June 18, 2002, ITF submitted an application with the Commission proposing to relocate WHR527 to American Tower's new tower in the Roxborough antenna farm,[6] a site move of less than 1,000 feet and with a centerline 139 feet below its currently licensed centerline.

[5] The STA application was assigned the file number BSTAIF-200032IAK
[6] File No BLNPIF-20020618AAC

This application represented ITF's proposal to resume long-term operation within the Roxborough antenna farm with facilities approximating those authorized in its current authorization so as to provide better service to area schools while also controlling adjacent channel interference.

WBS petitioned to deny the application.[7] As well, Northwest Communications, Inc. ("Northwest") filed a "Petition to Partially Deny" ITF's application because Northwest's F4 channel (WHT644) is first adjacent to the ITFS G1 channel. Both petitioners alleged that first-adjacent channel interference would result from the proposed relocation of WHR527's transmitting antenna.[8] ITF responded to the petitions and the matter remains pending before the Commission

Argument

The petitions to deny filed by WorldCom and at WorldCom's direction[9] are frivolous. The attached declaration of Thomas Bird places the petitions in their true light. Mr. Bird is an engineer with substantial experience in the MDS/ITFS industry and specifically with respect to the Philadelphia wireless system Additionally, Mr. Bird and is a principal in Northwest.

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[7] WBS is the licensee of MDS stations WNEY590 (channel H1) and WNET336 (channel H2) and an applicant for the H3 channel The H channels are first adjacent to WHR527's G channel group and are therefore entitled to interference protection under the Commission's rules

[8] The Engineering Statement filed by Northwest is prepared by the same WBS employee who prepared the Engineering Statement filed as part of the WBS petition to deny The language of the two engineering statements are essentially identical

9 Northwest can best be described as a reluctant petitioner as it was obligated to file by virtue of the terms of its lease agreement with WorldCom See attached Declaration of Thomas Bird Exhibit Two hereto With respect to the Northwest petition to deny, ITF's president contacted a principal of Northwest not long after receiving service of Northwest's filing The Northwest principal stated that Northwest had filed its petition because a WBS representative, pursuant to a lease agreement between those two parties, had demanded that such a filing be made See also, infra The Engineering Statement filed by Northwest is prepared by the same WBS employee who prepared the Engineering Statement filed as part of the WBS petition to deny The language of the two engineering statements are essentially identical

Mr Bird's declaration describes his opposition to the filing of the Northwest petition. In his opinion, while computer modeling showed that the proposed relocation of WHR527 did not fully satisfy the 0 dB ratio required by the rules, the real world consequences were immaterial given operating conditions in Philadelphia.

As the person largely responsible for the construction of the Philadelphia wireless system, Mr Bird was well positioned to make an assessment on the actual potential for harmful interference the relocated WHR527 posed to WorldCom's and Northwest's operations in Philadelphia As a part of his duties, Mr Bird "oversaw signal strength measurements taken at over 50,000 points in the Philadelphia metropolitan area."[10] "These measurements revealed that 'real world' signal strengths varied considerably from predicted signal strengths, and often were not the same as those which were predicted through mathematical models used by the Commission."[11]

In his opinion and experience, "any variation in signal strength caused by [WHR527's proposed move] of less than 1,000 feet would be far less consequential than the variations which had been measured under 'real world' conditions in many parts of the Philadelphia area caused by the side mounting of the wireless cable system's transmitting antenna."[12] Nevertheless, WorldCom filed its petition to deny and insisted that Northwest oppose the proposed WHR527 relocation which Northwest was contractually obligated to do

Because of Mr. Bird's objection to the filing of the petitions, WorldCom knew before filing that the petitions were without any basis in fact. Its true purpose was merely to further

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[10] Exhibit Two hereto
[11] *Id*
[12] *Id*

obstruct and delay ITF's ability to operate in Philadelphia in hopes of securing business advantage As such, its filing is frivolous and an abuse of process

The term "abuse of process" has been defined as "the use of a Commission process, procedure or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule."[13] In this instance, WorldCom has prosecuted a petition to deny alleging interference---when it was well aware that interference was not the issue---in order to achieve a coercive business result. In sum, WorldCom used a Commission process, wasting Commission resources, "to achieve a result which that process. was not designed or intended to achieve. "[14]

It is the Commission's policy to investigate legitimate claims of abuse of process, and to take appropriate enforcement action when warranted.[15] By this petition, ITF asks that the Commission take action pursuant to this well established policy

ITF has been placed in an untenable position by WBS's conduct ITF is forced to operate under STA with substandard facilities because WBS will not allow ITF to operate from its authorized site alongside the other Philadelphia authorized MDS/ITFS facilities while it also erects roadblocks to ITF's efforts to relocate to a nearby antenna in an effort to resume normal operations.

