

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

In the Matter of)	
)	
Review of the Spectrum Sharing Plan Among)	
Non-Geostationary Satellite Orbit Mobile)	IB Docket No. 02-364
Satellite Service Systems in the 1.6/2.4 GHz)	
Bands)	
)	
Amendment of Part 2 of the Commission's)	ET Docket No. 00-258
Rules to Allocate Spectrum Below 3 GHz for)	
Mobile and Fixed Services to Support the)	
Introduction of New Advanced Wireless)	
Services, including Third Generation Wireless)	
Systems)	

**JOINT MOTION TO DISMISS OR, IN THE ALTERNATIVE,
MOTION FOR LEAVE TO FILE SURREPLY**

The Wireless Communications Association International, Inc. (“WCA”), Sprint Corporation (“Sprint”) and Nextel Communications, Inc. (“Nextel”) (collectively, the “BRS Parties”) hereby move the Commission to dismiss the Reply of Whirlpool Corporation,¹ the Comments of LG Electronics Inc.,² the Replies of Matsushita Electric Corporation of America,³ the Replies of the Association of Home Appliance Manufacturers,⁴ and the Replies of GE Company⁵ in the above-captioned proceeding (Whirlpool Corporation, Matsushita Electric Corporation of America, Association of Home Appliance Manufacturers and GE Company

¹ Reply of Whirlpool Corporation, IB Docket No. 02-364 *et al.* (filed Nov. 8, 2004).

² Comments of LG Electronics Inc., IB Docket No. 02-364 *et al.* (filed Nov. 5, 2004).

³ Replies of Matsushita Electric Corporation of America, IB Docket No. 02-364 *et al.* (filed Nov. 8, 2004).

⁴ Replies of the Association of Home Appliance Manufacturers, IB Docket No. 02-364 *et al.* (filed Nov. 8, 2004).

⁵ Replies of GE Company, IB Docket No. 02-364 *et al.* (filed Nov. 9, 2004) [“GE Company Reply”].

hereinafter referred to collectively as the “Microwave Oven Vendors”). As shown below, all five pleadings should be dismissed on the grounds that they are not replies at all, but are late-filed oppositions to the petitions for reconsideration filed by the BRS Parties in this proceeding. In the alternative, should the Commission elect to accept the Microwave Oven Vendors’ untimely filings, the BRS Parties request that the Commission grant them leave to file surreplies to ensure that they have a full and fair opportunity to address the issues raised for the first time in the Microwave Oven Vendors’ filings.

In their respective petitions for reconsideration of the Commission’s *Report and Order* in IB Docket No. 02-364 and *Fourth Report and Order* in ET Docket No. 00-258 (collectively, the “*Reallocation Order*”),⁶ the BRS Parties requested, *inter alia*, that the Commission take reasonable measures to mitigate the interference Broadband Radio Service (“BRS”) channel 1 licensees involuntarily relocated from the 2150-2156 MHz band to the 2496-2502 MHz band will suffer from unlicensed industrial, scientific and medical (“ISM”) devices operating in the 2496-2500 MHz band.⁷ The source of the problem is Section 18.305(a) of the Commission’s Rules, which does not impose any limit on the power an ISM device may emit in the 2496-2500 MHz band and thus threatens all licensed BRS operations with a substantial risk of co-channel interference. Accordingly, WCA and Sprint asked that the Commission require all Part

⁶ *Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands and Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Service to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, 19 FCC Rcd 13356 (2004).

⁷ See Petition for Partial Reconsideration of the Wireless Communications Ass’n Int’l. IB Docket No. 02-364 *et al.*, at 23-26 (filed Sept. 8, 2004) [“WCA Petition”]; Sprint Petition for Partial Reconsideration, IB Docket No. 02-364 *et al.*, at 6-7 (filed Sept. 8, 2004) [“Sprint Petition”]; Petition for Reconsideration of Nextel Communications, Inc., IB Docket No. 02-364 *et al.*, at 9-11 (filed Sept. 8, 2004) [“Nextel Petition”].