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[13] *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuse of the Renewal Process, First Report and Order*, 4 FCC Rcd 4780, 4793 n 3 (1989)

[14] *Id*

[15] *See, e g*, *Public Notice*, "*Commission Takes Tough Measures Against Frivolous Pleadings*," 11 FCC Rcd 3030 (1996) *See also ConQuest Operator Services Corp*, 14 FCC Rcd 12518, 12523-24 and n 32 (1999) (parties "are under the obligation to be truthful and forthright in their written submissions ")

WorldCom cannot be allowed to be the cause of ITF's proposed relocation and to protest it at the same time, particularly when the potential for interference – the sole grounds for the objection does not exist under "real world" conditions.[16] The wrong-headedness of WorldCom's conduct is only exacerbated by its repeated refusal to allow ITF – **at ITF's cost and expense** -- to share the equipment and tower location it long occupied at 216 Paoli Avenue.

ITF recently sought to engage Nextel in a conversation regarding ITF's operations in Philadelphia in the hopes that the parties could reach an agreement that, at a minimum, would permit ITF to share the equipment and tower location under terms and conditions similar to those under which it formerly operated. ITF has not received any indication that Nextel will pursue this option. Thus, the status quo prevails: ITF cannot operate from its licensed facilities on the Paoli tower nor can it relocate to the nearby tower to which it has proposed to relocate.

Not only is WorldCom's objection to WHR527's relocation constitute an abuse of process, further compounding that, its actions are clearly a violation of Section 21.902(b)(1) of the Commission's Rules. As a condition of authorization, that section prohibits MMDS licensees from "enter[ing] into any lease or contract or otherwise tak[ing] any action that would unreasonably prohibit location of another station's transmitting antenna at any given site inside its own protected service area." But that is precisely what WorldCom has done. Though it will not be harmed by such operations (and in fact stands to benefit by virtue of ITF's lease payments) it will not permit ITF to operate WHR527 in accordance with its authorization along with the other Philadelphia ITFS/MDS facilities nor will it permit ITF to relocate to a nearby tower.

As is evident from the preceding narrative, consistent with the Commission's Rules, ITF has made extraordinary efforts to collocate its facilities with those of WorldCom and to avoid

[16] *See* Exhibit Two hereto

theoretical adjacent channel interference.[17] WorldCom's conduct, on the other hand, has been in complete contravention of the rules

WorldCom has refused to work with ITF such that ITF can operate with its authorized facilities – conduct that very nearly cost ITF its authorization – in violation of Section 21 902 and has failed to work with ITF to achieve the ends of Section 74 902(h), choosing instead to oppose ITF based upon theoretical adjacent channel interference that it knows will pose no real world consequences

WorldCom's refusal to allow ITF to operate in accordance with its authorization, the filing of its petition to deny ITF's relocation application, and its insistence that its excess capacity lessor Northwest do likewise, amounts to an abuse of process WorldCom's actions have been designed to delay and obstruct and are completely lacking in good faith.

ITF has long served the public interest through its operations in Philadelphia. WorldCom's conduct placed the future of those operations in serious jeopardy. As discussed above, ITF approached Nextel about this matter but has not received any indication that Nextel will rectify the situation. The Commission cannot stand idly by while private forces move to usurp its licensee's operations in the public interest

[17] Section 74 902(h) states

> Where adjacent channel operation is proposed in any area, the preferred location of the proposed station's transmitting antenna is at the site of the adjacent channel transmitting antenna If this is not practicable, the adjacent channel transmitting antennas should be located as close as reasonably possible

CONCLUSION

Wherefore, the premises considered, Instructional Telecommunications Foundation, Inc. respectfully requests that the Commission deny the Applications In the alternative, the Commission should either order WorldCom/Nextel to allow ITF to return ITFS station WHR527 to its authorized parameters, pursuant to commercially reasonable arrangements, or to withdraw (and to authorize the withdrawal of) the pending petitions to deny and support grant of WHR527's proposed modification

Respectfully submitted,

INSTRUCTIONAL TELECOMMUNICATIONS FOUNDATION, INC.