18 ISM devices marketed in the United States after December 31, 2006 to restrict their emissions in the 2496-2500 MHz band to 500 microvolts/meter, measured at 3 meters.⁸ In an effort to fairly accommodate the legitimate needs of ISM interests, WCA and Sprint proposed that the Commission grandfather any ISM devices marketed on or before December 31, 2006. Nextel recommended similar relief, stating that “new ISM emissions limitations into the 2495-2500 MHz band should allow sufficient time for ISM developers to transition product lines; two years should provide ample time for manufacturers to transition product lines, if necessary.”⁹ While these proposals will not leave relocated BRS licensees as well off as they are today (since they will be subject to higher levels of interference from ISM equipment sold prior to December 31, 2006), the BRS Parties are willing to accept this compromise because, over time as ISM devices reach the end of their useful life and are replaced, it will reduce the interference relocated BRS channel 1 licensees will suffer.

The Commission issued a public notice announcing the petitions filed by the BRS Parties on October 5, 2004,¹⁰ and a summary of that notice was published in the *Federal Register* on October 12, 2004.¹¹ Hence, under Section 1.429(f) of the Commission’s Rules, any opposition to those petitions was to be filed no later than October 27, 2004, a deadline

⁸ See WCA Petition at 25, Sprint Petition at 7. This is the emission limit applicable to unlicensed intentional radiators under Section 15.209(a) of the Commission’s Rules, and is the maximum emission level to which BRS licensees have been subjected in the 2150-2156 MHz band.

⁹ Nextel Petition at 11 n. 31.

¹⁰ See “Petitions For Reconsideration And Clarification Of Action In Rulemaking Proceedings”, *Public Notice*, Report No. 2675 (rel. Oct. 5, 2004).

¹¹ *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding*, 69 Fed Reg. 60626 (Oct. 12, 2004)

specifically noted in the *Federal Register* notice.¹² Significantly, not one pleading was submitted on or before that date opposing the BRS Parties' proposals for limiting the maximum permissible power level of ISM devices within the 2496-2500 MHz band.

Now, without requesting leave to do so, the Microwave Oven Vendors have belatedly submitted their oppositions to the BRS Parties' petitions. While the Microwave Oven Vendors cast their filings as reply pleadings, even a cursory review of those filings show that they are, in fact, untimely oppositions to the BRS Parties' proposed limits on ISM emissions in the 2496-2500 MHz band.¹³ None of the Microwave Oven Vendors' filings address any argument raised during the opposition phase of the proceeding. To the contrary, they are solely directed to the BRS Parties' proposals to restrict ISM power levels.

It is well settled that parties in Commission proceedings are responsible for complying with the Commission's filing deadlines, and that late-filed oppositions to petitions for reconsideration are subject to dismissal.¹⁴ Indeed, where parties do as the Microwave Oven Vendors have done and attempt to disguise late-filed oppositions as replies, the Commission

¹² See 47 C.F.R. § 1.429(f) ("Oppositions to a petition for reconsideration shall be filed within 15 days after the date of public notice of the petition's filing . . .").

¹³ See *id.* § 1.429(g) ("Replies to an opposition shall be filed within 10 days after the time for filing oppositions has expired . . ."). As indicated above, Whirlpool, AHAM and Matsushita submitted their untimely oppositions on November 8; LG Electronics submitted its untimely opposition on November 5; and GE Company submitted its untimely opposition on November 9. GE Company has also submitted a "Request to Accept Late Filed Pleading of General Electric Company," asking for leave to file "one day late." Request to Accept Late Filed Pleading of General Electric Company, IB Docket No. 02-364 *et al.* (filed Nov. 9, 2004). Since the deadline for GE Company's opposition was October 27, its filing is actually 13 days late, and GE's Request provides no explanation as to why GE Company did not file on October 27 as required by the Commission's Rules. GE's Request therefore is irrelevant.

¹⁴ See, e.g., *Applications Of Mobile Radio Service*, 17 FCC Rcd 1520, 1521-22 n. 21 (2002).

has not hesitated to dismiss the filings.¹⁵ Consistent with that precedent, the Commission thus should dismiss the Microwave Oven Vendors' untimely filings, as they have offered no justification for their failure to oppose the BRS Parties' petitions by the October 27th deadline.¹⁶

Should the Commission decide to accept the Microwave Oven Vendors' filings notwithstanding their untimeliness, the BRS Parties request that the Commission grant them leave to file a surreply to the Microwave Oven Vendors' filings no later than ten days after the grant of such relief. Acceptance of such a filing is essential to provide the BRS Parties a full and fair opportunity to address the Microwave Oven Vendors' arguments, all of which were raised for the first time in the Microwave Oven Vendors' belated submissions during the reply phase in this matter. Section 1.429 of the Commission's Rules is designed to assure that those petitioning for reconsideration of a Commission decision have a full and fair opportunity to respond to those opposing their proposals. Under the circumstances here, where the Microwave Oven Vendors either intentionally or negligently waited until the reply phase of the pleading cycle to advance their opposition to the BRS Parties' proposals, the only way in which the Commission can provide the BRS Parties with their formal opportunity to respond is to accept the accompanying surreply as a formal pleading. This will provide the Commission with a complete record on the merits of the BRS Parties' proposals, without prejudicing the interests of the Microwave Oven Vendors or any other participant in this proceeding.

¹⁵ See *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Service (Second Computer Inquiry)*, Memorandum Opinion and Order, 59 Rad. Reg. 278, 282 (1985) ("we find that the 'Reply' is an untimely filed Opposition to the Petition for Clarification, submitted in a manner which prohibits the OTCs from responding to it. Accordingly we will grant the OTC's Motion to Strike NATA's Reply Comments on the basis that the NATA filing is an improper pleading.")

¹⁶ See, e.g., *Dave's Communications, Inc.*, 16 FCC Rcd 21343, 21345 (WTB, 2001).

WHEREFORE, for the foregoing reasons, the Commission should dismiss the Microwave Oven Vendors' filings in this proceeding or, in the alternative, grant leave to WCA, Sprint and Next to file surreplies.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

By: Paul J. Sinderbrand
Paul J. Sinderbrand

Wilkinson Barker Knauer, LLP
2300 N Street, NW
Suite 701
Washington, DC 20037-1128
202.783.4141

SPRINT CORPORATION

By: David Munson
David Munson
Attorney

401 9th Street, N.W., Suite 400
Washington, DC 20004
(202) 585-1926

NEXTEL COMMUNICATIONS, INC.

By: George (Trey) Hanbury
George (Trey) Hanbury
Senior Counsel, Government Affairs

2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-8525

November 24, 2004

CERTIFICATE OF SERVICE

I, Karla Huffstickler, hereby certify that on this 24th day of November, 2004 I served the foregoing Joint Motion to Dismiss or, in the Alternative, Motion for Leave to File Surreply by depositing true copies thereof with the United States Postal Service, first class postage prepaid and addressed to the following:

J.B. Hoyt
Whirlpool Corporation
Director, Regulatory Affairs
& State Government Relations
2000 M-63, North
MD 3005
Benton Harbor, MI 49022

Lawrence R. Krevor
George (Trey) Hanbury
Nextel Communications
2001 Edmund Halley Drive
Reston, VA 20191

David Munson
Sprint Corporation
401 9th Street NW
Suite 400
Washington, DC 20004

David B. Calabrese
Vice President, Government Relations
Association of Home Appliance
Manufacturers
1111 19th Street, Suite 402
Washington, D.C. 20036

Russell H. Fox
Charles A. Samuels
Stefani V. Watterson
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

Earl F. Jones
Senior Counsel
GE Consumer & Industrial
Appliance Park AP2-225
Louisville, KY 40225

Daniel Kim
General Manager
LG Electronics Inc.
2000 Millbrook Drive
Lincolnshire, IL 60069

Peter M. Fannon
Vice President
Technology Policy & Regulatory Affairs
Matsushita Electric Corporation of America
1130 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036

/s/ Karla Huffstickler
Karla Huffstickler