By: _____
Howard J. Barr

WOMBLE CARLYLE SANDRIDGE & RICE PLLC
1401 Eye Street, N.W , 7th Floor
Washington, D.C 20005
(202) 857-4400

Attorneys for Instructional Telecommunications Foundation, Inc

October 27, 2003

Exhibit 1

DECLARATION UNDER PENALTY OF PERJURY

I, John B. Schwartz, depose and state as follows·

1. I am President of Instructional Telecommunications Foundation, Inc., the licensee of ITFS station WHR527, Philadelphia, Pennsylvania.

2 I have read the foregoing "Petition to Deny" and am familiar with its contents

3 Except for those matters of which the Commission may take official notice. I declare under penalty of perjury that all of the statements made therein are true and correct to the best of my knowledge and belief

John B Schwartz

Date 10/27/03

Exhibit 2

Declaration of Thomas E. Bird

I, Thomas E. Bird, am an engineer with more than 30 years of experience in the design and operation of RF systems.

Among other positions, I served as vice president of engineering for several wireless cable companies: ACS Enterprises ("ACS"), CAI Wireless ("CAI"), and CS Wireless ("CS"). In these capacities, I supervised the design, construction, and operation of many ITFS and MMDS facilities. I have also served on the Engineering Committee of the WCAI and as co-chair of the Wireless R&D Labs. studying long term propagation characteristics of the ITFS/MMDS band .

Through a series of transactions, the Philadelphia wireless cable system that was at one time operated by ACS was acquired by CAI, which, in turn, ultimately was acquired by a subsidiary of WorldCom. While the ownership of the system changed, the RF transmitting facilities remained essentially the same from the time I oversaw it to the present.

In my capacity with ACS, and, later, with CAI, I supervised all of the transmission facilities of the Philadelphia wireless cable system, consisting of 32 co-located MDS, ITFS and MMDS channels. In certain cases, the Philadelphia wireless cable operator owned its own stations, but in others, the operator leased capacity from third parties. Each ITFS or MMDS channel had a separate transmitter, and the outputs of all of these transmitters were multiplexed into a single transmission line that fed a single side-mounted transmitting antenna on a tall tower in the Roxboro antenna farm. Among the many stations included as part of the Philadelphia wireless cable system were: ITFS station WHR-527 (G group, licensed to Instructional Telecommunications Foundation "ITF"); WHT-644 (F group, licensed to Northwest Communications, Inc. "Northwest"); WNEY-590 (channel H-1, now licensed to WorldCom); and WNET-336 (channel H-2, also now licensed to WorldCom). Both ITF and Northwest leased capacity to the Philadelphia wireless cable system.

In addition to my other roles, I am a principal and part-owner of Northwest, the F group MMDS licensee at Philadelphia

At its height, the Philadelphia wireless cable system had tens of thousands of commercial subscribers. ACS and CAI were very interested in maximizing signal coverage, and, as part of my duties, I oversaw signal strength measurements taken at over 50, 000 points in the Philadelphia metropolitan area.

These measurements revealed that "real world" signal strengths varied considerably from predicted signal strengths, and often were not the same as those which were predicted through mathematical models used by the Commission. One of the chief reasons for the variations was the fact that the transmitting antenna was side-mounted on a tower; as a

TEB

result of the side mounting, both direct and reflected signals were received at each location Depending upon many factors, phase additions or subtractions led to considerable variations in received signal strengths at any given location. Some of these effects are frequency-specific, meaning that adjacent channels at times would not have the same strength at a given receiving location, even though they were transmitted with identical power through the same transmitting antenna.

While these propagation considerations represented an engineering challenge to the Philadelphia wireless cable system, we nonetheless generally were able to deliver satisfactory quality analog signals to our customer base. Our extensive testing of digital transmissions yielded similar success under these less than ideal conditions.

As time progressed, and WorldCom became owner of the Philadelphia wireless cable system, my understanding is that ITF and WorldCom let the excess capacity lease for WHR-527 lapse. However, Northwest renewed its lease with WorldCom. One of the provisions of the Northwest-WorldCom lease was that Northwest was obligated to make such FCC filings as WorldCom required to protect its leased spectrum.

ITF applied to move WHR-527's transmitting facilities to another adjacent tower in the Roxborough antenna farm, a move of less than 1,000 feet. WorldCom petitioned to deny this site move, alleging that it would cause adjacent channel interference to its MMDS stations WNEY-590 and WNET-336, based upon standard computer modeling. WorldCom also required Northwest to petition to deny the proposed ITF site move on the grounds of alleged interference to Northwest's WHT-644. (ITF's G channel ITFS system is interleaved with WorldCom's H-channel MMDS stations, and ITF's channel G-1 is first-adjacent to Northwest's channel F-4). In essence, WorldCom argued that as a result of ITF's proposed site move, there would be certain locations where WHR-527's signal strength would exceed those of WNEY-590 and WNET-336 by a few dB, thus violating the requirement of the Commission's rules that adjacent channel stations maintain at least a 0 dB ratio between desired and undesired signals

When WorldCom demanded that Northwest petition to deny the ITF site move, I argued against it, stating that any variation in signal strength caused by a site move of less than 1,000 feet would be far less consequential than the variations which had been measured under "real world" conditions in many parts of the Philadelphia area caused by the side-mounting of the wireless cable system's transmitting antenna. I told a WorldCom representative that in my professional opinion, no harmful interference would be created by the site move. Despite these protests, WorldCom continued to insist that Northwest petition to deny the ITF site move, and Northwest reluctantly complied. However, for the reasons I have expressed, in my view there were no substanative valid engineering grounds for the petition to deny, and WorldCom was informed of this fact.

I declare under penalty of perjury that the facts set forth in the above declaration are true and correct to the best of my knowledge and belief.

Executed on October 22, 2003.

Tab

Thomas E. Bird

Thomas E. Bird
Consulting Engineer
359 Waukazoo Dr
Holland, MI 49424

Certificate of Service

I, Dina Etemadi, a secretary with the law firm of Womble Carlyle Sandridge & Rice, PLLC, do hereby certify that a true and correct copy of the foregoing Petition to Deny was served by U.S. mail, first class, postage-prepaid on the 27th day of October, 2003, on the following individuals.

* Qualex International
445 12th Street, S W , Room CY-B402
Washington, D C. 20554

* David Krech
Policy Division, International Bureau
445 12th Street, S W , Room 7-A664
Washington, D C. 20554

* Erin McGrath
Commercial Wireless Division
Wireless Telecommunications Bureau
445 12th Street, S.W., Room 4-B454
Washington, D.C. 20554

* Jeffrey Tobias
Public Safety & Private Wireless Division
Wireless Telecommunications Bureau
445 12th Street, S.W , Room 2-C828
Washington, D.C. 20554

* JoAnn Lucanik
Satellite Division, International Bureau
445 12th Street, S.W , Room 6-A660
Washington, D.C. 20554

* Christine Newcomb
Competition Policy Division
Wireless Competition Bureau
445 12th Street, S W , Room 5-C360
Washington, D C. 20554

* Ann Bushmiller
Transaction Team
Office of General Counsel
445 12th Street, S.W., Room 8-A831
Washington, D C 20554

* Wayne McKee
Engineering Division, Media Bureau
445 12th Street, S.W , Room 4-C737
Washington, D.C 20554

Richard Whitt
Director of Federal Advocacy
Law and Public Policy
1133 19th Street, N W
Washington, D.C. 20036

Mark D Schneider, Esq
Jenner & Block, LLC
601 Thirteenth Street, N W
12th Floor
Washington, D C. 20005

Adam P Strochak, Esq
Weil, Gotshal & Manges, LLP
1501 K Street, N.W., Suite 100
Washington, D.C. 20005

Dina Etemadi

Dina Etemadi

* Via Hand Delivery